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VIA EMAIL

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Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
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c/o

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RE: CSA Proposed Amendments to National Instrument 44-102 - *Shelf Distributions* and Changes to Companion Policy 44-102CP - *Shelf Distributions* relating to At-the-Market Distributions

Ladies and Gentlemen:

We appreciate the opportunity to submit the below comments to the Canadian Securities Administrators (the "**CSA**") on the proposed amendments to National Instrument 44-102 - *Shelf Distributions* ("**NI 44-102**") and the accompanying Companion Policy 44-102CP – *Shelf Distributions* ("**44-102CP**") (collectively, the "**Proposed Amendments**"), the stated purpose of which is to replace the ATM Orders that have historically been required for issuers and their agents to conduct at-the-market ("**ATM**") distributions of equity securities (the "**Discretionary Relief Regime**"). Our comments appear directly underneath the applicable headings. Capitalized terms used but not defined in this letter have the

23679221.5

meanings given them in the CSA Notice and Request for Comment in respect of the Proposed Amendments, dated May 9, 2019.

25% Daily Cap: Option 1 or Option 2?

Our view is that Option 2 is the preferable alternative. Under Option 2 there would be no 25% Daily Cap, irrespective of whether the subject securities meet the “highly liquid” test. Option 2 is consistent with what we understand is the approach in the U.S. under the rules of the Securities and Exchange Commission (“SEC”). That approach is underpinned by the premise that market dynamics will sufficiently incentivize an issuer to conduct ATM distributions in a way that does not materially impact the trading price of its equity. Further, as the CSA points out in the proposed companion policy guidance in 44-102CP, IIROC’s rules provide an incremental layer of protection, since investment dealers are generally prohibited under IIROC rules from trading in a manner that would disrupt fair and orderly markets.

The final “brake” on large, undisclosed issuances of equity under an ATM distribution is that any issuer that proposes to make a large trade under an ATM program is required to consider whether the trade is a “material fact” or “material change” that requires prior disclosure. This is the case under the Discretionary Relief Regime and is reflected in the Proposed Amendments at paragraph 9.3(g) and the related guidance.

However, if the CSA decides to adopt a 25% Daily Cap, we suggest drafting changes.

We note that the 25% Daily Cap calculation that would apply under Option 1 is different from the cap calculation that applies under the Discretionary Relief Regime. Under Option 1, both the numerator and the denominator of the 25% Daily Cap includes trading volume on marketplaces outside Canada, meaning that, for a cross-border ATM distribution program for an inter-listed issuer, the 25% Daily Cap may apply to U.S. and Canadian sales combined. Under the Discretionary Relief Regime, the 25% Daily Cap only applied to sales over Canadian exchanges and marketplaces, and the denominator of the cap calculation only included Canadian trading volume. We prefer the approach under the Discretionary Relief Regime, and would further note that the drafting of the 25% Daily Cap in the Proposed Amendments could create uncertainty regarding whether the 25% Daily Cap applies to U.S. sales by Canadian issuers using “southbound only” ATM distribution programs under MJDS.

Also notable is that the denominator of 25% Daily Cap in Option 1 references “trading volume ... on all marketplaces **on that day**” (emphasis added). Although this is consistent with the Discretionary Relief Regime, we understand that the highlighted language reduces certainty and flexibility with respect to the size of trades that may be executed by dealers during the trading day, and requires ATM traders to rely heavily on market-on-close orders and trading algorithms that monitor volume throughout the day. A potential fix would be to adjust the language so that the denominator of the cap calculation is the prior day’s trading volume or the average volume over some number of trading days prior to the relevant trading day.

Execution on ATM Exchanges

The Proposed Amendments require ATM distributions to be made on an "ATM exchange", a defined term including, in Canada, only the TSX, the TSXV, Aequitas NEO and the Canadian Securities Exchange. This is different from the Discretionary Relief Regime, under which dealers are able to execute ATM sales on any Canadian exchange or marketplace, including alternative trading systems.

We strongly prefer the approach under the Discretionary Relief Regime. It is unclear why the Proposed Amendments would confine Canadian ATM sales to "ATM exchanges". We further note that it is not clear how a requirement to execute on an "ATM exchange" is conceptually consistent with dealers' best execution obligations under National Instrument 23-101 – *Trading Rules* and the IIROC rules.

At a minimum, however, the regulators should clearly explain the policy rationale for limiting ATM sales to "ATM exchanges" **before** adopting this restriction, so that market participants may provide comments on the policy justification for directing ATM liquidity to the major exchanges. And, if this restriction is to be adopted, meaningful companion policy guidance addressing the friction between executing only on ATM exchanges and dealers' best execution obligations should be provided.

10% Aggregate Program Size Cap

The Proposed Amendments do not include the 10% aggregate program size cap that has been included in the ATM Orders. We are supportive of this approach. We understand that, while there was a similar requirement under the SEC's rules, that requirement was eliminated in 2005 as part of the SEC's Securities Offering Reform initiative.

Cover Page Disclosure

The Proposed Amendments would impose a new requirement that the cover page of the base shelf prospectus for an ATM distribution program state that it may qualify an ATM distribution. The companion policy language included in the Proposed Amendments states that "[t]he 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."

We do not believe this additional requirement is helpful or justified. If there are concerns regarding an issuer's business, liquidity position or a recent reverse take-over, those concerns presumably should be addressed during the shelf review process regardless of whether or not an ATM distribution is contemplated. In addition, certain issuers may be reticent to include the cover page disclosure on their base shelf, thereby preserving the option to implement an ATM program during the life of the shelf, if there is potential that it will result in additional review. Further, the increased prominence of the new language relative to the "non-fixed price offering" language in Item 1.7 of 41-101F1, which is currently required to be included in a base shelf prospectus that may qualify an ATM distribution, may cause issuers to shy away from preserving the option to implement an ATM program due to increased "market overhang" concerns.

Elimination of Monthly Reporting Requirement

We support the elimination of the monthly reporting requirement for issuers of “highly liquid securities” consistent with the more recent ATM Orders. It may also be worth exploring whether the monthly reporting requirement may be eliminated for all issuers, on the basis that new issuances of securities are required to be reported monthly to the applicable listing exchange.

Designated News Releases

We support the inclusion, in the companion policy guidance, of the “designated news release” mechanism for incorporating material facts into ATM prospectuses.

Potential Transition Issues

The Proposed Amendments are silent on how issuers and agents currently using ATM programs implemented under the Discretionary Relief Regime would be impacted by the Proposed Amendments becoming law. While there are a number of potential approaches to transitioning from the Discretionary Relief Regime to the new rules, in our view the approach that provides the most flexibility to issuers and dealers with “live” ATM programs is to be preferred. The approach we favor is to permit issuers and dealers operating under the Discretionary Relief Regime to, once the new rules are in effect, comply with either the new rules or the terms and conditions of the applicable discretionary relief order, until such time as the applicable discretionary relief order expires. It would also be helpful if the CSA could clarify, either in the new rules or the related companion policy guidance, that issuers that have an existing shelf prospectus on file at the time the Proposed Amendments are implemented, but which is not yet being used for an ATM distribution, may still use the existing shelf (until it expires) to implement an ATM program under the new rules. An issuer should not, for example, be required to file an entirely new shelf prospectus to comply with, e.g., the cover page disclosure requirement (if that aspect of the Proposed Amendments is enacted) to implement an ATM program after the effective date of the Proposed Amendments if it has an unexpired shelf on file that complied with the ATM rules in effect when the shelf was filed.

Location of ATM Distributions

The proposed companion policy guidance raises the issue, inherent in ATM programs, that it is impossible to determine where an ATM distribution occurs where sales are made to anonymous purchasers directly on an exchange or marketplace. The companion policy language suggests, but does not state, that an issuer pursuing an ATM program will need to qualify its base shelf prospectus for an ATM program in all provinces and territories of Canada and pay any applicable fees in all provinces and territories, presumably because an ATM distribution could potentially occur in any province or territory of Canada.

The corollary of this (implicit) position is that French translation would also be required for all documents incorporated by reference in the prospectus for an ATM program unless an exemption from Quebec's translation requirements is obtained.

We are concerned that the additional cost inherent in a requirement to qualify an ATM prospectus in all provinces and territories and, in particular, to undertake French translation of continuous disclosure documents for an ATM prospectus, will significantly reduce the appeal of Canadian ATM distribution programs, and would incentivize Canadian issuers to continue to pursue "U.S. only" ATM distributions under the MJDS. We suggest that the CSA explore possible solutions to this issue, including perhaps the issuance of a blanket order providing relief from the French translation requirement for ATM distributions.

UMIR 7.7 and OSC Rule 48-501 Issues

The existing shelf rules and the Proposed Amendments provide that "[a]n 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."

We believe that market participants have been interpreting this provision in a manner that harmonizes the shelf rules with the restrictions in UMIR 7.7 and OSC Rule 48-501, i.e., by taking the view that, if a purchase (e.g., of a "highly liquid security") is permitted by UMIR 7.7 and OSC Rule 48-501, it should not be considered a "transaction that is intended to stabilize or maintain the market price" that would be a breach of the ATM rules. Clarifying guidance on this point in the companion policy would, however, be useful.

We also suggest that the Proposed Amendments codify the relief provided to certain senior issuers¹ to exempt insiders of those issuers from section 2.2(a) of OSC Rule 48-501 in connection with purchases of the issuer's shares while its ATM is operating.

Miscellaneous Drafting Comments

- Section 9.2 of the Proposed Amendments refers to item 8 of Section 5.5 of NI 44-102 in two places. Please consider where there should also be an exemption from, or modification to the language of, item 2 and 3 of Section 5.5 of NI 44-102, which each refer to a requirement to deliver a prospectus supplement. We are aware that certain of the ATM Orders include exemptive relief with respect to these two items.
- In Section 9.3(1)(k) and 9.3(2) of the Proposed Amendments, the prohibition on market stabilization, the drafting has lost the element of "in connection with the distribution". This is currently in 9.1(2) of 44-102 and should be restored.

¹ See, e.g.: https://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20170713_214_transcanada.htm
23679221.5

- Section 9.4(1)(b) and (2)(b) refer to reporting of proceeds and commissions under the ATM prospectus “to date”. We recommend this be changed to “during the [month][annual or interim period, as applicable]”.
- In Section 9.4(2), we would suggest replacing the words “period immediately following the distribution” with “for the year or interim period, as applicable.”

Use of ATM Distributions by Non-Redeemable Investment Funds (NRIFs) and Exchange-Traded Funds Not in Continuous Distribution (ETFNCDs)

While the Discretionary Relief Regime has, until very recently, been limited to ATM distributions by corporate finance issuers, NRIFs and ETFNCDs should be permitted to conduct ATM distributions. NRIFs and ETFNCDs are distinct from mutual funds and exchange-traded funds in continuous distribution, and function more like corporate finance issuers. NRIFs and ETFNCDs are launched through an initial public offering through registered investment dealers and then trade in the open market through registered investment dealers. Securities of NRIFs and ETFNCDs are not available through members of the Mutual Fund Dealers Association of Canada, and as such are marketed to a smaller subset of investors than a typical mutual fund or exchange-traded fund. NRIFs and ETFNCDs only issue a set number of securities and, although their value is based on the net asset value like a mutual fund, the actual trading price of an NRIF or ETFNCD is affected by supply and demand, allowing it to trade at prices above or below its net asset value.

Permitting ATM distributions for NRIFs and ETFNCDs is warranted because they will provide a means of quickly meeting existing demand in the market for the NRIF’s or ETFNCD’s securities. The cost of issuance via an ATM distribution is significantly less expensive than a conventional re-opening. In addition, a re-opening is generally priced at a discount to the last trade in the market on the pricing date. As the ATM distribution will be completed in the context of the market, such discount is not required, thereby further reducing the cost.

Further, as an NRIF or ETFNCD is only permitted to sell securities in an ATM distribution if the securities are trading at a premium to net asset value, such sales will always be accretive to the NRIF or ETFNCD and its existing securityholders. By virtue of the lower issuance costs, an NRIF or ETFNCD could accretively issue securities in scenarios where a re-opening may not be practicable, thereby benefitting existing securityholders.

NRIFs and ETFNCDs naturally shrink in asset size without new issuances due to the monthly and annual retraction privileges afforded to securityholders. Over time these retractions will reduce fund size and increase costs to securityholders. ATM issuances can be a cost-effective way for an NRIF or ETFNCD to offset the impact of retraction privileges and preserve the cost structure for remaining securityholders.

Permitting ATM distributions for NRIFs and ETFNCDs is consistent with the treatment of NRIFs and ETFNCDs in the U.S. by the SEC. We understand that the SEC permits NRIFs and ETFNCDs to undertake a shelf registration in reliance on certain SEC no-action relief. If an NRIF or ETFNCD satisfies the requirements of such no-action relief, it is permitted to undertake ATM Distributions, in addition to traditional follow-on offerings, under its shelf prospectus.

23679221.5

Additional Conditions for ATM Distributions by NRIFs and ETFNCDs

In accordance with paragraph 9.3(2)(a) of National Instrument 81-102 *Investment Funds*, the issue price of a security must not, (a) as far as reasonably practicable, be a price that causes dilution of the net asset value of the NRIF's or ETFNCD's other outstanding securities at the time of issue, and (b) be a price that is less than the most recently calculated net asset value per security. Accordingly, for NRIFs and ETFNCDs to use ATM distributions, the sell notice provided by an NRIF or ETFNCD to the agent(s) in an ATM distribution should indicate that the applicable price minimum for the sale of a security must be a price that is greater than the most recently calculated net asset value per security, as well as the estimated real time calculation of net asset value per security (the "**Estimated Real Time NAVPS**").

The Estimated Real Time NAVPS will be computed by revaluing the most recently calculated and publicly disclosed net asset value per security of the NRIF or ETFNCD by multiplying it by a market factor (such as an index) that the NRIF or ETFNCD believes is highly correlated with changes in the net asset value per security of the NRIF or ETFNCD. The use of Estimated Real Time NAVPS mitigates any risk that an NRIF or ETFNCD is issuing at a price that is dilutive to the existing securityholders.

NAV Calculation for ATM Distributions

With respect to ATM distributions, NAV should continue to be calculated at the same frequency the NRIF or ETFNCD currently calculates NAV. Provided that it is a condition that the applicable price minimum for the sale of a security must be a price that is greater than both the most recently calculated net asset value per security and the Estimated Real Time NAVPS (as discussed above), there is no need to increase the frequency of an NRIF's or ETFNCD's NAV calculation.

As with any other offering by an NRIF or ETFNCD, if the investment fund manager believes that the most recently calculated NAV (or the Estimated Real Time NAVPS) is not reflective of the current net asset value, such that the issuances may be dilutive to current securityholders, it can cease the ATM Distribution.

NRIFs with significant illiquid assets are not restricted from conventional re-openings, the pricing of which is based on the most recently calculated NAV, so we do not see a need to make a distinction for ATM distributions.

If you have any questions regarding this submission, other than the "Use of ATM Distributions by NRIFs and ETFNCDs" section, please contact Tim Phillips at tim.phillips@blakes.com or 416-863-3842, Trevor Rowles at trevor.rowles@blakes.com or 403-260-9750, Brendan Reay at brendan.reay@blakes.com or 416-863-5273 or Nicole Cargill at nicole.cargill@blakes.com or +44-20-7429-3554.

If you have any questions regarding the submissions under the heading "Use of ATM Distributions by NRIFs and ETFNCDs" please contact Stacy McLean at stacy.mclean@blakes.com or 416-863-4325 or Jill Davis at jill.davis@blakes.com or 416-863-3076.



Yours truly,

(signed) *Nicole Cargill*

(signed) *Jill Davis*

(signed) *Stacy McLean*

(signed) *Tim Phillips*

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(signed) *Brendan Reay*