

CSA Notice of Consultation
***Draft Regulation to amend Regulation 44-102 respecting Shelf
Distributions***
***Draft Amendments to Policy Statement to Regulation 44-102
respecting Shelf Distributions***
At-the-Market Distributions

May 9, 2019

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are publishing, for a 90-day comment period, a draft *Regulation to amend Regulation 44-102 respecting Shelf Distributions* (**Regulation 44-102**) and draft Amendments to *Policy Statement to Regulation 44-102 respecting Shelf Distributions* (**Policy Statement 44-102**). We are proposing amendments to Part 9 of Regulation 44-102 (the **Proposed Amendments**) to replace relief that has historically been required by issuers conducting at-the-market (**ATM**) distributions of equity securities.

The Proposed Amendments, including the amendments to Policy Statement 44-102, are published with this notice and, where applicable, local matters are published in an annex to this notice.

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 Regulation 44-102 contemplates the distribution of equity securities by way of an ATM distribution using the shelf procedures. Part 9 of Regulation 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*.

Regulation 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 the text) 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 Regulation 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 Regulation 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 Regulation 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 amendments to Policy Statement 44-102 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
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Deliver your comments only to the addresses listed below. Your comments will be distributed to the other participating CSA jurisdictions.

M^e Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 4^e étage
C.P. 246, Place Victoria
Montréal (Québec) H4Z 1G3
Fax : 514-864-6381
consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.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:

Carolyn Lassonde

Senior Legal Counsel, Legal Affairs
Autorité des marchés financiers
514 395-0337 ext. 2545
carolyn.lassonde@lautorite.qc.ca

Jan Bagh

Senior Legal Counsel, Corporate Finance
Alberta Securities Commission
403 355-2804
jan.bagh@asc.ca

Heather Kuchuran

Acting Deputy Director, Corporate Finance
Financial and Consumer Affairs Authority
of Saskatchewan
306 787-1009
heather.kuchuran@gov.sk.ca

Michael Balter

Manager, Corporate Finance Branch
Ontario Securities Commission
416 593-3739
mbalter@osc.gov.on.ca

Roxane Gunning

Legal Counsel, Corporate Finance Branch
Ontario Securities Commission
416 593-8269
rgunning@osc.gov.on.ca

Abel Lazarus

Director, Corporate Finance
Nova Scotia Securities Commission
902 424-6859
Abel.lazarus@novascotia.ca

Elliott Mak

Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604 899-6501
emak@bcsc.bc.ca

Gillian Findlay

Senior Legal Counsel, Corporate Finance
Alberta Securities Commission
403 297-3302
gillian.findlay@asc.ca

Patrick Weeks

Corporate Finance Analyst
Manitoba Securities Commission
204 945-3326
patrick.weeks@gov.mb.ca

Michael Tang

Senior Legal Counsel, Corporate Finance
Branch
Ontario Securities Commission
416 593-2330
mtang@osc.gov.on.ca

Wendy Morgan

Deputy Director, Policy
Financial and Consumer Services
Commission (New Brunswick)
506 643-7202
wendy.morgan@fcnb.ca