

## **CSA Notice of Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions**

**June 4, 2020**

### **Introduction**

The Canadian Securities Administrators (**CSA** or **we**) are making amendments (the **Amendments**) to National Instrument 44-102 *Shelf Distributions* (**NI 44-102**) and changes (the **Changes**) to Companion Policy 44-102CP *Shelf Distributions* (**44-102CP**).

The Amendments replace relief that has historically been required by issuers conducting at-the-market (**ATM**) distributions of equity securities. The text of the Amendments and the Changes is contained in Annexes C and D of this Notice.

The Amendments and the Changes are expected to be made by each member of the CSA. In certain jurisdictions, Ministerial approvals are required for the Amendments. Provided all necessary Ministerial approvals are obtained, the Amendments and the Changes will become effective on August 31, 2020. Where applicable, Annex E of this Notice provides information about each of the jurisdiction's approval process.

### **Substance and Purpose**

While Part 9 of NI 44-102 currently contemplates the distribution of equity securities by way of an ATM distribution using the shelf procedures, it does not provide an exemption for the prospectus delivery requirement. Because of the nature of ATM distributions, issuers are required to obtain exemptive relief from certain prospectus-related requirements if they wish to conduct ATM distributions in Canada. When the Amendments become effective, issuers will not have to apply for exemptive relief to conduct ATM distributions.

The Amendments reduce the regulatory burden for issuers who wish to conduct ATM distributions, without compromising investor protection or the efficiency of the capital markets.

### **Background**

The CSA published CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* to identify and consider areas of securities legislation that could benefit from a reduction of undue regulatory burden.

After receiving and reviewing stakeholder comments, the CSA published Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. Among other things, commenters observed that the limited

number of ATM distributions in Canada may be partly attributable to regulatory burden associated with the requirement to obtain prior exemptive relief and the conditions typically imposed in connection with such relief.

In response, we initiated a CSA policy project relating to ATM distributions resulting in the publication for comment on May 9, 2019 of proposed amendments (the **Proposed Amendments**) to NI 44-102 and proposed changes (the **Proposed Changes**) to 44-102CP.

### **Summary of Written Comments Received by the CSA**

On May 9, 2019, we published a Notice and Request for Comment (the **Publication for Comment Materials**) relating to the Proposed Amendments and the Proposed Changes. The comment period ended on August 7, 2019. We received written submissions from seven commenters. We considered all of the comments received and we thank the commenters for their input. The names of the commenters are contained in Annex B of this Notice along with a summary of the comments and our responses.

The comment letters can be viewed on the website of each of:

- the Alberta Securities Commission at [www.albertasecurities.com](http://www.albertasecurities.com)
- the Ontario Securities Commission at [www.osc.gov.on.ca](http://www.osc.gov.on.ca)
- the Autorité des marchés financiers at [www.lautorite.qc.ca](http://www.lautorite.qc.ca)

### **Summary of Changes**

We have revised the Proposed Amendments and the Proposed Changes to reflect certain of the comments received and to improve or clarify drafting. As these changes are not material, we are not republishing the Amendments and the Changes for a further comment period.

A summary of the noteworthy differences between the Proposed Amendments and the Amendments are contained in Annex A.

### **Annexes**

This Notice includes the following annexes:

- Annex A summarizes the noteworthy differences between the Proposed Amendments and the Amendments
- Annex B sets out the name of the commenters, a summary of their comments, and our responses
- Annex C sets out the Amendments
- Annex D sets out the Changes

Where applicable, Annex E provides additional information relevant for local jurisdictions.

## Questions

Please refer your questions to any of the following:

### **Elliott Mak**

Senior Legal Counsel, Corporate Finance  
British Columbia Securities Commission  
604-899-6501  
[emak@bcsc.bc.ca](mailto:emak@bcsc.bc.ca)

### **Jan Bagh**

Senior Legal Counsel, Corporate Finance  
Alberta Securities Commission  
403-355-2804  
[jan.bagh@asc.ca](mailto:jan.bagh@asc.ca)

### **Heather Kuchuran**

Deputy Director, Corporate Finance  
Financial and Consumer Affairs Authority  
of Saskatchewan  
306-787-1009  
[heather.kuchuran@gov.sk.ca](mailto:heather.kuchuran@gov.sk.ca)

### **Michael Balter**

Manager, Corporate Finance Branch  
Ontario Securities Commission  
416-593-3739  
[mbalter@osc.gov.on.ca](mailto:mbalter@osc.gov.on.ca)

### **Roxane Gunning**

Legal Counsel, Corporate Finance Branch  
Ontario Securities Commission  
416-593-8269  
[rgunning@osc.gov.on.ca](mailto:rgunning@osc.gov.on.ca)

### **Wendy Morgan**

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

### **Victoria Steeves**

Senior Legal Counsel, Corporate Finance  
British Columbia Securities Commission  
604-899-6791  
[vsteeves@bcsc.bc.ca](mailto:vsteeves@bcsc.bc.ca)

### **Gillian Findlay**

Senior Legal Counsel, Corporate Finance  
Alberta Securities Commission  
403-297-3302  
[gillian.findlay@asc.ca](mailto:gillian.findlay@asc.ca)

### **Patrick Weeks**

Corporate Finance Analyst  
Manitoba Securities Commission  
204-945-3326  
[patrick.weeks@gov.mb.ca](mailto:patrick.weeks@gov.mb.ca)

### **Michael Tang**

Senior Legal Counsel, Investment Funds  
and Structured Products Branch  
Ontario Securities Commission  
416-593-2330  
[mtang@osc.gov.on.ca](mailto:mtang@osc.gov.on.ca)

### **Carolynne Lassonde**

Senior Legal Counsel, Legal Affairs  
Autorité des marchés financiers  
514-395-0337 ext. 2545  
[carolynne.lassonde@lautorite.qc.ca](mailto:carolynne.lassonde@lautorite.qc.ca)

### **Abel Lazarus**

Director, Corporate Finance  
Nova Scotia Securities Commission  
902-424-6859  
[Abel.lazarus@novascotia.ca](mailto:Abel.lazarus@novascotia.ca)

## ANNEX A

### SUMMARY OF CHANGES

The following is a summary of the noteworthy differences between the Proposed Amendments and the Amendments.

#### **No liquidity requirements**

The Publication for Comment Materials proposed two different approaches, labelled as Option 1 and Option 2, to conducting ATM distributions.

Option 1 would have limited ATM distributions of a class of securities on each day to 25% of the trading volume of that class on that day (the **25% Daily Cap**) unless the securities were “highly-liquid securities”, as defined in the Proposed Amendments.

Option 2 did not impose the 25% Daily Cap or the “highly-liquid securities” requirement.

After considering the comments received, we decided to adopt Option 2.

We note the comments support the view that issuers are not expected to conduct ATM distributions that will have a material impact on the market price of their securities. We further note that the comments support the view that investment dealers, who must underwrite all ATM distributions, are expected to have the experience and expertise in managing orders to limit any negative impact on market integrity, and are also prohibited from engaging in conduct that may disrupt a fair and orderly market.

Our decision to adopt Option 2 is based on reasonable expectations regarding the conduct of market participants. Accordingly, we acknowledge the importance of remaining alert to potential abuses. We intend to monitor ATM distributions, focusing on distributions that may have had a material impact on the price of the issuer’s securities where the distribution was not publicly disclosed prior to it being made.

The Publication for Comment Materials also proposed to permit issuers that met the “highly-liquid securities” requirement to report certain information about an ATM distribution on a quarterly rather than a monthly basis. To be consistent with our decision to adopt Option 2, we have also decided to permit all issuers conducting ATM distributions to report on a quarterly basis.

#### **Removal of references to ATM exchange**

The Publication for Comment Materials included a condition in paragraph 9.3(1)(f) of the Proposed Amendments that the issuer must distribute the security through an ATM exchange, which was defined as a short form eligible exchange or a marketplace outside of Canada. This condition was inconsistent with the conditions in the existing exemptive relief orders, which only require the issuer to distribute the security through a marketplace.

The intent of the requirement in paragraph 9.3(1)(f) of the Proposed Amendments was to ensure the equity securities of the same class being distributed under the ATM distribution are listed and trading on a short form eligible exchange. Consistent with the existing exemptive relief orders, our intent was that the securities must be distributed through a marketplace. Accordingly, we have removed the definition of an ATM exchange, changed the reference to “ATM exchange” in paragraph 9.3(1)(e) of the Amendments to “marketplace”, and added paragraph 9.3(1)(a) of the Amendments requiring that a security of the same class as being distributed is listed and trading over a short form eligible exchange.

### **Investment funds**

The Publication for Comment Materials asked several questions regarding non-redeemable investment funds and mutual funds that are traded on an exchange that are not in continuous distribution. After considering the comments received, we have determined that all non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution are able to rely on the Amendments. Mutual funds that are traded on an exchange that are in continuous distribution, and therefore meet the definition of an “ETF” in National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) are also able to rely on the Amendments and would be required to comply with all requirements applicable to an ETF, including the requirement for dealers acting as agents for a purchaser to deliver ETF facts documents under section 3C.2 of NI 41-101. A mutual fund that is traded on an exchange that frequently makes ATM distributions would be considered to be in continuous distribution so must also comply with all ETF requirements.

In response to a comment, we added a requirement in paragraph 9.3(1)(l) of the Amendments that investment funds conducting ATM distributions must include a statement in the prospectus that any ATM distributions will be conducted in accordance with paragraph 9.3(2)(a) of National Instrument 81-102 *Investment Funds*.

### **Provisions not applicable to ATM distributions**

Paragraph 9.2(2)(a) of the Proposed Amendments stated that section 6.7 or a similar provision under securities legislation does not apply to an investment dealer acting as an underwriter in connection with the distribution of a security under an ATM prospectus. This paragraph has been replaced by subsection 9.2(3) of the Amendments. We made this change to improve drafting and for clarification purposes only.

## ANNEX B

### PROPOSED AMENDMENTS TO NI 44-102 LIST OF COMMENTERS AND SUMMARY OF COMMENTS AND RESPONSES

No.	Commenter	Date
1.	The Canadian Advocacy Council of CFA Societies Canada	August 2, 2019
2.	RBC Dominion Securities Inc., on behalf of RBC Capital Markets	August 6, 2019
3.	Investment Industry Association of Canada (IIAC)	August 7, 2019
4.	Prospectors & Developers Association of Canada (PDAC)	August 7, 2019
5.	Davies Ward Phillips & Vineberg LLP	August 7, 2019
6.	Blakes, Cassels & Graydon LLP	August 7, 2019
7.	Toronto Stock Exchange	August 13, 2019

No.	Subject	Summarized Comment	Response
<b>GENERAL COMMENTS</b>			
1	General Support	All seven commenters expressed general support for the Proposed Amendments.	We thank the commenters for their support.
<b>SPECIFIC QUESTIONS</b>			
2	Necessity of “highly liquid securities” test or the 25% Daily Cap – Option 1 versus Option 2	<p><b>Option 1</b></p> <p>One commenter supports Option 1, with modifications.</p> <p>Along with issuers with highly liquid securities, the commenter thinks issuers that are dually listed on a U.S. exchange should also not be subject to the 25% Daily Cap or the 10% Aggregate Cap. For other issuers, specifically smaller (venture) cap issuers, however, it is justified to align the 25% Daily Cap with the percentage of issuance for which a major exchange would require approval as a result of dilution concerns. For these smaller issuers, the commenter thinks a</p>	<p>We think the comments of the supporters of Option 2 are persuasive, even for smaller issuers. Accordingly, the Amendments impose neither the 25% Daily Cap nor the “highly liquid securities” requirement.</p> <p>Because we have decided to adopt Option 2, drafting changes to Option 1 are unnecessary.</p> <p>We agree with the importance of remaining alert to abuses of the ATM program. We intend</p>

No.	Subject	Summarized Comment	Response
		<p>specific percentage cap would be preferable to excluding securities which meet the “highly liquid securities” definition.</p> <p><b>Option 2</b></p> <p>Six commenters support Option 2 for the following reasons:</p> <ul style="list-style-type: none"> <li>• Five commenters think that the requirement that an IIROC dealer, subject to their own regulatory requirements, be involved in an ATM distribution is sufficient to ensure the maintenance of fair and orderly markets.</li> <li>• Four commenters think that issuers themselves are incentivized not to conduct ATM distributions that will have a material impact on the market price of their securities. Any issuer making a large trade under an ATM program is required to consider whether the trade is a material fact or material change requiring prior disclosure.</li> <li>• Three commenters note that neither the highly liquid test nor the 25% Daily Cap exist in the United States. They also note that the absence of an equivalent liquidity test in the United States has not resulted in market impact problems there. They think that the adoption of liquidity requirements in Canada would create inconsistencies with the U.S. requirements and deter the use of the ATM offering process in Canada.</li> <li>• One commenter thinks that a 25% Daily Cap for issuers whose securities are not highly liquid securities adds complexity and is unnecessary.</li> </ul>	<p>to monitor ATM distributions, focusing on distributions that may have had a material impact on the price of the issuer’s securities where the distribution was not publicly disclosed prior to it being made.</p>

No.	Subject	Summarized Comment	Response
		<ul style="list-style-type: none"> <li>One commenter thinks that the 25% Daily Cap may have the effect of limiting an issuer's ability to respond to reverse inquiries for larger block purchases.</li> <li>One commenter thinks, based on market data, that the 25% Daily Cap would render ATM distributions unworkable for larger companies in the mining industry.</li> </ul> <p><b>Other comments</b></p> <p>One commenter suggested drafting changes if the CSA decides to adopt a 25% Daily Cap.</p> <p>One commenter recommends that, should the CSA select Option 2, it remain alert to abuses of the ATM program where conventional prospectus follow-on would be more appropriate.</p>	
3	Debt securities	<p>Three commenters think that the Proposed Amendments should not be extended to debt securities.</p> <p>Commenters express the following reasons supporting their views:</p> <ul style="list-style-type: none"> <li>All three commenters think that the use of ATMs for debt securities is inconsistent with how the bond market works or is impractical given the nature of the bond market. They note the over-the-counter or off-exchange structure of fixed-income markets, the manner in which debt instruments are valued, and the resulting lack of liquidity and reliable pricing information.</li> <li>Two commenters think that there is no meaningful demand for the issuance of debt securities through ATM distributions.</li> </ul>	<p>We thank the commenters. The Amendments do not provide any exemptions for debt securities.</p>



No.	Subject	Summarized Comment	Response
		<ul style="list-style-type: none"> <li>One commenter thinks that the ATM distributions of debt securities by issuers would not be well received by investors.</li> <li>One commenter thinks the medium term note program available under Part 8 of NI 44-102 is more suitable for sequential debt offerings and works very well for this purpose.</li> </ul> <p>No commenters expressed support for permitting the issuance of debt securities under an ATM distribution.</p>	
4	Investment Funds	<p>Two commenters explicitly support permitting Non-Redeemable Investment Funds (NRIFs) and Exchange-Traded Funds Not in Continuous Distribution (ETFNCDs) to conduct ATM distributions.</p> <p>Both commenters think, 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.</p> <p>One commenter thinks that ATM distributions will provide a means of quickly meeting existing demand in the market for NRIF or ETFNCD securities. The cost of issuance via an ATM distribution is significantly less expensive than a conventional re-opening. Also, permitting ATM distributions for NRIFs and ETFNCDs is consistent with the treatment of these issuers in the United States.</p> <p>While no other commenters expressed a position on this issue, one of the other commenters notes that, if NRIFs and</p>	<p>We agree with the commenters. After considering the comments received, we have determined that all non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution are able to rely on the Amendments. Mutual funds that are traded on an exchange that are in continuous distribution, and therefore meet the definition of an “ETF” in National Instrument 41-101 <i>General Prospectus Requirements</i> (NI 41-101) are also able to rely on the Amendments and would be required to comply with all requirements applicable to an ETF, including the requirement for dealers acting as agents for a purchaser to deliver ETF facts documents under section 3C.2 of NI 41-101. A mutual fund that is traded on an exchange that frequently makes ATM distributions would be</p>

No.	Subject	Summarized Comment	Response
		<p>ETFs are permitted to conduct ATM distributions, they should be required to conduct ATM distributions at a premium to their net asset value (NAV) to ensure that the NAV is not diluted. This commenter also suggests that these investment funds should be required to certify that the ATM distribution is being conducted at a premium to NAV.</p>	<p>considered to be in continuous distribution so must also comply with all ETF requirements.</p> <p>We have added a requirement in paragraph 9.3(1)(l) of the Amendments that investment funds conducting ATM distributions must include a statement in the prospectus that any ATM distributions will be conducted in accordance with paragraph 9.3(2)(a) of National Instrument 81-102 <i>Investment Funds</i>.</p>
<b>THE PROPOSED AMENDMENTS</b>			
5	Timely disclosure	<p>One commenter thinks issuers should be required to issue a timely news release coinciding closer to the start of any share issuances under an ATM offering.</p> <p>The commenter notes that, in the absence of a timely news release, investors may not fully appreciate or be able to easily track the timing, magnitude and circumstances in which an issuer would typically utilize the offering.</p> <p>The commenter thinks that interim financial statements and other disclosure should continue to clearly note in the share tables any securities that were specifically issued under an ATM distribution.</p>	<p>We acknowledge the commenter's concern. We think the additional burden of requiring issuers to issue a news release closer to the start of any share issuances under an ATM offering provides limited benefit to investors.</p> <p>In our view, investors will have sufficient information about ATM distributions as a result of: (i) the requirement to disclose entry into a distribution agreement; (ii) the requirement to disclose, in advance of a distribution, any ATM distribution that will have a material impact on the market price of the issuer's securities; and (iii) the requirement to provide post-distribution quarterly reporting.</p>

No.	Subject	Summarized Comment	Response
6	Rescission rights	<p>Three commenters suggest that the amendments not allow traditional new issue rights, including rights of rescission or damages, to purchasers in connection with an ATM distribution.</p> <p>All three commenters argue that such investors are purchasing in the secondary market, unaware that they may be buying new issue shares. Accordingly, investors should not expect and should not have these traditional new issue rights.</p> <p>The commenters also note that investors remain protected by the secondary market liability regime.</p> <p>Two commenters are concerned that such traditional new issue rights are not workable in the context of ATM distributions because it is not possible to identify the specific purchaser of securities in an ATM distribution on the secondary market. Providing a right of action where it is impossible to distinguish ATM purchasers from other secondary market purchasers may expose issuers and the dealers for the ATM program to prospectus liability for all trades that occur during the ATM distribution.</p>	<p>We acknowledge the commenters' concerns but have determined not to make the suggested change for the following reasons:</p> <ul style="list-style-type: none"> <li>• Neither issuers nor their underwriters have identified the possible exposure of all secondary market trading to prospectus liability as a problem under the exemptive relief decisions that have been granted.</li> <li>• We are not aware of any cases where a court has imposed prospectus liability on all secondary market trades in connection with an ATM distribution.</li> <li>• Removing traditional new issue rights, including rights of rescission or damages, to purchasers in connection with an ATM distribution may require legislative amendments. While such amendments could be made, it would significantly delay the adoption of the proposed amendments and the reduction of the burden associated with these changes</li> <li>• We will monitor ATM distributions and consider seeking legislative amendments if warranted.</li> </ul>

No.	Subject	Summarized Comment	Response
7	Quarterly reporting	<p>Three commenters suggest that all issuers be permitted to report trades on a quarterly basis for the following reasons:</p> <ul style="list-style-type: none"> <li>• All three commenters note that issuers are subject to other (exchange) requirements to report, on a monthly basis, changes to the number of outstanding securities. Such information is available to investors on demand.</li> <li>• One commenter notes that relief from this requirement is already regularly provided in recent exemption orders on the basis that issuers provide full disclosure in their quarterly financial statements.</li> <li>• One commenter thinks that monthly reporting does not add incremental value to the investment decision of a secondary market purchaser.</li> <li>• One commenter notes that U.S. ATM rules do not require monthly disclosure.</li> <li>• One commenter notes that, if details in a monthly report do not constitute a material fact, there is no utility to investors from receiving them and if details do constitute a material fact, they would have to be disclosed in any event.</li> </ul>	We agree. Subsection 9.4(1) of the Amendments only requires quarterly reporting.
8	Material terms of agreement with agents	<p>One commenter suggests removing the requirement in paragraph 9.3(1)(e) of the Proposed Amendments to disclose the material terms of a distribution agreement.</p> <p>The commenter notes that the equity distribution agreement in question is a modified form of underwriting agreement. The commenter thinks there is no reason</p>	We agree that Form 44-101F1 requires disclosure of the material terms of the distribution agreement. The Amendments do not include the requirement in paragraph 9.3(1)(e) of the Proposed Amendments.

No.	Subject	Summarized Comment	Response
		<p>in connection with an ATM distribution that the issuer should include more detailed disclosure in a prospectus relating to its agreement with the agents than is required under Item 5 of Form 44-101F1, which applies to ATM prospectuses. The inclusion of the requirement in paragraph 9.3(1)(e) of the Proposed Amendments is redundant and unnecessary.</p>	
9	ATM Exchange	<p>Three commenters suggest that ATM distributions should be permitted over all markets, including exchanges and alternative trading systems, for the following reasons:</p> <ul style="list-style-type: none"> <li>• Two commenters note that the requirement to conduct an offering on an ATM exchange is too narrow. Given that not all Canadian marketplaces are included in the definition, this may result in regulatory contradictions with the requirement to transact on all marketplaces under the Order Protection Rule, and best execution standards.</li> <li>• Two commenters note that the current exemption orders do not limit trades to ATM exchanges and permit the execution of ATM trades on any Canadian exchange or marketplace, including alternative trading systems.</li> <li>• Two commenters note that the CSA has not explained the policy rationale behind the definition of ATM exchange in the Proposed Amendments.</li> <li>• One commenter notes that under U.S. ATM rules, execution can occur on all markets (including exchanges, alternative trading systems and U.S. dark pools).</li> </ul>	<p>We acknowledge these comments. The intent of the requirement in paragraph 9.3(1)(f) of the Proposed Amendments was to ensure the equity securities of the same class being distributed under the ATM distribution are listed and trading on a short form eligible exchange. As noted by the commenters, our intent was that the securities must be distributed through a marketplace. Accordingly, we have removed the definition of an ATM exchange, changed the reference to “ATM exchange” in paragraph 9.3(1)(e) of the Amendments to “marketplace”, and added paragraph 9.3(1)(a) of the Amendments requiring that a security of the same class as being distributed is listed and trading over a short form eligible exchange.</p>

No.	Subject	Summarized Comment	Response
10	Instalment receipts	One commenter supports the removal of instalment receipts from the Proposed Amendments.	We thank the commenter.
11	Cover page disclosure of intention to qualify ATM distribution	<p>One commenter supports the proposed requirement to disclose on the cover page of a base shelf prospectus where an issuer intends to qualify an ATM distribution.</p> <p>One commenter does not support this proposed cover page disclosure requirement for the following reasons:</p> <ul style="list-style-type: none"> <li>• If there are concerns regarding an issuer's business, liquidity position etc, those concerns should be addressed during the shelf review process whether or not an ATM distribution is contemplated.</li> <li>• Issuers may be reluctant to preserve the option for ATM distributions by including the cover page disclosure if it could result in additional review.</li> <li>• The prominence of the language relative to the "non-fixed price offering" language may cause reluctance to preserve the option for ATM distributions due to increased market overhang concerns.</li> </ul>	<p>We acknowledge the commenter's concerns. A base shelf prospectus is reviewed regardless of whether or not an issuer contemplates an ATM distribution. The cover page disclosure provides important information to investors and other market participants. Review of this information by securities regulatory authorities may result in further consideration of certain factors that would have been considered in any case.</p>
12	Designated news release	Two commenters support the proposed "designated news release" approach.	We thank the commenter.
13	Registered secondary offerings	One commenter supports the fact that the Proposed Amendments contemplate the use of ATM offerings by issuers only. The commenter does not support extending the Proposed Amendments to registered secondary offerings. The commenter believes the resale avenues currently available to selling shareholders are sufficient.	We thank the commenter.

No.	Subject	Summarized Comment	Response
14	Transition	<p>One commenter suggests clarifying whether issuers currently using ATM programs in reliance on discretionary exemptive relief will be required to comply with the conditions of the Proposed Amendments or whether they could elect to comply with the conditions under the existing exemptive relief orders. The commenter prefers that issuers have the option of being permitted to follow the conditions of its discretionary relief order, if applicable (until it expires) or the new rules. The rules or 44-102CP should clarify that issuers with a shelf on file not being used for ATM distributions when the Amendments are implemented, may use it to implement an ATM under the new rules (a new shelf should not have to be filed to comply with the rules).</p>	<p>We agree with the commenter that the transition to the Proposed Amendments needs to be explained. Issuers with an existing ATM program and a discretionary relief order, may chose to comply with the Proposed Amendments without having to file a new base shelf prospectus. The Amendments include a transition provision. Section 5.8 of the Changes clarify transition issues.</p>
15	Drafting	<p>One commenter suggests the following drafting changes:</p> <ul style="list-style-type: none"> <li>• Consider whether the Proposed Amendments should provide 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.</li> <li>• Paragraph 9.3(1)(k) and subsection 9.3(2) of the Proposed Amendments should include a reference to “in connection with the distribution.”</li> <li>• Paragraphs 9.4(1)(b) and (2)(b) should refer to “during the [month][annual or interim period, as applicable]” rather than “to date” when referring to reporting of proceeds and commissions under the ATM prospectus.</li> <li>• Consider replacing the words “for the year and period immediately following the distribution” with “for the year or interim period, as</li> </ul>	<p>We thank the commenter and generally agree with the drafting suggestions. With respect to the first suggested drafting change we note that section 9.2(3) of the Amendments stipulates that the obligation to send or deliver a prospectus does not apply in connection with an ATM distribution. Therefore, there is nothing in paragraphs 2 and 3 of section 5.5 of NI 44-102 precluding an issuer from modifying the language. Section 5.2 (2) of the Changes provides guidance on the language that should be used <u>to modify the statements required by section 5.5 of NI 44-102, if necessary.</u></p>

No.	Subject	Summarized Comment	Response
		applicable” in subsection 9.4(2) of the Proposed Amendments.	
<b>OTHER COMMENTS</b>			
16	UMIR Rule 7.7 and OSC Rule 48-501	<p>Three commenters request additional guidance regarding the applicability of the requirements under the Rule 7.7 of the <i>Universal Market Integrity Rules (UMIR)</i> of the Investment Industry Regulatory Organization of Canada and under OSC Rule 48-501 <i>Trading During Distributions, Formal Bids and Share Exchange Transactions</i> of the Ontario Securities Commission (<b>OSC Rule 48-501</b>)</p> <p>One commenter thinks that uncertainty about the ability of insiders to trade during the course of an ATM distribution may contribute to an unwillingness among issuers to engage in ATM offerings and does not think there is any rationale for subjecting insiders to a blanket prohibition on trading during an ATM distribution.</p> <p>Another commenter believes that if a purchase is permitted by UMIR Rule 7.7 and Rule 48-501 then it should not be considered a “transaction that is intended to stabilize or maintain the market price” under subsection 9.3(2) of the Proposed Amendments and suggests clarifying this point in 44-102CP. The same commenter also suggests codifying the exemptive relief from section 2.2(a) of OSC Rule 48-501 typically granted to issuers’ insiders in connection with purchases of issuer’s shares while the issuer’s ATM is operating.</p>	<p>We acknowledge these comments. The Ontario Securities Commission is considering a proposal to partially repeal sections of OSC Rule 48-501 that may impede some ATM distributions.</p> <p>Based on discussions with the Investment Industry Regulatory Organization of Canada, we understand UMIR Rule 7.7 applies to ATM distributions. We further understand that compliance with UMIR Rule 7.7 should not have an adverse impact on the ability of an issuer to make, or the ability of a broker dealer to underwrite, ATM distributions.</p> <p>While compliance with UMIR Rule 7.7 may be a factor when considering compliance with applicable securities law, it may not be determinative.</p>



No.	Subject	Summarized Comment	Response
17	Translation	<p>Three commenters suggest that the translation of ATM offering documents into the French language should not be required.</p> <p>All three commenters mentioned the expense of translation, and two mentioned the time required.</p> <p>All three commenters think the translation requirement will incent issuers to pursue US only ATMs. One commenter thinks the translation requirement will be most punitive to smaller issuers and will make the ATM benefits unavailable to most Canadian issuers.</p> <p>One commenter thinks translation is not required for investor protection as there is no prospectus delivery requirement and the purchaser relies on existing disclosure which is often only provided in English.</p>	<p>The Autorité des marchés financiers will analyse the merits of any exemptive relief application from the translation requirements and, if appropriate, grant relief from the obligation to translate the offering documents. This relief may be subject to conditions.</p>
18	Exempt ATM distributions	<p>One commenter suggests that the CSA adopt an exemption from the prospectus requirement for ATM distributions with gross proceeds of up to \$3mm.</p> <p>The commenter notes that an ATM based on filing a shelf prospectus is prohibitively expensive for a junior company compared to the funds it could expect to raise. The commenter prefers an ATM prospectus exemption based on allowing issuers to rely on continuous disclosure which in the commenter's view would give purchasers the same protection as those acquiring shares in the secondary market. In the commenter's view, the risk profile for ATM purchasers and secondary market purchasers is the same.</p>	<p>We acknowledge the commenter's concerns but have decided not to make any changes as the mandate of this project is focused on codifying existing exemptive relief. Other CSA projects are considering broader regulatory burden reduction initiatives, and we have brought the commenter's suggestion to their attention.</p>

No.	Subject	Summarized Comment	Response
19	Local distribution reporting exemption	<p>One commenter notes that the securities laws of British Columbia require that a report be filed and fees paid based on the value of proceeds raised in the province in a prospectus offering. Given that purchasers in an ATM offering cannot be identified by the issuer or its agents, the commenter suggests that the inability to comply with this requirement be considered in connection with the Proposed Amendments. The commenter also suggests that the securities laws of BC be amended to clarify that distribution reporting requirements do not apply to ATM distributions.</p>	<p>We thank the commenter for the comment. Any amendments to local fees are not within the scope of this project; however, jurisdictions can consider whether local initiatives to change their fee regimes are necessary and appropriate as the opportunity arises.</p>

## ANNEX C

### 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 prospectus” means

- (a) 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), or
- (c) a shelf prospectus supplement establishing an at-the-market distribution;

“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 an At-the-Market Distribution**

- (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) Item 8 of section 5.5 of this Instrument does not apply to an investment dealer acting as an underwriter in connection with a distribution of a security under an ATM prospectus.
- (3) The requirement to send or deliver a prospectus under securities legislation does not apply in connection with a distribution of a security under an ATM prospectus.

##### **9.3 Requirements for Issuers and Underwriters Conducting an At-the-Market Distribution**

- (1) An issuer must not distribute a security under an ATM prospectus as part of an at-the-market distribution unless the following apply:
  - (a) a security of the same class being distributed is listed and trading on a short form eligible exchange;
  - (b) the security being distributed is an equity security;

- (c) the security being distributed 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 or will be filed, 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;
- (e) the issuer distributes the security through a marketplace;
- (f) if applicable, the issuer has disclosed that the completion of the distribution would constitute a material fact or material change;
- (g) the cover page of the base shelf prospectus states that it may qualify an at-the-market distribution;
- (h) 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 supplement, and any amendment relating to securities purchased by a purchaser are not sent or delivered to the purchaser. 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, prospectus supplement, and any amendment relating to [describe securities] purchased by such purchaser because the prospectus, prospectus supplement, and any amendment relating to the [describe securities] purchased by such purchaser will not be sent or 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 supplement, and any amendment relating to securities purchased by a purchaser 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, prospectus supplement, and any amendment relating to securities purchased by a purchaser contain a misrepresentation will remain unaffected by the non-delivery of the prospectus referred to above.

A purchaser should refer to applicable securities legislation for the particulars of these rights and should consult a legal adviser.”;

- (i) if there has been a statement of a purchaser's rights contained in a previous version of the ATM prospectus, the issuer discloses in the current ATM prospectus a statement to the effect that, solely with regard to the at-the-market distribution, the statement of rights required to be included in the ATM prospectus, under paragraph (h), supersedes the previous statement;
  - (j) the ATM prospectus states:

“No underwriter of the at-the-market distribution, and no person or company acting jointly or in concert with an underwriter, may, in connection with the distribution, 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.”;
  - (k) 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;
  - (l) if the issuer is an investment fund, the ATM prospectus includes a statement that the at-the-market distribution will be conducted in accordance with paragraph 9.3(2)(a) of National Instrument 81-102 *Investment Funds*.
- (2) An underwriter of an at-the-market distribution, or a person or company acting jointly or in concert with the underwriter, must not, in connection with the distribution, 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 annual and interim period of the issuer during which the issuer distributes securities under an ATM prospectus, the issuer must, within 60 days after the end of the interim period or 120 days after the end of the annual period, as applicable, file a report, disclosing

- (a) the number and average price of the securities distributed under the ATM prospectus, and
  - (b) the aggregate gross and aggregate net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus during the annual or interim period, as applicable.
- (2) Subsection (1) does not apply if, in each of its filed interim financial reports, annual financial statements, and management discussion and analysis, for the interim period or year, as applicable, 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 aggregate net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus during the annual or interim period, as applicable.

## **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, an issuer certificate form required under paragraph 9.3(1)(k) 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 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, an underwriter certificate form required under paragraph 9.3 (1)(k) 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 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 as required by the securities legislation of [insert name of each jurisdiction in which qualified].”, and

- (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 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 as required by the securities legislation of [insert name of each jurisdiction in which qualified].”, and

- (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 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)(k) 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 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)(k) 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 as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (3) For an amendment to 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 as required by the securities legislation of [insert name of jurisdiction in which qualified].”, and

- (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 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 as required by the securities legislation of [insert name of jurisdiction in which qualified].”, and
  - (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 as required by the securities legislation of [insert name of jurisdiction in which qualified].”.
- 3. Paragraph 9.3(1)(g) of National Instrument 44-102 *Shelf Distributions*, as enacted by section 2 of this Instrument, does not apply in respect of a base shelf prospectus if the prospectus was filed

  - (a) before August 31, 2020, and
  - (b) for an at-the-market distribution in respect of which the issuer applied for and obtained an exemption from the requirement to send or deliver a prospectus.
- 4. (1) This Instrument comes into force on August 31, 2020.

(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after August 31, 2020, these regulations come into force on the day on which they are filed with the Registrar of Regulations.

## ANNEX D

### CHANGES TO COMPANION POLICY 44-102CP *SHELF DISTRIBUTIONS*

1. *Companion Policy 44-102CP 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 Disclosure of Intention to Qualify At-the-Market Distribution**

- (1) Paragraph 9.3(1)(g) 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 further review of certain factors that are considered during the review of a base shelf prospectus, such as the 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.

#### **5.3 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)(f) 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 IIROC rules and standards of conduct.

**5.4 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.

**5.5 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 filed news release. An ATM prospectus should provide that any such designated news release will be deemed to be incorporated by reference into the ATM prospectus.

**5.6 Prospectus Certificates** - The certificates required to be filed under paragraph 9.3(1)(k) of NI 44-102 or other securities legislation in the forms 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.

**5.7 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 a purchaser under an at-the-market distribution can be located in any jurisdiction of Canada.

**5.8 Transition Period** - An issuer with an outstanding base shelf prospectus filed prior to August 31, 2020 under which the issuer is qualified to make an at-the-market distribution pursuant to a discretionary relief order, will not be required to re-file the base shelf prospectus to comply with the cover page disclosure in paragraph 9.3(1)(g) of NI 44-102. Any other provisions of Part 9 of NI 44-102 that do not mirror the issuer's discretionary relief order may be addressed in the prospectus supplement..

3. These changes become effective on August 31, 2020.