

Nova Scotia Securities Commission

Rule 44-102 (Amendment)
Shelf Distributions

- and -

Changes to Companion Policy 44-102CP
Shelf Distributions

WHEREAS:

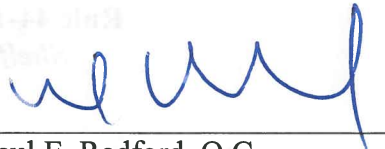
1. Pursuant to section 150 of the *Securities Act*, R.S.N.S. 1989, chapter 418, as amended (the Act), the Nova Scotia Securities Commission (the Commission) has power to make rules subject to compliance with the requirements of the Act;
2. Pursuant to section 19 of the Act, the Commission has power to issue and publish policy statements;
3. Amendments to National Instrument 44-102 *Shelf Distributions* (the Rule) and Changes to Companion Policy 44-102CP *Shelf Distributions* (the Policy), copies of which are attached hereto, have been made a rule by one or more of the Canadian securities regulatory authorities; and
4. The Commission is of the opinion that the attainment of the purpose of the Act is advanced by this Instrument.

NOW THEREFORE the Commission hereby:

- (a) pursuant to the authority contained in section 150 of the Act and subject to compliance with the requirements of section 150A of the Act, approves the Rule and makes the same a rule of the Commission;
- (b) pursuant to the authority contained in section 19 of the Act and subject to publication on the Commission's website, issues the Policy as a policy of the Commission; and
- (c) declares that the rule approved and made pursuant to clause (a) and the policy issued pursuant to clause (b) shall take effect on August 31, 2020, unless the Minister disapproves the rule or returns it to the Commission in accordance with subsection 150A(3) of the Act in which event the rule shall not become effective until the rule is approved by the Minister.

IN WITNESS WHEREOF this Instrument has been signed by the Chair of the Commission, being the member of the Commission prescribed by the Chair pursuant to subsection 15(3) of the

Act to attend the hearing of this matter and the quorum with respect to this matter, on the 4th day of June, 2020.


Paul E. Radford, Q.C.
Chair

Attachments

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.

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.

