

Amendments to “at-the-market” equity offerings a welcome change

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On June 4, 2020, the Canadian Securities Administrators (CSA) approved amendments to National Instrument 44-102 – *Shelf Distributions* (NI 44-102) and Companion Policy 44-102CP to facilitate at-the-market offerings (ATM Offerings) by Canadian issuers (the Amendments). The Amendments, which become effective on August 31, 2020, will permit issuers to conduct ATM Offerings without the need to obtain any exemptive relief from Canadian securities regulators. In an ATM Offering, an issuer raises capital by creating newly issued shares and selling them on an exchange at market prices from time to time over a period of time, under a program established with one or more dealers acting as the issuer’s agent.

Background

Prior to the Amendments, although NI 44-102 permitted ATM Offerings subject to certain limitations, Canadian issuers that wanted to effect an ATM Offering on an exchange in Canada still in fact needed to apply on a case-by-case basis for exemptive relief from prospectus delivery requirements, certain withdrawal and rescission rights and prospectus form and certification requirements. The Amendments eliminate the need to apply for this exemptive relief and also remove some of the conditions and constraints that previously applied to ATM Offerings under NI 44-102 and the conditions incorporated into the exemptive relief granted. In addition to public companies, non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution may rely on the Amendments to set up an at-the-market (ATM) program for equity securities. Mutual funds that are traded on an exchange that are in continuous distribution and meet the definition of an “ETF” in National Instrument 41-101 – *General Prospectus Requirements* are also able to rely on the Amendments.

Key takeaways

The Amendments are intended to codify ATM exemptive relief that had previously been granted by the regulators on a case-by-case basis and to reflect other changes arising from market consultations. Key changes include the following:

- **ATM limitations removed:** The Amendments remove the previous restrictions on the number of shares that can be sold under an ATM, both on a daily and aggregate basis.
 - NI 44-102 and ATM exemptive relief previously provided that the market value of securities distributed under an ATM could not exceed 10% of the aggregate market value of the issuer’s outstanding securities based on the last trading day of the month

- before the first sale of securities under the ATM was made (the 10% Cap).
- Similarly, the ATM exemptive relief granted on a case-by-case basis provided that the aggregate number of shares sold on a marketplace on any trading day could not exceed 25% of the daily trading volume of the shares (the 25% Cap).
- The Amendments eliminate both the 10% Cap and the 25% Cap. In dispensing with the 10% Cap and the 25% Cap, the CSA noted that it still expects issuers and their investment dealers to conduct ATM Offerings in a manner that will not have a material impact on the market price of their securities, and dealers are expected to manage orders to limit any negative impact on market integrity.
- **Additional disclosure requirements:** The Amendments codify certain disclosure requirements relating to ATM Offerings.
 - Consistent with the previously granted exemptive relief, the Amendments require disclosure by issuers of the number and average price of the securities distributed, the gross and net proceeds raised and the commissions paid under the ATM program. This disclosure must be made within 60 days after the end of the interim period or 120 days after the end of the annual period, and may be made in a separate report or included in an issuer's interim and annual financial statements and management discussion and analysis.
 - An issuer may be, and typically is, in continuous distribution under an ATM program provided that the documents incorporated by reference in the prospectus establishing the ATM program (ATM Prospectus) constitute, and continue to constitute throughout the life of the ATM program, full, true and plain disclosure of all material facts.
 - The Amendments codify certain disclosure in a base shelf prospectus, prospectus supplement and certain news releases that was mandated under the previously granted exemptive relief. If an issuer disseminates a news release disclosing a material fact, the issuer must identify that news release as a "designated news release" for purposes of the ATM Prospectus and it will then be incorporated by reference into the ATM Prospectus.

Transition

As noted above, the Amendments come into force August 31, 2020. Issuers filing a base shelf prospectus prior to the Amendments coming into force will be permitted to rely on the Amendments for purposes of conducting an ATM program even if their base shelf prospectus does not include the prescribed language required.

Starting September 1, 2020, issuers who have an ATM program in place that wish to avail themselves of the Amendments (principally to remove the 10% Cap and 25% Cap) may amend or amend and restate their ATM prospectus supplement, but issuers will not be required to amend their base shelf prospectus to do so. Amendments to a prospectus supplement (or an amended and restated prospectus supplement) can be filed without regulatory review, so it is relatively seamless for issuers with existing ATM programs to adjust their ATM programs to take advantage of the Amendments, including to remove the 10% Cap and 25% Cap.

Anticipated impact of the Amendments

ATM Offerings are an effective way for issuers to quickly access capital and have been steadily becoming more commonly used by U.S. issuers. By eliminating the requirement for Canadian issuers to obtain exemptive relief, and eliminating the 10% Cap and the 25% Cap, the Amendments will both reduce the costs and time for Canadian issuers to implement an ATM Offering program and also significantly expand its usefulness. Canadian issuers that conducted ATM Offerings in the United States under the Multijurisdictional Disclosure System will also benefit from the elimination of the 10% Cap under NI 44-102 that applied to such offerings, even though additional exemptive relief for ATM Offerings conducted solely in the United States was not required. The Amendments will provide Canadian issuers with additional flexibility to take advantage of market conditions to raise equity and we anticipate ATM Offerings to become more frequently used by Canadian issuers.