

CSA ANNOUNCES AMENDMENTS TO REGULATORY FRAMEWORK FOR AT-THE-MARKET DISTRIBUTIONS

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On June 4, 2020, as part of its effort to reduce the regulatory burden, the Canadian Securities Administrators (the "CSA") announced amendments coming into effect on August 31, 2020 (the "Amendments") to the regulatory framework for at-the-market ("ATM") distributions. Among other things, the Amendments will eliminate the requirement to obtain exemptive relief from securities regulatory authorities and will streamline the process for conducting an ATM distribution. In particular, the Amendments:

- remove the requirement that a physical prospectus be delivered to purchasers in connection with an ATM distribution;
- remove the 10% market cap limitation;
- require reporting of distributions on a quarterly basis (rather than the previously-proposed monthly requirement);
- remove instalment receipts convertible into equity securities as eligible securities for an ATM distribution; and
- remove the previously-proposed limitation that ATM distributions meet a specified daily cap or require that securities meet particular liquidity requirements.

This article provides a brief overview of ATM distributions and summarizes the announced Amendments.

What are At-The-Market Offerings?

An ATM offering is a distribution of equity securities, usually common shares, under the shelf offering procedures. Under an ATM distribution, securities are distributed into a pre-existing trading market (e.g. stock exchange) in which securities of the same class are traded. In an ATM distribution, the price of the distributed securities is not fixed and the securities are sold at the prevailing market price, subject to certain parameters.

In order to qualify, the reporting issuer has to meet certain eligibility criteria, which are the same as the criteria to file a short form prospectus. The reporting issuer also selects one or more securities dealers to act as its agent to distribute the securities. Once the ATM distribution program is established, depending on the reporting issuer's financing and other requirements, it may deliver a written notice to its agent(s) to sell the offered securities through a recognized marketplace (e.g. stock exchange). The written notice sets out parameters such as the minimum offering price, the offering period and the size of the offering.

An ATM distribution program is an attractive option since it allows issuers to quickly raise capital by selling into an existing marketplace; to determine the terms of each offering; and once the program is established, the offering process is often simpler than other methods.



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What is the Current Regulatory Framework?

Under the current framework, reporting issuers must apply to securities regulatory authorities for exemptive relief in order to establish an ATM distribution program. This includes relief from the requirement to physically deliver a prospectus to purchasers; certain prospectus disclosure requirements; and the form of prospectus certificate for the issuer and the selling agent(s).

Although the exemptive relief is routinely given, it is an additional step in the process of establishing an ATM distribution program, and therefore adds a regulatory burden.

Summary of the Amendments

The Amendments will become effective on August 31, 2020. Once in effect, they will eliminate the requirement to obtain exemptive relief from regulatory authorities. The Amendments are described in further detail below.

1. Prospectus Requirements

The requirement to physically send or deliver a prospectus to purchasers will not apply in connection with an ATM distribution.

Further, the Amendments add certain disclosure requirements for the base shelf prospectus and prospectus supplements, which are consistent with the practice under the current framework. For example, there is a statement of purchaser's rights that needs to be included. The statement required under the Amendments represents a relaxation of the current form requirement.

The Amendments also include new forms of certificates from an issuer and the ATM selling agents that are required to be included in the base shelf prospectus and prospectus supplements.

2. Removal of the 10% Market Cap

Under the current rules, the market value of equity securities distributed under a single ATM distribution prospectus supplement may not exceed 10% of the aggregate market value of the issuer's outstanding equity securities of the same class. The CSA recognized that this has been an impediment to the establishment of ATM distributions and so the Amendments remove this requirement.

3. Removal of Instalment Receipts

Under the current rules, instalment receipts convertible into equity securities are eligible securities for an ATM distribution in certain circumstances. The CSA noted that there is no market demand for ATM distributions of instalment receipts in Canada and so the Amendments remove this as an option.

4. Reporting Obligations

The CSA previously published proposed amendments for comment on May 9, 2019 (the "**Proposed Amendments**"). The Proposed Amendments included reporting obligations whereby the issuer has to file a report disclosing, among other things, the number and average price of the securities distributed and the aggregate gross and net proceeds raised. Under the Proposed Amendments, the CSA proposed that issuers of "highly-liquid securities" would have to report on a monthly basis. Under the current Amendments the CSA determined that all issuers will be permitted to report distributions on a quarterly basis.

5. Liquidity Requirement

Under the Proposed Amendments, the CSA offered two options for conducting ATM distributions. Under the first option, an issuer would only be allowed to distribute securities under its ATM program if: (i) the aggregate number of securities of the class distributed on any trading day does not exceed 25% of the trading volume of that class on all marketplaces on that day; or (ii) the securities are "highly-liquid securities" as defined in the Proposed Amendments. Under the second option, there would be no liquidity requirements.

The Amendments will adopt the second approach. The CSA has determined that it will not limit ATM distributions to a specified daily cap or require that securities meet specified liquidity requirements. In order to address concerns about potential abuses, the CSA mentioned that it intends to monitor ATM distributions, with a particular focus 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.

6. Transition Period

Under the Amendments, there will be a transition period for issuers with an outstanding base shelf prospectus filed prior to August 31, 2020 under which the issuer has an exemptive relief order. Such an issuer will not be required to re-file the base shelf prospectus and can address any discrepancies between its relief order and the Amendments in its prospectus supplement.

7. Investment Funds

The CSA has determined that all non-redeemable investment funds (NRIFs) and exchange-traded mutual funds (ETFs) that are not in continuous distribution are able to rely on the Amendments. Further, mutual funds that are traded on an exchange that are in continuous distribution, and therefore meet the definition of an "ETF" in NI 41-101- *Short Form Prospectus Distributions* are also able to rely on the Amendments, and would be required to comply with all requirements applicable to the ETF (including the requirement that dealers acting as agents for a purchaser deliver ETF facts documents). 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

Conclusion

The Amendments are a welcome reduction to the regulatory burden for issuers seeking to establish an ATM distribution program. Although the above discussion covers the major points of the Amendments, it does not describe all of the changes. Please contact the authors of this article if you have any questions or if you require any additional information regarding the latest developments discussed.