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At-the-Market Distributions Arrive in Canada

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Reporting issuers will soon be able to implement at-the-market (ATM) distributions without obtaining regulatory relief.[1] Starting August 31, 2020, ATM distributions in Canada will no longer be subject to prescribed liquidity requirements or prescribed limits on aggregate distribution size or daily sales volume, and issuers will be required to report on sales only on a quarterly basis. The Canadian ATM regime will largely align with the U.S. ATM regime. We expect this will result in Canadian ATM distributions becoming more mainstream and will incentivize some cross-listed issuers to expand their U.S.-only ATM distributions into Canada. We welcome this positive development for Canadian capital markets.

The new regime reduces the regulatory burden associated with ATM distributions by removing the need to apply for exemptive relief from the prospectus delivery and technical prospectus disclosure requirements. The new regime codifies the terms that were typically found in exemptive relief orders frequently granted by Canadian Securities Administrators (CSA) members (such as quarterly reporting of sales) and streamlines the ATM regime by eliminating certain restrictions previously imposed on ATM distributions:

- The size of an ATM distribution will not be limited. Previously it was capped at 10% of the issuer's public float at the end of the month prior to commencing the distribution.
- The securities under an ATM distribution will not have to meet liquidity thresholds. Previously only issuers whose securities were "highly liquid" or "actively traded" could distribute securities under an ATM distribution.
- The securities under an ATM distribution will not be subject to daily sales thresholds. Previously daily sales on Canadian marketplaces could not exceed 25% of the aggregate trading volume of the securities on all Canadian marketplaces.

The new regime will also permit non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution to conduct ATM distributions.

The new regime is a significant step in the right direction. But the work of the CSA and its members on ATM distributions continues:

- While the CSA eliminated liquidity restrictions from the new regime on the basis that issuers and underwriters are sufficiently incentivized to ensure that sales under ATM distributions do not significantly affect the markets into which sales are made, the CSA will nevertheless monitor ATM distributions for abusive conduct.
- Despite certain stakeholders advocating that ATM distributions should be exempt from the French language translation requirement (citing reasons such as reduction of costs, absence of a prospectus delivery requirement and competitiveness with the U.S. ATM regime), translation relief was not included in the new ATM regime. However, the CSA noted that the Autorité des marchés financiers will analyze the merits of any exemptive relief application from the translation requirements and, if appropriate, grant relief from the obligation to translate ATM offering documents subject to appropriate conditions.
- Following the initial proposal, several stakeholders recommended that the CSA eliminate traditional "new issue rights" to purchasers under an ATM distribution, including rights of rescission or damages against the issuer and underwriters. These recommendations noted that a purchaser under an ATM distribution does not know whether the purchase is from a third party or from treasury of the issuer (because the purchase is made on an exchange) and could instead be afforded protections under the civil liability regime for secondary market disclosure. The CSA did not adopt these changes, in part because such changes could require legislative

amendments that would have delayed the initiative. The CSA indicated that it will monitor ATM distributions and consider seeking such legislative amendments, if warranted.

[1] On June 4, 2020, the Canadian Securities Administrators published CSA Notice of Amendments to National Instrument 44-102 *Shelf Distributions* and Changes to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions that will implement a new regime for ATM distributions in Canada. They follow a notice and request for comment published by the CSA on May 9, 2019, in which the CSA put forward an initial proposal for the new regime.

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