INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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Dear Sir/Madam:

Re: Proposed Amendments to NI 44-102 and 44-102CP *Shelf Distribution* relating to At-the-Market Distributions (the "Proposed Amendments")

The Investment Industry Association of Canada (the "IIAC" or "Association") appreciates the opportunity to comment on the Proposed Amendments. The Association is pleased that the CSA has taken this important step in amending the above noted instruments to replace the burdensome and inefficient exemptive relief process for conducting At-the Market ("ATM") distributions. As discussed further below, we believe that aligning the Canadian framework for ATM distributions with the US ATM model is essential to facilitate efficient usage of this means of financing in Canada.

Under the existing regime, very few ATM offerings are conducted in Canada in part due to the expensive and time-consuming exemptive relief process. By codifying the exemptive relief that has been granted in the past, the Proposed Policy will eliminate the unnecessary costs and delays associated with a Canadian ATM distribution. However, further changes (proposed below) are necessary for the Canadian ATM framework to provide similar efficiencies as the U.S. framework and provide issuers with a cost effective and efficient means of public equity financing in Canada.

Alignment with US ATM Framework

Adopting a Canadian ATM framework that has substantially similar requirements to the US framework is essential to ensure that Canadian issuers do not have an incentive to undertake a U.S.-only ATM. If the U.S. ATM framework is significantly less burdensome that the one adopted in Canada, Canadian issuers may skip the Canadian market altogether and conduct their ATM in the US only. The propensity of issuers to migrate to the less burdensome regime is evident in the statistics for ATM distributions for Canadian reporting issuers since 2010, where only slightly more than a quarter of the 30 ATM offerings conducted by these reporting issuers were undertaken, in whole or in part, in Canada. In contrast, over 80% of these 30 ATM distributions were undertaken, in whole or in part, in the United States.

Proposals for Further Efficiencies

The Proposed Amendments, by codifying the standard exemption from prospectus delivery and associated withdrawal right, recognizes that the expectations of purchasers pursuant to an ATM offering are different from those buying equity new issues. New issue purchasers purchase directly from the issuer or the underwriter, and investor protection is tied to those identifiable sellers. In an ATM offering, the buyer is purchasing on the secondary market, and not purchasing from an identifiable seller. As such, their expectation is consistent with the experience of buying on the secondary market, which does not require investor protections or disclosure that is specific to a primary distribution.

Premised on the above, we propose two further amendments summarized below.

Remove Prospectus Specific Right for Rescission or Damages

The right of action for rescission or damages (referred to in s.9.3 (1)(i) of the Proposed Amendments) for a misrepresentation in a prospectus should not be available to ATM purchasers. This right of action is inconsistent with the method of distribution under an ATM offering as, from the perspective of an ATM purchaser, the purchase is a secondary market trade. Instead, the appropriate remedy for an ATM purchaser is the right of action for damages available for a misrepresentation in the responsible issuer's secondary market disclosure. Notably, a prospectus is listed among the core documents to which secondary market disclosure civil liability provisions apply. It is not necessary for investor protection to layer on an additional right of action. Further, an additional prospectus specific right of action is not workable in the context of an ATM distribution. As it is not possible to identify the specific purchaser of securities in an ATM distribution on the secondary market (as there is no prospectus delivery requirement), it is unclear how a prospectus specific right of action could even be enforced in an ATM distribution context. We are concerned that 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 their ATM program to prospectus liability for all trades (both ATM and secondary) that occur during the ATM distribution. For the above reasons, we submit that the proposed Canadian ATM framework should be amended (including, as necessary, by amending other applicable securities legislation) to remove ATM purchasers from the category of purchasers that have a right of action for rescission or damages for a misrepresentation in a prospectus.

Remove Translation Requirement

We also propose that ATM prospectuses be exempt from French translation requirements. Section 5.8 of the Proposed Companion Policy suggests that, since ATM distributions are made directly on a securities exchange and it is possible that purchasers under an ATM distribution can be located in any jurisdiction in Canada, a Canadian ATM prospectus must be qualified in all jurisdictions. As this would necessitate filing in Quebec, the French translation requirement would apply. There must be a clear exemption from the translation requirement, or the benefits of the Proposed Policy will be effectively unavailable to most Canadian issuers. In the context of an ATM distribution, a French translation is not necessary for investor protection, as there is no prospectus delivery requirement and the purchaser (who views this as a secondary trade) relies on existing continuous disclosure which is often only provided in English. Generally speaking, the translation requirement adds significant time and expense to the public offering process, and currently deters many Canadian issuers from conducting prospectus offerings in Quebec. In the context of an ATM distribution, translation is even more problematic due to the challenge of finalizing French versions concurrently with the filing of each and every English report. Even for Canadian issuers that do translate their continuous disclosure in the ordinary course, this timing issue poses a substantial challenge that adds unnecessary expense. Requiring the translation of ATM prospectuses ensures a non-level regulatory playing field with the US, and deters the use of ATM offerings in Canada. The translation requirement is the most punitive on smaller, oil and gas, mining and cannabis issuers that would not otherwise be subject to a translation requirement. If the translation requirement is maintained, we anticipate that ATM financings will be underutilized in Canada.

Other Issues with the Proposed ATM Framework

The requirement in Section 9.3(1)(f) to conduct the offering on an "ATM Exchange" is too narrow. Given that not all Canadian marketplaces are included in the definition, we are concerned that this will result in regulatory contradictions with the requirement to transact on all marketplaces under the Order Protection Rule, and best execution standards. There is no principled basis on which to limit ATM distributions to only prescribed Canadian marketplaces, and issuers should be able to conduct the ATM offering where they believe they will obtain the best price and execution.

Responses to Specific Questions

Our responses to the General Questions are as follows:

1. **Is a "highly liquid securities" test or the 25% Daily Cap necessary to reduce the impact on the market price of an issuer's securities? Please explain.**

The "highly liquid securities" test or 25% Daily Cap does not exist in the US and, as such, the implementation in Canada would create an inconsistency that may deter the use of the ATM offering process in Canada. We understand that the absence of an equivalent liquidity test in the US has not resulted in market impact problems in that market. In our view, it is not necessary to impose a liquidity

test. The dealer participation condition is sufficient to maintain fair and orderly markets, due to the IIROC rules applicable to dealer conduct.

We believe that permitting this professional discretion is appropriate. It is reasonable to be consistent with the US framework which does not have an equivalent liquidity test, and, to our knowledge, has had smaller issuers conduct ATM offerings successfully.

We are of the view that the provision allowing quarterly, rather than monthly reporting should be applied to Option 2. Given that issuers are required to report on the number of outstanding securities on a monthly basis, this information is available on demand to investors. Notably, if ATM sales were of an amount / sold at a price that would constitute a 'material fact', then securities legislation would require more current disclosure (via material change reporting) of those details in any event. If those details wouldn't constitute a material fact, we query why there is any utility in requiring reporting more current than in an issuer's quarterly reports. If not a material fact then, by definition, those details would not reasonably be expected to have a material effect on the market price or value of the securities.

We also agree with the removal of the 10% aggregate cap. This has been an impediment to ATM distributions in Canada, and investor protection issues are addressed by the requirement in the Proposed Policy to engage an underwriter.

2. The Proposed Amendments only permit distributions of equity securities. Should the issuance of debt securities under an ATM distribution be permitted? If yes, please explain the market need and suggest appropriate exemptions and conditions.

We believe the use of an ATM distribution is less practical with respect to the issuance of debt securities. This is largely owing to the over-the-counter structure of fixed-income markets. Off-exchange instruments often lack mechanisms to provide current and ongoing information with reference to amount issued and market pricing. Issues such as market overhang, daily accrued interest, call-features and convertible bond issues would add further complexities to the ATM process. Given the challenges above, and the capital raising alternatives currently available to debt borrowers, it is not clear what appetite they may have for an ATM distribution.

3. Do you think that permitting NRIFs and ETFNCDs to conduct ATM distributions is warranted, based on differences in their distribution model and investor base compared to ETFs in continuous distribution?

The IIAC does not have a position on this issue.

4. If the CSA permits NRIFs and ETFNCDs to use ATM distributions, what additional conditions, if any, should apply?

The IIAC does not have a position on this issue.

5. Net asset value (NAV) is calculated daily, if using specified derivatives or selling short, or, otherwise, weekly. How frequently should the NAV be calculated with respect to ATM distributions?

ATM distributions should be done at premium to NAV to ensure that the NAV is not diluted, with issuers providing certification to that effect.

6. Under new restrictions that came into force on January 3, 2019, NRIFs are generally limited to having 25% of assets in illiquid assets. However, illiquid assets are difficult to value. We have concerns that the NAV in some cases may be "stale" and may not reflect the economic value of the underlying assets. Should we restrict NRIFs with significant illiquid assets from conducting ATM distributions? What should the threshold be?

The IIAC does not have a position on this issue.

Thank you for considering our comments. If you have any questions, please don't hesitate to contact me.

Yours sincerely,

Susan Copland