



The Rise of the ATM – Public Equity Financing in a Capital Constrained World

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The Canadian Securities Administrators (CSA) have [proposed amendments](#) to [National Instrument 44-102 – Shelf Distributions](#) (NI 44-102) that would facilitate capital raising by public companies by easing regulation of “at-the-market” offerings (ATMs).

Background

With the adoption of NI 44-102 in 2000, the CSA created a shelf distribution system for the issuance of securities by Canadian public issuers that has served Canadian capital markets well. The vast majority of offerings under that shelf distribution system have been made under shelf prospectus supplements with the assistance of an agent or underwriter with specified pricing and size parameters intended to appeal to market demand at a single point in time. However, a much less utilized but innovative financing model was also included in NI 44-102 to allow issuers to issue treasury securities through the facilities of a stock exchange at variable market prices, in varying amounts and on an as-needed basis, all at the discretion of the issuer and its agent.

These ATMs were viewed skeptically by the established investment banking community following adoption and initially utilized sparingly. However, commencing with the income trust era and the unrelenting need for equity capital in the context of these distribution paying vehicles, ATMs slowly started to appear more frequently.

Their many advantages were fairly apparent, including notably:

- No discount to market price on issue (being issued between the bid/ask spread)
- Reduced commissions, fees and expenses
- No solicitation of purchasers
- Immediate access to capital
- Implemented as-needed with discretion on price and size
- Little impact on market price if implemented correctly
- Timed to capital needs or favourable market price movements

Of course, ATMs did not come without their challenges, including:

- The requirement to obtain exemptive relief (collectively, the Exemptive Relief) to:

- Avoid prospectus delivery obligations;
 - Avoid granting withdrawal rights and rights of rescission to purchasers; and
 - Amend the prospectus supplement form
- Unfamiliarity within both investment banking and shareholder communities
 - Significant liquidity required to avoid impacting market price
 - Fee quantum and structure disincentivizing dealers from endorsing ATMs relative to other offerings
 - Ineffective for significant urgent capital demands
 - Incremental reporting obligations to securities regulators on a monthly basis as to number and average price of distributed securities and aggregate proceeds raised (the Reporting Obligation)
 - Size and liquidity restrictions not applicable in the United States:
 - to mitigate the risk of over-allocating ATMs and having a material impact on the market price of the issuer's securities, the number of securities of a class distributed on one or more ATMs is capped at 25% of the daily trading volume of securities of that class (the 25% Cap); and
 - aggregate distributions under a single prospectus supplement are capped at 10% of the market value of the issuer's securities (the "10% Cap").

Owing in large part to these limitations, ATMs continue to find favour only with a limited subset of the Canadian capital market and have never truly flourished to the extent their advantages would suggest possible.

The Proposed Amendments

Principal Changes

In recognition of the structural challenges associated with ATMs which limited their broader market penetration and the standard nature of the exemptive relief that was required to implement them, on May 9, 2019 the [CSA proposed certain amendments to NI 44-102](#) (the Amendments) that would, among other things:

- Eliminate the need for the Exemptive Relief by codifying the terms of the relief in NI 44-102 in respect of all ATM distributions;
- Remove the 10% Cap entirely;
- Either:
 - remove the 25% Cap entirely; or
 - remove the 25% Cap only in relation to securities that qualify as "highly liquid securities"^[1] and otherwise retain the 25% Cap for all other issuers; and
- Eliminate the Reporting Obligation for "highly liquid securities".

Other Proposed Changes

While the Amendments highlighted above are the key changes that are likely to be most important in generating increased attention for ATMs, the following additional changes should be noted:

ATM Exchange Requirements – The Amendments would require that ATMs be executed through an "ATM exchange". In Canada, this means the TSX, Tier 1 and 2 of the TSX-V, Aequitas NEO Exchange and the

Canadian Securities Exchange. Outside of Canada, this means any “marketplace” (principally consisting of any exchange or quotation and trade reporting system). Currently, there is no prescription as to suitable exchanges other than that a Canadian exchange listing is required. The “ATM exchange” concept would therefore broaden the suite of potential ATM candidates by allowing exchanges outside of Canada to be the venue for the distribution activity without the need for a Canadian listing.

Secondary Offerings – The current provisions of the ATM program contemplate the use of ATMs for the distribution of equity securities without reference to issuers or shareholders, thereby potentially covering secondary offerings by significant shareholders (as opposed to prospectus offerings, for instance). The Amendments, however, may limit the availability of the ATM program to issuers only.

Use for Debt Securities – While both the current provisions of the ATM program and the Amendments contemplate the use of ATMs for the distribution of equity securities only, the CSA has requested comment on the potential to open the program for debt securities as well.

Non-Redeemable Investment Funds (NRIFs) and ETFs – The Amendments would permit ATMs by NRIFs and ETFs that are not in continuous distribution. The current ETF Facts delivery requirement will still be in place for ETFs in continuous distribution. No other conditions have been added aside from the current operational requirements under National Instrument 81-102 *Investment Funds*.

Reporting Obligations – Where “highly liquid securities” are distributed in an ATM, the current obligation to report these sales to securities regulators on a monthly basis would be eliminated provided that certain of the issuer’s continuous disclosure documents for the year and period following the distribution disclose the number and average price of securities distributed under the ATM and the aggregate gross and net proceeds raised (and commissions paid or payable) under the ATM to the relevant date. ATM distributions of securities that are not “highly liquid securities” would remain subject to the current monthly Reporting Obligation imposed through existing exemptive relief. Existing exchange reporting obligations would still apply.

Predicted Outcome of the CSA’s Proposed Amendments

In light of ongoing challenges in certain sectors of traditional capital raising channels, from bought deals to best efforts offerings and private placements, notably in the mining and oil and gas spaces, the Amendments are a welcome movement towards both easing the administrative burden associated with adopting and maintaining an ATM and increasing the quantum of capital that is able to be raised through them.

While it would be unreasonable to expect ATMs to displace conventional capital raising mechanisms entirely or even significantly in the circumstances where they have proven most beneficial, the proposed Amendments (if adopted) can be expected to result in ATMs becoming more attractive and more frequently utilized as a supplementary capital raising mechanism.

The CRA is welcoming comments on the proposals up to August 7, 2019.

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[1] A security that: (a) has traded during a 60-day period ending not earlier than 10 days prior to the distribution under the ATM an average of 100 times per day with an average trading value of C\$1 million per day; or (b) is subject to Regulation M under the *Securities Act of 1934* and is considered an “actively-traded security” thereunder.

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