

*Note: [31 Aug 2020] – Amendments to NI 44-102. Refer to Annex C of the CSA Notice announcing amendments to NI 44-102 dated 04 June 2020.*

## **AMENDMENTS TO NATIONAL INSTRUMENT 44-102 *SHELF DISTRIBUTIONS***

**1. *National Instrument 44-102 Shelf Distributions is amended by this Instrument.***

**2. *Part 9 is replaced with the following:***

### **PART 9 – AT-THE-MARKET DISTRIBUTIONS OF EQUITY SECURITIES UNDER SHELF**

**9.1 Definitions** - In this Part,

“ATM prospectus” means

- (a) a base shelf prospectus for an at-the-market distribution,
- (b) a shelf prospectus supplement to a base shelf prospectus referred to in paragraph (a), or
- (c) a shelf prospectus supplement establishing an at-the-market distribution;

“investment dealer” has the meaning ascribed to it in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

“marketplace” has the meaning ascribed to it in National Instrument 21-101 *Marketplace Operation*.

### **9.2 Provisions Not Applicable to an At-the-Market Distribution**

- (1) The following provisions do not apply to an issuer distributing a security under an ATM prospectus:
  - (a) section 7.2 of NI 41-101;
  - (b) Item 20 of Form 44-101F1;
  - (c) item 8 of section 5.5 of this Instrument.
- (2) Item 8 of section 5.5 of this Instrument does not apply to an investment dealer acting as an underwriter in connection with a distribution of a security under an ATM prospectus.
- (3) The requirement to send or deliver a prospectus under securities legislation does not apply in connection with a distribution of a security under an ATM prospectus.

### **9.3 Requirements for Issuers and Underwriters Conducting an At-the-Market Distribution**

- (1) An issuer must not distribute a security under an ATM prospectus as part of an at-the-market distribution unless the following apply:
  - (a) a security of the same class being distributed is listed and trading on a short form eligible exchange;

- (b) the security being distributed is an equity security;
- (c) the security being distributed is distributed through an investment dealer acting as an underwriter in connection with the distribution;
- (d) with respect to any agreement with an investment dealer referred to in paragraph (c) to distribute the security, the issuer
  - (i) has issued and filed a news release
    - (A) announcing that the issuer has entered into the agreement,
    - (B) indicating that an ATM prospectus has been or will be filed, and
    - (C) specifying where and how a purchaser of a security under the at-the-market distribution may obtain a copy of the agreement and the ATM prospectus, and
  - (ii) has filed a copy of the agreement;
- (e) the issuer distributes the security through a marketplace;
- (f) if applicable, the issuer has disclosed that the completion of the distribution would constitute a material fact or material change;
- (g) the cover page of the base shelf prospectus states that it may qualify an at-the-market distribution;
- (h) the ATM prospectus states in substantially the following words:

“Securities legislation in some provinces and territories of Canada provides purchasers of securities with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplement, and any amendment relating to securities purchased by a purchaser are not sent or delivered to the purchaser. However, purchasers of [describe securities] distributed under an at-the-market distribution by [name of issuer] do not have the right to withdraw from an agreement to purchase the [describe securities] and do not have remedies of rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus, prospectus supplement, and any amendment relating to [describe securities] purchased by such purchaser because the prospectus, prospectus supplement, and any amendment relating to the [describe securities] purchased by such purchaser will not be sent or delivered, as permitted under Part 9 of National Instrument 44-102 *Shelf Distributions*.

Securities legislation in some provinces and territories of Canada further provides purchasers with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus, prospectus supplement, and any amendment relating to securities purchased by a purchaser contains a misrepresentation. Those

remedies must be exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation that a purchaser of [describe securities] distributed under an at-the-market distribution by [name of issuer] may have against [name of issuer] or its agents for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplement, and any amendment relating to securities purchased by a purchaser contain a misrepresentation will remain unaffected by the non-delivery of the prospectus referred to above.

A purchaser should refer to applicable securities legislation for the particulars of these rights and should consult a legal adviser.”;

- (i) if there has been a statement of a purchaser's rights contained in a previous version of the ATM prospectus, the issuer discloses in the current ATM prospectus a statement to the effect that, solely with regard to the at-the-market distribution, the statement of rights required to be included in the ATM prospectus, under paragraph (h), supersedes the previous statement;
  - (j) the ATM prospectus states:
    - “No underwriter of the at-the-market distribution, and no person or company acting jointly or in concert with an underwriter, may, in connection with the distribution, enter into any transaction that is intended to stabilize or maintain the market price of the securities or securities of the same class as the securities distributed under the ATM prospectus, including selling an aggregate number or principal amount of securities that would result in the underwriter creating an over-allocation position in the securities.”;
  - (k) the ATM prospectus includes the certificates required under Part 5 of NI 41-101, or other securities legislation in the form required under section 9.5 or 9.6 of this Instrument, as applicable;
  - (l) if the issuer is an investment fund, the ATM prospectus includes a statement that the at-the-market distribution will be conducted in accordance with paragraph 9.3(2)(a) of National Instrument 81-102 *Investment Funds*.
- (2) An underwriter of an at-the-market distribution, or a person or company acting jointly or in concert with the underwriter, must not, in connection with the distribution, enter into any transaction that is intended to stabilize or maintain the market price of the same class of securities distributed under the at-the-market distribution, including for greater certainty, trading a security that would result in the underwriter creating an over-allocation position in that class of securities.

## 9.4 Reporting

- (1) Subject to subsection (2), for each annual and interim period of the issuer during which the issuer distributes securities under an ATM prospectus, the issuer must, within 60 days after the end of the interim period or 120 days after the end of the annual period, as applicable, file a report, disclosing

- (a) the number and average price of the securities distributed under the ATM prospectus, and
  - (b) the aggregate gross and aggregate net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus during the annual or interim period, as applicable.
- (2) Subsection (1) does not apply if, in each of its filed interim financial reports, annual financial statements, and management discussion and analysis, for the interim period or year, as applicable, following the distribution, the issuer discloses
  - (a) the number and average price of the securities distributed under the ATM prospectus, and
  - (b) the aggregate gross and aggregate net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus during the annual or interim period, as applicable.

## **9.5 Form of Certificates – Base Shelf Prospectus Establishing an At-the-Market Distribution**

- (1) If a base shelf prospectus establishes an at-the-market distribution, an issuer certificate form required under paragraph 9.3(1)(k) must state the following:

“This short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”
- (2) If a base shelf prospectus establishes an at-the-market distribution, an underwriter certificate form required under paragraph 9.3 (1)(k) must state the following:

“To the best of our knowledge, information and belief, this short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”
- (3) For an amendment to a base shelf prospectus that includes the form of certificates required under subsections (1) and (2), if the amendment does not restate the base shelf prospectus,
  - (a) the issuer certificate form must state the following:

“The short form prospectus dated [insert date] as amended by this amendment, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular

distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”, and

- (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus dated [insert date] as amended by this amendment, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”

- (4) For an amended and restated base shelf prospectus, in respect of a base shelf prospectus that includes the certificates required under subsections (1) and (2),

- (a) the issuer certificate form must state the following:

“This amended and restated short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”, and

- (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, this amended and restated short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement as required by the securities legislation of [insert name of each jurisdiction in which qualified].”

## **9.6 Form of Certificates – Shelf Prospectus Supplement Establishing an At-the Market Distribution**

- (1) If the form of certificate required under subsection 9.5(1) was not included in the corresponding base shelf prospectus, the issuer certificate form required under paragraph 9.3(1)(k) must, in a shelf prospectus supplement that establishes an at-the-market distribution, state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities

under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (2) If the form of certificate required under subsection 9.5(2) was not included in the corresponding base shelf prospectus, the underwriter certificate form required under paragraph 9.3(1)(k) must, in a shelf prospectus supplement that establishes an at-the-market distribution, state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (3) For an amendment to a shelf prospectus supplement that includes the certificates required under subsections (1) and (2), if the amendment does not restate the shelf prospectus supplement,

- (a) the issuer certificate form must state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing as it amends the shelf prospectus supplement dated [insert date], will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”, and

- (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing as it amends the shelf prospectus supplement dated [insert date], will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (4) For an amended and restated shelf prospectus supplement in respect of a shelf prospectus supplement that includes the certificates required under subsections (1) and (2),
    - (a) the issuer certificate form must state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”, and
    - (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement as required by the securities legislation of [insert name of jurisdiction in which qualified].”.
- 3. Paragraph 9.3(1)(g) of National Instrument 44-102 *Shelf Distributions*, as enacted by section 2 of this Instrument, does not apply in respect of a base shelf prospectus if the prospectus was filed
  - (a) before August 31, 2020, and
  - (b) for an at-the-market distribution in respect of which the issuer applied for and obtained an exemption from the requirement to send or deliver a prospectus.
- 4.
  - (1) This Instrument comes into force on August 31, 2020.
  - (2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after August 31, 2020, these regulations come into force on the day on which they are filed with the Registrar of Regulations.