

## ANNEX B

### PROPOSED AMENDMENTS TO NI 44-102 LIST OF COMMENTERS AND SUMMARY OF COMMENTS AND RESPONSES

No.	Commenter	Date
1.	The Canadian Advocacy Council of CFA Societies Canada	August 2, 2019
2.	RBC Dominion Securities Inc., on behalf of RBC Capital Markets	August 6, 2019
3.	Investment Industry Association of Canada (IIAC)	August 7, 2019
4.	Prospectors & Developers Association of Canada (PDAC)	August 7, 2019
5.	Davies Ward Phillips & Vineberg LLP	August 7, 2019
6.	Blakes, Cassels & Graydon LLP	August 7, 2019
7.	Toronto Stock Exchange	August 13, 2019

No.	Subject	Summarized Comment	Response
<b>GENERAL COMMENTS</b>			
1	General Support	All seven commenters expressed general support for the Proposed Amendments.	We thank the commenters for their support.
<b>SPECIFIC QUESTIONS</b>			
2	Necessity of “highly liquid securities” test or the 25% Daily Cap – Option 1 versus Option 2	<p><b>Option 1</b></p> <p>One commenter supports Option 1, with modifications.</p> <p>Along with issuers with highly liquid securities, the commenter thinks issuers that are dually listed on a U.S. exchange should also not be subject to the 25% Daily Cap or the 10% Aggregate Cap. For other issuers, specifically smaller (venture) cap issuers, however, it is justified to align the 25% Daily Cap with the percentage of issuance for which a major exchange would require approval as a result of dilution concerns. For these smaller issuers, the commenter thinks a</p>	<p>We think the comments of the supporters of Option 2 are persuasive, even for smaller issuers. Accordingly, the Amendments impose neither the 25% Daily Cap nor the “highly liquid securities” requirement.</p> <p>Because we have decided to adopt Option 2, drafting changes to Option 1 are unnecessary.</p> <p>We agree with the importance of remaining alert to abuses of the ATM program. We intend</p>

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		<p>specific percentage cap would be preferable to excluding securities which meet the “highly liquid securities” definition.</p> <p><b>Option 2</b></p> <p>Six commenters support Option 2 for the following reasons:</p> <ul style="list-style-type: none"> <li>• Five commenters think that the requirement that an IIROC dealer, subject to their own regulatory requirements, be involved in an ATM distribution is sufficient to ensure the maintenance of fair and orderly markets.</li> <li>• Four commenters think that issuers themselves are incentivized not to conduct ATM distributions that will have a material impact on the market price of their securities. Any issuer making a large trade under an ATM program is required to consider whether the trade is a material fact or material change requiring prior disclosure.</li> <li>• Three commenters note that neither the highly liquid test nor the 25% Daily Cap exist in the United States. They also note that the absence of an equivalent liquidity test in the United States has not resulted in market impact problems there. They think that the adoption of liquidity requirements in Canada would create inconsistencies with the U.S. requirements and deter the use of the ATM offering process in Canada.</li> <li>• One commenter thinks that a 25% Daily Cap for issuers whose securities are not highly liquid securities adds complexity and is unnecessary.</li> </ul>	<p>to monitor ATM distributions, focusing 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.</p>

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		<ul style="list-style-type: none"> <li>• One commenter thinks that the 25% Daily Cap may have the effect of limiting an issuer’s ability to respond to reverse inquiries for larger block purchases.</li> <li>• One commenter thinks, based on market data, that the 25% Daily Cap would render ATM distributions unworkable for larger companies in the mining industry.</li> </ul> <p><b>Other comments</b></p> <p>One commenter suggested drafting changes if the CSA decides to adopt a 25% Daily Cap.</p> <p>One commenter recommends that, should the CSA select Option 2, it remain alert to abuses of the ATM program where conventional prospectus follow-on would be more appropriate.</p>	
3	Debt securities	<p>Three commenters think that the Proposed Amendments should not be extended to debt securities.</p> <p>Commenters express the following reasons supporting their views:</p> <ul style="list-style-type: none"> <li>• All three commenters think that the use of ATMs for debt securities is inconsistent with how the bond market works or is impractical given the nature of the bond market. They note the over-the-counter or off-exchange structure of fixed-income markets, the manner in which debt instruments are valued, and the resulting lack of liquidity and reliable pricing information.</li> <li>• Two commenters think that there is no meaningful demand for the issuance of debt securities through ATM distributions.</li> </ul>	<p>We thank the commenters. The Amendments do not provide any exemptions for debt securities.</p>

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		<ul style="list-style-type: none"> <li>• One commenter thinks that the ATM distributions of debt securities by issuers would not be well received by investors.</li> <li>• One commenter thinks the medium term note program available under Part 8 of NI 44-102 is more suitable for sequential debt offerings and works very well for this purpose.</li> </ul> <p>No commenters expressed support for permitting the issuance of debt securities under an ATM distribution.</p>	
4	Investment Funds	<p>Two commenters explicitly support permitting Non-Redeemable Investment Funds (NRIFs) and Exchange-Traded Funds Not in Continuous Distribution (ETFNCDs) to conduct ATM distributions.</p> <p>Both commenters think, as an NRIF or ETFNCD is only permitted to sell securities in an ATM distribution if the securities are trading at a premium to net asset value, such sales will always be accretive to the NRIF or ETFNCD and its existing securityholders.</p> <p>One commenter thinks that ATM distributions will provide a means of quickly meeting existing demand in the market for NRIF or ETFNCD securities. The cost of issuance via an ATM distribution is significantly less expensive than a conventional re-opening. Also, permitting ATM distributions for NRIFs and ETFNCDs is consistent with the treatment of these issuers in the United States.</p> <p>While no other commenters expressed a position on this issue, one of the other commenters notes that, if NRIFs and</p>	<p>We agree with the commenters. After considering the comments received, we have determined that all non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution are able to rely on the Amendments. Mutual funds that are traded on an exchange that are in continuous distribution, and therefore meet the definition of an “ETF” in National Instrument 41-101 <i>General Prospectus Requirements</i> (NI 41-101) are also able to rely on the Amendments and would be required to comply with all requirements applicable to an ETF, including the requirement for dealers acting as agents for a purchaser to deliver ETF facts documents under section 3C.2 of NI 41-101. A mutual fund that is traded on an exchange that frequently makes ATM distributions would be</p>

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		<p>ETFs are permitted to conduct ATM distributions, they should be required to conduct ATM distributions at a premium to their net asset value (NAV) to ensure that the NAV is not diluted. This commenter also suggests that these investment funds should be required to certify that the ATM distribution is being conducted at a premium to NAV.</p>	<p>considered to be in continuous distribution so must also comply with all ETF requirements.</p> <p>We have added a requirement in paragraph 9.3(1)(l) of the Amendments that investment funds conducting ATM distributions must include a statement in the prospectus that any ATM distributions will be conducted in accordance with paragraph 9.3(2)(a) of National Instrument 81-102 <i>Investment Funds</i>.</p>
<b>THE PROPOSED AMENDMENTS</b>			
5	Timely disclosure	<p>One commenter thinks issuers should be required to issue a timely news release coinciding closer to the start of any share issuances under an ATM offering.</p> <p>The commenter notes that, in the absence of a timely news release, investors may not fully appreciate or be able to easily track the timing, magnitude and circumstances in which an issuer would typically utilize the offering.</p> <p>The commenter thinks that interim financial statements and other disclosure should continue to clearly note in the share tables any securities that were specifically issued under an ATM distribution.</p>	<p>We acknowledge the commenter’s concern. We think the additional burden of requiring issuers to issue a news release closer to the start of any share issuances under an ATM offering provides limited benefit to investors.</p> <p>In our view, investors will have sufficient information about ATM distributions as a result of: (i) the requirement to disclose entry into a distribution agreement; (ii) the requirement to disclose, in advance of a distribution, any ATM distribution that will have a material impact on the market price of the issuer’s securities; and (iii) the requirement to provide post-distribution quarterly reporting.</p>

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6	Rescission rights	<p>Three commenters suggest that the amendments not allow traditional new issue rights, including rights of rescission or damages, to purchasers in connection with an ATM distribution.</p> <p>All three commenters argue that such investors are purchasing in the secondary market, unaware that they may be buying new issue shares. Accordingly, investors should not expect and should not have these traditional new issue rights.</p> <p>The commenters also note that investors remain protected by the secondary market liability regime.</p> <p>Two commenters are concerned that such traditional new issue rights are not workable in the context of ATM distributions because it is not possible to identify the specific purchaser of securities in an ATM distribution on the secondary market. 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 the ATM program to prospectus liability for all trades that occur during the ATM distribution.</p>	<p>We acknowledge the commenters' concerns but have determined not to make the suggested change for the following reasons:</p> <ul style="list-style-type: none"> <li>• Neither issuers nor their underwriters have identified the possible exposure of all secondary market trading to prospectus liability as a problem under the exemptive relief decisions that have been granted.</li> <li>• We are not aware of any cases where a court has imposed prospectus liability on all secondary market trades in connection with an ATM distribution.</li> <li>• Removing traditional new issue rights, including rights of rescission or damages, to purchasers in connection with an ATM distribution may require legislative amendments. While such amendments could be made, it would significantly delay the adoption of the proposed amendments and the reduction of the burden associated with these changes</li> <li>• We will monitor ATM distributions and consider seeking legislative amendments if warranted.</li> </ul>

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7	Quarterly reporting	<p>Three commenters suggest that all issuers be permitted to report trades on a quarterly basis for the following reasons:</p> <ul style="list-style-type: none"> <li>• All three commenters note that issuers are subject to other (exchange) requirements to report, on a monthly basis, changes to the number of outstanding securities. Such information is available to investors on demand.</li> <li>• One commenter notes that relief from this requirement is already regularly provided in recent exemption orders on the basis that issuers provide full disclosure in their quarterly financial statements.</li> <li>• One commenter thinks that monthly reporting does not add incremental value to the investment decision of a secondary market purchaser.</li> <li>• One commenter notes that U.S. ATM rules do not require monthly disclosure.</li> <li>• One commenter notes that, if details in a monthly report do not constitute a material fact, there is no utility to investors from receiving them and if details do constitute a material fact, they would have to be disclosed in any event.</li> </ul>	<p>We agree. Subsection 9.4(1) of the Amendments only requires quarterly reporting.</p>
8	Material terms of agreement with agents	<p>One commenter suggests removing the requirement in paragraph 9.3(1)(e) of the Proposed Amendments to disclose the material terms of a distribution agreement.</p> <p>The commenter notes that the equity distribution agreement in question is a modified form of underwriting agreement. The commenter thinks there is no reason</p>	<p>We agree that Form 44-101F1 requires disclosure of the material terms of the distribution agreement. The Amendments do not include the requirement in paragraph 9.3(1)(e) of the Proposed Amendments.</p>

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		<p>in connection with an ATM distribution that the issuer should include more detailed disclosure in a prospectus relating to its agreement with the agents than is required under Item 5 of Form 44-101F1, which applies to ATM prospectuses. The inclusion of the requirement in paragraph 9.3(1)(e) of the Proposed Amendments is redundant and unnecessary.</p>	
9	ATM Exchange	<p>Three commenters suggest that ATM distributions should be permitted over all markets, including exchanges and alternative trading systems, for the following reasons:</p> <ul style="list-style-type: none"> <li>• Two commenters note that the requirement to conduct an offering on an ATM exchange is too narrow. Given that not all Canadian marketplaces are included in the definition, this may result in regulatory contradictions with the requirement to transact on all marketplaces under the Order Protection Rule, and best execution standards.</li> <li>• Two commenters note that the current exemption orders do not limit trades to ATM exchanges and permit the execution of ATM trades on any Canadian exchange or marketplace, including alternative trading systems.</li> <li>• Two commenters note that the CSA has not explained the policy rationale behind the definition of ATM exchange in the Proposed Amendments.</li> <li>• One commenter notes that under U.S. ATM rules, execution can occur on all markets (including exchanges, alternative trading systems and U.S. dark pools).</li> </ul>	<p>We acknowledge these comments. The intent of the requirement in paragraph 9.3(1)(f) of the Proposed Amendments was to ensure the equity securities of the same class being distributed under the ATM distribution are listed and trading on a short form eligible exchange. As noted by the commenters, our intent was that the securities must be distributed through a marketplace. Accordingly, we have removed the definition of an ATM exchange, changed the reference to “ATM exchange” in paragraph 9.3(1)(e) of the Amendments to “marketplace”, and added paragraph 9.3(1)(a) of the Amendments requiring that a security of the same class as being distributed is listed and trading over a short form eligible exchange.</p>



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10	Instalment receipts	One commenter supports the removal of instalment receipts from the Proposed Amendments.	We thank the commenter.
11	Cover page disclosure of intention to qualify ATM distribution	<p>One commenter supports the proposed requirement to disclose on the cover page of a base shelf prospectus where an issuer intends to qualify an ATM distribution.</p> <p>One commenter does not support this proposed cover page disclosure requirement for the following reasons:</p> <ul style="list-style-type: none"> <li>• If there are concerns regarding an issuer’s business, liquidity position etc, those concerns should be addressed during the shelf review process whether or not an ATM distribution is contemplated.</li> <li>• Issuers may be reluctant to preserve the option for ATM distributions by including the cover page disclosure if it could result in additional review.</li> <li>• The prominence of the language relative to the “non-fixed price offering” language may cause reluctance to preserve the option for ATM distributions due to increased market overhang concerns.</li> </ul>	<p>We acknowledge the commenter’s concerns. A base shelf prospectus is reviewed regardless of whether or not an issuer contemplates an ATM distribution. The cover page disclosure provides important information to investors and other market participants. Review of this information by securities regulatory authorities may result in further consideration of certain factors that would have been considered in any case.</p>
12	Designated news release	Two commenters support the proposed “designated news release” approach.	We thank the commenter.
13	Registered secondary offerings	One commenter supports the fact that the Proposed Amendments contemplate the use of ATM offerings by issuers only. The commenter does not support extending the Proposed Amendments to registered secondary offerings. The commenter believes the resale avenues currently available to selling shareholders are sufficient.	We thank the commenter.

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14	Transition	<p>One commenter suggests clarifying whether issuers currently using ATM programs in reliance on discretionary exemptive relief will be required to comply with the conditions of the Proposed Amendments or whether they could elect to comply with the conditions under the existing exemptive relief orders. The commenter prefers that issuers have the option of being permitted to follow the conditions of its discretionary relief order, if applicable (until it expires) or the new rules. The rules or 44-102CP should clarify that issuers with a shelf on file not being used for ATM distributions when the Amendments are implemented, may use it to implement an ATM under the new rules (a new shelf should not have to be filed to comply with the rules).</p>	<p>We agree with the commenter that the transition to the Proposed Amendments needs to be explained. Issuers with an existing ATM program and a discretionary relief order, may chose to comply with the Proposed Amendments without having to file a new base shelf prospectus. The Amendments include a transition provision. Section 5.8 of the Changes clarify transition issues.</p>
15	Drafting	<p>One commenter suggests the following drafting changes:</p> <ul style="list-style-type: none"> <li>• Consider whether the Proposed Amendments should provide an exemption from, or modification to the language of, item 2 and 3 of section 5.5 of NI 44-102, which each refer to a requirement to deliver a prospectus supplement.</li> <li>• Paragraph 9.3(1)(k) and subsection 9.3(2) of the Proposed Amendments should include a reference to “in connection with the distribution.”</li> <li>• Paragraphs 9.4(1)(b) and (2)(b) should refer to “during the [month][annual or interim period, as applicable]” rather than “to date” when referring to reporting of proceeds and commissions under the ATM prospectus.</li> <li>• Consider replacing the words “for the year and period immediately following the distribution” with “for the year or interim period, as</li> </ul>	<p>We thank the commenter and generally agree with the drafting suggestions. With respect to the first suggested drafting change we note that section 9.2(3) of the Amendments stipulates that the obligation to send or deliver a prospectus does not apply in connection with an ATM distribution. Therefore, there is nothing in paragraphs 2 and 3 of section 5.5 of NI 44-102 precluding an issuer from modifying the language. Section 5.2 (2) of the Changes provides guidance on the language that should be used <u>to modify the statements required by section 5.5 of NI 44-102, if necessary.</u></p>

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		applicable” in subsection 9.4(2) of the Proposed Amendments.	
<b>OTHER COMMENTS</b>			
16	UMIR Rule 7.7 and OSC Rule 48-501	<p>Three commenters request additional guidance regarding the applicability of the requirements under the Rule 7.7 of the <i>Universal Market Integrity Rules (UMIR)</i> of the Investment Industry Regulatory Organization of Canada and under OSC Rule 48-501 <i>Trading During Distributions, Formal Bids and Share Exchange Transactions</i> of the Ontario Securities Commission (<b>OSC Rule 48-501</b>)</p> <p>One commenter thinks that uncertainty about the ability of insiders to trade during the course of an ATM distribution may contribute to an unwillingness among issuers to engage in ATM offerings and does not think there is any rationale for subjecting insiders to a blanket prohibition on trading during an ATM distribution.</p> <p>Another commenter believes that if a purchase is permitted by UMIR Rule 7.7 and Rule 48-501 then it should not be considered a “transaction that is intended to stabilize or maintain the market price” under subsection 9.3(2) of the Proposed Amendments and suggests clarifying this point in 44-102CP. The same commenter also suggests codifying the exemptive relief from section 2.2(a) of OSC Rule 48-501 typically granted to issuers’ insiders in connection with purchases of issuer’s shares while the issuer’s ATM is operating.</p>	<p>We acknowledge these comments. The Ontario Securities Commission is considering a proposal to partially repeal sections of OSC Rule 48-501 that may impede some ATM distributions.</p> <p>Based on discussions with the Investment Industry Regulatory Organization of Canada, we understand UMIR Rule 7.7 applies to ATM distributions. We further understand that compliance with UMIR Rule 7.7 should not have an adverse impact on the ability of an issuer to make, or the ability of a broker dealer to underwrite, ATM distributions.</p> <p>While compliance with UMIR Rule 7.7 may be a factor when considering compliance with applicable securities law, it may not be determinative.</p>

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17	Translation	<p>Three commenters suggest that the translation of ATM offering documents into the French language should not be required.</p> <p>All three commenters mentioned the expense of translation, and two mentioned the time required.</p> <p>All three commenters think the translation requirement will incent issuers to pursue US only ATMs. One commenter thinks the translation requirement will be most punitive to smaller issuers and will make the ATM benefits unavailable to most Canadian issuers.</p> <p>One commenter thinks translation is not required for investor protection as there is no prospectus delivery requirement and the purchaser relies on existing disclosure which is often only provided in English.</p>	<p>The Autorité des marchés financiers will analyse the merits of any exemptive relief application from the translation requirements and, if appropriate, grant relief from the obligation to translate the offering documents. This relief may be subject to conditions.</p>
18	Exempt ATM distributions	<p>One commenter suggests that the CSA adopt an exemption from the prospectus requirement for ATM distributions with gross proceeds of up to \$3mm.</p> <p>The commenter notes that an ATM based on filing a shelf prospectus is prohibitively expensive for a junior company compared to the funds it could expect to raise. The commenter prefers an ATM prospectus exemption based on allowing issuers to rely on continuous disclosure which in the commenter's view would give purchasers the same protection as those acquiring shares in the secondary market. In the commenter's view, the risk profile for ATM purchasers and secondary market purchasers is the same.</p>	<p>We acknowledge the commenter's concerns but have decided not to make any changes as the mandate of this project is focused on codifying existing exemptive relief. Other CSA projects are considering broader regulatory burden reduction initiatives, and we have brought the commenter's suggestion to their attention.</p>

<b>No.</b>	<b>Subject</b>	<b>Summarized Comment</b>	<b>Response</b>
19	Local distribution reporting exemption	One commenter notes that the securities laws of British Columbia require that a report be filed and fees paid based on the value of proceeds raised in the province in a prospectus offering. Given that purchasers in an ATM offering cannot be identified by the issuer or its agents, the commenter suggests that the inability to comply with this requirement be considered in connection with the Proposed Amendments. The commenter also suggests that the securities laws of BC be amended to clarify that distribution reporting requirements do not apply to ATM distributions.	We thank the commenter for the comment. Any amendments to local fees are not within the scope of this project; however, jurisdictions can consider whether local initiatives to change their fee regimes are necessary and appropriate as the opportunity arises.