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July 28, 2017
VIA EMAIL

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Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
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c/o

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RE: **CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers***

Ladies and Gentlemen:

We appreciate the opportunity to submit the below comments on Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* (the "**Consultation Paper**"). Our comments appear directly underneath the applicable questions reproduced from the Consultation Paper. We have limited our comments to addressing Questions 14 and 15 from Part 2.2 of the Consultation Paper.

14. *What rule amendments or other measures could we adopt to further streamline the process for ATM offerings by reporting issuers? Are there any current limitations or requirements imposed on ATM offerings which we could modify or eliminate without compromising investor protection or the integrity of the capital markets?*

As set forth below in more detail, we recommend that Part 9 of National Instrument 44-102 – *Shelf Distributions* ("**NI 44-102**") be amended, and that any necessary consequential amendments to provincial and territorial securities legislation be made, to (i) eliminate the 10% of aggregate market value of equity securities size restriction on at-the-market distribution programs included in section 9.1(1) of NI 44-102 and (ii) adopt the facilitative aspects of the exemptive relief that has historically been granted by members of the Canadian Securities Administrators[1] (the "**Prior Exemptive Relief Decisions**").

The 10% aggregate market value cap in section 9.1(1) of NI 44-102 should be eliminated.

Section 9.1(1) of NI 44-102 (the "**10% Cap**") provides that "equity securities may be distributed by way of an at-the-market distribution using the shelf procedures if the market value of equity securities distributed does not exceed 10% of the aggregate market value of the issuer's outstanding equity securities of the same class as the class of securities distributed … calculated … as at the last trading day of the month before the month in which the first trade under the at-the-market distribution is made."

This restriction should be eliminated. The principal effect of this provision is to require issuers and agents for at-the-market distributions ("**ATMs**") to execute a new equity distribution agreement and file a new prospectus supplement to continue an existing ATM program once the initial 10% Cap been exhausted. Under the current regime, the 10% Cap also requires the issuer to refresh its exemptive relief for the new ATM tranche and, as a corollary, issue and file an additional press release for the "new" ATM program pursuant to section 3.2 of NI 44-102.[2]

These additional steps impose burdens on issuers seeking to utilize ATMs without any apparent corresponding regulatory benefit. It is not clear, for example, why the equity markets are better served or informed by a separate press release for each 10% ATM tranche than by a single press release at the inception of an ATM program that covers 20% of an issuer's market capitalization. The principal factor limiting the size of ATM programs that issuers are willing to undertake is (and would continue to be if the 10% Cap is eliminated) the risk of downward pressure on the issuer's share price that may

[1] See e.g., *Re TransCanada Corporation*, 2017 ABASC 113; *Re B2Gold Corp.*, 2016 BCSECCOM 291; *Re Parkland Fuel Corporation*, 2016 ABASC 138; *Re Oncolytics Biotech Inc.*, 2016 ABASC 21; *Re Artis Real Estate Investment Trust*, 2014 CanLII 63950 (MB SEC); *Re NAL Energy Corporation*, 2011 ABASC 240; *Re Resverlogix Corp.*, 2011 ABASC 479; *Re NAL Oil & Gas Trust et al.*, 2009 ABASC 606; *Re H&R Real Estate Investment Trust, et al*, 2009 CanLII 39069 (ON SEC); *Re TriStar Oil & Gas Ltd. et al*, 2009 ABASC 295; *Re Progress Energy Trust et al.*, 2008 ABASC 204; and *Re Pengrowth Energy Trust*, 2007 ABASC 711.

[2] The Prior Exemptive Relief Decisions have typically included a representation that "upon entering into the Equity Distribution Agreement, the Issuer will immediately: (a) issue and file a news release pursuant to section 3.2 of NI 44-102 indicating that the Shelf Prospectus and the Prospectus Supplement have been filed on SEDAR and disclosing where and how purchasers may obtain a copy; and (b) file the Equity Distribution Agreement on SEDAR…".

result from announcing an ATM program of a certain size. Said another way, issuers are sufficiently incentivized by equity market dynamics to limit the size of their ATM programs in a manner that makes sense for each particular issuer. The "one size fits all" 10% Cap does not appear to achieve any regulatory goal that is commensurate with the additional cost and burden placed on issuers.

We additionally note that, although there was formerly a similar 10% of non-affiliate market capitalization limit on the number of equity securities that could be registered for ATM programs under the rules of the U.S. Securities and Exchange Commission (the "**SEC**"), this restriction was completely eliminated as part of the SEC's 2005 Securities Offering Reforms.

The facilitative aspects of the Prior Exemptive Relief Decisions should be codified in Part 9 of NI 44-102 and elsewhere as required.

The Prior Exemptive Relief Decisions typically provide relief from the prospectus delivery requirement under applicable securities legislation[3] (the "**Prospectus Delivery Requirement**") and (ii) the certain prospectus form requirements (collectively, the "**Prospectus Form Requirements**") that would normally be applicable to a distribution of securities using the shelf procedures in NI 44-102.

Part 9 of NI 44-102 and, to the extent required, the provincial and territorial securities legislation should be amended to codify the Prior Exemptive Relief Decisions by:

- Providing that the Prospectus Delivery Requirement does not apply to ATMs[4];
- Providing that the withdrawal right[5] and the right of action for rescission or damages against a dealer that fails to comply with the Prospectus Delivery Requirement[6] are not applicable to ATMs;
- Setting forth revised forms of issuer and underwriter certificates consistent with the Prior Exemptive Relief Decisions that may be included in prospectus supplements for ATMs;
- Setting forth a different statement of purchasers' rights consistent with the Prior Exemptive Relief Decisions that may be included in prospectus supplements for ATMs;

[3] See, e.g., section 129 of the *Securities Act* (Alberta) and section 71(1) of the *Securities Act* (Ontario).
[4] One path forward that may merit consideration is the inclusion of an "access equals delivery" rule in Part 9 of NI 44-102 which would deem the Prospectus Delivery Requirement to have been satisfied if the prospectus supplement for an ATM program has been filed on SEDAR and investors have been directed to such prospectus supplement in some manner (by broadly disseminated press release or otherwise). Such an approach may obviate the need to amend the provincial securities statutes and would also mean that a more limited set of revisions to NI 44-102 may be required (potentially only revisions to the forms of issuer and underwriters certificates). This would be similar to the approach taken in the U.S. under SEC Rules 172 and 173 under the *Securities Act of 1933*, as amended.
[5] See, e.g., section 130 of the *Securities Act* (Alberta) and section 71(2) of the *Securities Act* (Ontario).
[6] See, e.g., section 206 of the *Securities Act* (Alberta) and section 133 of the *Securities Act* (Ontario).

- Setting forth alternative versions, consistent with the Prior Exemptive Relief Decisions, of the statements required by items 2 and 3 of section 5.5 of NI 44-102 that may be included in prospectus supplements for ATMs; and

- Providing an exemption from Ontario Securities Commission Rule 48-501 – *Trading during Distributions, Formal Bids and Share Exchange Transactions* to permit insiders to make purchases during ATM distributions.[7]

In addition, consideration should be given to codifying a mechanism whereby reporting issuers may incorporate by reference press releases and other documents into base shelf prospectuses, prospectus supplements or pricing supplements in cases where the filing of a material change report is not warranted. Such a mechanism would be similar to the "Designated News Release" concept that was included in *Re TransCanada Corporation*, 2017 ABASC 113, the exemptive relief decision for TransCanada Corporation's ATM program:

"*After the date of the Prospectus Supplement and before the termination of any ATM Distribution, if the Issuer disseminates a news release disclosing information that, in the Issuer's determination, constitutes a "material fact" …, the Issuer will identify such news release as a "designated news release" for the purposes of the Prospectus. This designation will be made on the face page of the version of such news release filed on SEDAR (any such news release, a Designated News Release). The Prospectus Supplement will provide that any such Designated News Release will be deemed to be incorporated by reference into the Base Shelf Prospectus. A Designated News Release will not be used to update disclosure in the Prospectus by the Issuer in the event of a "material change" …."*

We would suggest that a new SEDAR reporting form or document categorization be created to facilitate incorporation of "material facts" into prospectuses for continuous offering programs. The relevant form or document could, perhaps, appear on SEDAR as a "material fact filing" and base shelf prospectuses could include forward incorporation by reference language whereby all "material fact filings" would be incorporated by reference into the applicable base shelf prospectus. This change could be implemented via additions to National Instrument 51-102 – *Continuous Disclosure Obligations*, and thus the new form (or SEDAR categorization) could be more broadly used to ensure that offering documents for all manner of continuous offering programs, including for MTN offerings, shelf takedown offerings and ATMs, contain full, true and plain disclosure of all material facts. In many ways, the new reporting form (or SEDAR categorization) would fill a gap in the existing continuous disclosure system that does not exist in the U.S., because the SEC reporting forms 6-K (for foreign private issuers) and 8-K (for U.S. domestic issuers) permit a much broader array of information to be filed or furnished to the SEC and thereby incorporated into registration statements.

Codifying the aspects of Prior Exemptive Relief Decisions enumerated above would eliminate the need, and the related burden and expense, for issuers and dealers to seek discretionary exemptive relief from CSA members in order to implement an ATM program and would add more predictability to the process of establishing ATM programs in Canada.

[7] See, *Re TransCanada Corporation -- s. 5.1 of OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions*, Ont. Sec. Bull. Issue 40/28.

Despite the existing provisions of Part 9 of 44-102, ATM programs have not historically made up a significant component of capital markets financing in Canada, and are not generally well known to Canadian issuers and investors. This contrasts with the situation in the United States, where a large number of senior issuers regularly operate ATM programs and are able to raise significant capital thereunder. [8] Given that ATM programs can provide issuers with timely and cost-effective access to capital, we believe that the current incomplete regulatory framework for ATM programs in Canada, and the resulting need for exemptive relief, puts Canadian issuers at a disadvantage.

Certain requirements of Prior Exemptive Relief Decisions should not be adopted.

Prior Exemptive Relief Decisions have typically included three restrictions on the use of ATMs that should not be included in any codification of Canada's ATM regime: (i) the limitation on the number of common shares that may be sold on any trading day pursuant to an ATM of 25% of the aggregate trading volume traded on all marketplaces in Canada that day (the "**25% Daily Sales Cap**"); (ii) the requirement for the issuer to file, within seven calendar days after the end of any calendar month during which the issuer conducts an ATM, a report disclosing, in respect of any ATM sales, the number and average price of common shares sold, gross proceeds, commissions and net proceeds (the "**Monthly Reporting Requirement**"); and (iii) the requirement to issue and file a news release pursuant to section 3.2 of NI 44-102 upon entering into an equity distribution agreement for an ATM (the "**News Release Requirement**").

We do not view the 25% Daily Sales Cap as being protective of investors or the integrity of the capital markets. First and foremost, any issuer that proposes to make a large trade under an ATM program will have to consider if such trade would constitute a material fact or a material change and, therefore, whether a material change report would have to be filed or the ATM prospectus supplement would need to be amended prior to effecting the trade. This existing requirement of applicable securities legislation should be sufficient to protect against large, disruptive issuances of equity securities into the trading market without sufficient disclosure. Moreover, it is in the interest of both issuers and agents for ATM programs to minimize the market impact of ATM sales. ATM agents closely monitor the market's reaction to ATM trades and are keenly sensitized to any proposed trade that might significantly affect the market price of an issuer's equity securities.

We further note that (i) there is no restriction similar to the 25% Daily Sales Cap that is applicable in the United States under the SEC's rules; (ii) we understand that TSX representatives have recently indicated publicly that the TSX would be supportive of eliminating the 25% Daily Sales Cap and (iii) since the 25% Daily Sales Cap is imposed pursuant to the Prior Exemptive Relief Decisions, it is not applicable to "southbound only" ATMs by Canadian issuers under the multi-jurisdictional disclosure system ("**MJDS**"), and so its imposition would act as a disincentive for Canadian issuers to extend their ATM programs north of the border.

The Monthly Reporting Requirement should not be codified because disclosure of ATM sales on a monthly basis does not provide useful information to investors, and changes in capital structure are

[8] It is worth noting that discretionary exemptive or similar relief is not required to implement ATM programs in the United States. The SEC's ATM regime is contained entirely within SEC rules and the applicable statutes.

already more meaningfully disclosed quarterly in management discussion and analysis filings. The Monthly Reporting Requirement is therefore duplicative and unnecessarily cumbersome. Furthermore, particularly for large capitalization issuers that attract significant analyst coverage, a lack of information regarding ATM sales in any particular monthly report could lead to speculation in the market as to the reasons why an issuer is not in distribution under its ATM program, and as to whether there is material undisclosed information regarding the issuer. Such speculation could cause unnecessary confusion and uncertainty in the market. In addition, U.S. ATM issuers are not required under SEC rules to provide monthly reports regarding issuances pursuant to ATMs. Such disclosures are provided in such issuers' quarterly and annual continuous disclosure filings. Deviating from the U.S. reporting approach could act as an incentive against MJDS-eligible Canadian issuers to extend their ATM programs north of the border.

The News Release Requirement is included in section 3.2 of NI 44-102. Its further inclusion in ATM enabling legislation is therefore not required.[9]

15. Which elements of the exemptive relief granted for ATM offerings should be codified in securities legislation to further facilitate such offerings?

Please see our responses to question 14 above, set forth above.

If you have any questions regarding this submission please contact Tim Phillips at tim.phillips@blakes.com or 416-863-3842 or Trevor Rowles at trevor.rowles@blakes.com or 403-260-9750.

Yours truly,

(signed) Tim Phillips

(*signed)* Trevor Rowles

[9] Section 3.2 of NI 44-102 provides that "[a]n issuer … that forms a reasonable expectation that a distribution of a tranche of equity securities will proceed under a base shelf prospectus that is not specifically restricted to equity securities shall immediately issue a news release that announces the intention to proceed with the distribution."