Welcome to the cash machine: The rising popularity of ATMs in Canada

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As capital markets in Canada and around the world continue to strain under the weight of unprecedented volatility, an increasing number of Canadian listed issuers are turning to at-the-market (ATM) equity programs as an alternative to traditional follow-on public equity financings.

What You Need to Know

- ATM programs are on the rise in Canada because they serve as a flexible and cost-effective method for raising equity opportunistically and expeditiously on an as-needed basis without the dilution and pricing discounts typically associated with conventional financings.
- An ATM program can provide a potential source of new capital in a market where conventional financings are not feasible.
- National Instrument 44-102 – *Shelf Distributions* (NI 44-102) and the terms of the exemptive relief orders which are currently required in order to launch an ATM program impose certain regulatory restrictions on an issuer's ability to raise capital which has made them less attractive to some issuers.
- When the proposed amendments to NI 44-102 come into force, they will eliminate the market cap restriction and are expected to streamline many of the regulatory burdens and restrictions currently associated with ATM programs.
- ATM programs are not a one-size-fits-all solution and may be viewed more as a complementary financing alternative to an issuer's overall capital raising initiatives.

Background

ATM programs 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. In addition, in contrast to a more conventional underwritten offering, there is no obligation on the part of the issuer to issue or sell any securities under the ATM program once it has been launched. ATM programs have also served as an effective capital raising alternative for issuers in sectors normally characterized by capital-intensive projects

(*e.g.*, mining, oil and gas and cannabis) where conventional methods of financing have been unavailable.

The case for an ATM program is compelling and straightforward: once the program is in place, it can be accessed on short notice, at the issuer's discretion, with relatively little management involvement and serves as a low-cost, flexible way for listed issuers to add equity to their balance sheet without the level of dilution associated with conventional financings.

Although ATM programs have seen an uptick in use among Canadian issuers in the last few years, the exemptive relief currently required by issuers to implement an ATM program has prevented them from flourishing in Canada. However, this is all expected to change once the amendments (the Amendments) to NI 44-102 proposed by the Canadian Securities Administrators (CSA) come into force. The Amendments are designed to, among other things, reduce administrative burden and provide broader market penetration by removing the constraints currently imposed on issuers. The Amendments will also jettison the requirement to obtain exemptive relief before launching an ATM program, which is a current impediment to the expedited launch of an ATM program.

Establishing an ATM program

In order to implement an ATM program in Canada, an issuer must:

- Qualify a base shelf prospectus with the Canadian securities regulators.
- Apply to list on the relevant stock exchange the maximum number of securities permitted to be issued under the ATM program.
- Until the Amendments come into force, apply to the securities regulators for exemptive relief from the requirement to physically deliver a copy of the prospectus to purchasers, along with the withdrawal rights and action for non-delivery rights that are corollary to that requirement, as well as other prospectus form requirements to reflect the mechanics of ATM programs. Although exemptive relief orders are issued as a matter of course now and the terms of the orders have been standardized, receiving the final order can take up to 30 days so it is important to prioritize the submission of the application when launching an ATM program.
- Negotiate and execute an equity distribution agreement with one or more registered dealers to establish the terms under which the dealer(s) will sell into the trading market on the issuer's behalf during the term of the ATM program.
- File a prospectus supplement to the base shelf prospectus disclosing the terms of the ATM program as set forth under the equity distribution agreement.

Advantages and disadvantages of an ATM program

Issuers find ATM programs attractive for a number reasons:

- **Flexibility** – The issuer controls the timing, amount and minimum acceptable price of each offering under the ATM program, which allows issuers to move quickly to access capital in response to favourable market conditions on an as-needed basis.

- **Dilution & Discount** – New securities are sold into the market slowly over time and at unpredictable times, limiting dilution and opportunities for investors to short the stock in anticipation of a drop in trading price. Since the securities are sold through stock exchange facilities at prevailing market prices, there is typically no discount to market price.
- **Costs & Expenses** – Dealer fees, commissions and expenses associated with ATM programs are generally significantly lower when compared to traditional underwritten offerings.
- **Complementary Financing** – An ATM program does not preclude an issuer from pursuing other financing alternatives and can be used in tandem with conventional financings.
- **Management Time & Attention** – An ATM program does not require a roadshow, investor meetings or other traditional marketing efforts.

Certain countervailing considerations associated with ATM programs that have limited their appeal to date are summarized below. We expect that most of these limitations will be removed when the Amendments come into force, as discussed in more detail below.

- **Exemptive Relief** – Until the Amendments come info force, issuers are required to obtain exemptive relief before launching an ATM program.
- **Capital Limitations** – NI 44-102, together with the limitations imposed by securities regulators in exemptive relief orders, currently limit: (i) the maximum amount that can be raised under an ATM program to 10 per cent of an issuer's market capitalization at the time the ATM program is launched (the 10 per cent Market Cap), and (ii) the aggregate number of securities that may be distributed under the ATM program on any trading day at 25 per cent of the issuer's daily trading volume (the 25 per cent Daily Sales Cap).
- **Monthly Reporting** – Under the current ATM rules, issuers are typically required to file monthly reports with securities regulators disclosing the details of all distributions made under the ATM program (the Monthly Reporting Obligation).
- **Liquidity Requirements** – The speed with which capital can be raised under an ATM program is dependent upon how liquid a particular stock is. Significant liquidity is also required to avoid impacting the market price of an issuer's shares during the term of the program.
- **Ineffective for Large Discrete Raises** – ATM programs, by their nature, are not appropriate for raising significant amounts of capital on an urgent basis. In such instances, more conventional methods of financing will be necessary to secure the desired funds in a timely manner.

Proposed amendments

The proposed Amendments are aimed at reducing the regulatory burden and capital limitations currently imposed upon issuers and we expect when introduced the Amendments will, among other things:

- Remove the 10 per cent Market Cap.
- Either: (i) remove the 25 per cent Daily Sales Cap entirely, or (ii) only remove the 25 per cent Daily Sales Cap for "highly liquid securities"[1] and retain it for all other securities.
- Eliminate the requirement to obtain exemptive relief.
- Remove the Monthly Reporting Obligation.

Transition considerations for the proposed amendments

Although the CSA's proposal is unclear about how issuers with existing ATM programs will transition into the new regime once the Amendments come into force, it is our expectation that issuers will simply be able rely on the newly consolidated amendments to NI 44-102 in lieu of being subjected to the terms of the their existing exemptive relief orders, which are less accommodating. We will monitor the Amendments for such transitional provisions and provide an update once they are published. In addition, issuers who currently maintain active ATM programs will be able to expand the scope of capital that may be raised under their programs once the Amendments come into force by amending and restating their prospectus supplements to qualify a more substantial amount than is currently otherwise permitted under the 10 per cent Market Cap.

We expect that the removal of the 10 per cent Market Cap limitation, along with the removal of the other administrative burdens and limitations discussed above, will make ATM programs even more attractive to issuers in the future and will further increase their popularity in Canada for both domestic and cross-border equity offerings.

Is an ATM program right for you?

While there are clear advantages to an ATM program for some issuers – and these advantages will only be magnified with the proposed Amendments coming into force later this year – an ATM program is not a one-size-fits-all solution and should be considered in light of an issuer's overall capital strategy and sensitivity to dilution.

Contact one of the authors of this bulletin or your lawyer in BLG's Capital Markets Group if you would like to discuss whether an ATM program is right for you.

[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 at least 100 times per day with an average trading value of at least 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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