

## At-the-Market Offerings Under the MJDS

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Given the recent volatility and uncertainty in the capital markets, many Canadian issuers, particularly those in the resources sector, are hesitant to commit to traditional, fully marketed follow-on public offerings due to concerns about pricing and whether a desired offering size is achievable. In addition, a “bought deal” financing may no longer be a viable option for some of these companies.

At-the-market (ATM) offerings address these concerns by allowing an issuer to sell equity securities into the market at prevailing market prices where the terms of each sale (including minimum price, maximum number of shares and timing) are agreed upon by the issuer and the placement agent at the issuer’s discretion. While ATM offerings have been conducted by U.S. issuers for years, some Canadian issuers seeking to raise capital have recently started to look to ATM programs. Most recently, in September 2013, Avalon Rare Metals Inc., a junior mining company incorporated in Canada and dual-listed on the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE), announced a cross-border ATM program.

### Basic Characteristics of an ATM Offering

An ATM offering enables an issuer to periodically sell equity securities into the market at prevailing market prices through a registered broker-dealer who acts as a placement agent on behalf of the issuer, typically on an agency basis. The placement agent in an ATM offering does not engage in any special marketing efforts, including roadshows. Rather, each issuance under an ATM program is analogous to an ordinary brokerage transaction, except that the issuer, rather than a shareholder, is the party placing the order to sell.

The securities in an ATM offering are typically sold pursuant to a distribution agreement between the issuer and the placement agent. Under applicable securities laws, the placement agent in an ATM offering is subject to underwriter liability, and so distribution agreements are generally framed in the manner of typical underwriting agreements and provide customary underwriter protections, including representations and warranties from the issuer, opinion letters and “10b-5” negative assurance letters from the issuer’s counsel, and comfort letters from the issuer’s accountants. Placement agents and their counsel also typically conduct due diligence similar to an underwritten offering. In light of the ongoing nature of an ATM program, the distribution agreement also requires periodic updates to these issuer deliverables to the placement agent.

An issuer is not bound to issue or sell securities under a distribution agreement until the issuer delivers written instructions to the placement agent (a “drawdown” or “issuance” notice). The drawdown notice allows the issuer to determine the desired price for the shares (often a minimum or “floor” price), the maximum number of shares to be sold and the timing of the sales.

ATM offerings provide issuers with several advantages over traditional, fully marketed public offerings and bought deals, including:

- An issuer can raise capital on an “as needed” basis, including when a traditional, fully marketed public offering or bought deal may not be a viable financing alternative due to market conditions.
- Since the issuer controls the timing of sales and the minimum acceptable price, the issuer can mitigate share price volatility by selling more during periods of share price strength and slowing sales during periods of share price weakness.
- The impact of an ATM program on an issuer’s share price is usually limited because issuers can sell shares into the natural trading flow of the market without having to market or announce the sales. Investors cannot short the issuer’s shares in advance of the offering since the timing of any particular drawdown is not publicly known.
- The initial costs of establishing an ATM program are usually lower than those associated with traditional underwritten public offerings, in part because of the lack of marketing-related documents and expenses, including a roadshow and a preliminary prospectus. Placement agent fees also are generally lower in ATM offerings than underwriting commissions associated with traditional, fully marketed public offerings and Canadian bought deals.
- An ATM program eliminates the distraction to management that occurs in connection with a roadshow or the marketing of a traditional follow-on public offering.
- There is generally no lock-up period under an ATM program, so the issuer is free to pursue a traditional public offering while the ATM program is operational (although the ATM program will typically be suspended while the issuer is pursuing a public offering).

### **An Overview of the MJDS**

The Canadian securities regulators and the U.S. Securities and Exchange Commission (SEC) have adopted the U.S./Canada Multijurisdictional Disclosure System (MJDS), which permits certain Canadian issuers to use their Canadian disclosure documents (1) to register a public offering of securities in the United States, either alone or in conjunction with a Canadian public offering, and (2) to satisfy their U.S. continuous reporting obligations.

A Canadian corporation is eligible to use the MJDS if it is a Canadian “foreign private issuer”<sup>1</sup> with a public float (market capitalization, excluding 10 percent shareholders) of US\$75 million and a one-year history as a reporting issuer in Canada. The issuer also must be in compliance with Canadian reporting requirements.

### **ATM Documentation Under the MJDS**

ATM offerings under the MJDS require that the issuer file a base shelf prospectus with Canadian securities regulators and a corresponding shelf registration statement with the SEC on Form F-10. The plan of distribution contained in the base prospectus must provide that the issuer may be engaging

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1 A “foreign private issuer” means any foreign company except a company meeting the following conditions: (1) more than 50 percent of the company’s outstanding voting securities are directly or indirectly held of record by U.S. residents, and (2) any one of the following: (i) the majority of the company’s executive officers or directors are United States citizens or residents, (ii) more than 50 percent of the company’s assets are located in the United States or (iii) the company’s business is administered principally in the United States. Foreign private issuer status is determined as of the end of the issuer’s second fiscal quarter.

in ATM transactions in connection with the sale of securities under the base shelf prospectus; however, the base shelf prospectus need not name the placement agent involved in the ATM offering. Under the MJDS, the review of the issuer's base shelf prospectus is undertaken by Canadian securities regulators who are responsible for applying Canadian disclosure standards. Most importantly from a timing and cost perspective, there is no review of the registration statement by the SEC.

If the designated Canadian securities regulator selects the base shelf prospectus for review, it will so advise the issuer and comments will be resolved between the issuer and the Canadian securities regulators. This process generally takes one to two weeks. Once the Canadian securities regulators are satisfied with the base shelf prospectus, the issuer will file a final base shelf prospectus and the Canadian securities regulators will issue a final receipt. The U.S. registration statement will become effective following the filing of an amended registration statement with the SEC, which typically occurs at the same time as the filing of the final base shelf prospectus in Canada.

Once a receipt has been issued for the final base shelf prospectus filed with Canadian securities regulators and the issuer's registration statement has been declared effective by the SEC, the issuer must file a prospectus supplement disclosing the terms of the ATM offering, including the identity of the placement agent, the commissions payable to the placement agent and the maximum number of shares to be sold in the offering or the aggregate offering size. We understand that pursuant to Canadian regulations, the market value of shares distributed under any single prospectus supplement may not exceed 10 percent of the aggregate market value of the issuer's outstanding shares. The prospectus supplement is generally quite brief and is not reviewed by Canadian securities regulators or the SEC.

Prior to filing the prospectus supplement, the issuer and the placement agent must enter into a distribution agreement for the ATM offering. As noted above, the distribution agreement is substantially similar to a standard underwriting agreement, and includes customary representations and warranties and covenants by the issuer and customary conditions to the closing of any particular drawdown. The main distinctions between an underwriting agreement and an ATM distribution agreement are that the broker-dealer can typically act in either an agent or principal capacity under the distribution agreement (in practice, purchases of securities by a broker-dealer as principal are rare in ATM offerings) and the distribution agreement stays in place for as long as there are remaining shares to be sold under the program. As a result, there are ongoing obligations for the issuer throughout the term of the distribution agreement, including an obligation to provide quarterly comfort letters from the issuer's accountants and quarterly legal opinions and "10b-5" negative assurance letters from the issuer's counsel.

In connection with entering into the distribution agreement and filing the prospectus supplement, the issuer must issue a news release announcing the ATM program. Equity issuances made under an MJDS ATM program are typically disclosed on a quarterly and annual basis in interim and annual reports, respectively, filed with Canadian securities regulators and the SEC, rather than at the time of issuance.

### **Canadian Exemptive Relief for ATM Offerings**

Cross-border ATM offerings have historically required exemptive relief from Canadian securities regulators. Specifically, issuers must apply for relief from the requirement under Canadian securities laws that broker-dealers effecting transactions in an issuer's securities deliver a prospectus to purchasers of those securities. While a similar prospectus delivery requirement exists in the United States, this requirement is deemed satisfied by virtue of the filing of the prospectus supplement with the SEC and the "access equals delivery" principles under the U.S. Securities Act of 1933. Issuers must also apply for exemptive relief from Canadian securities regulators in respect of the requirement

to include in the Canadian prospectus supplement a statement of purchasers' statutory rights in the prescribed form as well as the requirement to include in the prospectus supplement a certificate of the issuer in the prescribed form. While we understand that Canadian securities regulators tend to grant the relief described above as a matter of course, the exemptive relief orders have historically been predicated on a cap on the number of shares sold on the TSX on any trading day equal to 25 percent of the trading volume of the shares on the TSX on that date.

We understand that exemptive relief from Canadian securities regulators is not required where sales pursuant to the ATM program will only be effected on a U.S. securities exchange. For example, where an issuer is dual-listed on the TSX and a U.S. securities exchange (*i.e.*, the NYSE), exemptive relief from Canadian securities regulators is not required where the issuer and the placement agent agree that ATM sales will only be made over the U.S. securities exchange.

### **Additional Legal Considerations Applicable to ATM Offerings Under the MJDS**

- ATM programs may be considered a “distribution” for purposes of Regulation M under the U.S. Securities Exchange Act of 1934. Regulation M is intended to prevent manipulation of the trading market of a class of securities during a distribution of securities of that class by prohibiting distribution participants from bidding for or purchasing securities of that class until the distribution has ended. These restrictions do not apply to offerings by an issuer of “actively traded” securities (an issuer with an average daily trading volume of at least US\$1.0 million and a public float of at least US\$150.0 million). ATM offerings by issuers that do not satisfy these ADTV and public float thresholds must be analyzed based on the magnitude of the offering and whether the offering involves special selling efforts that could be perceived as market manipulation. Regulation M and Canadian securities laws also prohibit stabilizing transactions in connection with an ATM offering.
- Issuers should confirm with the TSX and applicable U.S. securities exchanges that the terms of any ATM offering do not require shareholder approval, although ATM programs are normally considered public offerings not subject to shareholder approval requirements.
- A private placement conducted while an ATM offering is on file for an issuer may give rise to potential “integration” concerns.
- Depending on the issuer’s market capitalization and other factors, a FINRA filing may be required in connection with the launch of the ATM program.