



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
CORPORATION FINANCE

April 24, 2020

Amy Natterson Kroll, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue NW  
Washington, DC 20004

Re: **Royal Bank of Canada – Waiver Request of Ineligible Issuer Status under Rule 405 of the Securities Act of 1933**

Dear Ms. Kroll:

This is in response to your letter dated April 23, 2020, written on behalf of Royal Bank of Canada (“RBC”) and constituting an application for relief from RBC being considered an “ineligible issuer” under clause (1)(iv) of the definition of ineligible issuer in Rule 405 of the Securities Act of 1933 (“Securities Act”). RBC requests relief from being considered an ineligible issuer under Rule 405, due to the entry on April 24, 2020 of a Commission Order (“Order”) pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940 against RBC Capital Markets LLC (“RBC Capital”), a subsidiary of RBC. The Order requires that, among other things, RBC Capital cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

We have determined that RBC has made a showing of good cause under clause (2) of the definition of ineligible issuer in Rule 405 and that RBC will not be considered an ineligible issuer by reason of the entry of the Order. Accordingly, the relief described above from RBC being an ineligible issuer under Rule 405 of the Securities Act is hereby granted. Any different facts or circumstances from those represented in the letter or failure to comply with the terms of the Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance

# Morgan Lewis

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April 23, 2020

**VIA EMAIL**

Timothy B. Henseler, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-7553

Re: In the Matter of RBC Capital Markets, LLC

Dear Mr. Henseler:

We are submitting this letter on behalf of our client, RBC Capital Markets, LLC (the "RBC Capital"), and its ultimate parent, Royal Bank of Canada ("RBC"), a Canadian bank reporting under the multijurisdictional disclosure system ("MJDS") with securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"). RBC Capital is considering settling the above-captioned action brought by the U.S. Securities and Exchange Commission (the "SEC" or "Commission"). The settlement will result in the entry of a cease-and-desist order against RBC Capital pursuant to Section 8A of the Securities Act of 1933 (the "Securities Act"), Section 15(b) of the Exchange Act, and Sections 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against RBC Capital (the "Order"). The action and Order are described below.

As a result of the Order, RBC will be an "ineligible issuer" as defined in Rule 405 under the Securities Act. Although RBC is a reporting company under the MJDS and is not eligible to be a well-known seasoned issuer or WKSJ,<sup>1</sup> it relies on the more liberal use of "free writing prospectuses" ("FWP") in its offering communications that is afforded to eligible issuers. We respectfully request on behalf of RBC a waiver from such disqualification by the Commission, or the Division of Corporation Finance (the "Division") acting pursuant to authority duly delegated by the Commission, determining that it is not necessary under the circumstances that RBC be an "ineligible issuer" as defined in Rule 405 under the Securities Act. Consistent with the framework outlined in the Division's *Revised Statement on Well-Known Seasoned Issuer Waivers* (April 24, 2014) (the "Revised Statement"), we respectfully submit that there is good cause to grant the

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<sup>1</sup> See, Securities and Exchange Commission, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Rules, Question 203.12 at <https://www.sec.gov/divisions/corpfina/guidance/securitiesactrules-interps.htm>.

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requested waiver, as discussed below. RBC has previously received waivers from ineligible issuer status.<sup>2</sup> RBC requests that this exemptive relief be made effective upon the entry of the Order.

## 1. BACKGROUND

Following discussions with the SEC's Division of Enforcement, RBC Capital has submitted an offer of settlement to the Commission, which will result in the Commission issuing the Order. In the offer of settlement, RBC Capital consents to entry of the Order without admitting or denying the findings set forth in the Order, except for the jurisdiction of the Commission and the subject matter of the proceeding. The Order states that RBC Capital violated Sections 17(a)(2) and 17(a)(3) of the Securities Act as a result of RBC Capital's failure to ascertain that certain retirement and charitable organization brokerage customers were eligible for less expensive share classes (the "Eligible Customers") and as a result RBC Capital recommended and sold to the Eligible Customers share classes in certain open-end registered investment companies that were more expensive than other available share classes. Specifically, the Order states that from July 2012 through August 2017, RBC Capital failed to disclose to the Eligible Customers that it would receive greater compensation from purchases of the more expensive share classes, resulting in an undisclosed conflict of interest. The Order further states that RBC Capital failed to disclose the negative impact on the overall return on the Eligible Customers' investments resulting from the purchase of the more expensive share classes, in light of the different fee structures for the different fund share classes.

Pursuant to the Order, RBC Capital: (i) must cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act; (ii) is censured; and (iii) must pay disgorgement of \$2,607,676 million, prejudgment interest of \$591,678, and a civil monetary penalty of \$650,000.

## 2. DISCUSSION

Effective on December 1, 2005, the Commission reformed and revised the registration, communications, and offering procedures under the Securities Act.<sup>3</sup> As part of the Securities Offering Reforms, the Commission revised Securities Act Rule 405 and created a new category of offering communication, the "free writing prospectus". Eligible issuers may use FWPs in registered offerings pursuant to Rules 164 and 433 under the Securities Act. These benefits, however, are unavailable to issuers defined as "ineligible issuers" under Rule 405.

An issuer is an ineligible issuer if, among other things, the issuer, or an entity that at the time was a subsidiary of the issuer, has been, within three years, the subject of an administrative decree or order arising out of a governmental action that requires the issuer or its subsidiary to cease and

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<sup>2</sup> RBC has previously been granted waivers regarding its eligible issuer status in the following instances: *In the Matter of RBC Capital Markets, LLC* (March 11, 2019) relating to the Share Class Selection Disclosure Initiative; *In the Matter of Certain Underwriters Participating in the Municipalities Continuing Disclosure Cooperation Initiative* (June 18, 2015) relating to the Municipalities Continuing Disclosure Cooperation Initiative; *In the Matter of RBC Capital Markets Corporation* (Jun. 11, 2009) relating to the marketing and sale of auction rate securities; and *In the Matter of RBC Dain Rauscher Inc.* (May 31, 2006) relating to offerings of auction rate securities.

<sup>3</sup> Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005) ("Securities Offering Reforms").

desist from violating the anti-fraud provisions of the federal securities laws or determines that the issuer or the issuer's subsidiary violated the anti-fraud provisions of the federal securities laws.<sup>4</sup>

The entry of the Order against RBC Capital makes RBC an ineligible issuer for a period of three years after the date of the Order. This will preclude RBC from having the benefits of the Securities Offering Reforms for three years, including the use of FWP's.

The Commission has the authority, directly or pursuant to authority delegated to the Division, to determine, "upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer."<sup>5</sup> In the Revised Statement, the Division stated that it would consider the following factors in determining whether to grant a waiver:

- The nature of the violation and whether it involved disclosure for which the issuer or any of its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosure currently and in the future;
- Whether the alleged misconduct involved a criminal conviction or scienter-based violation;
- Who was responsible for the misconduct and what was the duration of the misconduct;
- What remedial steps the issuer took; and
- The impact to the issuer if the waiver request is denied.

For the reasons set forth below, we respectfully submit that there is good cause for the Commission, or the Division pursuant to delegated authority, to grant the waiver requested and determine that it is not necessary for the public interest or the protection of investors that RBC be considered an ineligible issuer as a result of the Order.

*a. Nature of Violation and Whether the Violation Casts Doubt on the Ability of the Issuer to Produce Reliable Disclosures to Investors*

The conduct described in the Order pertains to the disclosures provided by RBC Capital to certain customers, but the Order does not allege that the disclosures were by or about RBC or involved misstatements or omissions about RBC. The Order also does not call into question the reliability of RBC's financial statements or any of its disclosures or its ability to produce reliable disclosures in the future.

RBC has and maintains controls and procedures with respect to financial reporting and disclosures. Such controls and procedures apply to RBC's preparation of its filings with the Commission and Canadian securities regulators. The process for continuous disclosure is managed in Toronto, Canada, and all disclosures are made in accordance with RBC's financial reporting and disclosure controls and procedures, including its disclosure policy. RBC Capital has policies and procedures for the preparation and filing of regulatory reports in its capacity as a SEC registered broker-dealer and investment advisor that are separate from RBC's financial reporting and disclosure controls

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<sup>4</sup> 17 C.F.R. 230.405(1)(vi).

<sup>5</sup> 17 C.F.R. 230.405(2).

and procedures to comply with Section 13 of the Exchange Act as an issuer of securities registered pursuant to Section 12 of the Exchange Act.

*b. The Order Is Not Criminal in Nature and Does Not Involve Scienter-Based Fraud*

The Order does not involve a criminal conviction and does not state that RBC Capital acted with scienter or intent to defraud. The Order states that RBC Capital violated Section 17(a)(2) and Section 17(a)(3) of the Securities Act, two non-scienter-based anti-fraud provisions of the federal securities laws.

*c. The Duration of the Misconduct and the Persons Responsible for the Misconduct*

The Order states that the conduct occurred over five (5) years, from July 2012 through August 2017.

The personnel primarily responsible for the conduct are or were employed by RBC Capital. None of those individuals has responsibility for, or any influence over, RBC as an issuer of securities or its filings with the Commission or the Canadian securities regulators.

*d. Remedial Steps*

RBC Capital cooperated with the Enforcement staff and adopted remedial measures directed at the issues identified in the investigation. RBC Capital provided the Enforcement staff with an analysis of relevant sales charge waiver provisions for each of the mutual fund families offered through RBC Capital throughout the relevant period. RBC Capital also developed a corresponding client financial remediation plan for consideration and commentary by the staff. For clients eligible for financial remediation, RBC Capital also converted client holdings of higher-cost share classes to the lower-cost share class for which the client was originally eligible.

RBC Capital also adopted enhanced internal controls, policies, procedures, and disclosures in connection with the sales charge discrepancies that were the subject of the investigation. Enhanced controls and procedures included adoption of supervisory measures reasonably designed to verify that sales charge waivers for eligible clients were applied in a manner consistent with prospectus terms. RBC Capital also enhanced its client disclosures related to mutual fund sales charge waivers in a manner consistent with the findings of the investigation.

*e. Impact on the Issuer if the Request Is Denied*

RBC is a foreign private issuer that files reports with the Commission pursuant to MJDS. RBC frequently issues securities that are registered with the Commission and that are offered and sold under RBC's effective Form F-3 shelf registration statements. These registered offerings of securities provide RBC with an important source of capital and funding for RBC's global operations and are used to address the investment needs of RBC's individual and institutional customers.

As noted above, RBC issues a variety of securities that are registered in the U.S. under its shelf registration statements, including senior debt securities, structured notes and subordinated debt securities. Since RBC's Senior Global Medium-Term Notes Program, (the "MTN program") was renewed on September 7, 2018, RBC has issued approximately \$2.6 billion of registered senior notes in 2018, approximately \$7.8 billion in 2019 and approximately \$2.4 billion to date in 2020, including \$776.7 million of structured notes in 2018, approximately \$ 2.6 billion in 2019 and

approximately \$532 million to date in 2020.<sup>6</sup> In 2016, RBC also issued \$1.5 billion of its Non-Viability Contingent Capital Subordinated Debt securities (these securities count as Tier 2 regulatory capital of RBC under the Basel III capital rules), representing over half of the Tier 2 regulatory capital securities issued by RBC in 2016. These figures demonstrate the importance for RBC of access to the U.S. public securities markets in order to meet its capital and funding requirements.<sup>7</sup>

As an ineligible issuer, RBC would be unable to use FWP's other than ones that contain only a description of the terms of the securities in the offering or the offering itself.<sup>8</sup> This limitation would restrict RBC and its underwriters from using FWP's with content customarily seen in connection with their offers and sales of RBC's securities. For instance, this would significantly limit the use of general or educational marketing materials, such as product brochures or general investment strategy materials that are customarily used and relied upon by industry participants for registered structured product offerings of the type issued by RBC.

RBC filed over 800 FWP's with the Commission in 2019, with over 60 filed so far in 2020, and a significant portion of these materials were guidebooks, brochures, "fact cards" relating to RBC's structured notes and presentations used in connection with the offering of structured senior debt securities under the MTN program. The FWP's that RBC uses contain content that would not be permitted in FWP's of an ineligible issuer.<sup>9</sup> RBC views the FWP's that it would be precluded from using if it were an ineligible issuer as integral to its MTN program. RBC uses these communications for multiple purposes, including to market new structured products in advance of specific offerings of securities. A variety of these materials are used to convey key information about RBC and its securities in a format that is designed to enhance the understanding of retail investors and to complement the statutory prospectuses that they receive. The Securities Offering Reforms were implemented to enable issuers to more effectively communicate the terms and features of securities to retail investors.<sup>10</sup> RBC believes that, consistent with the Commission's intent in adopting the Securities Offering Reforms, it is very important for RBC's investors to continue to obtain the benefit of content in RBC's FWP's that the Securities Offering Reforms permit.

Further, as an ineligible issuer, RBC would be required to use offering documentation that is different from what the market is accustomed to from previous RBC offerings and offerings of most other comparable issuers. This could adversely impact the marketability of such securities. Therefore, a restriction on RBC's ability to use FWP's with customary content would significantly curtail important channels of communication to investors and preclude investors (including retail investors) and their advisors from access to materials that they may find useful in evaluating offerings, including structured notes offerings. This could also place RBC at a competitive

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<sup>6</sup> 2020 numbers through January 27, 2020.

<sup>7</sup> RBC has not issued any additional Non-Viability Contingent Capital Subordinated Debt securities in the U.S. public markets since 2016, but may do so in the future.

<sup>8</sup> Securities Act Rules 164(e), 17 C.F.R. § 230.164(e).

<sup>9</sup> Even the brief term sheets filed in connection with RBC's "vanilla" senior debt offerings contain expected credit ratings information that would be impermissible in the event RBC were considered an ineligible issuer. Only a small number of RBC's FWP's filed in 2019, approximately 0.896%, fall into this category.

<sup>10</sup> See, Securities Offering Reform, at III.D.3.(b)(i)-(ii).

Timothy Henseler, Esq.  
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disadvantage compared to other issuers who can use these materials, and may decrease the willingness of other underwriters and broker-dealers to offer RBC's securities.

The adverse market and issuer impact if RBC loses the flexibility afforded eligible issuers with respect to investor communications is particularly concerning to RBC in light of current regulatory and market conditions and uncertainties that have been significantly transforming the landscape for financial institutions such as RBC. These conditions and uncertainties make it important for RBC to have full access to the U.S. public markets, including the ability to use FWP's without the severe restrictions that would be imposed by ineligible issuer status. In Canada, the Office of the Superintendent of Financial Institutions ("OSFI"), the Canadian prudential regulator responsible for the day-to-day supervision of RBC, requires domestic systemically important banks ("D-SIBs"), including RBC, to maintain a minimum capacity to absorb losses and to meet stringent capital and liquidity requirements consistent with global standards. Banks face continuing changes to global and domestic standards for capital and liquidity. As well, under stress tests administered internally and by the regulators from time to time, the parameters and requirements of which continue to evolve, significant capital buffers are required for financial institutions to ensure they have adequate capital to absorb losses under stress scenarios. RBC frequently accesses the U.S. public markets to raise the capital, liquidity and total loss absorbing capacity it needs to meet regulatory requirements and supervisory expectations.

### **3. CONCLUSION**

Accordingly, we respectfully request that the Commission, or the Division pursuant to delegated authority on behalf of the Commission, make the determination that there is good cause for RBC not to be considered an ineligible issuer as a result of the Order and grant this request for waiver from ineligible issuer status.

If you have any questions regarding any of the foregoing, please do not hesitate to contact me at 202-739-5746 or Emily Chapman at 202-739-5699.

Sincerely,

A handwritten signature in blue ink that reads "Amy Natterson Kroll". The signature is written in a cursive, flowing style.

Amy Natterson Kroll