

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – relief from prospectus and registration requirements in connection with an employee share offering by a foreign issuer – issuer cannot rely on exemptions in sections 2.2 or 2.24 of National Instrument 45-106 *Prospectus and Registration Exemptions* or section 8.16 or 8.17 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* because securities are being offered indirectly to employees through special purpose entities – issuer granted relief, subject to conditions.

Applicable Legislative Provisions

Securities Act, R.S.A., 2000, c. S-4, section 144

National Instrument 45-106 *Prospectus and Registration Exemptions*, sections 2.2, 2.24

National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, sections 8.16, 8.17

Citation: Re TotalEnergies SE, 2022 ABASC 62

Date: 20220602

In the Matter of
the Securities Legislation of
Alberta and Ontario (the **Jurisdictions**)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
TotalEnergies SE (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for:

1. an exemption from the prospectus requirement (**Prospectus Relief**) with respect to each distribution of:
 - (a) a unit of FCPE TotalEnergies Actionnariat International Relais 2022 (the **Intermediary Fund**) pursuant to the global employee share offering of the Filer for 2022 (the **Current Employee Offering**) to or with an employee of a Canadian related entity of the Filer (a **Canadian Related Entity**), including, Hutchinson Aéronautique et Industrie Limitée, TotalEnergies EP Canada Ltd., TotalEnergies Marketing Canada Inc. and TotalEnergies Trading Canada LP, who is on the

payroll of a Canadian Related Entity at the end of the subscription period for the Current Employee Offering and who has been employed thereby at the closing of the subscription period and for at least a specified minimum period prior thereto (a **Qualified Canadian Participant**);

- (b) a unit of TAIC COMPARTIMENT A subfund of the TotalEnergies Actionnariat International Capitalisation fund (the **Classic Fund**, and together with the Intermediary Fund, the **Classic Funds**) to or with a Qualified Canadian Participant;
 - (c) a unit of the Classic Fund that is created as a result of the merger of the Intermediary Fund with the Classic Fund whereby Qualified Canadian Participants' units in an Intermediary Fund are exchanged for units of the Classic Fund;
 - (d) a unit of either of the Classic Funds that a Qualified Canadian Participant receives by virtue of any dividend paid on the common shares of the Filer (the **Shares**) held in either of the Classic Funds for Qualified Canadian Participants that results in the subsequent issuance of additional units of either of the Classic Funds to a Qualified Canadian Participant;
 - (e) a unit of either of the Classic Funds by a Qualified Canadian Participant to either of the Classic Funds, or a Share by either of the Classic Funds to a Qualified Canadian Participant, upon the redemption of units by a Qualified Canadian Participant;
 - (f) a unit distributed in connection with a Subsequent Employee Offering (as described below and, together with the Current Employee Offering, an **Employee Offering**);
2. an exemption from the dealer registration requirement (**Registration Relief**, and together with the Prospectus Relief, the **Exemptive Relief Sought**) in respect of each of the Filer, the Canadian Related Entities, the Classic Funds, and the respective manager from time to time of each of the Classic Funds (the **Manager**), with respect to each trade of:
- (a) a unit of the Intermediary Fund for the Current Employee Offering to or with a Qualified Canadian Participant;
 - (b) a unit of either of the Classic Funds to or with a Qualified Canadian Participant;
 - (c) a unit of the Classic Fund that is created as a result of the merger of any Intermediary Fund with the Classic Fund whereby Qualified Canadian Participants' units in an Intermediary Fund are exchanged for units of the Classic Fund;

- (d) a unit of either of the Classic Funds that a Qualified Canadian Participant receives by virtue of any dividend paid on the Shares held in the Classic Funds for Qualified Canadian Participants that results in the subsequent issuance of additional units of either of the Classic Funds to a Qualified Canadian Participant;
- (e) a unit distributed in connection with a Subsequent Employee Offering.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Alberta Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System (MI 11-102)* is intended to be relied upon in Québec, British Columbia, Nova Scotia and Prince Edward Island; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* or in MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

In this decision, **related entity** has the same meaning given to such term in section 2.22 of National Instrument 45-106 *Prospectus Exemptions*.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation formed under the laws of France.
2. The Shares are listed on the Euronext Paris Eurolist and on the New York Stock Exchange (in the form of American Depositary Shares).
3. As of the date hereof and after giving effect to any Employee Offering, the Filer is and will be a "foreign issuer" as such term is defined in section 2.15(1) of National Instrument 45-102 *Resale of Securities*, section 11(1) of ASC Rule 72-501 *Distributions to Purchasers Outside Alberta* and section 2.8(1) of OSC Rule 72-503 *Distributions Outside Canada*) and as of the date hereof the Filer is not and has no current intention of becoming a reporting issuer under the securities legislation in any of the jurisdictions of Canada.
4. Each of the Canadian Related Entities is a direct or indirect controlled subsidiary of the Filer and is not, and has no current intention of becoming, a reporting issuer under the securities legislation in any of the jurisdictions of Canada.

5. Until recently, the Filer relied upon exemptions from the prospectus requirement and the dealer registration requirement, respectively, entitled *In the Matter of TOTAL S.A. (2017) ABASC 37* dated March 6, 2017 (the "**2017 Order**"). The 2017 Order terminated on March 6, 2022, and the subscription period of the Current Employee Offering began on April 29, 2022 before the Filer obtained new exemptive relief. Subject to the foregoing, neither the Filer nor any of its Canadian Related Entities is in default of securities legislation in any of the jurisdictions of Canada.
6. Qualified Canadian Participants will be invited to participate in an Employee Offering under the terms of the "classic plan" (the **Classic Plan**), which is intended to provide Qualified Canadian Participants with an opportunity to indirectly hold an investment in the Shares.
7. Each subsequent offering (**Subsequent Employee Offering**) to employees of a Canadian Related Entity or an entity that is directly or indirectly controlled by the Filer will be similar to the Current Employee Offering, with each of the representations in paragraphs 3 through 5, 8, 9, 11 through 18, and 21 through 32 hereof being applicable (save for the identities of particular special-purpose entities).
8. The Employee Offerings will be made only to employees of the Filer, of the Canadian Related Entities or of other entities directly or indirectly controlled by the Filer.
9. Only participants in an Employee Offering are allowed to hold units of the Classic Funds.
10. For the Current Employee Offering, as of May 2, 2022, there were approximately 291 Qualified Canadian Participants resident in Canada, in the provinces of Alberta (approximately 21), Quebec (approximately 256), Ontario (approximately 10), British Columbia (2), Nova Scotia (1), and Prince Edward Island (1) who represent in aggregate less than 0.30% of the Filer's employees worldwide.
11. Qualified Canadian Participants will not be induced to participate in an Employee Offering by expectation of employment or continued employment. Participation in an Employee Offering is optional. The total cumulative amount invested by a Qualified Canadian Participant in an Employee Offering under the Classic Plan cannot exceed a specified percentage (currently 25%) of his or her estimated gross annual remuneration or allocations for the calendar year in which an Employee Offering occurs.
12. Qualified Canadian Participants can complete a subscription form during a prescribed subscription period indicating the amount they wish to invest in the Employee Offering. The subscription price will be communicated to the Qualified Canadian Participants and will be determined by the commencement of the subscription period. The subscription price for the Classic Funds will be determined as provided for in paragraph 18(b) below.
13. The Classic Funds are and will be collective shareholding vehicles of a type commonly used in France for investing in shares of an issuer by employee-investors.

14. The Classic Funds must be registered and approved by the French Autorité des marchés financiers (**AMF France**) at the time of their creation.
15. The Classic Funds are not and have no current intention of becoming reporting issuers under the securities legislation in any of the jurisdictions in Canada.
16. After each Employee Offering, the relevant Intermediary Fund and the Classic Fund will invest in Shares. From time to time, cash in respect of dividends paid on the Shares held in the Classic Funds will be reinvested in Shares. Classic Funds may also hold cash or cash equivalents pending investments in the Shares and for the purpose of unit redemptions.
17. The payment of dividends on the Shares (in the ordinary course or otherwise) is strictly determined by the board of directors of the Filer and approved by the shareholders of the Filer.
18. Under the Classic Plan, an Employee Offering will involve an offering of Shares to be subscribed through the Classic Funds as follows:
 - (a) Qualified Canadian Participants will subscribe for and be issued units of the relevant Intermediary Fund which will, in turn, subscribe for and hold Shares on behalf of the Qualified Canadian Participants;
 - (b) the subscription price for Shares is equal to the price calculated as the average of the closing prices of the Shares for a specified number of trading days ending on a date preceding the date of the corporate decision on which the dates of the subscription period are set and the Employee Offering commences (the **Reference Price**), less a specified discount to the Reference Price;
 - (c) after completion of an Employee Offering, the Intermediary Fund will be merged with the Classic Fund, and the units of the Intermediary Fund held by Qualified Canadian Participants will be exchanged for units of the Classic Fund and the Shares previously held by the Intermediary Fund will be held in the Classic Fund;
 - (d) the units of the Classic Funds will be subject to a hold period of approximately five years from the issuance date (the **Lock-Up Period**), subject to certain exceptions prescribed by French law (such as a release on death, disability or termination of employment);
 - (e) any dividends paid on the Shares held in the Classic Funds on behalf of a Qualified Canadian Participant, and any income and earnings on the assets in the Classic Funds, will be used by the Classic Funds to purchase more Shares, and additional units will be issued to the Qualified Canadian Participant to reflect such additional Shares being held in the Classic Funds;

- (f) at the end of the Lock-Up Period, or any time thereafter, or in the event of an early release outlined under paragraph 18(d), a Qualified Canadian Participant may:
 - (i) redeem his or her units in the Classic Funds for the Qualified Canadian Participant's pro rata portion of the underlying Shares held in the Classic Funds or a cash payment equal to the net asset value of the units held by the Qualified Canadian Participant in the Classic Funds; or
 - (ii) continue to hold his or her units in the Classic Funds and redeem those units at a later date;
 - (g) units of Classic Funds held by Qualified Canadian Participants are not transferable, except when the units held by the Qualified Canadian Participants are exchanged when the Intermediary Fund merges with the Classic Fund; and
 - (h) units of Classic Funds will not be listed on any exchange.
- 19. The initial value of a unit of an Intermediary Fund will be approximately equal to the subscription price of a Share as described above in paragraph 18(b).
 - 20. The value of a unit of the Classic Fund is tied to the market price of Shares, plus or minus 1%. The value of a unit any of the Classic Funds will be based on the relevant fund's net assets divided by the number of its units outstanding.
 - 21. Subject to the Lock-Up Period hold requirement described above, the Classic Funds will redeem units at the request of a Qualified Canadian Participant, making payment in cash or the equivalent number of Shares. The amount payable on redemption of a unit of the Classic Funds will be based of the per-unit net asset value of such fund.
 - 22. It is anticipated that any resale by a Qualified Canadian Participant of Shares received on the redemption of units of the Classic Funds will be effected through the facilities of, and in accordance with the rules of, a foreign exchange.
 - 23. Shares issued under an Employee Offering will be deposited in the relevant Intermediary Fund through a depositary (the **Depositary**). The Depositary will carry out orders to purchase and sell securities, and take all necessary action to allow the Classic Funds to exercise the rights relating to the Shares held. The Depositary must carry out its activities in accordance with French law. The current Depositary is CACEIS Bank France, a large French commercial bank.
 - 24. The Classic Funds are or will be established by their Manager and the Filer. The Manager will be a portfolio management company governed by the laws of France. The Manager will be registered with AMF France to manage French investment funds and will comply with the rules of AMF France. At present, the Manager of the Classic Funds is Amundi Asset Management, a limited liability company registered in the *Paris Trade and Companies Register*. It is not and has no current intention of becoming a reporting issuer under the securities legislation in any of the jurisdictions of Canada, nor is it registered as an adviser or a dealer under the securities legislation in any of the

jurisdictions of Canada. To the best of the Filer's knowledge, the Manager is not in default of securities legislation in any of the jurisdictions of Canada.

25. The Manager's portfolio management activities in connection with Employee Offerings will be limited to purchasing Shares from the Filer and selling such Shares in a marketplace (as defined in National Instrument 21-101 *Marketplace Operation* (a **Marketplace**)) as necessary in order to fund redemption requests. The Filer, the Manager, the Canadian Related Entities or any of their employees, agents or representatives will not be involved in providing advice to any Qualified Canadian Participant with respect to investments in the Shares or units of the Classic Funds. Manager's activities will in no way affect the underlying value of the Shares or of units of the Classic Funds.
26. The management of the Classic Funds will be overseen by a separate supervisory board (the **Supervisory Board**) comprised of employee unitholders from the various geographical zones in which the Filer operates and management representatives of the Filer. The Supervisory Board's duties will include, among other things, examining the Classic Funds' management reports and annual accounts, reviewing major changes in the Classic Funds and making decisions about the merger of an Intermediary Fund with the Classic Fund.
27. Administrative, accounting, audit and financial management expenses incurred by the Classic Funds will be paid by the Filer. Other expenses incurred by the Classic Funds, including transaction fees relating to the purchase or sale of Shares, will be borne by the respective fund and paid from its assets.
28. Qualified Canadian Participants will receive an information package in French or English, as they choose, which will include a summary of the terms of the applicable Employee Offering and a description of relevant Canadian income tax consequences.
29. Qualified Canadian Participants will have access, through the Filer's website, to the Filer's annual report filed with the United States Securities and Exchange Commission and to the continuous disclosure furnished by the Filer to its shareholders generally.
30. A copy of the rules of the Classic Fund will be made available to Qualified Canadian Participants when they receive their application to subscribe for units of an Intermediary Fund.
31. Each Qualified Canadian Participant will receive, at least annually, a statement of account.
32. As of the date hereof and after giving effect to the Employee Offering, Qualified Canadian Participants do not and will not beneficially own more than 10% of the Shares and do not and will not represent in number more than 10% of the total number of holders of the Shares as shown on the books of the Filer.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemptive Relief Sought is granted:

- (a) for the Current Employee Offering provided that:
 - (i) the first trade of any security acquired by a Qualified Canadian Participant pursuant to this decision, in a Jurisdiction, is deemed to be a distribution or a primary distribution to the public under the Legislation of such Jurisdiction unless the following conditions are met:
 - A. the issuer of the security:
 - (1) was not a reporting issuer in any jurisdiction of Canada at any time during the distribution; or
 - (2) is not a reporting issuer in any jurisdiction of Canada at the date of such first trade;
 - B. at the date of any distribution under the Current Employee Offering, residents of Canada:
 - (1) do not own directly or indirectly more than 10% of outstanding Shares; and
 - (2) did not represent in number more than 10% of the total number of direct or indirect owners of outstanding Shares; and
 - C. the trade is made:
 - (1) through a Marketplace outside Canada; or
 - (2) to a person or company outside Canada; and
 - D. in Québec, the required fees are paid in accordance with section 271.6(1.1) of the *Securities Regulation* (Québec); and
 - (b) for any Subsequent Employee Offerings under this decision completed within five years from the date of this decision provided that the representations in paragraphs 3 through 5, 8, 9, 11 through 18, and 21 through 32 (varied to reflect the identities of particular special-purpose entities) remain true and correct in respect of that Subsequent Employee Offering, and the conditions set out in paragraph (a) above (varied such that any reference therein to the Current

Employee Offering is read as a reference to the relevant Subsequent Employee Offering) are satisfied, as of the date of any distribution of a security under such Subsequent Employee Offering.

For the Commission:

“original signed by”

Tom Cotter
Vice-Chair

“original signed by”

Kari Horn
Vice-Chair