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VIA E-MAIL

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West,
Suite 800, Box 55
Toronto, ON
M5H 3S8

Dear Sirs/Mesdames:

Re: Comments on Proposed Revocation and Replacement of Ontario Securities Commission Rule 13-502 - *Fees*

This letter responds to the request of the Ontario Securities Commission (the "**OSC**") for comments on the proposed revocation and replacement of OSC Rule 13-502 - *Fees* (the "**Proposed Rule**"). Please note that our comments are restricted to one specific definition within the Proposed Rule.

In particular, we believe that the proposed definition of "Class 3A Reporting Issuer" may, as currently drafted in the Proposed Rule, capture a broader range of issuers than is intended and may cause certain issuers to incur costs disproportionate to the $600 fee payable by such issuers in determining whether they meet the necessary criteria.

Determination of *de minimis* security holding in Ontario

With respect to subparagraph (b)(i), we have two principal concerns. First, while it is relatively simple for issuers to determine the registered holders of their equity securities by requesting a shareholder list from their transfer agent, issuers with debt securities outstanding would be faced with additional costs in connection with obtaining securityholder registers from the trustees of those securities, many of whom may be located in different parts of the world. Depending on the amount and types of debt outstanding, there may be several trustees from whom such lists must be obtained and each trustee typically charges the issuer for providing such list for each series of debt securities.

Given the rationale for creating the "Class 3A Reporting Issuer" category, we suggest that the OSC consider requiring issuers with debt securities outstanding to determine the

registered holders of such securities based on registers maintained directly by the issuer or maintained by trustees located in Canada. This would limit the number of searches that would be required by foreign issuers with public debt. While we acknowledge that it is possible that persons or companies in Ontario could hold debt where the trustee is located in a foreign jurisdiction, we believe it more likely that Ontario persons or companies would not necessarily hold such debt in significant quantities. In particular, in those circumstances, it would seem more likely that the debt was not originally offered in Ontario in significant quantities.

Our second concern arises from the fact that there appears to be no explanation of how issuers are to determine whether they have crossed the 1% threshold in circumstances where an issuer has both debt and equity securities outstanding. In that regard, we would recommend that clear guidelines be included regarding how an issuer is to aggregate its equity and debt securities in determining the percentage of securities registered in the name of Ontario persons or companies.

"Marketplace"

With respect to subparagraph (b)(ii), we understand that certain issuers may have a concern as to whether they can categorically determine that there is no "marketplace" in Canada for any class or series of securities of the reporting issuer. In particular, the concern arises from paragraphs (c) and (d) of the definition of "marketplace" in National Instrument 21-101. While an issuer typically has control over whether its securities are listed or posted for trading on a stock exchange or are quoted on a quotation system, it is possible that the latter two components of the definition are outside of an issuer's knowledge or control. On that basis, we would recommend that the definition for purposes of the Proposed Rule be narrowed or, alternatively, the requirement could be qualified "to the knowledge of" the issuer. While we recognize that this term is used in the current OSC Rule 13-502, we believe that the definition may be overly broad for current purposes as well.

"Distribution"

We note that the criterion in subparagraph (b)(iii) provides that:

> There has been no *distribution* in Ontario of any class or series of securities of the reporting issuer in the last 5 years, other than to employees of the reporting issuer or employees of a subsidiary entity of the reporting issuer [emphasis added].

In our view, a problem arises since the term "distribution" is a legal term capturing activities that may not involve capital-raising by the issuer. As drafted, the current

definition would capture any issuer that otherwise meets the test, but who issues a single share from treasury to an entity other than an employee, even if no capital-raising activities are being undertaken by the issuer in connection with such issuance.

For example, an issuer with a subsidiary that has shares outstanding which are exchangeable into shares of the issuer would be captured by the definition when it issues shares on the exercise of the exchange right. Assuming that the other criteria of the definition are met, we do not believe that the OSC intended to capture this scenario as the issuer in question is not engaging in capital-raising activities but is merely honouring an outstanding contractual commitment. The definition could also capture a resale in Ontario of securities of the issuer by one or more of the issuer's securityholders out of a control block or any other resale by an existing securityholder of a security that was originally issued in reliance on a prospectus exemption.

Accordingly, we propose that the subparagraph (b)(iii) be amended so that the term "distribution" is removed and replaced with reference to an issue of securities by the issuer with appropriate exclusions. In that regard, we propose the following revised definition below:

> The issuer has not issued any of its securities in Ontario in the last 5 years, other than (A) to employees of the reporting issuer or employees of a subsidiary entity of the reporting issuer, or (B) pursuant to the exercise of a right previously granted by the issuer or an affiliated entity of the issuer to convert or exchange previously issued securities into securities of the issuer without payment of any additional consideration therefor.

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We trust that the foregoing will be given due consideration by staff of the OSC. We would be pleased to discuss the foregoing with you in greater detail. In that regard, please do not hesitate to contact the undersigned.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

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