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July 10, 2013

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Ottawa

Calgary

The Secretary
Ontario Securities Commission
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New York

Dear Sirs/Mesdames:

Proposed OSC Rule 11-501 – *Electronic Delivery of Documents to the Ontario Securities Commission*

This letter is in response to Notice and Request for Comment - Proposed Ontario Securities Commission Rule 11-501 - *Electronic Delivery of Documents to the Ontario Securities Commission* and Proposed Consequential Policy Amendments dated April 11, 2013 (the **Notice**). The Notice sets forth proposed Ontario Securities Commission Rule 11-501 (the **Proposed Rule**), which would make it mandatory to electronically file a number of documents that may currently be filed in paper format with the Ontario Securities Commission (the **OSC**), including Form 45-106F1 - *Report of Exempt Distribution (Form 45-106F1)*.

As counsel to clients that include global financial institutions, investment dealers and issuers, including investment funds, Osler, Hoskin & Harcourt LLP has had extensive involvement in private placements of securities to accredited investors. In this letter, we comment on the Proposed Rule in light of OSC Staff Notice 45-708 - *Introduction of Electronic Report of Exempt Distribution on Form 45-106F1 (Notice 45-708)*. In Notice 45-708, the OSC announced the availability of an electronic version of Form 45-106F1 (the **E-form**). We understand that, should the Proposed Rule become effective, issuers, underwriters and their advisers (collectively, **Filers**) will be required to use the E-form.

We are supportive of the efforts of the OSC to improve its data analysis, compliance and enforcement capabilities and to make data processing more efficient. However, we think that the Proposed Rule will significantly increase the administrative burden and costs

borne by market participants and raises important privacy issues that should be given careful consideration.

Regulatory Burden

It is respectfully submitted that the E-form is time-consuming and cumbersome to complete and may well not result in submissions that are of higher quality than those made in paper form. Under the E-form regime, the information to be set forth in the first part of Form 45-106F1, including calculations such as the total dollar value raised from purchasers in each jurisdiction (Item 7), must be inputted into fields of an online, web-based form. We think that in practice most people will find it necessary to complete this part of the E-form by first preparing a separate, “locally-saved” form, setting forth all of the requisite information, and then “copying and pasting” that information into the corresponding fields of the E-form. As a result, Filers will essentially be completing the first part of Form 45-106F1 twice—once in the “locally-saved” version and once in the E-form.

Creating a filing system that allows documents to be prepared offline and then uploaded, rather than requiring the use of an online, web-based form as currently contemplated, would have the advantage of allowing different individuals within the same organization to collaborate on preparing the filings before they are submitted. It would also permit a Filer to use previously filed forms as templates or precedents for future filings, allowing any information that is common to both the past and future filing to be preserved.

We also note that the E-form will not eliminate the need for Filers to make a mailing to the OSC that encloses the cheque in respect of the applicable filing fees. Thus, the Proposed Rule results in both an electronic filing obligation and a paper filing obligation rather than substituting electronic filings for paper filings.

The administrative burden imposed by the E-form is even greater for Filers that distribute securities to accredited investors resident in more than one Canadian jurisdiction because of the extent of the differences between the E-form and the version of Form 45-106F1 appended to National Instrument 45-106 - *Prospectus and Registration Exemptions* (**National Form 45-106F1**). First, the E-form requires more detailed information than that set forth in National Form 45-106F1. For example, Item 8 of the E-form and the E-form version of Schedule I to Form 45-106F1 (the **E-form Spreadsheet**) require a Filer to state whether or not the person whose name is required to be disclosed is an individual. Moreover, the E-form requires that information normally set forth in one block of text in National Form 45-106F1 be entered into separate fields in the E-form. For example, the name and address of the person being compensated, which is to be provided as a single block of text in Item 8 of National Form 45-106F1, must be entered as eight separate items in the following eight cells of the E-form: “Company Name”, “First Name”, “Last

Name”, “Street”, “City”, “Postal Code”, “Province” and “Country”. Similarly, the name, residential address and telephone number of each investor normally provided as a single block of text in Schedule I of National Form 45-106F1 must be entered as six separate items in the following six cells of the E-form Spreadsheet: “First Name (Company Name)”, “Last Name”, “Address of Purchaser”, “Telephone Number of Purchaser”, “Province” and “Country”. It is extremely time consuming to “copy and paste”, on an item-by-item basis, information about Canadian sales taken from internal spreadsheets or other sources of information prepared by issuers or underwriters for other purposes into the appropriate cells of the E-form, particularly when hundreds, if not thousands, of trades may have to be reported (see *e.g.*, the Form 45-106F1 filed by Cypress US Equity Fund with respect to 1,355 purchasers, referenced in Ontario Securities Commission Bulletin Issue 36/19 (May 9, 2013)). Thus, the Proposed Rule will result in significant additional administrative burdens and costs for Filers (including increased legal fees or payments to other third parties engaged to assist with the completion and filing of E-forms).

We also wish to express our concern that, by imposing an Ontario-only administrative requirement, the E-form represents a significant departure by the OSC from the spirit of National Instrument 45-106 and other national and multilateral instruments designed to coordinate and harmonize regulation of the Canadian capital markets across all provinces and territories.

In light of the foregoing, we would strongly encourage the OSC to:

- (a) replace the current, online, web-based format of the first part of Form 45-106F1 with a template form that can be submitted through uploading, similar to the commissions and finder’s fee template (Item 8) and the E-form Spreadsheet, so as to permit Filers to populate the required information at their convenience offline before uploading it, to allow collaboration among various individuals within an organization who may be involved in preparing the filings, and to use previously-filed E-forms as templates or precedents for future filings;
- (b) eliminate the need for both an electronic and paper submission for each trade report filing by allowing for electronic payment of filing fees rather than maintaining the requirement to pay filing fees by cheque; and
- (c) continue recent efforts to harmonize regulation by working collaboratively with other members of the Canadian Securities Administrators to develop a uniform and harmonized electronic filing system under which a Filer need complete only one electronic trade report to comply with the

requirements of all Canadian jurisdictions in which securities are distributed.

Privacy Issues

We are also concerned about the OSC's expectation that the Proposed Rule will facilitate its "ability to provide access to public records not filed through the CSA National Systems". The information set forth in Schedule I to Form 45-106F1 as it pertains to individuals is highly personal, including not only the purchaser's residential address, but also an indication of the purchaser's net worth based on the value of the securities purchased and the exemption relied upon. The information may also constitute proprietary information for institutional and other non-individual investors regarding their investment strategies and portfolio holdings that they would not otherwise be required to make publicly available. While we appreciate that the information contained in an E-form Spreadsheet will not be placed on the public file, we also note that freedom of information legislation may require the OSC to make the contents of the E-form Spreadsheet available to a party requesting it under that legislation. We believe it is extremely important for the protection of personal privacy and proprietary information that the OSC respond to freedom of information requests for access to the contents of E-form Spreadsheets by providing the requesting party with data in paper format only, and not in an electronic form that facilitates searching, sorting or other data analysis.

We thank you for the opportunity to comment on the Proposed Rule and would be pleased to discuss it with you further. If you have any questions or comments, please contact Andrew Aziz (416.862.6840; aaziz@osler.com), Rob Lando (212.991.2504; rlando@osler.com) or Anna Huculak (416.862.4929; ahuculak@osler.com).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"