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September 27, 2017

BY E-MAIL

Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Email: comments@osc.gov.on.ca

Attention: The Secretary

Dear Sir/Madame:

Re: Proposed Ontario Securities Commission Rule 72-503 *Distributions Outside of Canada*

We are writing in response to the Notice and Request for Comment published on June 29, 2017 in respect of the Proposed OSC Rule 72-503 *Distributions Outside of Canada* (the "Proposed Rule"), Companion Policy 72-503CP to the Proposed Rule (the "Proposed Companion Policy") and Proposed Form 72-503F *Report of Distributions Outside of Canada* (the "Proposed Form" and together with the Proposed Rule and the Proposed Companion Policy, the "2017 Proposal"). For convenience, certain defined terms from the 2017 Proposal are used in this comment letter.

As we noted in our September 28, 2016 submissions in respect of the 2016 Proposal, we support the Commission's initiative to modernize the current offshore offering regime in Ontario and urge the remainder of the CSA to adopt corresponding rules in order to harmonize the offshore offering regimes across Canada. In our view, the 2017 Proposal would be a vast improvement to the offshore offering regimes in Ontario and elsewhere across Canada as it provides much needed transparency and certainty for offshore offerings, addressing many of our previously stated concerns with the potential for extra-territorial application of Canadian prospectus requirements. A comprehensive, national framework for offshore offerings that is modelled on the 2017 Proposal would make Canada's capital markets more efficient and competitive and bring Canada's approach in line with more modern approaches applied in other jurisdictions.

However, we do have concerns with certain elements of the 2017 Proposal and the corresponding proposals in the Proposed 45-102 Amendments. Our significant concerns are noted below and in our corresponding submissions in respect of the proposed new Section 2.14.1 ("Section 2.14.1 Resale Exemption") in the Proposed 45-102 Amendments.

Proposed Rule

Sections 2.2, 2.3 and 2.4 – Foreign securities law compliance is not relevant to the objective of Ontario's prospectus requirement and should not be a condition to the exemptions in Part 2 of the Proposed Rule.

We continue to be of the view that the 'foreign law compliance' condition (contained in clause (a) of Sections 2.2 and 2.3 and in Section 2.4 of the Proposed Rule) should be deleted or modified, as this condition is not relevant to the purpose of these Part 2 exemptions. The purpose of these exemptions should be to permit *bona fide* trades outside of Canada. For the reasons noted in our 2016 Comment Letter, it is not the purpose of Ontario's prospectus requirement to protect foreign investors or the integrity of their foreign capital markets by ensuring offshore offerings comply with foreign securities regimes. Nor should Ontario's prospectus requirement be used as a general regulatory tool to require foreign law compliance for the indirect purpose of protecting the integrity of Ontario capital markets. As a result, it is unclear what purpose of the Act is served by conditioning the availability of the exemptions in Sections 2.2, 2.3 and 2.4 upon foreign securities law compliance. Accordingly, these 'foreign law compliance' conditions should be deleted. Alternatively, they could be modified to instead provide that the offshore trade *is subject to* (as opposed to being materially compliant with) the securities law requirements of the relevant foreign jurisdiction applicable to qualifying or exempting the trade in that jurisdiction (as opposed to broadly referring to any securities laws of the foreign jurisdiction that may apply in connection with the trade). Knowing that an issuer must comply with these foreign securities law requirements should be sufficient to establish the *bona fide* nature of an offshore trade without imposing the unnecessary expense and uncertainty that would flow from the need to confirm an issuer's material compliance with those laws.

Section 2.4 – Resales outside of Canada should not be subject to any hold period

We understand that the resale provisions associated with the prior Section 2.4 were removed from the 2016 Proposed Rule on the premise that the proposed Section 2.14.1 Resale Exemption would accommodate all *bona fide* resales of securities outside of Canada. In our view, this change is inappropriate as it will force offshore investors to rely on the Section 2.14.1 Resale Exemption, which is not adequate to address the resale of certain securities initially placed offshore.

Exemptive relief applications in respect of the exemption under Section 2.14 of National Instrument 45-102 have typically involved the offshore resale of securities initially acquired by Canadian investors by way of a private placement. In contrast, Section 2.4 of the 2017 Proposed Rule addresses securities that were initially placed offshore with non-Canadian investors. This latter group of securities (initially placed offshore) could be subject to an indefinite hold period, if they were issued by a non-reporting issuer and the Section 2.14.1 Resale Exemption is the only available safe-harbour for offshore resales, merely because their issuer is organized or has its head office in Canada, a majority of its directors or officers in Canada or more than 50% of its consolidated assets are located in Canada. To avoid such a result, and allow for the resale of

those offshore securities on a foreign exchange, the issuer would have to become a reporting issuer in Canada, resulting in additional cost and regulatory burden without satisfying any particular policy rationale.

In our view, the focus of any regulation of the resale of securities placed offshore in reliance on Section 2.4 of the Proposed Rule should be whether the resale is intended to be, or is otherwise in effect, an indirect distribution into Canada. We therefore suggest that you restore the resale exemption previously proposed in Section 2.4(2)(a) of the 2016 Proposed Rule in order to allow for securities initially placed offshore to be resold freely on or through the facilities of an exchange or market outside Canada. Under Section 2.5 of the Proposed Rule, a resale over a foreign exchange or market will be deemed to be to a resale to a person or company outside of Canada and, therefore, not a distribution if Section 2.4(2)(a) of the 2016 Proposed Rule is re-inserted in Section 2.4 of the Proposed Rule. Notably, without restoring this resale provision, it is unclear what purpose is served by Section 2.5 of the Proposed Rule.

Proposed Companion Policy

In our view, the "Statement of Principle" section of Part 1 and the "General" section of Part 2 of the Proposed Policy should be revised to better express the animating principles of the prospectus requirement and the Part 2 exemptions in the context of trades outside of Canada. In particular, these sections would benefit from clearer language that distinguishes circumstances where a trade is not subject to the prospectus requirement by virtue of not being a "distribution" as opposed to circumstances where it is an exempt distribution by virtue of the Part 2 exemptions of the Proposed Rule.

To avoid confusion, we suggest that Part 1 of the Proposed Policy be revised to address only the animating principles underlying the prospectus requirement and the Commission's guidance as to when it would not interpret an offshore trade to be a "distribution" for Ontario securities law purposes. The policy rationale in respect of the Part 2 exemptions should be addressed separately in Part 2 of the Proposed Policy.

In particular, the first two paragraphs under "Statement of Principle" in Part 1 of the Proposed Policy should be revised and moved, as applicable, as, together, they conflate principles relevant to a trade that is not a "distribution" (and so not subject to the prospectus requirement) with those relevant to a trade that is an exempt distribution by virtue of a Part 2 exemption. The first paragraph under "Statement of Principle" and the first sentence of the second paragraph seem to identify an animating principle of one or more of those Part 2 exemptions (as it refers to the corresponding condition of compliance with foreign securities laws). However, instead of saying the Commission has provided the Part 2 exemptions for certain offshore trades where it has determined that the protections of the prospectus requirement are necessary to fulfill the purposes of the Act (regardless of whether the trades may still constitute a "distribution"), this sentence says the Commission "*does not interpret*" the prospectus requirement as applying (thereby suggesting a view that the trade is not a "distribution"). The second sentence of the second paragraph under "Statement of Principle" adds to the potential confusion, as it is

connected to the first sentence (by virtue of leading with "*However…*") and errantly implies that, despite meeting the express conditions for a Part 2 exemption, offering participants would still be required to take reasonable steps to ensure there is no flow back. This second sentence should instead address circumstances where offering participants wish to come to a view that an offshore offering is not a "distribution" and, as a result, no Part 2 exemption is required.

We have attached to this letter excerpts from the relevant sections of the Proposed Policy with proposed revisions that would address our concerns.

General Comments

On a technical note, we suggest replacing the term "distribution" in appropriate places in the 2017 Proposal with more generic terms (e.g., "trade" or "offer or sale") where the purpose is to identify whether or not a particular trade is in fact a "distribution" as defined in the *Securities Act* (Ontario). Referring to an offshore trade as a distribution where it is not (or may not be) a "distribution" as defined in the *Securities Act* (Ontario) could lead to confusion.

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If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned at 416.367.6907 (Mindy Gilbert) or 416.863.5517 (David Wilson).

Yours very truly,

(signed) Mindy Gilbert & David Wilson

PROPOSED COMPANION POLICY 72-503 *DISTRIBUTIONS OUTSIDE CANADA*

PART 1 APPLICATION AND PURPOSE

This Policy sets out how the Ontario Securities Commission (the **Commission** or the **OSC**) interprets and applies section 53 of the *Securities Act* (Ontario) (the **Act**), the provisions of OSC Rule 72-503 *Distributions of Securities Outside Canada* (the **Rule**) and section 25 of the Act in the context of distributions outside Canada.

Statement of Principle

~~The Commission takes the view that an investor outside Canada will ordinarily expect to rely on the prospectus, registration statement or similar protections of the securities laws of the foreign jurisdiction in which the investor is located. The Commission recognizes that compliance with the prospectus requirement or conditions of a prospectus exemption under Ontario securities law may be unnecessarily duplicative of these protections and will generally not be necessary to fulfill the purposes of the Act.~~

~~Accordingly, t~~The Commission does not interpret the term ~~Ontario prospectus requirement as applying to a "~~distribution~~" to include a trade~~ of securities outside Canada ~~that is made in compliance with the securities laws of the foreign jurisdiction in which the investor is located. However, the Commission would expect~~, provided that one or more of the issuer, ~~a~~ selling security holder, ~~an~~ underwriter ~~and~~ or other participants in the distribution, as applicable, ~~to~~ take reasonable steps to ensure that the offered securities come to rest outside Canada and are not redistributed back into Canada. The following are factors that participants may consider and examples of reasonable steps they may take in support of their reliance on this Statement of Principle:

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PART 2 EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

General

The prospectus exemptions under Part 2 of the Rule are intended to facilitate cross-border offerings by removing the potentially duplicative application of Ontario's prospectus requirement~~s~~ in circumstances where an offering~~s~~ to an investor outside Canada may constitute a "distribution" under the Act but the Commission has nonetheless determined that the protections afforded by the prospectus requirement are not necessary to fulfill the purposes of the Act~~are made in material compliance with the securities laws of the foreign jurisdiction~~.

The Commission takes the view that an investor outside Canada will ordinarily expect to rely on the prospectus, registration statement or similar protections of the securities laws of the foreign jurisdiction in which the investor is located. The Commission recognizes that compliance with the prospectus requirement or conditions of a prospectus exemption under Ontario securities law may be unnecessarily duplicative of these protections and will generally not be necessary to fulfill the purposes of the Act. Accordingly, Part 2 includes exemptions from the prospectus requirement for a distribution in a foreign jurisdiction that is made in material compliance with the securities laws of the foreign jurisdiction.[1]

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[1] **Note**: Per our earlier commentary, we do not think any of the Part 2 exemptions should be conditioned on foreign securities law compliance. However, if this condition remains in the final rule, the Proposed Policy should at least be revised to clarify that foreign securities law compliance is not a condition of all the Part 2 exemptions (as foreign securities law compliance is not a condition of Section 2.1) and, more generally, does not bear on the 'flow-back' analysis into whether an offshore trade is a "distribution". Moving this language from Part 1 to Part 2 of the Proposed Policy should resolve potential confusion on this point.