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The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

VIA EMAIL

Ladies and Gentlemen:

**RE: Second Notice and Request for Comment: Proposed OSC Rule 72-503
Distributions Outside Canada and Proposed Companion Policy 72-503
*Distributions Outside Canada***

We are writing to you in response to the request of the Ontario Securities Commission (the "OSC") for comments on the above noted proposed rule and companion policy (collectively, the "Proposed Rule").

Overall, we are very supportive of the revised Proposed Rule, subject to one comment that follows.

In our prior comment letter on the Proposed Rule, dated September 28, 2016, our comment number 3 was that: "The Companion Policy Guidance that suggests that foreign purchasers may be entitled to statutory withdrawal and other rights under Ontario law in certain circumstances should be deleted." We reiterate this comment as we continue to be of the view that including such a suggestion would raise serious legal and practical concerns.

The particular concern arises from the sentence from the proposed Companion Policy guidance highlighted below:

"If an issuer or selling security holder files a prospectus to qualify a concurrent distribution to a person or company in Ontario, the issuer may choose to file a prospectus in Ontario to qualify the distribution of securities to an investor outside Canada, rather than rely on the exemption in section 2.2 of the Rule. *Any prospectus filed in such circumstances should clearly state whether or not it also qualifies the distribution of securities to an investor outside Canada, recognizing that purchasers of Ontario prospectus-qualified securities may be entitled to certain rights and investor protections under the Act even if the investor is outside Canada.*"

We feel that this proposed guidance may be especially harmful when coupled with the following highlighted passage from the OSC's responses to comments in the latest release in respect of the Proposed Rule:

“Accordingly, if an issuer does not intend the prospectus to qualify the distribution of securities to purchasers outside Canada, the prospectus should include a statement to this effect.”

These two passages read together give the impression that Ontario issuers are under a burden to effectively disclaim the applicability of Ontario securities law to purchasers in foreign jurisdictions, for example when offering, in parallel to a Canadian public offering, a US component privately in the U.S. under Rule 144A or even under the MJDS and, absent such an express disclaimer in the Canadian prospectus, the OSC’s view is that statutory withdrawal rights under Section 71 of the *Securities Act* (Ontario) (the “**Act**”) and the statutory causes of action for a misrepresentation in a prospectus under Section 130 of the Act and for failure to deliver a prospectus under Section 133 of the Act could be extended to foreign investors *simply by inadvertently failing to disclaim the applicability of Ontario statutory rights to foreign investors.*

We do not believe this is an accurate statement of the legal jurisdiction of Ontario securities laws in such factual circumstances, which should not depend upon optional disclaiming language in any offering document. If any presumption would be appropriate in this context, we respectfully submit that the presumption should be the reverse: that Ontario securities law **does not** automatically confer statutory rights on foreign investors, and therefore the extension of Ontario statutory rights to such investors should require an express statement by the issuer in the prospectus, not silence.

As an aside – and to anticipate a potential objection – in our view it is not necessary to extend Ontario statutory rights to foreign investors simply because the Canadian prospectus qualifies shares sold into foreign jurisdictions to be freely tradeable in Canada. We see no policy reason why these concepts should be linked. For securities initially placed outside Canada, the fact that such security is freely tradeable in Canada is only consequential once it is sold back into Canada. And filing the prospectus in Canada does not purport to make those securities freely tradable in the U.S. or any other non-Canadian jurisdiction, merely because they were qualified by prospectus initially in Canada. Statutory rights upon distribution and the ability to freely resell securities in Canada are different concepts that do not need to be tied together.

Overall, the Proposed Rule seeks to give clearer guidance around the application of Ontario securities laws for distributions outside Canada, and this has been in large part achieved. We respectfully submit that the final version of the Companion Policy guidance for the rule should clearly state that Ontario securities law (and, in particular, statutory rights thereunder) generally may be presumed **not** to apply to protect foreign investors.



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If you have any questions regarding this submission please contact Ross McKee at ross.mckee@blakes.com or 416-863-3277 or Tim Phillips at tim.phillips@blakes.com or 416-863-3842.

Yours truly,

(signed) Ross McKee

(signed) Tim Phillips