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The Secretary
Ontario Securities Commission
20 Queen Street West
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Dear Sirs and Mesdames:

**Second Notice and Request for Comments dated June 29, 2017 –
Revised Proposed Ontario Securities Commission Rule 72-503 *Distributions Outside Canada* and Proposed Companion Policy 72-503 *Distributions Outside Canada***

This letter is in response to the Second Notice and Request for Comments published by the Ontario Securities Commission (the "OSC") on June 29, 2017 regarding Revised Proposed Ontario Securities Commission Rule 72-503 *Distributions Outside* Canada (the "2017 Proposed Rule") and Revised Proposed Companion Policy 72-503 *Distributions Outside Canada* (the "2017 Proposed Companion Policy" and, together with the 2017 Proposed Rule, the "2017 Proposal").

Introduction

We wish to thank the Ontario Securities Commission (the "Commission") and Staff for their significant efforts in connection with the 2017 Proposal and the earlier proposals advanced in 2016 to modernize, and achieve greater certainty, regarding the Ontario regime governing distributions of securities outside Canada. Clearly, Ontario market participants are in need of greater certainty in this area than the guidance currently available under Interpretation Note 1 (the "Interpretation Note"), which was issued in 1983 at the time of the repeal of OSC Policy 1.5 *Distribution of Securities Outside of Ontario*. We believe that the 2017 Proposal will go a long way toward achieving the intended result, and will work to the significant benefit of Ontario market participants.

We recognize that some of the issues and concerns intended to be addressed by the 2017 Proposal overlap with the proposed amendments to Section 2.14 of National Instrument 45-102 *Resale of Securities* ("NI 45-102") published by the Canadian Securities Administrators (the "CSA") on June 29, 2017, on which we have provided comments to the CSA separately. We note, however, that there are certain aspects of NI 45-102 other than Section 2.14 which we believe are also in need of reconsideration, and we urge the Commission and Staff to continue to work with the CSA to revisit the NI 45-102 resale

regime more generally, in the context of the resale of securities of both Canadian and non-Canadian issuers, and resales taking place both inside and outside of Canada.

We also thank the Commission for providing us with the opportunity to comment on the 2017 Proposal, and hope that our comments may be of assistance.

Comments on the 2017 Proposed Rule

1. The "Material Compliance" Standard in Reference to Foreign Laws

Sections 2.2, 2.3, 2.4, 3.1(b) and 3.1(c) each provide relief from Ontario prospectus or dealer registration requirements on the condition that the entity seeking to rely on the relief has "materially complied" with the securities law requirements of a jurisdiction outside Canada.

We strongly urge the Commission to reconsider the adoption of a "material compliance" standard with respect to foreign legal requirements. We understand that the Commission's initial approach was to condition these new Ontario exemptions on compliance with the laws of the other jurisdictions involved. Comments received on that approach raised two different concerns.

One concern was the appropriateness of effectively "importing" foreign legal requirements into the securities laws of the Province of Ontario, when those laws may not be consistent with, and could even run contrary to, the underlying public policies of Ontario law.

A second concern was that minor violations of foreign law should not have the consequence of disqualifying the Ontario exemption. This concern was addressed through the introduction of the currently proposed materiality qualifier, and the introduction of guidance in the 2017 Proposed Companion Policy stating that an issuer or selling security holder will have "materially complied" with foreign securities law requirements if it has taken "reasonable steps to ensure" the distribution is effected in accordance with the foreign laws. We respectfully submit that this proposed solution creates even greater mischief than the concern that was raised, for the following reasons:

- the clearly stated and fundamentally important goal of the 2017 Proposal is to provide certainty to market participants regarding the circumstances in which a distribution from Ontario to purchasers outside Canada will comply with Ontario securities laws;

- traditionally, capital markets participants look to their legal counsel to express clear and unqualified opinions regarding legal compliance (sometimes referred to as "transaction level certainty");

- an Ontario exemption conditioned on compliance with non-Ontario law cannot form the basis of a legal opinion given by an Ontario lawyer without the Ontario lawyer relying on the supporting opinion of a foreign lawyer; however, a foreign lawyer could always be asked to supply an opinion that the offering complies with that other country's laws, supporting the Ontario lawyer's opinion;

- a foreign lawyer cannot, however, express any opinion regarding whether or not an issuer or selling security holder has "materially complied" with the securities law requirements of the foreign jurisdiction, within the meaning of the term "materially complied" as interpreted under Ontario securities law; further, assessments of materiality are generally based at least in part on factual determinations and exercises of judgment that are outside the appropriate role of a legal opinion giver; and

- the 2017 Proposed Companion Policy exacerbates this problem by introducing yet a different standard, requiring the issuer or selling security holder to have taken "reasonable steps to ensure the distribution is effected" in accordance with foreign law. Neither an Ontario lawyer nor a foreign lawyer could express an opinion regarding what steps, under an Ontario law standard of reasonableness, are necessary to ensure compliance with the foreign law's requirements.

We urge the Commission to reconsider the appropriateness, from a policy perspective, of conditioning compliance with an Ontario exemption on compliance with the laws of a foreign country. However, we recognize that the Commission may see a need to ensure that market participants cannot take advantage of any regulatory lacuna that may exist to avoid being subject to the securities laws of any jurisdiction at all, which could undermine the integrity of the Ontario capital markets.

If that is the case, we would strongly recommend eliminating the concepts of "material compliance" in the 2017 Proposed Rule and "reasonable steps" to ensure compliance in the 2017 Proposed Companion Policy. If compliance with foreign law is important to Ontario public policy, then we respectfully submit that the Commission should not presume to rewrite those foreign laws by introducing materiality qualifiers, especially when the consequence of doing would be to reintroduce uncertainty and undermine the ability of market participants to obtain legal opinions regarding compliance with Ontario law.

We suggest that an alternative formulation of the foreign law compliance condition may be preferable, for example Section 2.2 might be revised to require that:

> ...the distribution is made pursuant to any applicable prospectus, qualification, registration or similar requirements of the jurisdiction outside Canada, or an available exemption from such requirements.

This wording change focuses the condition of the exemption on the distribution being made "pursuant to" the foreign country's prospectus, qualification, registration or similar requirements, rather than in full "compliance with" all of that country's securities law requirements more generally. It also eliminates the materiality qualification that we see as problematic from a legal opinion perspective, allowing an Ontario lawyer to express an opinion with transaction-level certainty subject only to obtaining a supporting opinion from counsel in the foreign jurisdiction.

2. Section 2.5 – Exchange or Market Outside Canada

We suggest that the last clause of Section 2.5 should be revised to state:

> ...if neither the seller nor any person acting on its behalf has reason to believe that the distribution has been pre-arranged with a buyer in Canada.

There does not appear to be any reason to disallow a pre-arranged transaction with a foreign purchaser on an exchange or market outside Canada.

3. Section 4.1 – Report of Distribution Outside Canada

While we recognize that the Commission has an interest in monitoring the use of the new exemptions afforded by the 2017 Proposed Rule, and that the information required by Form 72-503F *Report of Distributions Outside Canada* (the "Report") is relatively modest in the information it requires (and, specifically, does not require the inclusion of a list of purchasers), we would ask the Commission to reconsider the requirement to file the Report in the context of distributions relying on Section 2.2 of the 2017 Proposed Rule. We believe that the Commission quite appropriately determined to exclude Section 2.1 from the scope of the Report requirement so as not to impose an undue burden on market participants in circumstances where information regarding the distribution would be readily available through public filings in the United States or a specified foreign jurisdiction. We note that in the context of distributions relying on Section 2.2, the Commission will similarly be well aware of the distribution that is taking place as a result of the concurrently filed Ontario prospectus.

We wish to draw to the Commission's attention the fact that most, if not virtually all, Ontario issuers making Canadian prospectus offerings will also concurrently offer and sell the same securities in the United States or other countries. As a result, if the Commission retains the requirement to file the Report in connection with distributions under Section 2.2, virtually every Ontario issuer filing a prospectus in Canada will be required to file the Report in connection with the same distribution. This would introduce a new administrative requirement into the prospectus offering process for Ontario issuers that would not appear to be justified in the circumstances.

4. Section 4.3 – Investment Funds

We appreciate the Commission seeking to align the timing of the reporting requirements for distributions outside Ontario by investment funds under the Report with the annual reporting requirements of investment funds under Form 45-106F1. However, it is not clear how an investment fund could in fact electronically file a Form 45-106F1 report that contains the same information that would be required in a Report, given that both will be electronic forms containing different prescribed fields for different required data. We would suggest that Section 4.3 might instead provide for the ability of an investment fund to make a single annual Report filing on Form 72-503F (without regard or reference to Form 45-106F1). We note, however, that it may be necessary to introduce a modified version of the Report for use by investment funds for annual reporting purposes in order to ensure that all of the data for annual reporting purposes can be captured in the electronic form's fields.

5. Certification of Form 72-503F *Report of Distributions Outside Canada*

We urge the Commission to take into account the comments and concerns that have been raised by market participants regarding the certification requirements of Form 45-106F1, including the comments provided jointly by Blake, Cassels & Graydon LLP, Davies Ward Phillips & Vineberg LLP, McCarthy Tétrault LLP, Osler, Hoskin & Harcourt LLP and Stikeman Elliott LLP on September 6, 2017 in connection with proposed amendments to National Instrument 45-106 *Prospectus Exemptions*. We strongly suggest that conforming changes be made to proposed Form 72-503F. We also note that, unlike Form 45-106F1, Form 72-503F does not appear to contemplate the option of being completed, certified and filed by an underwriter, and we propose that alternative should also be made available.

6. 2017 Proposed Companion Policy

We would like to offer the following comments and suggestions that we believe may help to clarify the guidance provided by the 2017 Proposed Companion Policy.

(a) <u>"Reasonable Steps to Ensure that the Offered Securities Come to Rest Outside Canada"</u>

While we recognize that the concept of "reasonable steps to ensure that the offered securities come to rest outside Canada" was the cornerstone of the Interpretation Note, it was also the source of tremendous uncertainty. In particular, the use of the word "ensure" suggests a requirement to ensure with certainty, setting a standard of perfection for the result, when in fact perfection may be impossible to achieve, and the result impossible to measure.

We propose that the Commission consider making the following changes to the second paragraph of the Statement of Principle, which we believe may more accurately capture the Commission's intentions and expectations, and help to reduce the extent of uncertainty:

> However, the Commission would expect the issuer, a selling security holder, an underwriter or other participants in the distribution to take ~~reasonable steps to ensure~~ sufficient measures in the circumstances of the distribution to make it reasonable to conclude that the offered securities have come to rest outside Canada, meaning that it is unlikely that they will be ~~and are not~~ redistributed back into Canada by an original purchaser outside Canada that has acquired the securities for the purpose of immediate resale, rather than with investment intent.

The paragraph following the listed examples could also be revised as follows:

> This list of ~~factors and examples of reasonable steps~~ examples of measures that may be taken is provided for illustrative purposes, and is not intended to be a definitive list of any or all of the ~~factors or steps~~ measures that participants may take, or other factors they may take into account, in order to make it reasonable to conclude that ~~reasonable steps have been taken to ensure that~~ securities have come to rest outside Canada.

(b) Example (1), Restriction in the Underwriting Agreement

We would suggest adding a reference to an "agency agreement" in addition to the existing references to an underwriting, banking group or selling group agreement.

(c) Example (6), 90 Day Restriction on Resale

It is not clear on what basis the sixth example proposes a period of 90 days for the applicable restriction. While the Interpretation Note contained a reference to a 90-day period in one of the examples it listed, that reference was likely drawn from Securities and Exchange Commission Release 4708, adopted in 1964, which was the predecessor to current Regulation S under the U.S. Securities Act of 1933, as amended ("Regulation S"). We believe this is the most likely explanation of the source of the reference to 90 days, as the Interpretation Note was issued at a time when Release 4708 was the governing United States guidance, prior to the adoption of Regulation S.

We note that currently the "hold period" for securities of a reporting issuer in Canada following a private placement is 120 days. We also note that, in Eurobond offerings, a practice of imposing a 40-day restriction has become prevalent, most likely because Regulation S contemplates a 40-day distribution compliance period for certain debt

security offerings (in contrast to the 1-year distribution compliance period that may apply for certain equity offerings).

We would suggest that the Commission should not propose a fixed period of time, but rather consider expressing conceptual guidance which is more consistent with the general policy being articulated:

> Purchasers outside Canada provide representations and warranties, or are given notice that their purchase of the securities will constitute a representation and warranty, that they will not resell the security to a person they actually know to be located in Canada or through the facilities of an exchange or market in Canada, for a period ~~of 90 days from the date of their purchase~~ sufficient to create a meaningful economic risk in connection with their investment in the security.

In the alternative, if the Commission elects to retain a reference to a fixed period of time, we recommend that the 90-day period either be reduced to 40 days, to be consistent with current Regulation S and resulting global practices.

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We again wish to express our thanks to the Commission and Staff for their significant efforts modernize and improve the Ontario regime governing distributions of securities outside Canada, and for providing us with the opportunity to comment on the 2017 Proposals.

If you have any questions regarding our comments, please do not hesitate to contact Rob Lando at (212) 991-2504, or by e-mail at rlando@osler.com.

Yours very truly,

Osler, Hoskin & Harcourt LLP

RCL: