

September 27, 2017

Without Prejudice
By E-mail

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

Dear Sirs/Mesdames:

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 submit the following comments in response to the OSC Second Notice and Request for Comment (the “**Request for Comment**”) published by the Ontario Securities Commission (the “**OSC**”) on June 29, 2017 with respect to proposed OSC Rule 72-503 *Distributions Outside Canada* (the “**Proposed Rule**”) and proposed Companion Policy 72-503 *Distributions Outside Canada* (the “**Proposed CP**”) and together with the Proposed Rule, the “**Proposal**”).

We have organized our comments below with reference to the proposed rule, policy or form to which the comments relate. All references to parts and sections are to the relevant parts or sections of the applicable rule, policy or form.

Thank you for the opportunity to comment on the Proposal. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or of any client of the firm) and is submitted without prejudice to any position taken, or that may be taken, by our firm on its own behalf or on behalf of any client.

A. GENERAL

1. Not a Restatement of the Law

The Request for Comment provides that the Proposal is intended to modernize and replace the Interpretation Note, update interpretive guidance, re-articulate key aspects of the Interpretation Note and generally provide greater certainty. We agree that the Proposal should not be treated or viewed as changing the law in Ontario. The legal determination as to whether a “distribution” has occurred in Ontario should continue to be made under the *Securities Act* (Ontario). As stated in the Request for Comment, we agree that “[t]he 2017 Proposed Rule does not deem any particular issuances to be distributions, but rather provides codified exemptions to market participants that need more certainty in connection with a particular transaction”.

2. Distributions Outside Canada vs. Distributions Outside Ontario

As we had previously commented, the Proposed Rule is entitled “Distributions Outside Canada” and does not address whether the prospectus requirement in Ontario is triggered (or an exemption therefrom required) where the issuer is selling securities to purchasers outside of Ontario but not outside Canada. In

response to such comment, the OSC has stated that the application of the Proposed Rule to trades in other Canadian jurisdictions “raises issues in connection with the operation of the passport system and the Canadian Securities Administrators’ (CSA) approach to multi-jurisdictional distributions.” To the extent there is a distinction between a distribution outside Canada and outside Ontario from the perspective of Ontario securities laws, we respectfully submit that the OSC should explain such distinction.

B. PROPOSED RULE

1. Section 1.1 – “designated foreign jurisdiction”

We thank you for the expanded list of jurisdictions included in the new definition of “specified foreign jurisdiction” in the Proposed Rule. While we acknowledge that the OSC may consider applications for exemptive relief in respect of distributions in foreign jurisdictions not listed in Appendix A to the Proposed Rule, we would suggest that to the extent it can be anticipated that certain foreign jurisdictions may become the subject of an application for exemptive relief, that such jurisdiction(s) be included in Appendix A to promote efficiency in Canadian capital markets and reduce future regulatory burden on issuers.

2. Sections 2.2, 2.3 and 2.4 – “compliance with foreign laws”

We agree that minor technical breaches of foreign securities laws should not preclude an issuer from relying on the exemptions in the Proposed Rule. However, rather than the current revised language in the Proposed Rule (“...has materially complied with securities laws...”), wherein the word “materially” would arguably modify the compliance with law rather than the law itself, we suggest that the OSC consider substituting this provision with language to the effect that the issuer has “...substantially complied with material aspects of securities laws...” so as to reflect the intention behind the condition.

3. Section 2.5 – “Exchange or Market Outside Canada”

We respectfully submit that the end of this section be revised to refer to a “Canadian buyer” and not just a “buyer”. This would be consistent with the guidance provided in Part 2 of the Proposed CP which states that “...the exemption from the prospectus requirement will only be available if the pre-arranged buyer is in fact a person or company outside Canada.” In our view, codifying this in the Proposed Rule as opposed to in the Proposed CP would be preferable as it provides certainty with respect to trades that have been pre-arranged with a person or company outside of Canada.

C. FORM 72-503F – REPORT OF DISTRIBUTIONS OUTSIDE CANADA

1. Certification

We suggest additional language be included in the certification clarifying that the individual certifying the Report is doing so on behalf of the filer and “not in his/her personal capacity”.

D. PROPOSED CP

1. Statement of Principle

We appreciate the additional guidance that has been added to the Proposed CP. However, we respectfully suggest that additional consideration be given to the list of factors included in Part 1 of the Proposed CP to provide greater consistency with the OSC’s commentary in the Request for Comment stating that the Proposed Rule is not intended to deem any particular issuance a “distribution”. Currently, the Proposed CP states that the factors are ones that are “examples of reasonable steps [participants] may take in support of their reliance on this Statement of Principle”. We submit that the factors should provide guidance to assist in the determination of whether an issuance of securities is a “distribution” for the purpose of Ontario securities law and not just for the purpose of determining whether securities have

come to rest in a foreign jurisdiction. Ultimately, the determination of whether or not an issuance is a distribution is essential to whether or not an issuer requires an exemption from the prospectus requirement in the first instance.

Furthermore, even if the list of factors is read in the context noted above, we do not believe that factors (5) and (6) are relevant or their inclusion or exclusion deemed determinative. Factor (5) suggests that a foreign purchaser would be prohibited from reselling securities acquired from a Canadian issuer. However, a foreign purchaser would generally be able to resell the securities to another foreign purchaser. Requiring a foreign purchaser to provide representations and warranties to this effect to the issuer would only provide any comfort with regard to the initial purchaser. Should the initial purchaser turn around and resell the securities in accordance with the laws of the foreign jurisdiction, an issuer would have no means of enforcing any representations or warranties against any subsequent purchaser. The same issue arises with regard to factor (6).

2. Concurrent Distribution under Final Prospectus in Ontario

The following statement is included in the Proposed CP:

If there is no concurrent distribution in Ontario but the issuer files an Ontario prospectus in connection with the distribution of securities to an investor outside Canada, the securities being distributed outside Canada will be qualified by the Ontario prospectus. In this case, the issuer or selling security holder would not be relying on the exemption from the prospectus requirement in section 2.2 of the Rule because a prospectus in Ontario is qualifying the distribution.

We are concerned that this statement raises questions as to whether foreign purchasers are entitled to statutory protection under a Canadian prospectus and as to whether a Canadian underwriter is required to sign the prospectus filed in Ontario. We believe that consistent with the regime under the MJDS, where an issuer files a prospectus in Ontario solely to address any flowback concerns, it should be clarified that where a prospectus is filed in Ontario but there is no concurrent distribution in Ontario, that foreign purchasers would not have statutory rights and investor protections under the *Securities Act* (Ontario) and that a Canadian underwriter would not be required to sign the prospectus.

Yours truly,

Laura Levine,

on my own behalf and on behalf of,

Ramandeep K. Grewal
Mihkel E. Voore