Paul A.D. Mingay T (416) 367-6006 F (416) 361-7098 pmingay@blg.com
Gordon G. Raman T (416) 367-6232 F (416) 361-7311 graman@blg.com
Michael Burns T (416) 367-6091 F (416) 361-2796 mburns@blg.com

Borden Ladner Gervais LLP
Scotia Plaza, 40 King St W
Toronto, ON, Canada
M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

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DELIVERED BY EMAIL

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Dear Sirs/Mesdames:

Re: Proposed Rule 72-503

We are writing in response to the Request for Comments dated June 30, 2016 in respect of proposed OSC Rule 72-503 – Distributions Outside of Canada (the "**Proposed Rule**") and the related Companion Policy (the "**Policy**").

We are very supportive of the Proposed Rule and believe it will eliminate a lot of uncertainty and facilitate regulatory compliance for issuers and their advisers when dealing with securities distributions outside Canada. The Interpretation Note referred to in the Request for Comment has been the source of much consternation over the years and is certainly due for replacement.

We have six comments, as outlined below.

1. The Proposed Rule is quite clear in providing exemptions for certain types of distributions effected outside Canada. Our concern lies with the Companion Policy because it appears to muddy the waters by seeming to impose additional requirements over and above those in the Proposed Rule and resurrecting the concept of "coming to rest" from the Interpretation Note.

The purpose of the Rule, as stated in Part 1 of the Companion Policy, is to provide certainty to cross-border transactions by providing explicit exemptions. It goes on to say that the provision of these exemptions is not determinative of whether Ontario securities law otherwise applies to such a transaction. Accordingly, put another way, the purpose of the Rule is to provide a safe harbour for a distribution when it is not clear whether Ontario law applies or not; if the requirements of the Rule are met, the applicability of Ontario law is no longer a concern and the participants in the distribution are able to proceed confident in the knowledge that they are not violating Ontario law.

We note that this leaves it open to an issuer to make the determination that, in fact, Ontario law does not apply to a particular distribution. The issuer could then choose to not take advantage of the Rule and not file a report under the Rule. We expect that most issuers will choose to file a report when faced with the choice because of the certainty this should provide.

Where we have trouble with the Policy is in relation to two statements. First, in the second paragraph under "Statement of Principle" in Part 1, it states,

> The issuer, underwriters and other participants in the offering would be expected to implement reasonable precautions and restrictions designed to ensure that the entire distribution process results in the securities being held by or for the benefit of foreign investors, as opposed to intermediaries in the distribution chain holding securities for resale to investors in Canada.

Second, the first paragraph under "Resale" in Part 2, states,

> Nevertheless, the Commission expects the issuer, underwriters and other participants in the offering will have taken reasonable steps to ensure that the securities come to rest outside of Canada and are not redistributed back into Canada in a manner that constitutes an indirect distribution in Ontario.

The use of the word "expects" or "expected" in these statements appears to impose additional requirements upon issuers beyond the requirements of the Rule itself. Not only that, the second statement resurrects the concept of "coming to rest outside of Canada", one of the concepts that so many people struggled with in attempting to comply with the Interpretation Note. While the first statement, on its face, appears less problematic, it raises similar issues. The fact is that the issue of securities rarely results in securities being held directly by investors (foreign or otherwise); rather, they are held by brokers or other intermediaries for the benefit of their ultimate investor clients. Even then, securities are most often held in book-based systems such as CDS, DTC or CREST. As a result, the suggestion that securities not be held by intermediaries creates problems. While it would not be unusual to obtain a representation from an investor that it is buying as principal and not for resale, it is unclear what further "reasonable steps" are "expected", nor is it clear whether there are different expectations where the investor holds securities through an intermediary or what to do if the investor itself could somehow be considered to be an intermediary.

In our view, these statements are unnecessary and should be deleted. We understand that the new exemptions should not be used as a back door so as to allow distributions outside Canada to result in the securities immediately ending up back in Canada because the foreign investors have immediately resold or distributed them to Canadians. We would argue, however, that this is covered by the paragraph in the Policy under the heading "The Integrity of the Ontario Capital Markets and the Jurisdiction of the Commission". If the exemptions under the Rule are not relied upon in a bona fide manner by issuers, the Commission may well have grounds to take action. If the test is going to be whether issuers have taken reasonable steps to ensure the securities come to rest outside of Canada, however, the Commission will have essentially left issuers in the same regulatory limbo as existed under the Interpretation Note, since no one really knows what that requires in a particular situation.

It must be acknowledged and accepted that in today's international markets, sometimes securities placed outside Canada will flow back through no fault of the issuer. To give one example, if an issuer is dual listed on the TSX and AIM and, for reasons of investor interest or otherwise, the issuer decides to do a private placement under U.K. law, it is possible that those securities could be traded back through the TSX prior to the four months that would apply to a Canadian private

placement for the simple reason that there may be no hold period required under U.K. law. It is more likely than not that this will not happen because the securities will probably be held in a broker account through CREST, and the investor will find it much easier to trade through AIM. Accordingly, while the risk of flow back does exist, we would argue this risk is small and is a small price for the regulatory certainty that the Rule should bring. In the absence of the Policy, the Rule provides a clear safe harbour for such a distribution. Introducing the concept of "coming to rest" in the Policy only creates regulatory uncertainty and is potentially disruptive to the foreign offering process since investors are unlikely to be prepared to agree to restrictions or covenants which are not part of the usual foreign offering regime.

To conclude, our view is that the Commission's warning against abuse in Part 1 is sufficient. We note that the filing of reports under the Proposed Rule may provide a basis for the Commission to spot check trading in the securities of issuers who effect distributions in reliance on the Proposed Rule in order to monitor for signs of abuse.

2. The second point is in response to a practical concern. Each of the exemptions states that the issuer or selling shareholder must have "complied" with the securities law requirements of the particular jurisdiction outside Canada. If there is flow back into Canada of the securities issued, and the OSC decides to review the matter, what will be required to demonstrate compliance with the foreign securities laws? Our concern is that issuers will be expected to produce a legal opinion to that effect, or some other formal legal "proof" of compliance. Such a legal opinion may not be obtainable and, in any case, could well be prohibitively expensive.

The reason we say this is that, if one thinks about the usual legal opinions delivered in a Canadian prospectus or private placement offering, they do not say that an offering is in compliance with securities laws. Canadian legal opinions are expressed very narrowly to say, for example, that a private placement may be completed without a prospectus provided certain conditions are met, or that securities may be offered to the public through registered dealers (based on the fact that a prospectus receipt has been issued). The opinion never says that an offering has complied with law – there are just too many moving parts and parties involved, many of whom could have made a foot-fault in relation to some aspect of securities law which the law firm giving the opinion has no knowledge of, and cannot police in any case.

A law firm in another jurisdiction is likely to be in the same position. If an issuer were to ask for a compliance opinion, the law firm may reply that such an opinion cannot be given because it is not in a position to know what happened at every step of the process. Even if such an opinion were to be available, it is likely to be expensive.

Our suggestion, while not completely solving the problem, would at least deal with the current binary nature of the exemption – an offering either complies or it does not, with all the attendant consequences that brings – while preserving the OSC's rationale behind the exemption of deferring to the jurisdiction where the offering takes place. Specifically, we suggest that the wording be changed to read,

> "the issuer of those securities or the selling securityholder has effected the distribution pursuant to the securities law requirements of the jurisdiction outside Canada."

Using this language as the standard at least allows the issuer to point to the process it followed, which may involve the use of a securities dealer there and an accepted process. The process may or may not involve legal opinions in the particular jurisdiction but, if it has been followed, that should be sufficient for purposes of compliance with the Proposed Rule.

3. The third point is simply to inquire whether Proposed Rule might be extended beyond Ontario so as to be a National Instrument. The regulators in some provinces take a very broad view of when a distribution occurs in a province, to the extreme that if a company is headquartered or incorporated in the province, any distribution made by the company is viewed as occurring in that province, at least in part, regardless of where the investors are located. If the Rule comes into effect in Ontario only, this results in an un-level regulatory playing field for Canadian issuers seeking to raise capital outside Canada - an undesirable result. Having said that, we believe that implementing the Proposed Rule in Ontario and not elsewhere is better than not implementing it at all.

Also, looking ahead, we query the difference in approach between the Proposed Rule and the proposed CMRA Policy 71-601 Distribution of Securities to Persons Outside CMR Jurisdictions ("**CMRA 71-601**"). CMRA 71-601 essentially stipulates that an issuer with a connection to a CMR jurisdiction must comply with the prospectus requirements of the CMR jurisdiction or rely on an exemption from that requirement when such an issuer is distributing securities outside the CMR jurisdiction. Is the intent that the approach that is being taken in Ontario is only temporary until CMR 71-601 comes into place or will 71-601 be amended to follow the approach in the Proposed Rule?

4. We have trouble understanding the intended operation of the exemption provided in section 2.2(b) of the Proposed Rule. The Policy states:

> "An issuer or selling securityholder distributing securities to an investor outside of Canada may concurrently distribute securities to purchasers in Ontario provided that the distribution of securities to an investor in Ontario is qualified by a prospectus filed under the Act, or is conducted in reliance on an exemption from the prospectus requirement. The condition under paragraph 2.2(b) of the Rule therefore requires the filing of a prospectus in Ontario in connection with a concurrent distribution in Ontario. The prospectus exemption under section 2.2 of the Rule may be relied on for purposes of the distribution to an investor outside of Canada only.
>
> If an issuer or selling securityholder 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 of Canada. Any prospectus filed in such circumstances should therefore clearly state whether or not it also qualifies the distribution of securities to an investor outside of 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 of Canada.

What is not clear to us is the following:

(A) If an issuer files a prospectus in Ontario to qualify the distribution of securities to an investor outside Canada, then it seems to us that the issuer is complying with the prospectus requirements and so it is not clear why this is proposed as an exemption from the prospectus requirement.

(B) Additionally, if an issuer does file such a prospectus, with respect to the securities that are being distributed to investors outside Canada, will an underwriter be required to sign the prospectus in respect of those securities? An underwriter effecting the distribution of those securities outside Canada may not be qualified to sign the prospectus in Canada.

5. While the Proposed Rule provides much-needed clarity with respect to prospectus exemptions for outbound distributions, we are concerned that the dealer and underwriter exemptions contained in the Proposed Rule may be an issue for Ontario investment fund managers in the context of distributions of Ontario investment funds to non-residents of Canada. Many Ontario investment fund managers are also registered as exempt market dealers in order to facilitate direct investments into any domestic investment funds that they manage. The language contained in the Proposed Rule indicates that dealer and underwriter exemptions will not be available if the person or company is registered as a dealer in any province or territory of Canada. This would mean that an investment fund manager would also be required to comply with its obligations as a dealer (for example, the "know your client" and "suitability" obligations) for all foreign investors in its domestic funds in the same manner currently required for all direct Canadian investors in the fund irrespective of any dealer requirements and obligations which may be in place in the foreign jurisdiction in which an investor resides. We would request that you clarify whether this outcome was specifically intended by the Proposed Rule and, if not, that the Proposed Rule be amended to eliminate any potential duplication of regulatory requirements and costs in this area.

6. As privately offered investment funds are not reporting issuers, offerings of securities in such funds to non-residents of Canada could be made in reliance on the exemption provided in Section 2.4 (Other Distributions) of the Proposed Rule, meaning that the distribution would: (i) need to be conducted in compliance with the applicable securities laws of the foreign jurisdiction; and (ii) that the fund would be required to prepare and file a report on Form 72-503F within 10 days of the distribution date. However, we note that under National Instrument 45-106 — Prospectus Exemptions, investment funds in Canada are currently permitted to file reports of exempt distributions on an annual basis that reflect distributions in all jurisdictions (both domestic and foreign) during the reporting period. As currently formulated, the Proposed Rule does not excuse investment funds from complying with either the requirement to prepare and file a Form 72-503F or from the 10-day reporting requirement. This could mean that Canadian investment funds would have two forms of distribution reports with different filing deadlines, further complicating their compliance efforts. We would respectfully submit that investment funds be exempted from the requirement to prepare and file a Form 72-503F.

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This submission is made on behalf of the undersigned and does not necessarily represent the views of Borden Ladner Gervais LLP as a firm. We hope you find these comments of assistance and would be pleased to answer any questions.

Yours truly,

(Signed) "*Paul A.D. Mingay*"
Incorporated Partner*****

(Signed) "*Gordon G. Raman*"

(Signed) "*Michael Burns*"

*** Paul A.D. Mingay Professional Corporation**