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September 28, 2016

BY E-MAIL

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

Attention: The Secretary

Dear Sir/Madame:

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

We are writing to you in response to the Notice and Request for Comment 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 "Proposed Regime").

We are supportive of the Commission's initiative to modernize the current offshore offering regime in Ontario and urge the remainder of the Canadian Securities Administrators (the "CSA") to adopt corresponding rules in order to harmonize the offshore offering regimes across Canada. In our view, the Proposed Regime 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 Proposed Regime 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 Proposed Regime, as well as some suggested improvements. These are noted below and in our attached, annotated markup to the Proposed Rule and Proposed Companion Policy.

General Principle Underlying Proposed Regime

As a general principle, trades of securities outside of a Canadian province or territory should not be subject to that jurisdiction's prospectus requirement *unless* there is a reasonable likelihood that the offered securities will flow back into that jurisdiction without first "coming to rest" outside of

the jurisdiction. We believe that applying this "come to rest" approach for determining whether to apply the prospectus requirement of a Canadian jurisdiction is consistent with the case law. Ultimately, the prospectus requirement of a Canadian jurisdiction should be for the protection of investors in that Canadian jurisdiction only, not foreign investors.

As noted in the Request for Comment, the case law considers when connecting factors to a Canadian jurisdiction are sufficient for extra-territorial application of that jurisdiction's securities laws generally. Notably, the case law deals with cases of fraud, a failure to comply with registration requirements or insider trading. It does not conclude that (or even consider whether) a Canadian prospectus requirement could be applied extra-territorially. However, the case law is clear that what constitutes a sufficient connection depends not only on the relationship with the jurisdiction but also the subject matter of the legislation and the individual or entity sought to be regulated by it. Accordingly, connecting factors that do not bear on flowback risk would be insufficient for applying a Canadian prospectus requirement to offshore trades.

Ultimately, it is not a matter of choosing between the come to rest approach and the extra-territorial jurisdiction approach as each serves a different purpose. Even if a Canadian prospectus requirement could be applied extra-territorially, we do not believe that it is the appropriate regulatory tool for enforcement against offshore activities of local boiler rooms and bad actors. Canadian securities regulators can still properly and adequately address these concerns and the purposes of Canadian securities laws through registration requirements, prohibitions on insider trading, fraud and misrepresentation and public interest authority. In our view, there are significant costs and regulatory burdens associated with applying a Canadian prospectus requirement to bona fide offshore trades, with no corresponding benefit to Canadian investors.

Below and attached are our general and specific comments on the Proposed Regime.

General Comments

The following general comments to the Proposed Regime have been reflected where applicable in our attached markup to the Proposed Rule and Proposed Companion Policy.

1. The Proposed Regime would benefit from clearer language as to its general principle, including to distinguish 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.

Under Ontario securities laws, the term "distribution" is used exclusively to identify trades in securities that are subject to the prospectus requirement, requiring either a prospectus or a prospectus exemption. As noted above, Ontario's prospectus requirement is for the protection of Ontario investors not foreign investors. Accordingly, only connecting factors with Ontario that bear on flow back risk are relevant in assessing whether an offshore trade is a distribution. Where it is likely that securities sold in an offshore offering will come to rest outside of Ontario

(due to the extent of offshore trading in the security, the nature of the security, any steps taken to guard against flow back or otherwise), that offshore offering does not constitute a "distribution" within the meaning of Ontario securities laws and, accordingly, is not subject to the prospectus requirement. In contrast, where there may be a significant risk of flow back into Ontario, the offshore offering may be a distribution and, accordingly, subject to Ontario's prospectus requirement. However, where the conditions to the exemptions in Part 2 of the Proposed Rule are met, the Commission has determined that the protections afforded by Ontario's prospectus requirement are not necessary to fulfill the purposes of the *Securities Act* (Ontario) (the "Act").

We have proposed clarifying language to this effect in Part 1 of the Proposed Companion Policy under the heading "Statement of Principle". We have also made changes elsewhere within the Proposed Companion Policy to avoid inconsistencies with this principle. For example, we have deleted text under the heading "Resale" which suggested that, despite meeting the conditions for an exemption in Section 2.1, 2.2 or 2.3 of the Proposed Rule, offering participants would still be required to take reasonable steps to ensure there is no flow back. We deleted this language as the absence of flow back risk is not fundamental to the exemptions Section 2.1, 2.2 or 2.3. Further, the deleted language could be interpreted to require Canadian resale restrictions notwithstanding the securities distributed pursuant to those exemptions are intended to be freely tradeable. This would defeat the purpose of those exemptions (which are intended to provide certainty through 'bright line' tests) by introducing a subjective (and unnecessary) condition to their use. . Notably, the offshore offering would not be a "distribution" if reasonable steps have been taken to guard against flow back and, accordingly, would not even require those or any other exemption from the prospectus requirement.

We do not think it is necessary that the Proposed Companion Policy provide a specific list of connecting factors that may pose a flowback risk for securities offered offshore or elaborate on what might constitute "reasonable steps" to ensure those securities do "come to rest" outside of Ontario. Rather than conduct this analysis to determine whether a particular trade is or is not a "distribution", we expect most participants will instead look to satisfy the conditions of one of the exemptions in Part 2 of the Proposed Rule as these provide a level of certainty that cannot be achieved through a "come to rest" analysis. Nevertheless, there may be circumstances where it is more appropriate to conduct a "come to rest" analysis, particularly where there is an absence of relevant connecting factors and it is unlikely that the securities will flow back. In those circumstances, we think it would be helpful for the Proposed Companion Policy to provide guidance on connecting factors that are *not* relevant to this analysis as there are a number of factors listed in OSC Interpretation Note 1 *Distributions of Securities Outside Ontario* (the "Interpretation Note") that, in a modern marketplace, are cast too broadly to identify the particular flow back risk or do not bear on flow back at all. For example, (i) “the presence of the issuer in Ontario” (which too broadly refers to the conduct of business in Ontario), (ii) the ease of access between the offshore market and Ontario (which should only be a factor in favour of concluding it is not a distribution because access is limited; not the opposite, as foreign markets of developed countries are generally accessible), and (iii) the affiliation of offering participants with investment dealers that conduct substantial activities in Ontario (this relationship is moot

where there is a restriction in the underwriting agreement on the foreign underwriters or their affiliates from selling to Ontario residents). In the absence of other guidance, there is a risk that some may refer back to the Interpretation Note. Accordingly, for clarity, it would be useful for the Proposed Companion Policy to clearly override some of the now antiquated guidance contained in the Interpretation Note.

2. As a local rule, the Proposed Rule should exempt sales made outside of Ontario.

It is unclear why the Ontario prospectus requirement would govern with respect to an offering made in one or more other Canadian jurisdictions (excluding Ontario) unless that offering was in fact an indirect distribution into Ontario. Of course, a national approach would make sense if the Proposed Regime established a national framework pursuant to a national instrument. However, given it is a local rule, we encourage the Commission to extend the exemptions in the Proposed Rule to any trade outside of Ontario rather than just trades made outside of Canada absent a compelling policy reason against such a local approach. Ontario's prospectus requirement is for the protection of Ontario investors, not Canadian investors. Accordingly, as a principled matter, we do not think that application of the exemption should be conditioned on the initial purchaser not being Canadian (provided they are not in Ontario). Notably, proposed Multilateral Instrument 72-101 – *Distributions Outside of the Local Jurisdiction* clearly distinguished between offerings in and outside of the local jurisdiction.

We have not included any edits to reflect a local approach to the proposed exemptions in our attached markup. If the Commission determines to take this local approach, this would obviously involve replacing a number of references to Canada with references to Ontario, reflecting that Ontario's prospectus requirement applies only to a "distribution" in (whether direct or indirect) Ontario. However, further edits may also be appropriate. Clarification may also be helpful to address circumstances where a Canadian prospectus is filed with securities regulatory authorities in one or more Canadian jurisdictions but not the local jurisdiction.

3. Clarity is required as to the "distribution" that is qualified by an Ontario filed prospectus, and who is entitled to statutory rights of action with respect to that prospectus

The second and third paragraphs in Part 2 of the Proposed Companion Policy under the heading "Concurrent Distribution Under Final Prospectus in Ontario" suggest that an Ontario filed prospectus could qualify an offering of securities to a foreign investor. We suggest these paragraphs be deleted. Technically, an Ontario prospectus filed in respect of an offshore offering would be to qualify the flow back of securities into Ontario (a so-called 'flow-back' prospectus) as that would be the "distribution" subject to the prospectus requirement. It would not qualify the offering to foreign investors as that is not itself a "distribution" under Ontario securities laws. While we do not object to the concept of a 'flow-back' prospectus in principle, we do not think accommodation for such a prospectus is necessary in light of the exemptions afforded in the Proposed Rule. Notably, in order to allow an issuer to file an Ontario prospectus to qualify an offshore "distribution", additional exemptions and associated guidance would be necessary in respect of the offshore offering that are not addressed in the Proposed Regime or elsewhere

under Ontario securities laws, including (i) exemptions from the requirement to deliver a copy of the prospectus to the ultimate (Ontario) purchaser and the certificate requirements (for foreign underwriters) and (ii) clarification that no statutory rights (*i.e.*, the Ontario rights of withdrawal, rescission and damages referred to below) are afforded to a foreign investor in respect of the Ontario filed prospectus and the foreign offering is not subject to Canadian marketing rules.

The aforementioned paragraphs also errantly suggest that a purchaser could be entitled to the statutory rights of action under Section 71 of the Act and the statutory cause of action for a misrepresentation in a prospectus under Section 130 of the Act "*even if [the purchaser] is outside of Canada*". This should be removed from the Proposed Companion Policy as foreign investors are not entitled to these rights. As noted above, an Ontario filed prospectus is not delivered to a foreign investor as it does not qualify the offshore offering. A foreign investor instead receives the foreign offering document appropriate for the foreign jurisdiction in which it is located. Affording foreign investors Ontario prospectus rights is impractical and entirely inconsistent with the purpose of Ontario's prospectus requirement which, as previously noted, is for the protection of Ontario (not foreign) investors. In addition, one cannot reconcile existing law and practice with circumstances where foreign investors are afforded Ontario prospectus rights.[1] Accordingly, we recommend the Proposed Companion Policy include a clear acknowledgement that the number or amount of securities referred to in an Ontario filed prospectus may include securities that are concurrently being offered, and may ultimately be sold, to investors outside of Ontario and are therefore not qualified by the Ontario filed prospectus. In addition to being consistent with the law and policy underlying the prospectus requirement, this is also the right approach as a practical matter. In concurrent domestic and offshore offerings, all of the offered securities are referred to in the Ontario filed prospectus as it is impossible to determine with certainty how many of the offered securities will be sold in each jurisdiction at the time that the prospectus is filed. To the extent those securities are ultimately sold in a foreign jurisdiction, the foreign purchaser will have the rights and investor protections afforded to them in the foreign jurisdiction in which they are located, not those afforded in Ontario. We have proposed language in our markup for this purpose.

Specific Comments on Proposed Regime

Our specific comments are principally contained in our attached, annotated markup to the Proposed Rule and Proposed Companion Policy. However, we have included some additional

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[1] For example, where an issuer conducts a public offering in Ontario concurrently with a public offering in the United States, the U.S. offering is qualified by a prospectus filed in a registration statement with the SEC and it is that SEC filed prospectus (not the concurrently filed Canadian prospectus) that is delivered to U.S. investors. This is particularly clear in the case of a "southbound" MJDS prospectus, where the instructions (in Item 1 to the SEC's Form F-10) specifically allow for the deletion from the SEC filed prospectus of disclosure applicable solely to Canadian purchasers, including the aforementioned Canadian statutory rights. If these rights were available to U.S. purchasers, it would require delivery of the Canadian prospectus (in addition to the SEC filed prospectus) to U.S. investors and, in the absence of any such delivery, U.S. investors would have a perpetual right of withdrawal. Further, delivery of a Canadian prospectus to U.S. investors is not accommodated by U.S. securities laws governing U.S. prospectuses.

detail with respect to those comments below to the extent we thought some further context would be useful.

Section 2.1 - Distribution under Public Offering Document in Foreign Jurisdictions

We recommend that the Commission give further consideration as to whether there are other jurisdictions that have prospectus regimes that are satisfactory to achieve the policy objective underlying the exemption in Section 2.1 of the Proposed Rule and should therefore be included within the list of "designated foreign jurisdictions". We assume the basis for this public offering document exemption is that the process and consequences of qualifying a public offering in a designated foreign jurisdiction are sufficiently substantial to provide comfort to the Commission that the offering is a bona fide offshore offering and is not intended to avoid Ontario's prospectus requirement. In other words, it is unlikely an issuer would subject itself to the equivalent prospectus requirement (including any associated clearance processes) of any designated foreign jurisdiction simply for the purposes of conducting an indirect distribution into Canada. Accordingly, the list of "designated foreign jurisdictions" is not intended to be limited only to those jurisdictions whose disclosure requirements (for a public offering document or continuous disclosure) meet a minimum standard. We also think it would be useful to have a general statement within the Proposed Companion Policy that expresses the aforementioned policy objective. We have included such a statement, under a new subheading to Part 2 of the Proposed Companion Policy, for this purpose.

Key among our proposed edits to Section 2.1(b) is our removal of the requirement that the filed offering document be "similar to a final prospectus". This language is susceptible to an interpretation that, in substance, the foreign offering document must meet an Ontario prospectus standard. As noted above, it is not the objective of this condition (b) to protect foreign investors or to require that a sufficient level of disclosure be available (as a substitute to a Canadian prospectus). Accordingly, applying an Ontario standard to the foreign offering document is inappropriate. This language may also cause confusion in terms of the process to be followed in order to clear the offering document. We think it is sufficient that the foreign offering document qualifies or registers the public offering in a designated foreign jurisdiction. To provide additional guidance, the Proposed Companion Policy could clarify that (i) the offering document must be a document that is publicly filed with a securities regulator and subject to review by such regulator, unless the issuer is otherwise exempt from the review requirement, and (ii) a private offering of securities pursuant to an offering document that is not publicly filed with a securities regulator in a designated foreign jurisdiction would not qualify for the exemption.

We also recommend that the Commission further consult with securities law practitioners in foreign jurisdictions in which Canadian issuers commonly offer their securities to confirm that the language in Section 2.1(b) is sufficiently broad to capture the principal offering documentation and clearance process applicable to a public offering in those foreign jurisdictions.

Section 2.2 - Distributions under Final Prospectus in Ontario

We suggest deleting or modifying the 'foreign law compliance' condition in clause (a) of Section 2.2 and the equivalent condition in each of Section 2.3 and 2.4 of the Proposed Rule. The purpose of Ontario securities laws is for the protection of Ontario investors and the integrity of Ontario capital markets. They are not for the protection of foreign investors by ensuring compliance of offshore offerings with foreign securities regimes. Accordingly, in our view, the use of the exemptions in Sections 2.2, 2.3 and 2.4 should not be conditioned at all upon such compliance. Notably, none of the 'foreign law compliance' conditions allows for even a minor, technical breach. Accordingly, in our view, the 'foreign law compliance' condition in each of these three sections should be deleted. Alternatively, these conditions could instead provide that the issuer or selling securityholder *is subject to* securities laws of the relevant foreign jurisdiction (as opposed to being strictly compliant with them) provided that this is relevant to the policy rationale underlying the applicable exemption.

Section 2.3 - Distributions by Reporting Issuers

It is unclear why an issuer would have to be a reporting issuer for the four months preceding a distribution to a person outside of Canada in order for the exemption in Section 2.3 of the Proposed Rule to apply, other than to substantiate the basis on which the subsequent resale of those securities is permitted back into Canada. If that is the intention of the requirement, then we would suggest removing Section 2.3 and addressing it as a new, third circumstance under Section 2.4(2) in which one could freely resell securities distributed pursuant to the exemption in Section 2.4(1). Specifically, in lieu of Section 2.3, we suggest adding a new subparagraph (c) to Section 2.4(2) which provides that the first trade of securities initially distributed pursuant to Section 2.4(1) is not a distribution (and is therefore exempt from the prospectus requirement) if the issuer of the securities is and has been a reporting issuer for the four months preceding the date of the trade (*i.e.* the date of the resale back into Canada), as opposed to the date of the initial distribution (per the current draft of the Proposed Rule). Alternatively, Section 2.3 could be divided into two subsections in a similar manner as Section 2.4, with subsection (1) providing for the exemption for the initial distribution (i.e., a trade meeting the requirements of subparagraph (a)) and a subsection (2) providing that the first trade of those securities is not a distribution in the circumstances noted in the new subparagraph (c) proposed above. We have taken this latter approach in our attached markup only for expediency. However, while this latter approach yields the same result, it results in some unnecessary overlap (and potential confusion) as each of Section 2.3(a) (Section 2.3(1) in our markup) and Section 2.4(1) provide for an identical exemption.

Section 2.4 - Other Distributions

We are of the view that Section 2.4(2)(a) of the Proposed Rule is unnecessarily restrictive in the context of a listed security in that it requires that a seller know who is on the other end of a trade, which is not possible for an ordinary trade over an exchange. As a policy matter we believe that a trade over an offshore market that is not pre-arranged with a buyer in Canada should be

afforded the same exemption from the prospectus requirement as an initial offshore sale, provided that it is not an indirect distribution into Ontario. In principle, this is consistent with the offshore resale exemption in section 2.14 of National Instrument 45-102- *Resale of Securities* ("NI 45-102"), which is agnostic as to whether the resale is to person outside of Canada or over a market outside of Canada. However, in the case of a listed security, we think trading volume over a Canadian exchange is a better proxy for flow back risk than the Canadian ownership thresholds employed in section 2.14 of NI 45-102. Accordingly, we recommend that Section 2.4(2)(a) of the Proposed Rule be modified to provide that the first trade of securities that were initially distributed under Section 2.4(1) will not be a distribution if the trade is made *either* (i) to a person outside of Canada *or* (ii) on or through an exchange or market outside of Canada provided that, in the case of clause (ii), (x) the trade has not been pre-arranged with a buyer in Ontario and (y) less than 45% of the trading in that class of security over the prior fiscal year (or since the issuer's incorporation, if a shorter period) took place on or through the facilities of a "designated Canadian exchange" (*i.e.*, Canadian exchanges designated by the Commission as potential sources for flowback risk). From a flowback risk perspective, we have assumed it will be sufficient that the majority of trading in the resold securities be offshore and, as a result, our proposed 'listing condition' in clause (y) above requires that less than 45% of the trading occurred on a designated Canadian exchange. However, in consultation with representatives from Canadian exchanges and other market participants, the Commission may determine that a different trading threshold is appropriate. Notably, where an issuer is listed on a Canadian exchange and a foreign exchange, it will also be a Canadian reporting issuer. Accordingly, the resale exemption in Section 2.3 of the Proposed Rule (allowing for unrestricted resale of the securities of a reporting issuer with a minimum of four months reporting history) will be available in lieu of the resale exemption in Section 2.4(2)(a). As a result, we expect the resale exemption in Section 2.4(2)(a) will be relevant principally to issuers without a Canadian exchange listing. In light of this, the 'listing condition' in clause (y) above could ignore trading volume and simply provide that, at the time of the trade, the securities are not listed on a designated Canadian exchange.

Part 3 - Exemption from the Dealer and Underwriter Registration Requirements

We suggest the Commission consider deleting the exemption in Part 3 of the Proposed Rule as it serves no clear purpose. We are of the view that a foreign dealer is not subject to Ontario's dealer and underwriter registration requirements by virtue only of its offer and sale of securities of an Ontario issuer to a person or company in a foreign jurisdiction.

Part 4 - Report of Distribution Outside Ontario

We recommend including an exception from reporting on Form 72-503F in circumstances where the offshore distribution, if it had instead been made to a person or company in Ontario, would have been exempt from the prospectus requirement in reliance on an exemption (in National Instrument 45-106- *Prospectus Exemptions* or otherwise under Ontario securities laws) for which there is no corresponding obligation upon the issuer (or underwriter, as applicable) to file a report of exempt distribution. This will avoid circumstances where an issuer is required only to

report an offshore distribution on Form 72-503F without a corresponding report on Form 45-106F1 for a concurrent exempt distribution made in Ontario. More generally, we do not see a policy rationale for requiring reporting with respect to trades outside of Ontario in circumstances where, if such trade was made in Ontario, the Commission requires no reporting. We have included a new Section 4.2 to address this potential disconnect.

There is no indication in the Proposed Regime whether a filing fee will be required to accompany the Proposed Form. It is our submission that such a filing fee would be inappropriate in the circumstances. Likewise, we do not think it would be appropriate to require the filing or delivery of a foreign offering document or any other documentation (other than the Proposed Form) in connection with an offshore offering that is exempt pursuant to Part 2 of the Proposed Rule. While Part 5 of Rule 45-501 clearly would not require delivery of the foreign offering document (as an offering memorandum), we still think it would be clearest to address this in the Proposed Rule. We have included a new Section 4.3 to provide certainty on these points.

Additional Considerations - Offshore Resales by Canadian Investors

As a general principle, we are of the view that it is inconsistent to adopt a regime that allows in prescribed circumstances the unrestricted resale of securities initially acquired in offshore offerings without allowing for unrestricted resales in corresponding circumstances by Canadian investors (of securities that were acquired pursuant to an exemption in NI 45-106) that would otherwise be deemed to be a "distribution" pursuant to NI 45-102. In particular, it is unclear why a first trade of securities initially acquired outside of Canada may be sold without restriction outside of Canada pursuant to the exemption in Section 2.4(2)(a) of the Proposed Rule whereas the first trade of securities acquired by a Canadian investor under certain prospectus exemptions may not be sold freely outside of Canada (except in the limited circumstances identified in section 2.14 of NI 45-102). To address this inconsistency, we recommend that the Proposed Regime include an exemption equivalent to Section 2.4(2)(a) with the modifications noted in our comments to Section 2.4(2)(a) above. Specifically, this exemption should provide that the first trade of securities initially acquired by a Canadian investor under a prospectus exemption is not a distribution if the trade is to a person outside of Canada or on or through an exchange, or market, outside of Canada, provided that, in the latter case, the trade has not been pre-arranged with a buyer in Ontario and less than 45% of the trading in that class of security over the prior fiscal year (or since the issuer's incorporation, if a shorter period) took place on or through the facilities of a designated Canadian exchange.

We appreciate that this suggested addition to the Proposed Regime will reduce the need for the prospectus exemption found in section 2.14 of NI 45-102. However, we believe that section 2.14 is flawed and impractical for Canadian investors, particularly in the context of a listed security. Section 2.14 of NI 45-102 allows securities of non-reporting issuers privately placed in Canada to be resold over a foreign exchange where less than 10% of the outstanding securities of the issuer are held in Canada and less than 10% of the number of security holders of the issuer are in Canada. We understand the policy rationale behind section 2.14 of NI 45-102 is to protect Canadian investors by ensuring that only *de minimus* markets exist in Canada for issuers that are

not subject to the same reporting requirements as reporting issuers or the equivalent under Canadian securities legislation. While we appreciate the objective that the CSA is trying to achieve, we submit that section 2.14 establishes arbitrary thresholds that fail to identify circumstances where the prospectus requirement should not be applied to an offshore resale. Namely, circumstances in which the risk is low that the trade is, in fact, an indirect distribution into Canada. In the case of a listed security, we think trading volume is a much better proxy for flow back risk than the Canadian ownership thresholds employed in section 2.14 of NI 45-102. Trading volume information is also preferable as it is accessible to all investors. In contrast, it is difficult for investors to determine whether the 10% thresholds in section 2.14 of NI 45-102 have been exceeded without relying on the issuer's assistance. This makes reliance on the section 2.14 exemption impractical for investors other than insiders.

Although there are other prospectus exemptions available to Canadian investors in connection with the first trade of securities of non-reporting issuers, these exemptions do not provide investors with any meaningful liquidity and, as a result, Canadian investors may be disadvantaged when participating in private placements of non-reporting issuers with securities listed on a foreign exchange. The advantage for Canadian institutional investors in participating in such a private placement is the ability to acquire a significant block at once, an investment objective that is consistent for most institutional investors and more difficult to achieve through normal course purchases over an exchange.

Further, Canadian investors are generally free to buy and sell securities over a foreign exchange without restriction, regardless of the number of Canadian security holders of the issuer or the percentage of securities held in Canada. In light of the policy underlying the Proposed Rule, it is unclear why these secondary trades should be distinguished from a first trade over a foreign exchange of securities acquired by a Canadian investor from the issuer (or a control person) in an exempt distribution.

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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

ANNEX A

PROPOSED ONTARIO SECURITIES COMMISSION RULE
72-503 *DISTRIBUTIONS OUTSIDE OF CANADA*

PART 1 DEFINITIONS

1.1 Definitions – In this Rule

"1933 Act" means the *Securities Act* of 1933 of the United States of America, as amended from time to time;

~~"distribution date" has the same meaning as in National Instrument 45-102 *Resale of Securities*;~~

"designated Canadian exchange" means [the Toronto Stock Exchange, the TSX Venture Exchange, the Canadian Securities Exchange and ■[1]];

"designated foreign jurisdiction" [has the same meaning as in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*][2];

"distribution date" has the same meaning as in National Instrument 45-102 *Resale of Securities*;

[[FINRA" means the Financial Industry Regulatory Authority, a self-regulatory organization in the United States of America;] and

"SEC" means the Securities and Exchange Commission of the United States of America.

PART 2 EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

21 Distribution Under Public Offering Document in Foreign Jurisdictions – The prospectus requirement does not apply to a distribution of securities to a person or company outside of Canada[3] if, prior to the issuance or resale of the securities,

(a) the issuer of those securities has filed a registration statement in accordance with the 1933 Act registering the offering of those securities ~~in connection with the distribution~~[4], and that registration statement has become effective; or

(b) the issuer of those securities has filed ~~a document similar to a final prospectus~~[5] and, if applicable, ~~for which~~ a receipt or similar acknowledgement of approval or clearance has been obtained for, an offering document that qualifies or registers, as applicable, the public offering of those securities in accordance with the securities laws of a designated foreign jurisdiction ~~registering the securities in connection with the distribution or qualifying the securities for distribution~~.

22 Concurrent Distribution under ~~Final~~ [6]Prospectus in Ontario – The prospectus requirement does not apply to a

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[1] **Note:** To include list of Canadian exchanges designated by the Commission as potential sources for flowback risk for purposes of the exemption in Section 2.4(2)(a).

[2] **Note:** We recommend that the Commission give further consider as to whether other jurisdictions have prospectus regimes that are satisfactory to achieve the policy underlying this exemption and should therefore be included within the list of designated foreign jurisdictions.

[3] **Note:** It is unclear why the Ontario prospectus requirement would govern with respect to a public offering made in one or more other Canadian jurisdictions (excluding Ontario). Consider replacing this and corresponding references throughout this Rule and the associated policy to "Canada" with references to "Ontario" in order to reflect that Ontario's prospectus requirement applies only to a "distribution" in (whether direct or indirect) Ontario.

[4] **Note**: As a technical matter, the offering is qualified/registered by the registration statement - the securities themselves are not registered. Also, the "distribution" (from a Canadian securities law perspective) is not qualified by the registration statement; the registration statement qualifies the offering (from a U.S. securities law perspective).

[5] **Note**: Requiring that the offering document be "similar" to a prospectus suggests that, in substance, it must meet an Ontario prospectus standard. As the objective of this condition (b) is to ensure the offering is a bona fide offshore offering – rather than protect foreign investors – applying any Ontario standard to the foreign offering document is inappropriate.

[6] **Note:** As a technical matter, the term "final prospectus" is not defined in Ontario securities legislation. The Securities Act (Ontario) (the "Act") and accompanying regulations and policies define a final prospectus as a "prospectus". For consistency purposes, we would suggest using the term "prospectus" throughout the Proposed Rule.

distribution of securities to a person or company outside of Canada if,

(a) [~~in connection with the distribution,~~ the issuer of those securities or the selling securityholder, as applicable, ~~has complied with~~is subject to ~~the~~ securities law requirements of th~~at~~e jurisdiction ~~outside of Canada~~ applicable to registering or qualifying, or exempting from registration or qualification, that distribution[7]; and][8]

(b) prior to the issuance or resale of ~~the~~ those securities, the issuer of those securities has filed with the Commission, and a receipt has been issued for, a ~~final~~ prospectus qualifying ~~the~~ a concurrent distribution of ~~such~~ securities of the same or a similar[9] class in Ontario in accordance with Ontario securities law.

23 Distributions by Reporting Issuers[10] – ~~The prospectus requirement does not apply to a distribution of securities to a person or company outside of Canada if,~~

~~(a)~~ (1) [~~in connection with the distribution,~~ The prospectus requirement does not apply to a distribution of securities to a person or company outside of Canada if the issuer of those securities or the selling securityholder, as applicable, ~~has complied with~~ is subject to ~~the~~ securities law requirements of th~~at~~e jurisdiction applicable to registering or qualifying, or exempting from registration or qualification, that distribution~~outside of Canada~~;][11] ~~and~~

~~(b)~~ (2) The first trade of securities that were distributed under the exemption in subsection (1) is a distribution unless (a) the issuer of the securities is and has been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding such ~~distribution~~first trade and (b) the trade is not a control distribution.

24 Other Distributions

(1) The prospectus requirement does not apply to a distribution of securities to a person or company outside of Canada [if, in connection with the distribution, the issuer of those securities or the selling securityholder, as applicable, ~~has complied with~~ is subject to ~~the~~ securities law requirements of th~~at~~e jurisdiction applicable to registering or qualifying, or exempting from registration or qualification, that distribution~~outside of Canada~~][12].

(2) The first trade of securities that were distributed under the exemption in subsection (1) is a distribution unless

(a) the trade is made (i) to a person or company outside of Canada or (ii) on or through the facilities of an exchange, or market, outside of Canada; provided, in the case of clause (ii), that (x) neither the seller nor any person acting on its behalf knows that the trade has been pre-arranged with a buyer in Canada and (y) less than 45% of the trading in that class of security over the prior fiscal year (or since the issuer's incorporation, if a shorter period) took place on or through the facilities of a designated Canadian exchange[13]; or

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[7] **Note:** To the extent this condition (a) is kept, consider modifying to require that the issuer / selling securityholder be *subject to* rather than strictly compliance with the applicable securities laws. See our comment letter. Also consider modifying as noted to more clearly identify the foreign securities laws in question as being those applicable to the private placement or public offering.

[8] **Note:** We suggest deleting this condition (a) of Section 2.2 in its entirety. The purpose of Ontario securities laws is for the protection of Ontario investors and the integrity of Ontario capital markets. They are not for the protection of foreign investors by ensuring compliance of offshore offerings with foreign securities regimes.

[9] **Note**: This may be appropriate if an issuer has multiple classes to address foreign ownership restrictions.

[10] **Note**: See our comment letter for our reasons for changes to the structure of this section. Alternatively, Section 2.3 could be removed in its entirety and the resale exemption addressed here could be added as a new clause (c) to Section 2.4(2).

[11] **Note:** We suggest deleting or modifying this condition. See above comments to corresponding condition in 2.2(a).

[12] **Note:** We suggest deleting or modifying this condition. See above comments to corresponding condition in 2.2(a).

[13] **Note:** Investors (whether outside or in Canada) should be entitled to freely resell securities over an offshore market in the noted circumstances. It is commercially impractical to require that a seller know who is on the other end of a trade in a listed security as these trades are invariably made over the relevant exchange. Notably, the ability to resell freely over an exchange is consistent with the existing offshore resale exemption in section 2.14 of NI 45-102. As detailed in our letter, a corresponding exemption to this Section 2.4(2)(a) should be adopted for a first trade by a Canadian investor of securities initially acquired pursuant to a prospectus exemption.

(b) ~~both~~ all of the following are satisfied:

(i) [The issuer of the securities is and has been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the trade;~~,~~][14]

(ii) At least four months have elapsed from the distribution date; and~~.~~

(iii) The trade is not a control distribution.

25 Determining Time Periods -- In determining the period of time that an issuer was a reporting issuer in a jurisdiction of Canada for the purposes of this Part 2, if the issuer was a party to an amalgamation, merger, reorganization or arrangement, the selling security holder may include the period of time that one of the parties to the amalgamation, merger, reorganization or arrangement was a reporting issuer in a jurisdiction of Canada immediately before the amalgamation, merger, reorganization or arrangement[15],

~~(ii)~~**26 Not an Offering Memorandum** -- ,A registration statement or other foreign offering document provided to a person or company in a jurisdiction outside of Ontario in connection with a distribution to any such person or company in reliance on an exemption in section 2.1, 2.2, 2.3 or 2.4 will not be an offering memorandum as defined in the Act.[16]

PART 3 EXEMPTION FROM THE DEALER AND UNDERWRITER REGISTRATION REQUIREMENTS[17]

3.1 Exemption from the Dealer and Underwriter Registration Requirements – The dealer registration requirement and the underwriter registration requirement do not apply to a person or company in connection with a distribution of securities ~~to a person or company outside of Canada that is qualified by a prospectus filed in a jurisdiction of Canada or~~[18] that is exempt from the prospectus requirement under Part 2 of this Rule if all of the following apply

(a) The head office or principal place of business of the person or company is in the United States of America, a designated foreign jurisdiction or Canada;

(b) In the case of a distribution to a purchaser located in the United States of America, the person or company is registered as a broker-dealer with the SEC, is a member in good standing of FINRA and complies with all applicable conduct and other regulatory requirements of U.S. federal and state securities law and FINRA rules in connection with the distribution;

(c) In the case of a distribution to a purchaser located in a designated foreign jurisdiction, the person or company is registered under the securities legislation of the designated foreign jurisdiction in a category of registration that permits it to carry on the activities in that jurisdiction that registration as a dealer would permit it to carry on in Ontario, and complies with all applicable dealer registration requirements and other broker-dealer regulatory requirements of the designated foreign jurisdiction in connection with the distribution;

(d) The person or company does not carry on business as a dealer or underwriter from an office or place of business in Ontario except in accordance with Ontario Securities Commission Rule 32-505 *Conditional*

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[14] **Note**: We suggest deleting the condition in this clause (b)(i). We assume the purpose of this exemption is to provide certainty that a first trade back into Canada is not restricted where the securities initially came to rest offshore (rather than requiring seller to conclude that it is not a "distribution" based on the principle summarized in the companion policy). This is achieved by conditioning the exemption on a minimum four month hold. A Canadian reporting history does not bear on this flow-back risk. Further, Section 2.3(2) independently allows for resale based on a reporting history.

[15] **Note**: This corresponds to the equivalent provision in 2.9(1) of NI 45-102.

[16] **Note**: Consider including something to this effect for clarity because a foreign offering document could otherwise be an "offering memorandum" per the definition in the Act. We understand that Part 5 of Rule 45-501 (including its offering memorandum delivery and disclosure obligations) would not apply to these foreign offering documents in any event (as its application is limited to the prospectus exemptions identified within that Part) and, as a consequence, the rights referred to in section 130.1 of the Act would not apply. However, we think some further clarity on this point would be helpful to avoid potential confusion.

[17] **Note**: We suggest deleting this Part 3 as the exemption serves no clear purpose.

[18] **Note**: As a technical matter, the deleted language does not work as the Canadian prospectus would not qualify the offshore offering (unless it is a 'flow-back' prospectus of the type referred to in the companion policy). The Canadian prospectus would instead qualify a concurrent distribution in Canada. Alternatively, in the case of a "southbound-only" MJDS offering, a registration statement would be filed that includes a prospectus that adheres to Canadian prospectus requirements and register the US offering (from a US securities law perspective); however, this prospectus would not qualify any distribution (from a Canadian securities law perspective).

Exemption from Registration for United States Broker-Dealers and Advisers Servicing U.S. Clients from Ontario or this Rule;

(e) Other than an issuer or selling security holder involved in a distribution that is exempt from Ontario prospectus requirements under this Rule, the person or company does not trade securities to, with, or on behalf of, a person or company in Ontario, except pursuant to an exemption from registration other than the exemption provided by this section 3.1; and

(f) The person or company is not registered in any jurisdiction of Canada in the category of dealer.

PART 4 REPORT OF DISTRIBUTION OUTSIDE CANADA

4.1 Report of Distribution outside Canada – ~~A~~Subject to section 4.2, an issuer that distributes securities in ~~relies~~ reliance on the exemption in section 2.2, 2.3(1) or 2.4(1) must, on or before the tenth day after the distribution date, electronically file a report of trade with respect to that exempt distribution. The electronic filing must be prepared in accordance with the instructions and must include the required information set forth in Form 72-503F *Report of Distributions Outside of Canada*.

4.2 When report not required – An issuer is not required to file the report required by section 4.1 for a distribution that, if made to a person or company in Ontario, would have been exempt from the prospectus requirement in reliance on an exemption (in National Instrument 45-106- *Prospectus Exemptions* or otherwise under Ontario securities laws) for which there is no corresponding obligation upon the issuer (or underwriter, as applicable) to file a report of exempt distribution.

4.3 No filing fees or other deliveries required – Except as provided in section 4.1, there are no filing fees payable to, and no filings or deliveries are required to be made with, the Commission in connection with a distribution in reliance on the exemption in section 2.1, 2.2, 2.3 or 2.4.

PART 5 EXEMPTION

5.1 Exemption – Only the Director may grant an exemption and only an exemption from Part 4 may be granted, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

PART 6 EFFECTIVE DATE

6.1 Effective Date – This Rule comes into force on •.

ANNEX B
PROPOSED COMPANION POLICY 72-503CP
TO OSC RULE 72-503 DISTRIBUTIONS
OUTSIDE OF 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(1) (the **prospectus requirement**) of the *Securities Act* (Ontario) (the **Act**), the provisions of OSC Rule 72-503 *Distributions of Securities Outside of Canada* (the **Rule**) [and section 25 of the Act in limited circumstances].

Statement of Principle

A ~~distribution~~ trade[19] of an issuer's securities by ~~an~~the issuer, an underwriter or a control person, or a first trade of securities by an Ontario investor, to an investor outside of Ontario (an **offshore offering**) may be subject to certain requirements of the Act depending on the connecting factors with Ontario. However, under Ontario securities laws, the term "distribution" is used exclusively to identify trades in securities that are subject to the prospectus requirement, requiring either a prospectus or a prospectus exemption. The Commission takes the view that the purpose of Ontario's prospectus requirement is the protection of investors in Ontario, not foreign investors. ~~a~~An investor outside of ~~Canada~~ Ontario 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~~is not ~~be~~ necessary to fulfill the purposes of the Act.

Accordingly, the Commission does not interpret the term ~~prospectus requirement as applying to a~~ "distribution" to include a trade of securities outside of ~~Canada~~ Ontario~~that is made in compliance with the securities laws of the foreign jurisdiction in which the investor is located~~[20], provided that the issuer (or selling security holder, in the case of a control distribution), underwriters and other participants in th~~at~~e offshore offering take reasonable steps to ensure that the offered securities come to rest outside of Ontario~~Canada~~ and are not redistributed back into Ontario~~Canada~~. The Commission takes the view that only connecting factors with Ontario that bear on this flow back risk are relevant in assessing whether an offshore offering is a "distribution" for purposes of the Act. Accordingly, to come to a view that an offshore offering is not a "distribution", ~~T~~the issuer (or selling security holder, as applicable), underwriters and other participants in the offshore 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 outside of Ontario, as opposed to intermediaries in the distribution chain holding securities for resale to investors in ~~Canada~~Ontario.

The Commission acknowledges that the connecting factors test at common law for determining the extra-territorial application of Ontario securities laws ~~Commission's jurisdiction~~ and the coming to rest ~~notion~~ test for determining whether an offshore offering is a "distribution" subject to Ontario's prospectus requirement ~~is required~~ may not provide sufficient certainty to market participants. The purpose of the Rule is to provide certainty to cross-border transactions by providing explicit exemptions that respond to the challenges that issuers and intermediaries face in determining whether a prospectus must be filed or an exemption from the prospectus requirement must be relied on in connection with an offshore offering which may be a "distribution" in circumstances where the Commission has determined that the protections afforded by the prospectus requirement are not necessary to fulfill the purposes of the Act~~of securities to investors outside of Canada~~. These exemptions are not exclusive. Further, as noted above, an offshore offering may not be a distribution and, as a result, not require an exemption from the prospectus requirement ~~Therefore,~~ While they afford express exemptions from the prospectus requirement, the provision of exemptions in the Rule is not, by itself, determinative of whether other[21] Ontario securities laws would otherwise apply to an offshore offering ~~distribution outside of Canada~~ or to ~~activities~~ any related activities ~~to the distribution~~.

The Integrity of the Ontario Capital Markets and the Jurisdiction of the Commission

Neither the Rule nor this Policy impacts the jurisdiction of the Commission. Where the Commission becomes aware of conduct that may bring the reputation of Ontario's capital markets into disrepute or otherwise impair its mandate, the Commission may assert its jurisdiction and exercise its powers to take appropriate action against issuers, underwriters and other persons,

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[19] **Note**: To avoid confusion, where appropriate, consider replacing the term "distribution" with more generic terms (*e.g.*, "trade" or "offer or sale") as the purpose of this principle is to identify whether or not a particular trade is in fact a "distribution" as defined in the Act.

[20] **Note**: Compliance with the securities laws of a foreign jurisdiction is irrelevant to the analysis of flow back risk that would characterize a trade as a "distribution".

[21] **Note**: Clarification to say that requirements of Ontario securities laws *other* than those specifically excepted by the Rule (*i.e.*, the prospectus requirement) may apply. Absent this clarification, this policy statement undercuts the certainty and transparency these exemptions are intended to provide.

including in connection with ~~distributions of securities to an investor outside of Canada~~an offshore offering. Regardless of whether there is a distribution in Ontario in breach of ~~section 53 of the Act~~the prospectus requirement, the Commission may exercise its discretionary authority to cease trade securities, make orders to prevent conduct contrary to the public interest, and make regulations to foster fair and efficient capital markets and confidence in capital markets.

PART 2 EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

Generally

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 requirements in circumstances where it is uncertain whether the offering would 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 ~~offerings to an investor outside of Canada are made in compliance with the securities laws of the foreign jurisdiction~~. However, in view of the objective of the Rule and the policies underlying the Act, an exemption provided in Part 2 of the Rule is not available with respect to any transaction or series of transactions that, although in technical compliance with the exemption, is part of a plan or scheme to evade the prospectus requirement.

Distribution Under Public Offering Document in Foreign Jurisdictions

An offering that meets the conditions of section 2.1 of the Rule is exempt from the prospectus requirement because the process and consequences of registering or qualifying a public offering in the United States or one of the "designated foreign jurisdictions" are sufficiently substantial to assure the Commission that the offering is a bona fide offshore offering and is not being conducted with the purpose of avoiding Ontario's prospectus requirement. The list of "designated foreign jurisdictions" is not intended to be limited only to those jurisdictions whose disclosure requirements (for a public offering document or continuous disclosure) meet a minimum standard.

Concurrent Distribution ~~under Final Prospectus in Ontario~~

The Commission will view an offshore offering as separate from a concurrent distribution in Ontario in determining whether the offshore offering is a "distribution" for purposes of the Act and, if so, whether any of sections 2.1 to 2.4 of the Rule are available to exempt that distribution from the prospectus requirement. An issuer or selling securityholder ~~distributing~~ trading securities to an investor outside of ~~Canada~~ Ontario 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~~ trade 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~~ that Ontario filed prospectus ~~in Ontario to~~does not qualify the distribution of securities to ~~an~~ investors outside of Canada. However, consistent with market practice, the number or amount of securities referred to in the Ontario filed prospectus may include securities that are concurrently being offered, and may ultimately be sold, to investors outside of Canada. Any such Ontario filed prospectus filed ~~in such circumstances~~ should ~~therefore~~ clearly state ~~whether or~~ that it does not ~~it also~~ qualify~~ies~~ the distribution of any such securities to an investor outside of Canada~~, recognizing that~~. pPurchasers outside of Canada ~~of Ontario prospectus qualified securities may be~~are not entitled to ~~certain~~ the rights and investor protections under Section 71 and Section 130 of the Act, as such rights are afforded only to purchasers of Ontario prospectus qualified securities ~~even if the investor is outside of Canada~~[22].

~~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 of Canada, the securities being distributed outside of Canada will be qualified by the Ontario prospectus. In this case, the issuer or selling securityholder 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.~~[23]

Resale

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[22] **Note**: Foreign investors should not be entitled to Ontario rights of withdrawal, damages or rescission. See our comment letter for further discussion on this point.

[23] **Note**: We have deleted this, and recast the prior paragraph, to be clear that an Ontario filed prospectus does not qualify an offering to investors outside of Canada. Technically, an Ontario prospectus filed in respect of such an offshore offering would be to qualify the flow back of securities into Ontario (a so-called 'flow-back' prospectus) as that would be the "distribution" subject to the prospectus requirement. It would not qualify the offering to foreign investors as that is not itself a "distribution" under Ontario securities laws. While we do not object to the concept of a 'flow-back' prospectus in principle, we do not think accommodation for such a prospectus is necessary in light of the exemptions afforded in this Rule. Notably, to allow an issuer to file a Ontario prospectus to qualify an offshore "distribution", additional exemptions and guidance would be necessary.

Nothing in the Rule prohibits or restricts the resale of the securities distributed under an exemption from the prospectus requirement in section 2.1~~,~~ or 2.2~~, or 2.3~~ of the Rule. ~~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.~~[24] In contrast with section 2.3 or 2.4 of the Rule, and in contrast with private placements to which section 2.5 or 2.6 of National Instrument 45-102- *Resale of Securities* apply, a first trade of securities distributed under an exemption from the prospectus requirement in section 2.1 or 2.2 of the Rule will not be deemed a distribution if it fails to meet certain prescribed conditions. These securities are freely tradeable without condition in all circumstances, except where the trade is a control distribution.

A first trade of ~~S~~securities distributed under an exemption from the prospectus requirement in subsection 2.3(1) or subsection 2.4(1) of the Rule ~~may~~ will be deemed to be a distribution, and therefore ~~be~~ subject to resale restrictions, if it fails to meet the conditions of subsection 2.3(1) or paragraph (a) or (b) of subsection 2.4(2), as applicable.

The Multijurisdictional Disclosure System

Nothing in the Rule is intended to affect the guidance in section 4.3 of Companion Policy 71-101CP To National Instrument 71-101 *The Multijurisdictional Disclosure System*. An issuer relying on an exemption from the prospectus requirement in paragraph 2.1(a) of the Rule may file a Form F-10 in connection with a distribution solely in the United States of America under the multijurisdictional disclosure system adopted by the SEC, select ~~the~~ Ontario as the review jurisdiction, file the registration statement filed with the SEC with the Commission contemporaneously with the filing of the registration statement with the SEC, obtain notification of clearance from the Commission and advise the SEC of the issuance of the notification of clearance.

PART 3 EXEMPTIONS FROM THE REGISTRATION REQUIREMENT[25]

Section 25 of the Act and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) set out the general requirements for registration as well as certain exemptions from these requirements. The Companion Policy to NI 31-103 provides guidance to issuers and intermediaries on how to apply the triggers for registration as well as interpret the exemptions from these requirements.

Part 3 of the Rule provides an exemption from the dealer and underwriter registration requirements in Ontario securities law for certain foreign dealers (including dealers acting as underwriters) with respect to distributions to investors outside of Canada that are made under a prospectus filed in Ontario or made in reliance on the exemptions in Part 2 of the Rule. The exemption may also be relied on by an entity that has its head office in Canada, is not registered as a dealer in Canada but is registered as a dealer in the United States of America or a designated foreign jurisdiction. The exemption includes entities that have their head office in Canada to address the situation of certain foreign broker-dealer affiliates of Canadian firms that have no foreign offices and share space and personnel with the affiliated Canadian dealer.

The Commission reminds market participants that registration in Ontario is generally required (unless an exemption is otherwise available) where registerable activities are provided to investors in Ontario or where registerable activities are otherwise conducted within Ontario, regardless of the location of the investors.

The Commission recognizes that, in the case of a distribution of securities by an Ontario issuer to purchasers outside of Ontario, there may be a question as to whether foreign dealers or underwriters that participate in the distribution are subject to the dealer and underwriter registration requirements of Ontario securities law. The Commission has introduced the exemption in Part 3 of the Rule to provide greater certainty to market participants and to help address the challenges that foreign dealers and underwriters may face in determining whether the dealer and underwriter registration requirement applies to their activities. The provision of these exemptions is not determinative of whether Ontario securities law would otherwise apply to the activities of the foreign dealer or underwriter related to the distribution. Foreign dealers and advisers may also wish to consider the registration exemptions in OSC Rule 32-505 *Conditional Exemption from Registration for United States Broker-Dealers and Advisers Servicing U.S. Clients from Ontario*.

PART 4 THE FORM

Issuers are required to file the information set forth in Form 72-503F *Report of Distributions Outside of Canada* (the **Form**) electronically through the Commission's Electronic Filing Portal. The electronic filing requirement applies to all issuers that are subject to the Form's disclosure requirements. Please see OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario*

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[24] **Note**: This text is deleted as it is inconsistent with the approach of providing certainty (*i.e.*, bright line tests) through these exemptions. Absence of flow back risk is not a condition to these exemptions. If participants have taken reasonable steps to ensure that the securities come to rest abroad, the offshore offering will not be a "distribution" and these exemptions are therefore irrelevant. We have added text in the first paragraph of Part 2 of this proposed companion policy to address any policy concern with respect to a transaction or series of transactions that, although in technical compliance with the exemption, is part of a plan or scheme to evade the prospectus requirement.

[25] **Note**: We suggest the Commission consider deleting this Part 3 as the exemption serves no clear purpose.

Securities Commission for further information.