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September 28, 2016

BY E-MAIL

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318

E-mail: comments@osc.gov.on.ca

Dear Sirs and Mesdames:

OSC Notice and Request for Comment –
Proposed OSC Rule 72-503 – Distributions Outside of Canada and CP 72-503CP to OSC Rule 72-503 Distributions Outside of Canada

The Ontario Securities Commission (the "**Commission**") has taken an important and much needed step forward by proposing OSC Rule 72-503 *Distributions Outside of Canada* and its Companion Policy 72-503CP (together, the "**Proposed Rule**").

Interpretation Note 1 (the "**Interpretation Note**"), published in 1983 in connection with the repeal of OSC Policy 1.5, has long outlived its useful life. While we believe the principles underlying the Interpretation Note remain as valid today as they were thirty-three years ago, changes in market practices have called into question whether, and to what extent, the Interpretation Note accurately reflects the current views of Commission Staff, and to what extent the interpretative guidance it expresses may continue to be relied upon by market participants.

We believe that the Proposed Rule will introduce a welcome era of certainty for Ontario issuers and shareholders engaging in distributions of securities outside Canada.

We offer the following comments for your consideration.

1. Statement of Principle in Part 1 of 72-503CP

We understand that the three paragraphs appearing under the heading "Statement of Principle" are intended to carry forward the principles and policies expressed in the Interpretation Note, and to clarify that the explicit exemptions contained in the Proposed Rule are, in effect, non-exclusive "safe harbours". The Commission has no doubt quite

rightly recognized that it could be extremely disruptive to existing Ontario market practice to move, in one step, from a principles-based regime such as the Interpretation Note to an exclusively rules-based regime.

In order to ensure that there is no unintended disruption of current Ontario market practice as a result of the adoption of the Proposed Rule, we would suggest adding a statement to the following effect as a new fourth paragraph under that heading:

> *Distributions outside Canada which would have been in accordance with the principles articulated in Interpretation Note 1 (March 25, 1983) 6 OSCB 226 (the "Interpretation Note") will also be in accordance with this Statement of Principle. The explicit exemptions introduced in the Rule are not intended to require market participants to ensure specific compliance with one of them, but rather only to provide an alternative means of compliance for those market participants seeking greater certainty than could be achieved through reliance on the Interpretation Note or this Statement of Principle.*

2. Paragraph Under the Heading "Resale" in Part 2 of 72-503CP

In discussing the resale regime applicable to securities distributed under the prospectus exemptions in section 2.1, 2.2 or 2.3 of the Rule, the Companion Policy states:

> *Nevertheless, the Commission expects the issuer, underwriters and other market 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. [emphasis added]*

This Companion Policy guidance appears to be at odds with stated rationale for the adoption of the Rule, as it requires all market participants seeking to rely on section 2.1, 2.2 or 2.3 of the Rule to conduct the same analysis of the same nebulous concepts that were criticized as problematic in the Interpretation Note. What are the "reasonable steps" that must be taken? What does it mean for securities to "come to rest"? How can one be sure there is no "indirect distribution" in Ontario? These are the very uncertainties which reliance on the new specific exemptions should avoid having to be addressed.

The Commission may be concerned that unscrupulous market participants will seek to avoid the application of Ontario prospectus requirements, or the need to comply with the conditions of specific prospectus exemptions, by deliberately structuring "indirect" or "backdoor" distributions into Ontario. We propose that a more appropriate statement for inclusion in the Companion Policy might be as follows:

Nevertheless, the Commission expects the issuer, underwriters and other market participants in the offering will not use these exemptions as a means to intentionally circumvent the application of Ontario prospectus requirements through indirect distributions into Ontario. These exemptions are intended only for distributions being made in good faith outside Canada, and not as part of a plan or scheme to conduct an indirect distribution to persons in Ontario.

3. Other Distributions – Section 2.4

We believe that the exemption afforded by Section 2.4(2)(a) has the potential to resolve the significant frustration faced by Canadian institutional investors seeking to resell securities acquired in foreign issuer private placement offerings into Canada, but for which it is not clear (due to lack of information, or otherwise) that the conditions of the exemption afforded by Section 2.14 of National Instrument 45-102 ("**NI 45-102**") are satisfied. While some institutional investors were satisfied that the Interpretation Note would permit such resales even in the absence of the availability of the Section 2.14 resale exemption, others were not.

Section 2.4(2)(a) of the Proposed Rule is therefore a welcome solution to that difficulty, as well as its other intended purposes.

We note, however, that when sales are made through an exchange or market outside Canada, it is not typically possible for the seller to confirm that the trade is being made to a person or company outside Canada, as the counterparty to the trade is usually unknown. Section 2.14 of NI 45-102 anticipates and resolves this difficulty by exempting trades made either "through an exchange, or a market, outside of Canada" or "to a person or company outside of Canada". We recommend adoption of the same approach in Section 2.4(2)(a) of the Proposed Rule.

4. Dealer and Underwriter Exemption – Part 3

We appreciate the Commission's desire to provide certainty through Part 3 of the Proposed Rule regarding certain circumstances where registration as a dealer or underwriter in Ontario is not required in connection with a distribution of securities outside Canada.

However, we are concerned that the specific exemption provided in Section 3.1 of the Proposed Rule may actually introduce more uncertainty than it resolves.

We believe it is fairly clear to market participants that the "business trigger" requiring registration as a dealer in Ontario pursuant to Section 25(1) of the *Securities Act* (Ontario) (the "**Act**") should not apply to a foreign dealer distributing securities of an

Ontario issuer outside Canada, as the "business of trading in securities" will be taking place where the trading takes place, which will be outside Canada. Alternatively, an international dealer would be able to rely on the exemption afforded by Section 8.18(2)(a) of National Instrument 31-103 ("**NI 31-103**"), which exempts activities other than a sale of a security, that are reasonably necessary to facilitate a distribution of securities offered primarily in a foreign jurisdiction.

Further, we believe that registration as an underwriter under Section 25(2) of the Act would not be required in these circumstances. That section requires registration to "act as an underwriter". As defined in the Act, an underwriter means a person who, as principal, agrees to purchase securities *with a view to distribution* or who, as agent, offers for sale or sells securities in connection with a *distribution*. To suggest that an underwriter "acts" as an underwriter in Ontario in connection with a distribution taking place outside Ontario runs contrary to decades of established market practice. Further, if need to rely on an exemption from underwriter registration indeed exists, Section 8.3 of NI 31-103 would afford that exemption to international dealers through its expansion of the scope of the dealer registration exemption in Section 8.18(2)(a) of NI 31-103.

For all of these reasons, we urge the Commission to consider removing Part 3 from the Proposed Rule, as it does not appear to provide any relief that is actually necessary in the circumstances contemplated. Rather, it creates mischief by calling into question the existing framework of registration requirements and exemptions under the Act and NI 31-103, suggesting that registration as a dealer or underwriter may be required in circumstances where market participants do not currently understand such registration requirements to apply, and where the specific relief afforded by Section 3.1 may not be available.

5. Report of Distribution Outside Canada – Part 4

The purpose and expected benefits of the new Form 72-503F *Report of Distributions Outside of Canada* are unclear. We are concerned that the introduction of this requirement will undermine the objectives of the Proposed Rule and the desire to achieve modernization of the former Interpretation Note regime.

Many, if not most, capital raising transactions by Ontario issuers involve sales of securities into the United States or other jurisdictions, whether the concurrent offering in Ontario is conducted as a prospectus offering or private placement. Ontario issuers engaging in "bought deals" will now be required to file Form 72-503F to report having made sales to qualified institutional buyers in the United States, or other exempt foreign sales, even though they have already filed a prospectus qualifying a concurrent distribution in Ontario. Issuers conducting delayed or continuous distributions into the United States or other jurisdictions (such as, for example, an "at-the-market" program)

could be required to file reports on an ongoing basis. Major Ontario institutional investors making resales of "hold period" securities outside Canada will have to file Form 72-503F every time they make a sale, which could entail a continuous stream of daily reporting to reflect their ongoing trading activity.

As a practical matter, we are also concerned that enforcement of the filing obligation will be difficult, if not impossible. An issuer or selling securityholder who does not wish to file Form 72-503F, or overlooks making the filing, could always elect to claim reliance on the general Statement of Principle in Part 1 of 72-503CP, obviating the need for the filing.

We strongly urge the Commission to reconsider the purpose and utility of Form 72-503F, bearing in mind the need to balance whatever benefits it may afford, in terms of investor protection and market integrity, against the compliance burdens it imposes.

In the event that the Commission sees fit to retain the requirement to file Form 72-503F in some or all of the circumstances contemplated by the Proposed Rule, we urge the Commission to reconsider the certification requirements in Section 5 of the form. While the desire to ensure the integrity of information provided to the Commission is understandable, certification requirements imposed in other contexts have recently proven to be quite problematic for market participants. Is it in fact necessary for a director or officer of a multinational corporation headquartered in Ontario, or a director or officer of a major Ontario pension fund reselling securities subject to a hold period, to provide a personal certification of the information in Form 72-503F? It is not clear why these individuals should be required to devote their personal time and attention to this filing requirement, and be prohibited from delegating this responsibility to an "agent or other individual preparing the report on behalf of the issuer" with greater knowledge of the facts and fewer other responsibilities.

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We hope that our comments will be of assistance to the Commission in advancing the objectives of the Proposed Rule. Should you wish to discuss any of these comments with us, please contact Rob Lando at (212) 991-2504 (rlando@osler.com).

Yours very truly,

Osler, Hoskin & Harcourt LLP

RCL: