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BY E-MAIL September 28, 2016

The Secretary
Ontario Securities Commission
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Fax: 416-593-2318
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Comments on Proposed OSC Rule 72-503 *Distributions Outside of Canada* and Companion Policy 72-503CP to OSC Rule 72-503 *Distributions Outside of Canada*

We submit the following comments in response to the OSC Notice and Request for Comment (the "**Request for Comment**") published by the Ontario Securities Commission (the "**OSC**") on June 30, 2016 with respect to proposed OSC Rule 72-503 *Distributions Outside of Canada* (the "**Proposed Rule**"), Companion Policy 72-503CP to OSC Rule 72-503 *Distributions Outside of Canada* (the "**Proposed CP**") and proposed Form 72-503F *Report of Distributions Outside of Canada* (the "**Proposed Form**", and together with the Proposed Rule and the Proposed CP, the "**Proposal**").

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

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

1. **General Comments**

a. Necessity of a New Rule

As we understand it, the intent behind the Proposal is not to amend or reinterpret the law in Ontario, as reflected in Interpretation Note 1 *Distributions of Securities Outside Ontario* (March 25, 1983) ("**Interpretation Note 1**"), which requires a fact specific analysis to determine whether activity in or from Ontario that takes

place outside Ontario is a "distribution" for the purposes of Ontario securities laws. Rather, we understand that the intent is to provide express exemptions from the prospectus requirement to the extent it is determined under such law that the activity in question is a distribution for the purposes of Ontario securities laws.

To that extent, if the intent is to provide express exemptions from the prospectus requirement, we respectfully submit that this should be made clearer in the Proposal by stating that the intent or impact of the Proposal is not to change or reinterpret the law in Ontario. Otherwise, as a general comment, we respectfully question the necessity of the Proposal. While the Request for Comment remarks that the OSC has encountered issuers and intermediaries who have experienced challenges in implementing Interpretation Note 1, we submit that this has not generally been our experience and note that, other than stating the conclusion, no examples of problems have been cited in the Proposal. We further note that a similar statement regarding the difficulty of administering Interpretation Note 1 due to its uncertainty was made 16 years ago in connection with the proposal of Multilateral Instrument 72-101 - *Distributions Outside of the Local Jurisdiction* and that such problems did not prove sufficiently pressing to be addressed in the intervening 16 years. However, notwithstanding the foregoing, we submit that the preferred approach is to keep the legal framework as is in Ontario and provide a safe harbour as per the Proposal, as opposed to the approach in British Columbia or as proposed in the draft regulations to the Cooperative Capital Markets Regulatory System published last year.

b. **Public Policy**

We respectfully question the public policy rationale underlying the Proposed Rule and, in particular, the suggestion that the OSC should regulate transactions taking place outside of Canada. To the extent that any such transaction impacts the integrity of capital markets in Ontario, we believe that the OSC's public interest jurisdiction under section 127 of the *Securities Act* (Ontario) gives the OSC adequate authority and should be relied upon to address any malfeasance. We understand that interpretation under recent case law and in staff guidance may confound the difference, however we would like to underscore that there is a difference between broader trading activity and acts in furtherance of a trade which may give rise to public interest concerns, and the narrower activity of distributions requiring compliance with the prospectus requirement.

c. Lack of Bright Line Rule

We welcome the OSC's intention to avoid duplicative application of Ontario securities law requirements where offerings are subject to foreign laws. We also acknowledge that it may be the OSC's intention in the Proposal to provide express prospectus exemptions for distributions outside Canada, rather than to provide a bright line rule as to when a distribution has occurred. However, as a result, we respectfully submit that under the Proposal the uncertainty around when Ontario securities laws apply to activities outside Ontario remains given that the Proposed Rule does not provide a bright line test to determine when a "distribution" has

occurred in Ontario and does not state that all sales of securities to purchasers outside Ontario from issuers in Ontario will be distributions. As such, we believe that, to the extent there were previously issues with the application of Interpretation Note 1, such issues would still exist and it would still remain unclear under the Proposal as to when the exemptions in the Proposed Rule, or another exemption from the prospectus requirement in Ontario, would be required for an Ontario issuer to offer securities to investors outside Canada.

We suggest that the Proposal be revised to include increased interpretive guidance to assist market participants in their understanding of Ontario securities laws and avoid the issues that currently exist under Interpretation Note 1, to the extent there are any. In addition, we request clarification that to the extent a trade outside of Ontario was not considered to be a distribution for which a prospectus or prospectus exemption was required under Interpretation Note 1, the same trade under the Proposed Rule would similarly not require the use of an exemption from the prospectus requirement.

d. Distributions Outside Canada vs. Distributions Outside Ontario

The Proposed Rule is entitled "Distributions Outside of Canada" and the proposed exemptions apply to distributions of securities to persons or companies outside of Canada The Proposed Rule, however, does not address whether the prospectus requirement in Ontario is triggered (or an exemption therefrom required) where the issuer is selling securities to purchasers outside of Ontario but not outside of Canada. For example, if an issuer has a significant connection to Ontario and sells securities only to purchasers in Manitoba, it still remains unclear as to whether the issuer would need to file a prospectus or rely on an exemption from the prospectus requirement in Ontario or if the prospectus requirement only applies in Manitoba. Additionally, if the issuer relied on a prospectus exemption that triggers post-trade reporting, it is unclear whether the issuer would have to file a Form 45-106F1 *Report of Exempt Distribution* in Ontario as well as in Manitoba. Additional clarity would be helpful as to the consequence of having a "distribution" in the jurisdiction also trigger the requirement to file a Form 45-106F1.

2. **The Proposed Rule**

a. **Designated Foreign Jurisdiction**

In the first instance, we respectfully question whether it is appropriate to require that securities issued to purchasers outside Canada be qualified by an offering document in a "designated foreign jurisdiction" in order to rely on the exemption in section 2.1 of the Proposed Rule. The concept of a "designated foreign jurisdiction" has a clear underlying policy rationale in National Instrument 72-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers,* and with respect to inbound offerings, where the OSC would want to ensure that Ontario purchasers receive sufficient disclosure regarding the securities they are purchasing. In the context of outbound offerings, however, we do not believe the same policy rationale would apply. Respectfully, we do not believe that it is nor should it be the

role of the OSC to ensure that purchasers outside Canada receive similar disclosure to purchasers inside Ontario. It should be sufficient that the trade is carried out in accordance with the laws of the applicable foreign jurisdiction. Furthermore, we do not believe that the OSC should impose additional requirements on issuers distributing securities into a foreign jurisdiction from Canada as it may create anomalous results. This would be the case, for example, where an Ontario issuer relied on the "accredited investor" prospectus exemption for sales to purchasers in Ontario but section 2.1 of the Proposed Rule for sales to foreign purchasers, with the latter requiring that the issuer file a prospectus or similar document under the laws of the foreign jurisdiction.

In the alternative, should the concept of a "designated foreign jurisdiction" remain in the Proposed Rule, we would suggest that the list of jurisdictions included in the definition of "designated foreign jurisdiction" be expanded. The limited number of jurisdictions named therein risks excluding countries that have the same or substantially similar requirements for prospectuses or similar offering or disclosure documents as those countries that are listed. For example, in the European Economic Area (being all 28 members of the European Union, Norway, Lichtenstein and Iceland) (the "**EEA**"), the requirements for prospectus approval and the contents of prospectuses have been harmonized under Directive 2003/71/EC, as amended. However, only a limited number of those EEA states are considered to be "designated foreign jurisdictions". As well, there is a mutual recognition system in place across the EEA whereby prospectuses that are approved by regulators in any EEA country can be "passported" to any other EEA country for the purpose of making offers of securities in those countries. We respectfully submit that the limited list of European countries is outdated and created without a clear set of criteria, and does not take into account either the harmonization or the mutual recognition with respect to prospectuses in Europe.

We would also note that the proposed list of designated foreign jurisdictions fails to take into account the fact that Luxembourg and the Republic of Ireland have some of the largest stock exchanges in Europe in terms of international bond listings and many Canadian issuers currently have prospectuses and other offering documents approved in Luxembourg and the Republic of Ireland. Canadian issuers are also listed on a number of other stock exchanges globally, including, for example the Tel-Aviv Stock Exchange in Israel. Additionally, we note that, while not applicable in Ontario, other Canadian jurisdictions have adopted broader lists of stock exchanges in connection with exemptions from Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*, which lists include stock exchanges located in China (Shanghai Stock Exchange), Thailand (The Stock Exchange of Thailand), India (National Stock Exchange of India; Bombay Stock Exchange), and Korea (Korea Exchange). Accordingly, we request that additional consideration be given to the definition of "designated foreign jurisdiction" as used in the Proposed Rule.

b. **Part 2 Exemptions from the Prospectus Requirement**

We welcome the exemption for issuers that have been reporting issuers in a jurisdiction of Canada for the four months preceding the distribution included in section 2.3 of the Proposed Rule. However, we note that in order to take advantage of this exemption, as well as the exemptions provided in sections 2.2 and 2.4 of the Proposed Rule, an issuer must have "complied with the securities law requirements of the jurisdiction outside of Canada". While we recognize that an issuer is not required to rely on one of these exemptions, where an issuer wishes to do so, we submit that issuers and intermediaries may find it difficult to confirm such compliance with law and may require additional time-consuming and costly diligence on the part of intermediaries participating in such distributions, including, potentially, the requirement that issuers obtain legal opinions as to their compliance with law. It may also be difficult for issuers to conduct diligence on all dealers/underwriters involved in the distribution in a foreign jurisdiction to confirm compliance with laws in connection with such distribution. As such, we suggest that the requirement that the issuer comply with securities law of the foreign jurisdiction be restated to provide that, to the issuer's actual knowledge at the time of the distribution, reasonable steps have been taken to ensure compliance with foreign securities laws.

c. **Section 2.1 Distribution Under Public Offering Document in Foreign Jurisdictions**

As discussed above, many Canadian issuers currently have prospectuses and other offering documents approved for listing on foreign stock exchanges. We respectfully suggest that an additional option be added to the exemption in section 2.1 of the Proposed Rule, namely that the issuer have filed a document similar to a final prospectus with a stock exchange in a designated foreign jurisdiction for which approval has been obtained in accordance with the rules of the stock exchange in connection with the listing or quotation of the securities on such stock exchange.

In addition, we request that the following language be added to section 2.1(b) of the Proposed Rule to take into account analogous procedures under the laws of foreign jurisdictions: "or permitting the distribution of the securities in the designated foreign jurisdiction."

d. **Section 3.1 Exemption from the Dealer and Underwriter Registration Requirements**

As a general comment, we respectfully question the OSC's jurisdiction and the public policy rationale underlying its assertion of authority over trades effected by dealers located in the United States and other designated foreign jurisdictions which deal exclusively with investors resident outside Canada. Historically, such trading activities have been viewed as being properly regulated by the regulatory authority of the dealer's and client's home jurisdiction (consistent with the basic rationale behind the minimal regulatory requirements applicable to dealers and advisers relying on the international dealer and international adviser exemptions) as

there is no compelling nexus with Ontario or Canadian investor protection concerns associated with such activities.

In addition, we note that the exemption appears to impose new registration requirements on foreign dealers where none previously existed. Notwithstanding that section 3.1 of the Proposed Rule is generally providing an "exemption" from the registration requirement and therefore comfort that the dealers are not running afoul of Ontario securities laws, we submit that the exemption itself implies that the Ontario registration requirements are triggered when a non-Canadian dealer (including a dealer without an office or representatives based in Ontario) exclusively trades with investors resident outside Canada. This further implies that the dealer is therefore required to register or qualify under an exemption and that the OSC implicitly has the jurisdiction to regulate such activities. We specifically note that a person that is exempted from the requirement to be registered is a "market participant" under paragraph (b) of the definition of "market participant" in the Act. In addition to opening the door to foreign regulators who could, under the same rationale, assert regulatory authority over Canadian dealers trading exclusively with clients in Canada, the exemption would require foreign dealers to implement procedures and protocols to determine if Ontario securities laws are implicated in connection with such trades and to establish comfort that the terms of the exemption have been met. This may further deter such dealers from undertaking such activity altogether due to the consequences of being a "market participant" in Ontario. This will superimpose another layer of due diligence onto a distribution, necessitate that agreements be modified to address the exemption and/or registration requirement in Ontario and will ultimately increase transactional costs and dissuade foreign dealers from marketing Canadian securities to clients outside Canada. Furthermore, foreign dealers may not even know to consider the issue of whether registration or an exemption therefrom is required in Canada, which could result in inadvertent non-compliance with Ontario law, and in turn could create regulatory issues in connection with the dealer's compliance with home jurisdiction requirements.

More specifically, we once again note that the list of "designated foreign jurisdictions" enumerated in the Proposed Rule is too narrow and excludes a number of jurisdictions that are commonly involved in distributions of securities by Ontario issuers outside Canada. Furthermore, we note that some foreign jurisdictions do not have dealer registration requirements. As such, we request that the Proposed Rule be amended to reference other analogous requirements in foreign jurisdictions.

e. **Section 4.1 Report of Distribution outside Canada**

Issuers selling securities in reliance on the exemption in section 2.2 of the Proposed Rule would be required to complete and file a report of distribution in Form 72-503F. We do not believe that this post-trade reporting requirement is necessary given that the information required by Form 72-503F would all be included in the prospectus filed in Ontario and, in some cases, the securities being sold could be qualified by the prospectus filed in Ontario as noted in the Proposed

CP, which states that the prospectus filed in connection with a Proposed Rule section 2.2 distribution should 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 *Securities Act* (Ontario) even if the investor is outside of Canada (see our comment below in 3.b.i "*Prospectus Exemption*"). We question the policy rationale for requiring issuers issuing securities under a final prospectus for which a receipt has been issued in Ontario or for a reporting issuer in Ontario to prepare and file a report for any distribution outside Ontario.

While we understand that the OSC may consider a reporting requirement to be an administrative requirement, experience has now shown that any additional burden may have a chilling effect on cross-border capital markets activity and significantly reduce the capital raising options available to Canadian issuers, as we have experienced, for example, with the recently expanded Form 45-106F1 *Report of Exempt Distribution*.

We also respectfully submit that the reporting requirements should not be imposed on distributions outside Ontario made in compliance with securities laws of foreign jurisdictions under section 2.4 of the Proposed Rule. Similar concerns as expressed above apply as this will impose an unnecessary administrative burden on Canadian issuers with no specific public policy rationale. In many cases there would be no reporting requirements in the foreign jurisdiction in which the distribution is being made.

3. **The Proposed CP**

a. ***PART 1 Application and Purpose***

i. ***Statement of Principle***

The Statement of Principle in the Proposed CP states that "[a] distribution of securities by an issuer to an investor outside of Ontario may be subject to the Act depending on the connecting factors with Ontario" [emphasis added]. The Proposed CP goes on to reiterate a similar position to that in Interpretation Note 1, namely that a distribution of securities made outside of Canada would not be subject to the prospectus requirement provided that reasonable steps are taken to ensure that the securities come to rest outside of Canada and are not redistributed back into Canada. The Proposed CP explicitly states that the "provision of exemptions in the [Proposed] Rule is not, by itself, determinative of whether Ontario securities law would otherwise apply to a distribution outside of Canada or to activities related to the distribution." Given this language in the Proposed CP, we do not believe that the Proposal provides any greater certainty for issuers than what is currently provided in Interpretation Note 1. Under the Proposal, issuers will still be required to undertake the preliminary determination as to whether the sale of securities outside of Canada constitutes a "distribution" triggering the prospectus requirement. The Statement of Principle is evidence of a seemingly inconsistent position on the part of

the OSC insofar as it preserves the current connecting factors and coming to rest doctrines and is therefore outright confusing.

While we recognize that the OSC may have intended only to provide express prospectus exemptions for distributions outside Canada, rather than to provide a bright line rule as to when a distribution has occurred, we reiterate that such exemptions would only be necessary if the prospectus requirement is applicable to the trade in question. As such, we request that the OSC provide additional interpretive guidance and clarity in the Proposed CP to assist market participants in determining when a distribution would occur. Acknowledging that the OSC cannot change Ontario securities law through the Proposal, to the extent that the intent of the Proposal is to provide express prospectus exemptions only, it would be helpful to have more clarity as to the interpretation of the law and factors that would reflect whether there is or is not a distribution so that market participants could determine whether a safe harbour is required and avoid any unnecessary reliance on the exemptions in the Proposed Rule. We further underscore that where market participants may have a level of comfort with respect to certain activities under Interpretation Note 1, the implementation of the Proposal may cause some to call into question previously settled issues and therefore should be used as an occasion to provide greater clarity. The statement in the Proposal that "…Interpretation Note 1 is out of date and no longer accurately represents the [OSC's] staff practice" further exacerbates this issue and underscores the need for OSC Staff to clarify their current practice.

b. ***PART 2 Exemptions from the Prospectus Requirement***

i. ***Prospectus Exemption***

Interpretation Note 1 confirms that the OSC has historically taken the view that a distribution of securities *in* Ontario is subject to the Act and a distribution *outside* Ontario is not a "distribution" for purposes of the Act except that, depending on the connecting factors with Ontario, a distribution of securities *outside* Ontario by Ontario or non-Ontario issuers might also be considered a distribution of securities *in* Ontario requiring compliance with the prospectus requirements of the Act or an exemption therefrom.

A distinction seems to have been drawn between distributions *in* Ontario, requiring a prospectus or prospectus exemption, and *outside* Ontario, where a prospectus was not required under the Act nor was an exemption from the prospectus requirement necessary except where such distribution was also considered to be a distribution *in* Ontario because of connecting factors. This distinction is also reflected in the Statement of Principle in the Proposed CP.

The Proposed Rule provides prospectus exemptions that would apply to distributions *outside* Ontario only, which suggests a broader interpretation of "distribution". We therefore respectfully request that the OSC confirm in the Proposed CP that it does not consider the prospectus exemptions in the Proposed Rule to be the only exemptions that may be applicable to distributions outside

Ontario and that the exemptions in Part XVII of the Act and National Instrument 45-106 *Prospectus Exemptions* apply to distributions *in* Ontario and *outside* Ontario.

ii. ***Concurrent Distribution under Final Prospectus in Ontario***

The Proposed CP states that issuers relying on section 2.2 of the Proposed Rule (i.e., where an issuer files a prospectus to qualify a concurrent distribution to a person or company in Ontario) may choose to file a prospectus in Ontario to qualify the distribution of securities to a foreign purchaser and if so must clearly state in the prospectus whether or not the prospectus also qualifies the distribution of securities to an investor outside of Canada. The Proposed CP in this instance suggests that the Ontario prospectus could, or could not, qualify the securities issued to investors outside of Canada. However, the Proposed CP further states that 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 such a case, the issuer would not need to rely on an exemption from the prospectus requirement because a prospectus in Ontario is qualifying the distribution.

We respectfully submit that if an issuer files a prospectus in Ontario and concurrently undertakes a sale of securities in a foreign jurisdiction, the prospectus should only qualify the distribution in Ontario and not those sold to foreign purchasers. The prospectus should be considered a prospectus for the purpose of Ontario securities laws only and should be considered an exempt offering document or equivalent in foreign jurisdictions as Ontario issuers, underwriters and other parties signing prospectus certificates should not be required to extend the protections of Ontario securities law to foreign purchasers. We further submit that the prospectus can qualify the distribution in Ontario so as to address any flow-back concerns without the necessary corollary that the issuer and underwriters would be liable to investors outside Ontario under the prospectus. It is our understanding that foreign purchasers are generally provided with the protections under the securities laws of their own jurisdiction and the exemptions provided in the Proposed Rule require that issuers comply with the securities laws of the applicable foreign jurisdiction.

In addition, we question whether the use of an Ontario prospectus to qualify securities in a foreign jurisdiction would trigger the requirement that a dealer in such foreign jurisdiction sign a certificate of underwriter pursuant to section 59(1) of the Act, further suggesting that foreign dealers would be required to be registered as a dealer in accordance with Ontario securities laws or rely on an exemption therefrom (see comment 2.d above). Finally, we suggest that further consideration be given to how the Proposal would impact the current Multijurisdictional Disclosure System regime.

iii. ***Resale***

The resale relief provided in the Proposed Rule is a welcome proposal and is bolstered by language in the Proposed CP which states that "[n]othing in the [Proposed] Rule prohibits or restricts the resale of the securities distributed under an exemption from the prospectus requirement in section 2.1, 2.2, or 2.3 of the [Proposed] Rule." However, we are concerned with the additional language in the Proposed CP that states that "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." While the Proposed Rule suggests that securities issued thereunder would generally be freely tradeable, the Proposed CP calls this into question relying on language similar to that which was previously included in Interpretation Note 1 without providing any further clarity as to how issuers and underwriters can ensure that securities come to rest outside of Canada. In fact, the Proposed CP does not include any examples of the types of restrictions and precautions that might be advisable or other guidance to ensure that securities are held by or for the benefit of non-residents as were previously provided by Interpretation Note 1. As the stated goal of the Proposal is to "provide certainty to participants in cross-border transactions", we respectfully request that the guidance previously provided in Interpretation Note 1 be restated and enhanced in the Proposed CP if Interpretation Note 1 is to be withdrawn, or in the alternative, that additional guidance as to the steps an issuer may take to ensure that securities come to rest outside Canada be provided.

We also question whether the resale relief provided in the Proposed Rule creates an anomalous result when considered in conjunction with section 2.14 of National Instrument 45-102 *Resale of Securities*. Pursuant to section 2.14, securities of foreign issuers with significant markets in Canada (i.e., more than 10% held in Canada) issued to Canadian investors on a private placement basis will not be freely tradeable both in and out of Canada; whereas, under the Proposed Rule, securities of Canadian issuers with the majority of their market in Canada sold to foreign purchasers are freely tradeable. Read together, the two rules favour securities of Canadian issuers sold outside Canada over those of foreign issuers sold in Canada and may serve to limit investment opportunities for Canadian investors.

4. **The Proposed Form**

a. **Certification**

While the Proposed Form must be certified by the issuer and not an underwriter, we respectfully request that the certificate include language to the effect that the individual signing the certificate is doing so in his or her official capacity and without personal liability. Based on our experience with the new Form 45-106F1 *Report of Exempt Distribution* adopted earlier this year, certain U.S. dealers have refused to act as dealer on reportable distributions into Canada given that the director/officer certification in the Form 45-106F1 does not contain an express statement that the certification is in the signatory's official capacity and without

personal liability. We also take this opportunity to urge the CSA to amend Form 45-106F1 to rectify this omission.

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Thank you for the opportunity to comment on the Proposal. As stated above, we appreciate the OSC's focus on this complex issue and believe that the express prospectus exemptions provided in the Proposal are preferable to the approach currently taken in other jurisdictions.

Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

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on my own behalf and on behalf of,

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