TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

September 28, 2016

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

Dear Sirs/Mesdames:

Re: Proposed OSC Rule 72-503 Distributions Outside of Canada

We are writing in response to the invitation of the Ontario Securities Commission (**OSC**) to comment on the proposed OSC Rule 72-503 – *Distributions Outside of Canada* (the **Proposed Rule**) and related Companion Policy 72-503CP (the **Proposed CP**) published on June 30, 2016. These comments are provided by the partners and counsel of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We support the adoption of the Proposed Rule and the withdrawal of "Interpretation Note 1 Distributions of Securities Outside Ontario" (the **Interpretation Note**). In our view, the Proposed Rule will provide much greater certainty for market participants and represents a practical regulatory framework which will facilitate Ontario based issuers conducting legitimate capital raising activities outside of Canada. We believe the "non-exclusive" prospectus exemptions provided by the Proposed Rule is a preferred approach to the "catch and release" model of regulating offshore distributions that has been adopted by other jurisdictions in Canada. The Proposed Rule recognizes that investors in foreign jurisdictions are best protected by their local laws and local securities regulatory authorities and that imposing additional compliance burdens and costs on Ontario market participants conducting such offerings does little to advance the OSC's goals of investor protection and capital markets efficiency.

The Proposed Rule is also much more consistent with the current practice of market participants in Ontario based on the Interpretation Note and is to be preferred to the draft regulation 71-501 and draft policy 71-601 (the **draft CCMRS regulation**) published under the proposed Cooperative Capital Markets Regulatory System (**CCMRS**). As noted in the comment letter submitted by certain partners of Torys LLP in response to the draft Capital Markets Act and draft initial regulations, the draft CCMRS regulation is not reflective of current market practices and includes exemptions or "solutions" that will either not be practical or will impose unnecessary compliance burdens and costs on market participants, including where investors in foreign jurisdictions have purchased Canadian securities in a bona fide offshore offering in accordance with the requirements of applicable local laws. For example, imposing Canadian legend requirements and exempt distribution report filing obligations where each purchaser is to be individually identified could have significant implications on the ability for Canadian issuers to efficiently access foreign markets, and appear duplicative or unnecessary where the distribution is to purchasers located in a jurisdiction with a comparable regulatory scheme. The Proposed Rule represents a much more practical approach to these issues and we suggest that

the Proposed Rule form the basis of any regulation addressing foreign distributions under the CCMRS.

While we fully support the adoption of the Proposed Rule, we do have some specific comments with respect to certain aspects of the Proposed Rule and Proposed CP:

1. The OSC's Request for Comments on the Proposed Rule notes that the "purpose of the Commission's proposals and the exemptions provided is to remove uncertainty regarding the extent of the application of the prospectus and registration requirements in certain cross-border transactions". While the Proposed Rule accomplishes this on its face, the Proposed CP includes the following commentary which appears to re-introduce uncertainty for market participants:

> Nothing in the 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 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.* (emphasis added)[1]

The above commentary suggests that compliance with the conditions of the exemptions in the Proposed Rule and the resale restrictions contained therein may not be sufficient in all cases. By including such commentary, we submit that the OSC has eliminated much of the certainty it hoped to achieve by the Proposed Rule and has put market participants and their advisors back in the same quandary they faced when trying to apply the Interpretation Note. As noted in the OSC's Request for Comment on the Proposed Rule, "staff regularly encounter the various challenges that issuers and intermediaries face in determining whether sufficient steps have been taken to reasonably conclude that securities have 'come to rest' outside Canada and will not 'flow back' into Canada." We submit that the commentary cited above from the Proposed CP, and other statements like it that suggest a need to take steps over and above those contemplated within the Proposed Rule itself, should be removed from the Proposed CP. If the statement was included to address possible abuses of the exemptions in the Proposed Rules or attempts by market participants to conduct "backdoor" offerings into Ontario, we submit that the OSC's ability to take action in those cases is already addressed under the heading "The Integrity of the Ontario Capital Markets and the Jurisdiction of the Commission".

2. We suggest that an additional option for the first trade in securities distributed under the exemption in section 2.4(1) of the Proposed Rule be a trade made through an exchange, or market, outside of Canada. For securities that trade on an exchange or market outside Canada, that is the most likely means by which a foreign investor will trade the securities. It is likely not feasible in those circumstances for the foreign investor to conclude with certainty that the trade has in fact been made to a person or company outside of Canada. Such an alternative means of conducting a first trade is consistent with subsection 2.14(c) of National Instrument 45-102 – *Resale of Securities* (**NI 45-**

[1] A similar comment also appears in the second paragraph under the heading "Statement of Principle" in the Proposed CP, although it is unclear whether the statement in that instance is merely meant to indicate the principle the OSC applied in developing the resale restrictions and conditions contemplated by the Proposed Rule.

102), which permits trades either through an exchange or market or to a person or company outside Canada.

3. We note that the Proposed Rule does not address the issues faced by institutional investors attempting to dispose of foreign securities pursuant to section 2.14 of NI 45-102 due to the 10% Canadian ownership threshold. The exemption in section 2.4 of the Proposed Rule would not permit such investors to sell foreign securities through a foreign exchange due to the need to impose the resale restrictions contemplated by subsection 2.4(2). We suggest that the Canadian Securities Administrators re-examine the first trade exemption in section 2.14 of NI 45-102 to more easily facilitate trades by Canadian investors in foreign securities. While investors may be able to conclude that a particular sale of securities in a foreign jurisdiction is not a distribution to which Ontario securities laws apply, an additional exemption in the Proposed Rule to facilitate such trades would be beneficial to provide more certainty to such investors. Such an exemption could allow trades in securities of an issuer incorporated or organized under the laws of a foreign jurisdiction to a person or company outside of Canada or through a foreign exchange, provided that the issuer is not a reporting issuer in any jurisdiction of Canada. Where an issuer is incorporated or organized outside of Canada and is not a reporting issuer in Canada, it is unlikely that a significant Canadian market would exist for such securities and the risk of flowback should be low. The 10% Canadian ownership restriction in section 2.14 of NI 45-102 does not necessarily imply a level of broad Canadian interest in the issuer or demand for its securities, but is often exceeded merely because of the holdings of the very institutional investor seeking to dispose of its stake. In addition, the precise geographic ownership breakdown of an issuer's securities is very difficult to determine by the issuer itself, let alone an investor seeking to dispose of securities.

4. Section 3.1 of the Proposed Rule provides an exemption from the Ontario dealer and underwriter registration requirements for foreign dealers and foreign underwriters acting in connection with a distribution of securities outside of Canada by an Ontario issuer under one of the four new exemptions in Part 2 of the Proposed Rule. Notably, these exemptions require that the foreign dealer or foreign underwriter be registered as a dealer (for distributions to investors located in the U.S.), or in a category similar to a dealer (for distributions to investors located in a designated foreign jurisdiction); these exemptions are not available to a foreign dealer or foreign underwriter in circumstances where the foreign dealer or foreign underwriter is not registered in its home jurisdiction (because, for example, it has the benefit of a registration exemption, or is otherwise permitted to engage in the trading or underwriting activity without being registered). From a public policy perspective, it is difficult to meaningfully distinguish between foreign registered status vs. foreign non-registered status for the purposes of these exemptions since in both cases, the securities laws of the country where the foreign investor is located are being complied with. Presumably, the foreign securities regulator saw fit to exempt, or otherwise permit, the foreign dealer or the foreign underwriter to engage in the trading or underwriting activity without registration because foreign investors would still be appropriately protected. Accordingly, we would ask you to consider whether this language should be broadened so that this concept of operating under a registration exemption, or other permission, is sufficient to allow the foreign dealer or the foreign underwriter to rely on the section 3.1 exemption. For example, consider adding the words "…the person or company is registered, *exempt from registration, or otherwise permitted,* under the securities legislation…" to subsections 3.1(b) and 3.1(c).

5. The registration exemption in section 3.1 of the Proposed Rule is also unavailable for dealers or underwriters in jurisdictions other than the United States and designated foreign jurisdictions. This means that dealers or underwriters acting for an issuer in connection with a distribution made under the prospectus exemptions in sections 2.2, 2.3 and 2.4 would not have the benefit of the registration exemption unless the offering is conducted in the United States or a designated foreign jurisdiction. Although such a dealer or underwriter may conclude that Ontario securities laws are not applicable to their activities in connection with such an offering, we submit that providing certainty in those situations would be beneficial and would be consistent with the approach taken to deference to foreign securities laws in the rest of the Proposed Rule. For example, section 3.1 could be read to suggest that an issuer proposing to rely on the exemption in section 2.3 for an offering of securities in a jurisdiction other than the United States or a designated foreign jurisdiction will be forced to engage a dealer or underwriter registered in Ontario, although that dealer or underwriter may not be registered in the foreign jurisdiction to carry out the activities necessary to conduct the offering. This could severely limit, or eliminate altogether, an issuer's choice of dealer or underwriter in the foreign jurisdiction. Accordingly, we suggest that paragraph (a) of section 3.1 be deleted and paragraph (c) amended to simply refer to the registration requirements of the foreign jurisdiction, rather than limiting it to designated foreign jurisdictions.

Thank you for the opportunity to comment on the Proposed Rule and Proposed CP. We believe that with the changes suggested above it will bring greater certainty and efficiency to market participants engaged in foreign securities offerings.

Yours truly,

Thomas Yeo

John Emanoilidis

Glen Johnson

Leslie McCallum

Rima Ramchandani

Christine Vogelesang