Osler, Hoskin & Harcourt LLP
620 8th Avenue – 36th Floor
New York, N.Y. 10018
212.867.5800 MAIN
212.867.5802 FACSIMILE

OSLER

New York
Toronto
Montréal
Calgary
Ottawa
Vancouver

September 27, 2017

Rob Lando
Direct Dial: (212) 991-2504
RLando@osler.com

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

c/o Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

– and –

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8
e-mail: comments@osc.gov.on.ca

Dear Sirs and Mesdames:

CSA Notice and Request for Comments dated June 29, 2017 –
Proposed Amendments to National Instrument 45-102 *Resale of Securities*

This letter is in response to the Notice and Request for Comments published by the Canadian Securities Administrators (the "CSA") regarding proposed amendments to National Instrument 45-102 *Resale of Securities* ("NI 45-102") on June 29, 2017 (the

"Request for Comments") and, specifically, proposed changes to the prospectus exemption in Section 2.14 of NI 45-102 (the "Proposed Amendments").

Summary of Our Comments

We wish to thank the CSA for its initiative in proposing changes to the existing Section 2.14 exemption. We very strongly agree that the existing exemption has created uncertainty, complexity and cost for Canadian investors in foreign issuers, including institutional investors seeking to participate in global securities offerings on a private placement basis with the expectation of ultimately utilizing an exchange or market outside Canada for liquidity when making resales in the future.

In our view, the Proposed Amendments are a much welcome development that will help Canadian institutional investors achieve diversification of their investment portfolios through investments in foreign securities, with greater certainty regarding the future liquidity of those investments.

We do, however, have significant concerns regarding the proposed definition of "foreign issuer", and would like to propose alternatives for consideration by the CSA, as discussed further below.

Response to Specific Questions

The CSA has invited comments on specific questions regarding the Proposed Amendments. For ease of reference, each of those questions is repeated prior to the comments we are providing in response.

1. We have proposed a definition of "foreign issuer" for the purposes of the proposed exemption.

(a) Are the proposed elements of the definition of foreign issuer appropriate for purposes of establishing that an issuer has a minimal connection to Canada? If not, please explain which elements of the proposed definition of foreign issuer are not appropriate and why.

We urge the CSA to consider allowing any entity incorporated or organized outside Canada to qualify as a "foreign issuer", without any disqualifications based on the location of head office, the place of residence of executive officers or directors, or the location of assets.

From the perspective of Canadian investors, we believe it is crucially important that the test of "foreign issuer" for this purpose should be one that can be determined easily by the investor, based on publicly available information. Otherwise, the stated goal of the Proposed Amendments of eliminating uncertainty and complexity will not be achieved.

The jurisdiction of the issuer's incorporation can almost invariably be easily determined by reference to the offering document being used to sell the securities, or the continuous disclosure or similar documents filed by the issuer under the securities laws of its home country, or the requirements of the foreign stock exchange or market on which its securities trade.

However, information regarding the location of the head office may be less easy to obtain, and issuers in certain jurisdictions may not be required to identify a specific "head office", as distinguished from a registered office or their place (or places) of business.

More significantly, determining the place of residence of the issuer's executive officers or directors may be a virtually impossible task for a Canadian investor. A foreign issuer may not be required to disclose this type of information, and in fact may be prohibited from making disclosure of this type of information under its home country privacy or other laws. Not all foreign corporations have a "board of directors" similar to that of North American corporations, calling into question which individuals would be relevant for this test. For non-corporate foreign issuers, the difficulty in determining the relevant individuals is further magnified. Further, we expect that it would be difficult if not impossible for a Canadian investor to determine which individuals of a foreign corporation, or other entity, would fit the definition of "executive officer" set out in the Proposed Amendments, especially with respect to the determination of which individuals perform a policy-making function. Even assuming that the relevant individuals can be determined for the purposes of applying the majority residence test, it is unlikely that a Canadian investor would have any way of determining where all of those people live, unless by chance the issuer is required to make public disclosure of the country of residence of the very same group of people under its home country's rules.

Finally, we believe that in many cases it is not possible to determine from any issuer's offering documents or ongoing disclosure documents where a majority of the issuer's assets are located. While it is true that, in some cases, there will only be a small number of assets and their location may be easily identified, an issuer with assets around the world (including, potentially, in Canada) is not normally required to provide in its disclosure a geographic breakdown of where its assets are located. Further, the test in the Proposed Amendments is based on consolidated assets, which presumably is intended to mean all of the assets held by the issuer and its subsidiaries on a consolidated basis. We expect that identifying the location of the assets held by an issuer's subsidiaries for the purposes of this test would be even more difficult.

We recognize that the head office, residence of directors and executive officers and location of assets tests for establishing connections to Canada are used in a number of other contexts, including National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* ("NI 71-102"), National Instrument 71-102 *The*

Multijurisdictional Disclosure System ("Northbound MJDS") and the test of "foreign private issuer" status used in U.S. Securities and Exchange Commission ("SEC") rules. The head office and residence of executive officers and directors test is also used in the definition of "eligible foreign security" in the "wrapper relief" exemptions for foreign issuer private placements into Canada that were adopted by the CSA in 2015. However, in all of those other contexts, the assessment of whether or not an issuer meets those tests is a matter that must be determined by the issuer itself, in order to assess whether or not some benefit is available to it. None of these other contexts call for an investor (and often a relatively small investor) to make these determinations independently of the issuer.

Finally, we note that under the Proposed Amendments the assessment of "foreign issuer" status is to be made on the distribution date (i.e., the date a Canadian investor purchases the securities), rather than at the time of resale by the Canadian investor. This approach has significant advantages, including fixing a specific time to apply the tests, and avoiding the risk that securities may become ineligible for resale in the future if the facts and circumstances change while the Canadian investor continues to hold the securities. However, there are also disadvantages to this approach that must be considered. Even if it were possible to obtain the required information to assess "foreign issuer" status on the distribution date, the Proposed Amendments effectively impose a record-keeping obligation on institutional investors, who would have to establish and maintain systems for keeping documentation regarding "foreign issuer" eligibility for each foreign issuer they invest in, and for each "distribution date" on which they invest. Alternatively, a Canadian investor may fall into a trap for the unwary, as it may not be thinking ahead to the requirements for a future resale, or may not yet have received legal advice about resale requirements. As a result, it is possible that the Canadian investor will not seek to obtain information to support a "foreign issuer" determination until the time it wishes to make a resale. Attempting to obtain this information on a historical basis, retroactive to and perhaps years after the distribution date, would be virtually impossible. We also note with concern that existing Canadian investors in foreign securities would be required, under the Proposed Amendments, to seek out information confirming the issuer's status as a "foreign issuer" dating back to the time of their original investment.

Unfairly, those existing Canadian investors who went to the time and effort of establishing compliance with the current "10% tests" when they purchased the securities they currently hold would not be able to derive any benefit from that information, if Section 2.14 were to be entirely repealed, as proposed – in effect, they will have fallen into a trap for the wary. This potential unfairness could be remedied by maintaining Section 2.14 in effect in its current form, but limiting its application to distribution dates occurring prior to the effective date of new Section 2.14.1.

(b) Are there other elements we should incorporate into the proposed definition of foreign issuer that would be a more appropriate indicator of whether an issuer has a minimal connection to Canada? If so, which ones and why?

For the reasons discussed above, we would propose that "foreign issuer" status should be determined solely on the basis of jurisdiction of incorporation or formation, as applicable at the distribution date (recognizing that foreign issuers may reincorporate in Canada, and vice versa, from time to time). We note that if the issuer is not a reporting issuer in Canada, it is virtually certain that there will be no public trading market for that issuer's securities in Canada. It is not clear to us that any meaningful Canadian investor protection benefit is served by restricting the ability of a Canadian investor to resell securities of a non-Canadian issuer on an exchange or market outside Canada, even if the issuer has substantial connections to Canada. In that regard, we strongly commend the AMF for the approach it has taken in the June 30, 2016 "foreign issuer blanket order" (Decision No. 2016-PDG-0094), as described in the Request for Comments, which provided resale relief to certain institutional investors in respect of securities of any "foreign issuer" as defined in Northbound MJDS (which captures all issuers incorporated or organized outside Canada unless a majority of their voting securities are held in Canada, in addition to having at least one of three other connections to Canada).

However, if the CSA determines it necessary to impose any additional conditions or restrictions on "foreign issuer" status, we strongly urge that they should be based solely on readily available public information that is likely to be required in the foreign issuer's home country offering document disclosure or under its continuous disclosure requirements, and drafted in a manner that permits Canadian investors to rely on that disclosure without independent investigation.

We also note that any such additional conditions or restrictions on the definition of "foreign issuer" impose real and substantial costs on Canadian investors, as they would have to make a careful review of the issuer's offering document and public disclosure documents, or pay the costs of having a legal or other adviser conduct that review, in order to assess whether the issuer qualifies as a "foreign issuer".

(c) Would investors be able to easily determine whether the majority of the consolidated assets of the issuer are located in Canada for purposes of the new foreign issuer definition? Please explain the reasons for your views.

As noted above, we do not believe that this determination could easily be made, and may in fact be impossible to make. Canadian, U.S. and international disclosure standards do not typically require a geographic breakdown of the location of an issuer's assets, let alone the location of the assets held by an issuer's subsidiaries, which may separately be immaterial. Further, determining the location of certain assets requires access to

information that may not be available, or that would require the exercise of judgment. For example, if an issuer holds investments in securities, is the location of those securities determined on the basis of what custodial or subcustodial arrangements the issuer happens to have in place, and where those custodians or subcustodians are located? Or suppose that an issuer has real estate holdings around the world, including in Canada. Would the majority asset determination be made on the basis of the historical acquisition cost of each property, which would not necessarily be broken down by country in the issuer's financial statements or other disclosure documents? Or would it be necessary to base the test on the current fair market value of the property? Or would a "majority" of the assets be in Canada if there were more parcels of land held in Canada, or more acres of land held in Canada, than all other countries combined, even if the value of those assets was only a small fraction of the total value of the issuer's consolidated real estate holdings?

(d) Are there other aspects of the proposed definition of foreign issuer that would be difficult to determine and should be removed? Please explain which aspects and why?

Please see our response to Question 1(a), above.

(e) In practice, will investors be able to obtain sufficient information from the issuer at the date of distribution to enable them to determine whether the issuer meets the definition of foreign issuer? If not, could investors easily make this determination on their own without assistance from the issuer? Please explain the reasons for your views.

No. In practice, we do not believe that Canadian investors will be able to obtain any information from the issuer at the distribution date to allow them to apply the proposed "foreign issuer" test, other than the offering document being used to sell the securities (if any), and the issuer's home country public disclosure documents. Under current Section 2.14 of NI 45-102, Canadian institutional investors would sometimes ask international dealers to provide, or to have the issuer provide, a certificate regarding satisfaction of the 10% Canadian ownership tests. In our experience, international dealers would typically refuse to entertain those requests, so that they would not to have to trouble the foreign issuer to incur the time and expense of researching its Canadian beneficial ownership levels, and then provide a certificate as to matters of Canadian law without the benefit of obtaining Canadian legal advice (or at the cost of having to obtain Canadian legal advice). We anticipate that a request for information under the new "foreign issuer" test would be met with the same reaction. We believe that, most likely, the issuer would respond by directing that no securities be sold in Canada, as a simpler alternative. This would of course work to the prejudice of Canadian institutional investors, who would then lose the opportunity to participate in the offering at all, even if willing to accept some uncertainty regarding future liquidity.

Further, in many foreign issuer offerings there is little or no time available, or opportunity in the process, for a Canadian investor to request this information or for the issuer to provide it, even if so inclined. Some U.S. and global offerings may be executed in a matter of hours. A Canadian institutional investor may be offered an allocation by an international dealer, but if the Canadian institutional investor pauses to ask for additional information, or to request that the issuer deliver a certificate or similar supplemental document, the dealer would likely move on to the next potential investor on its list. We also note that as a result of the "wrapper relief" adopted in 2015, most foreign offerings to Canadian institutional investors are now conducted without the involvement of Canadian counsel, or the preparation of any Canadian-specific offering documentation, as was the intended streamlining effect for the benefit of the Canadian institutional market. To require the collection of information regarding satisfaction of the "foreign issuer" test in the Proposed Amendments, even in the circumstances where time permits, could result in effectively reintroducing the requirement for Canadian "wrappers" or similar supplemental disclosure documents for each offering.

For the reasons explained above, we do not believe that investors could easily determine this information independently.

2. Under the proposed exemption, the determination of whether an issuer is a foreign issuer is made at the distribution date. We are proposing the determination be made at this date because, in our view, it provides certainty to the investor at the time of the initial purchase as to whether the proposed exemption will be available for the subsequent resale of the securities. Also, it enables the investor to ask the issuer to make representations as to its foreign issuer status at the time of distribution.

(a) Do you agree with our analysis? If not, please explain why.

We agree that the determination of "foreign issuer" status should be made at the distribution date in order to avoid future uncertainty, and unfairness to the Canadian investor if a change in facts later occurs which would, through circumstances beyond the investor's control, result in a change of the issuer's status. However, we note that those Canadian investors who are already holding securities acquired prior to the effective date of the Proposed Amendments will be required to make the "foreign issuer" status determination retroactively to the date of their original investment, a task even more difficult than making the determination at the time they purchase. Even the issuer were fully willing to cooperate with the request, the issuer may not even have access to the required historical information to make the determination as of each past date that securities were distributed to investors in Canada.

(b) Do you believe that the date of the trade is a more appropriate time to determine foreign issuer status? If so, please explain why?

No. For securities acquired on a date after the Proposed Amendments come into effect, we believe that the distribution date, rather than the date of resale, is the more appropriate time to determine whether the conditions of resale are satisfied.

(c) Do you believe that we should allow a choice as to whether the determination of the foreign issuer status is made at either the distribution date or the date of trade? Please explain the reasons for your views.

We believe that Canadian investors should be able to determine, with certainty, at the time they acquire securities whether or not those securities will be eligible for resale under the Proposed Amendments. However, with respect to securities acquired before the Proposed Amendments come into effect, establishing foreign issuer status at the distribution date would be much more difficult than at the resale date, so the CSA may wish to allow that as an option with respect to securities with a distribution date prior to the effective date of the Proposed Amendments. We also urge the CSA to consider allowing the existing Section 2.14 regime to remain in effect with respect to securities acquired prior to the date that the Proposed Amendments come into effect, so that those Canadian investors who were able to ensure compliance with the existing 10% tests will not be prejudiced by the need to ensure compliance with a different test under the Proposed Amendments, which they may not be able to do either with respect to the distribution date or the resale trade date.

We also note that applying the foreign issuer test at the resale date would involve significant practical difficulties. The Canadian investor could not take advantage of a market opportunity to sell the securities without first obtaining confirmation of foreign issuer status from the issuer (assuming the full and willing cooperation of the issuer). Further, if the Canadian investor were to obtain confirmation of foreign issuer status from an issuer in advance of a resale, that information could well be stale by the time the investor makes its investment decision to place the sell order.

3. Under the proposed exemption, the determination of the non-reporting issuer status is made at either the distribution date or the date of trade.

(a) Do you agree with this approach?

Yes. If the issuer is not a reporting issuer on the distribution date, investors should have the certainty of establishing eligibility for resale even if the issuer subsequently becomes a reporting issuer in Canada. If the issuer is a reporting issuer on the distribution date, investors who may have otherwise been able to rely on Section 2.5 or Section 2.6 of NI 45-102 should not be precluded from making resales on an exchange or market outside Canada under the Proposed Amendments only because, through no fault of the investor, the issuer has ceased to be a reporting issuer. We note, however, that the benefit of this optionality may be somewhat illusory, as it may be difficult or impossible for a Canadian shareholder to establish retroactively that the issuer satisfied the foreign issuer test on the distribution

date, having not sought the necessary information at the time of its original investment because it believed that Section 2.5 or Section 2.6 of NI 45-102 would be available at the time of a future resale.

(b) Do you believe that determination should be made at only one of these dates? If so, which date? Please explain the reasons for your views?

We believe that despite the practical difficulties identified in our response to Question 3(a) above, the Proposed Amendments should preserve the current choice of dates for determination of non-reporting issuer status.

4. We have stipulated as a condition to the proposed exemption that if the selling security holder is an insider of the issuer, then no unusual efforts can be made by the selling security holder to prepare the market or to create a demand in Canada for the security that is the subject of the trade.

(a) Do you think that such a condition is appropriate? Please explain why or why not?

We believe this condition is appropriate, and consistent with the policy objectives of regulating resales of securities by shareholders in Canada that are made on an exchange or market outside Canada. From a policy perspective, in our view the primary objective of regulating such resales should be twofold. The first objective should be the protection of investors in Canada, by imposing reasonable requirements to ensure that investors in Canada are not acquiring securities on an exchange or market outside Canada that they would not have been able to acquire directly from an existing shareholder in Canada because of Canadian resale restrictions attaching to those securities. The second objective should be to preserve the integrity of the Canadian and global capital markets, by imposing restrictions to discourage market participants from exploiting gaps in investor protection mechanisms that may exist between different legal regimes through regulatory arbitrage.

We do not believe that it would be appropriate for a Canadian investor to engage in unusual efforts to prepare the market in Canada, or to create a demand in Canada, for the securities that it proposes to sell on an exchange or market outside Canada pursuant to the Proposed Amendments. Such actions would effectively defeat the first objective to the extent that, as a result, Canadian investors were successfully enticed to purchase securities on an exchange or market outside Canada that they could not lawfully purchase directly from the seller within Canada. Further, such actions would effectively defeat the second objective, to the extent that they undermine the integrity of the capital markets by allowing Canadian resale restrictions to be circumvented through cross-border transactions.

The CSA is most likely well aware that Rule 904 of Regulation S under the U.S. Securities Act of 1933, as amended (the "U.S. Securities Act") is the provision of the U.S. Securities Act which most closely corresponds to the Proposed Amendments. Under Rule 904 of

Regulation S, all shareholders are prohibited from engaging in "directed selling efforts" in the United States when making offshore resales of securities. Subject to certain specified exceptions, the term "directed selling efforts" is defined to include any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being sold offshore. While the restriction on conditioning the market in the Proposed Amendment only applies to insiders of the issuer, and not all shareholders generally as does the directed selling efforts prohibition under the U.S. Securities Act, we note that as a practical matter it is unlikely that a shareholder that is not an affiliate of the issuer would be able to prepare the market, or create a demand, for the issuer's securities in Canada.

(b) Would a different condition be more appropriate to address potential concerns about selling security holders that are insiders preparing the market or creating a demand in Canada for the foreign issuer's securities? Please explain and provide examples.

We believe the condition is appropriate, for the reasons outlined in our response to Question 4(a) above.

(c) Do you think we should be concerned that security holders that are insiders may prepare the market or create a demand in Canada for the foreign issuer's securities? Please explain the reasons for your views.

Although we believe that the concern is legitimate from a policy perspective, in practice the number of situations in which an insider in Canada could successfully prepare the market in Canada, or create demand in Canada, for a foreign issuer's securities may well be quite limited. Nevertheless, even if a remote concern, we agree that the restriction is appropriate and note that it is consistent with the U.S. restrictions on directed selling efforts in the United States under the U.S. Securities Act regime regulating offshore resales.

5. Under the proposed amendments, we are proposing to repeal the existing 2.14 exemption. The existing 2.14 exemption applies to the securities of non-reporting issuers that satisfy the ownership conditions whereas the proposed exemption applies to the securities of non-reporting issuers that are foreign issuers.

(a) Are you aware of non-reporting issuers that use the existing 2.14 exemption and would not qualify as foreign issuers under the proposed exemption? Please provide examples.

It is likely that there will be many issuers that currently satisfy the existing 2.14 exemption but will not satisfy the new foreign issuer test under the Proposed Amendments. The following are just a few hypothetical examples:

- An Australian mining company that has never raised capital in Canada, but has a majority of its directors ordinarily resident in Canada, selected primarily for their expertise in the Canadian mining industry. Such a company would likely have less than 10% of its shares in Canada and fewer than 10% of its shareholders in Canada. Currently, Canadian resident directors would be able to sell shares they obtain through stock option plans, or other equity compensation plans, back into Australia on the Australian Securities Exchange (the "ASX"), the only liquid market for those securities. Under the Proposed Amendments, having a majority of directors resident in Canada would disqualify the issuer from foreign issuer status, and the directors would no longer be able to resell their equity compensation on the ASX.

- A Seattle-based technology company, trading only on NASDAQ, has fewer than 10% of its shares and shareholders in Canada, but a Canadian institutional investor holds a 4% equity ownership position. That Canadian institutional investor could currently use Section 2.14 to make resales on NASDAQ. However, if the majority of the issuer's consolidated assets are located at a technology development center in Vancouver, the Canadian institutional investor will be disqualified from selling its stake on NASDAQ under the Proposed Amendments.

- A Guernsey corporation, trading only on the London Stock Exchange ("LSE"), has three Canadian institutional shareholders accounting for approximately 7% of its shares, in the aggregate. The issuer owns and operates gold, silver and copper mines around the world, including one in Canada that accounts for 51% of its consolidated assets. The three Canadian institutions are currently free to sell their stake on the LSE under Section 2.14, but would not be able to do so under the Proposed Amendments because a majority of the consolidated assets are located in Canada.

(b) Are there other circumstances where an issuer would be able to use the existing 2.14 exemption but not the proposed exemption? Please provide examples.

Please see the illustrative examples in our response to Question 5(a) above. We also note that the question whether an issuer meets both the current 10% tests and the foreign issuer definition in the Proposed Amendments is a different matter than the ability of a Canadian security holder to satisfy itself those tests are met. Existing Canadian holders who were successfully able to confirm satisfaction of the 10% tests will not be able to benefit from their efforts under the Proposed Amendments, and are unlikely to be able to confirm that the foreign issuer test was satisfied on the date, or each of the various dates, that they originally acquired their securities.

(c) Do you foresee any other issues if we repeal the existing 2.14 exemption? Please provide examples.

Please see our responses to Questions 5(a) and (b) above. We urge the CSA to retain the existing Section 2.14 exemption as an alternative resale exemption to the new proposed Section 2.14.1, ideally in all cases to provide additional flexibility for situations like those described in our response to Question 5(a). Alternatively, we believe that at a minimum the existing Section 2.14 exemption should continue to be available for securities acquired prior to the effective date of the Proposed Amendments, to avoid unfair prejudice to Canadian investors who had made their initial investment decision on the basis of the liquidity they believed they would have available under existing Section 2.14.

6. The proposed exemption would not be available for the resale outside of Canada of securities of an issuer incorporated or organized in Canada because such issuers do not fall within the definition of foreign issuer.

(a) In your view, should we consider a similar exemption for the resale outside of Canada of securities of a Canadian issuer distributed under a prospectus exemption if the securities of the Canadian issuer are only listed on an exchange, or market, outside of Canada? Please explain the reasons for your views.

As stated in our response to Question 4(a), we believe that the policy objectives of regulating resales of securities by shareholders in Canada that are made on an exchange or market outside Canada should be the protection of investors in Canada, and the preservation of the integrity of the capital markets by discouraging regulatory arbitrage. It is not clear to us that either of these objectives necessarily requires that the application of the Proposed Amendments be limited to non-Canadian issuers in all cases. In fact, we believe that the more important regulatory consideration should be the relationship between the security holder and the issuer, rather than the issuer's relationship to Canada. For example, we would suggest that the extent to which a "control person" of an issuer should be entitled to rely on the Proposed Amendments, without following the procedures in Section 2.8 of NI 45-102, may warrant further consideration by the CSA.

A potentially helpful comparison may be the manner in which Rule 903, Rule 904 and Rule 905 of Regulation S operate under the U.S. Securities Act. The result of those rules may be summarized as follows:

- an "affiliate" of an issuer (generally considered to include 10% or greater shareholders) must follow the same, stricter requirements for offshore sales as apply to an issuer of securities, which may include taking steps to ensure that the purchaser on a foreign exchange or market is not in fact a U.S. purchaser, or imposing a 40-day or one year distribution compliance period on the dealers involved in the distribution, or treating the securities being sold offshore as

continuing to be subject to U.S. resale restrictions even after they leave the United States;

- all other holders of restricted securities that are not "affiliates" of the issuer are permitted to sell securities on a "designated offshore securities market" outside the United States, without regard to whether the purchaser may or may not actually be a U.S. purchaser, so long as:
    - they do not engage in any "directed selling efforts" to prepare the market in the United States; and
    - the transaction is not pre-arranged with a buyer in the United States; and
- the securities sold on a designated offshore securities market do not continue to be "restricted securities" under the U.S. Securities Act after they leave the United States, unless the securities are equity securities of an issuer incorporated or organized in the United States, or a non-U.S. issuer that has ceased to qualify as a "foreign private issuer" (which only occurs if the issuer has a majority of its voting securities held in the United States, in addition to at least one other connecting factor to the United States).

Although the Canadian and U.S. capital markets are significantly different markets and each has its own different needs and regulatory concerns, it was with great deliberation that the SEC reached the conclusion, from a policy perspective, that only equity securities of U.S. domestic issuers, and disqualified foreign private issuers, should continue to be subject to U.S. resale restrictions after they leave the United States in an offshore resale.

We suggest that from a Canadian regulatory policy perspective, there should be no harm to Canadian investors or market integrity in implementing a prospectus exemption for resales of certain securities of Canadian issuers on an exchange or market outside Canada, subject to the conditions we propose for consideration in our response to Question 6(b). Such an exemption could be particularly useful, for example, to Canadian institutions that acquire foreign dollar denominated debt securities of Canadian issuers under a Canadian private placement exemption and wish to resell those debt securities in the foreign markets where they principally trade (particularly in circumstances where Section 2.5 of NI 45-102 may not yet be available, or may not become available due to the Canadian legend condition not having been satisfied).

(b) What conditions, if any, would you suggest we include in a similar exemption? Please explain the reasons for your suggestions.

We believe that it would be appropriate for the CSA to consider an exemption to allow Canadian holders of securities of Canadian issuers to resell those securities on an exchange

or market outside Canada, similar to the regime for securities of foreign issuers under the Proposed Amendments, subject to the following possible additional conditions:

- a restriction on the type of securities that could be resold without continuing to be subject to a Canadian "hold period" (and we note that the SEC has chosen to impose a corresponding restriction under the U.S. Securities Act only on equity securities);

- a prohibition against unusual efforts to prepare the market in Canada or create a demand for the securities in Canada, whether or not the seller is an insider of the issuer;

- a requirement that the Canadian holder originally acquired the securities with investment intent, and not for the purpose of continuing a further distribution, whether inside or outside Canada; and

- a prohibition against pre-arranging trades with a Canadian purchaser to be executed on an exchange or market outside Canada.

We also note that if any types of securities are made subject to a continuing Canadian "hold period" after being resold outside Canada, it will effectively be impossible for a Canadian holder to resell those types of securities on an exchange or market outside Canada, as the Canadian holder will be unable to ensure compliance with Canadian resale restrictions by the subsequent holders of the security.

Conclusion and Summary of Recommendations

1. We urge the CSA to consider revising the definition of "foreign issuer" in the Proposed Amendments so that any issuer incorporated or organized outside Canada will qualify, and continue to qualify, without regard to any of the factors currently listed in subparagraphs (a) through (c) of the proposed definition. Alternatively, we would propose that much more significant connections to Canada should be required before a disqualification from foreign issuer status would apply, such as having a majority of the issuer's voting securities held in Canada in addition to one of the factors in subparagraphs (a) through (c). This approach would be fully consistent with the approach taken in NI 71-102, Northbound MJDS and the "foreign private issuer" test under the U.S. Securities Act.

2. To the extent that the CSA considers a broader range of disqualifications to be necessary or appropriate for the protection of Canadian investors, or the integrity of the capital markets, we strongly urge the CSA to limit the disqualifying factors to those which can be easily ascertained by Canadian investors from the offering document they receive, or from public disclosure made by the issuer, at the time of their initial investment. For example, instead of a disqualification based on the issuer having its head office in Canada,

a disqualification could be tied to stating a Canadian head office address in the offering document or the issuer's most recent home country public disclosure document.

3. The existing exemption in Section 2.14 should be preserved, preferably permanently as a legitimate alternative to the new proposed Section 2.14.1 exemption, or at a minimum with respect to securities acquired by a Canadian holder before the Proposed Amendments come into effect.

4. We encourage the CSA to provide additional relief for resales of Canadian issuer securities outside Canada, subject to any additional conditions or limitations considered necessary for the protection of Canadian investors, and to avoid potential abuses that could bring the capital markets into disrepute.

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We once again wish to commend the CSA for advancing this initiative, and strongly agree that amendments to the existing Section 2.14 exemption are necessary to reduce the uncertainty, complexity and cost for Canadian investors in foreign issuers, including institutional investors seeking to participate in global securities offerings on a private placement basis with the expectation of ultimately utilizing an exchange or market outside Canada for liquidity when making resales in the future.

If you have any questions regarding our comments, please do not hesitate to contact Rob Lando at (212) 991-2504, or by e-mail at rlando@osler.com.

Yours very truly,

Osler, Hoskin & Harcourt LLP

RCL: