

**NOTICE AND REQUEST FOR COMMENTS****Proposed Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*  
and Related Companion Policy 61-101CP to Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*****August 25, 2006****Introduction**

We, the *Autorité des marchés financiers* (AMF) and the Ontario Securities Commission (OSC), seek comments on proposed Multilateral Instrument 61-101 *Protection of Minority Securityholders in Special Transactions* (the Instrument), which introduces harmonized requirements in Québec and Ontario for enhanced disclosure, independent valuations and majority of minority security holder approval for specified types of transactions. These requirements are substantially similar to those currently set out in Regulation Q-27 *respecting Protection of Minority Securityholders in the Course of Certain Transactions* (Regulation Q-27) in Québec and in Rule 61-501 *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions* (Rule 61-501) in Ontario.

Proposed Companion Policy 61-101CP *Protection of Minority Security Holders in Special Transactions* (the Companion Policy) provides guidance on how the AMF and the OSC will interpret and apply the Instrument.

We are publishing the Instrument and Companion Policy for a 90-day comment period. The Instrument will be implemented as a regulation in Québec and as a rule in Ontario.

We are also proposing to withdraw the following notices upon the coming into force of the Instrument as they will no longer be relevant:

- Ontario Securities Commission Staff Notice 61-701 - *Applications for Exemptive Relief under Rule 61-501*
- Notice of the Autorité des marchés financiers - *Protection of Securityholders in the Course of Certain Transactions - Situation in Québec and Ontario – Exemptive Relief*

The text of the Instrument and Companion Policy will be available on the websites of the AMF and the OSC:

[www.lautorite.qc.ca](http://www.lautorite.qc.ca)  
[www.osc.gov.on.ca](http://www.osc.gov.on.ca)

**Background**

The Instrument will achieve three objectives. First, when the OSC amended Rule 61-501 in 2004, the AMF had indicated its intention to harmonize its Regulation Q-27 by making similar amendments. The Instrument and the related repeal of Rule 61-501 and Regulation Q-27 will achieve this objective by providing a single harmonized instrument governing the subject transactions in both Québec and Ontario.

Second, the Instrument provides an opportunity to make minor enhancements to the existing provisions of Rule 61-501 that are incorporated in the Instrument.

In the context of the CSA initiative to harmonize and streamline securities law in Canada, the Minister of Finance of Québec has introduced before the National Assembly Bill 29, *An Act to amend the Securities Act and Other Legislative Provisions*. The OSC has proposed similar amendments to its Minister for consideration. In publishing proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (Proposed NI 62-104) for comment on April 28, 2006, it was recognized that harmonized amendments were needed. Once amended, the *Securities Act* (Québec) (QSA) and the *Securities Act* (Ontario) (OSA), together with the Proposed NI 62-104, will create a harmonized take-over bid and issuer bid regime. As a result, the Instrument achieves a third objective by addressing a number of consequential amendments that would otherwise be required to be made to Regulation Q-27 and Rule 61-501 to reflect this new legislative environment.

The effective date of the Instrument will depend on the adoption and coming into force of the harmonizing amendments to the QSA and OSA described above and on the adoption and coming into force of the Proposed NI 62-104.

To facilitate transition from the existing rules to the Instrument, we determined that Rule 61-501 would serve as the base document to which changes could be made to create the Instrument and achieve our stated goal of harmonizing Regulation Q-27 and Rule 61-501. As a consequence, we have adopted the approach of describing the Instrument in terms of a series of changes made to the current Rule 61-501. A number of the proposed changes are consequential changes as a result of the Proposed NI 62-104 and are not intended to affect the substance of Rule 61-501. Changes other than these consequential changes are described under “Summary of Key Features of the Instrument” and in footnotes to the draft of the Instrument that has been compared with Rule 61-501 and its Companion Policy and blacklined to show the differences. This blacklined version of the Instrument is available on the websites of the AMF and the OSC and published in the OSC Bulletin as a schedule to this notice.

### **Purpose and Benefits**

The Instrument is primarily designed to consolidate and harmonize the requirements of Québec and Ontario governing insider bids, issuer bids, business combinations and related party transactions in a single multilateral instrument.

### **Summary of Key Features of the Instrument**

### ***Part 1 Definitions and Interpretation***

Part 1 of the Instrument identifies defined terms used in the Instrument. As noted above, many of the changes to this section, as compared with Rule 61-501, are a consequence of the Proposed NI 62-104 or of proposed amendments to the QSA or OSA (the QSA together with the OSA being referred to as the “Acts”), as many of the definitions in Rule 61-501 cross-reference definitions in the Acts. The following are the most significant amendments to the definitions.

The expression “beneficially owns” now includes the substantive provision to address deemed indirect ownership. The definitions of collateral benefit and downstream transactions have been added for completeness. The ownership thresholds in all these definitions should be calculated equally.

The term “bid” replaces the term “formal bid”. As the term “bid” is restricted to a take-over bid or an issuer bid made by way of a circular. This is not a substantive change.

The term “control person” replaces the term “control block holder”. It is proposed that the Acts will be amended to include equivalent definitions of “control person”. We anticipate removing the definition in the final version of the Instrument once the proposed amendments to the Acts are in force to avoid duplication.

The definition of “disclosure document” has been changed to take into consideration the technical circumstance where no information circular or other document is required in connection with a business combination and a material change report is the only disclosure document required.

The definition of “person” has been updated to harmonize the definitions. The definition of “entity” has been retained despite the addition of the definition of “person” to assist with the readability of certain sections.

The definition of “income trust” has been updated to reflect the definition in section 1.2 of National Policy 41-201 Income Trusts and Other Indirect Offerings.

The definition of “issuer insider” was amended to reflect the new definition of “insider” proposed for the Acts.

In order to preserve the status quo, we have amended the definition of “related party” to include an exception for a “bona fide lender” as the equivalent exception was removed from the definition of “control person” in order to conform the definition of “control person” to the definition proposed for the Acts.

We have amended the definition of “related party transaction” to include the provision of services to the issuer by a related party or by the issuer to a related party. These new categories of related party transactions would not be subject to a formal valuation requirement, as contemplated by section 5.4(1), but would require minority approval unless an exemption was otherwise available.

We have removed the requirement to obtain a statement from the published market that it concurs with an opinion obtained for the purpose of demonstrating that there is a liquid market for a class of

securities. The additional statement or opinion of the published market was no longer regarded as being necessary to ensure compliance.

### ***Part 2 Disclosure***

Specific additional disclosure for an insider bid is presently included as an item in Form 32 to the OSA (the current form of take-over bid circular in Ontario) but is not proposed to be an item in the form of take-over bid circular required under Proposed NI 62-104. We have therefore expanded the disclosure required under the Instrument to maintain the overall current level of required disclosure.

We have deleted the reference to National Instrument 62-102 Disclosure of Outstanding Share Data from section 2.4(2)(b) of the Instrument as National Instrument 62-102 has been repealed.

### ***Part 3 Issuer Bid***

We have deleted the current disclosure requirement in section 3.2(a) as the same disclosure for an issuer bid is now proposed as Item 27 of Form 62-104F2 (issuer bid circular form).

### ***Part 4 Business Combinations***

To preserve the standard used in Regulation Q-27, the *de minimis* exemption set out at section 4.1(c) is calculated with reference to beneficial owners instead of registered owners.

We have moved the exemption entitled, “Amalgamation or Equivalent Transaction with No Adverse Effect on Issuer or Minority”, Part 5 of Rule 61-501 to Part 4 of the Instrument as this exemption more appropriately applies in the context of a business combination than in the context of a related party transaction.

### ***Part 5 Related Party Transactions***

Transactions yet to be carried out under the terms of agreements entered into before May 1, 2000 in Ontario and before December 15, 2000 in Québec will now be subject to the requirements of this Part.

### ***Part 7 Independent Directors***

The proposed Instrument will prohibit an independent director from receiving a benefit that is not generally available to security holders as a consequence of a transaction even if the intention to provide the benefit was not formed until after the transaction closed. A director who accepts such a benefit will not be considered independent for the purpose of the Instrument.

### ***Companion Policy***

We have not made any significant changes to the Companion Policy.

### **Local Repeals**

Regulation Q-27 and Rule 61-501 will be repealed upon the coming into force of this Instrument. Both jurisdictions will need to implement the Instrument, including a repeal of either Regulation Q-27 or Rule 61-501, as applicable, using a local implementing rule. Each jurisdiction will separately publish its respective implementing rule.

### **Alternatives Considered**

No other alternatives were considered.

### **Authority for the Proposed Instrument in Québec**

Paragraph 331.1(24) of the QSA authorizes the AMF to make regulations to prescribe measures to protect minority shareholders with respect to the transactions determined by the AMF that are carried out by issuers or other persons having access to the financial market and that are likely to give rise to situations of conflict of interest.

### **Authority for the Proposed Instrument in Ontario**

Paragraph 143(1)28 of the OSA authorizes the OSC to make rules to regulate issuer bids, insider bids, going private transactions and related party transactions, including, in clause v, prescribing requirements for disclosure, valuations, review by independent committees of boards of directors and approval by minority security holders.

### **Anticipated Costs and Benefits**

Primarily, the Instrument consolidates and harmonizes the existing requirements of Québec and Ontario governing insider bids, issuer bids, business combinations and related party transactions in a single multilateral instrument. In our view, the Instrument will generally reduce compliance costs for market participants as two overlapping regulations will be replaced by a single instrument. While a new category of related party transactions will incrementally increase compliance costs for certain transactions, the benefit of the additional regulation is consistent with the policy objectives of the Instrument and justified in relation to the cost of compliance.

### **Unpublished Materials**

No unpublished study, report, or other written materials were relied on in proposing the Instrument, Companion Policy or the repeal of Rule 61-501 and Regulation Q-27.

### **Request for Comment**

We request your comments on the Instrument. In addition to any general comments you may have, we also invite comments on the following specific questions.

1. *Service Agreements with a Related Party.* We have modified the definition of “related party transaction” to establish additional categories of related party transactions. We believe that issuers that retain the services of a related party for valuable consideration or provide services to a related party should obtain the approval of minority security holders unless an exemption is otherwise available. Should a formal valuation also be required? Would a formal valuation be feasible? If so, why? If not, why not?
2. *Prohibition Against Independent Directors Receiving Special Benefits.* The Instrument includes a new prohibition against independent directors receiving a benefit that is not generally available to security holders as a consequence of a transaction. This prohibition is intended to prohibit, for example, the payment of “success fees” to independent directors in the context of the completion of a transaction. In order to safeguard the independent director review process, the prohibition still applies even if the intention to provide the benefit was not formed until after the transaction has been completed. Do you agree with the stated policy objective? Do you believe that the prohibition will interfere with otherwise legitimate practices? If so, please provide examples.

## **How to Provide Your Comments**

Please provide your comments by November 23, 2006 by addressing your submission to the *Autorité des marchés financiers* and the Ontario Securities Commission.

Deliver your comments only to the address that follows. Your comments will be forwarded to OSC staff.

Anne-Marie Beaudoin  
Directrice du secrétariat  
Autorité des marchés financiers  
Tour de la Bourse  
800, square Victoria  
C.P. 246, 22e étage  
Montréal, Québec  
H4Z 1G3  
Fax: 514-864-6381  
e-mail: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

If you are not able to send your comments by e-mail, please send a diskette containing your comments in Word.

We cannot keep submissions confidential because securities legislation in Ontario requires that a summary of the written comments received during the comment period be published.

## **Questions**

Questions relating to this notice may be referred to:

Rosetta Gagliardi  
Conseillère en réglementation  
Autorité des marchés financiers  
514-395-0558, poste 4462  
[rosetta.gagliardi@lautorite.qc.ca](mailto:rosetta.gagliardi@lautorite.qc.ca)

Lucie J. Roy  
Conseillère en réglementation  
Autorité des marchés financiers  
514-395-0558, poste 4364  
[lucie.roy@lautorite.qc.ca](mailto:lucie.roy@lautorite.qc.ca)

Naizam Kanji  
Manager, Mergers & Acquisitions  
Ontario Securities Commission  
416-593-8060  
[nkanji@osc.gov.on.ca](mailto:nkanji@osc.gov.on.ca)

