Notice of Publication

Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions* and Policy Statement to *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions

Introduction

We, the *Autorité des marchés financiers* (AMF) and the Ontario Securities Commission (OSC), are publishing *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions* (the Regulation), 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.

Policy Statement to *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions* (the Policy Statement) provides guidance on how the AMF and the OSC will interpret and apply the Regulation.

We are also publishing a summary of comments we received on the proposed Regulation we published for comment on August 25, 2006, together with our response. We would like to thank all of the commenters for the time they took to provide us with their comments.

The following notices will be withdrawn upon the coming into force of the Regulation as they will no longer be relevant:

- OSC Staff Notice 61-701 - *Applications for Exemptive Relief under Rule 61-501*
- Notice of the AMF - *Protection of Security Holders in the Course of Certain Transactions - Situation in Québec and Ontario – Exemptive Relief*

The text of the Regulation and Policy Statement will be available on the websites of the AMF and the OSC:

www.lautorite.qc.ca
www.osc.gov.on.ca

In Québec, the Regulation is a regulation made under section 331.1 of the *Securities Act* (Québec) (the QSA) and must be approved, with or without amendment, by the Minister of Finance. The Regulation will come into force on the date of its publication in the *Gazette officielle du Québec* or on any later date specified in the regulation.

In Ontario, the Regulation was delivered to the Minister of Finance (the "Minister") on November 16, 2007. If the Minister approves the Regulation, the Regulation will come into force on February 1, 2008. If the Minister does not approve or reject the Regulation or return it for further consideration, it will come into force on February 1, 2008.

Provided all necessary ministerial approvals are obtained, the Policy Statement will come into force on the day that the Regulation comes into force.

Background

When the OSC amended Rule 61-501 in 2004, the AMF indicated its intention to harmonize Rule 61-501 and Regulation Q-27 by making similar amendments to Regulation Q-

27. The Regulation and the related repeal of Rule 61-501 and Regulation Q-27 will achieve this objective.

As part of the Canadian Securities Administrators (the CSA) initiative to harmonize and streamline securities law in Canada, the CSA published for comment *Regulation 62-104 respecting Take-Over Bids and Issuer Bids* (Regulation 62-104). Those CSA jurisdictions that currently regulate bids recommended to their respective governments legislative amendments and rule-making authority that would remove detailed bid provisions from statutes and substitute general "platform" provisions to enable regulators to harmonize, streamline and update bid requirements in Regulation 62-104. In Quebec, the Minister of Finance of Québec introduced before the National Assembly Bill 29, *An Act to amend the Securities Act and Other Legislative Provisions.* In Ontario, the Government of Ontario is seeking to achieve the same harmonization and modernization effect through proposed amendments to Part XX - Take-Over Bids and Issuer Bids of the *Securities Act* (the OSA) introduced in Schedule 38 to Bill 187 *Budget Measures and Interim Appropriation Act, 2007* and proposed OSC Rule 62-504 *Take-Over Bids and Issuer Bids* (Proposed OSC Rule 62-504). The Regulation 62-104 will be implemented in jurisdictions other than Ontario.

A number of the changes proposed in the Regulation are consequential changes as a result of the proposed amendments to the QSA and OSA, Regulation 62-104 and Proposed OSC Rule 62-504. The effective date of the Regulation will be February 1, 2008, which will coincide with the coming into force of the amendments to the QSA and OSA described above and, subject to all necessary regulatory and ministerial approvals, with the adoption and coming into force of the Regulation 62-104 and Proposed OSC Rule 62-504.

Purpose and Benefits

The Regulation 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 regulation.

Summary of Amendments to the Regulation

The following are the most significant amendments to the Regulation and Policy Statement.

Part 1 Definitions and Interpretation

We removed the definition of "beneficially owns" and replaced it with interpretation section 1.6 as is the case in the QSA and OSA and Regulation 62-104. We also revised the interpretation to take into account comments received.

We removed the definition of "controlled". We added interpretation of the concept of control for the purposes of the definition of subsidiary entity in section 1.7 and harmonized it with the concept of control used in the OSA and in Regulation 62-104.

We have not amended the definition of "related party transaction". We are now of the view that an extensive analysis should be done before we propose any change to the definition.

Part 4 Business Combinations

We clarified the requirement set out in section 4.2(3)(h) of the Regulation to provide the disclosure in the information circular of the identity of the holders of securities specified in paragraph (g) together with their individual holdings. The same applies to similar disclosure provisions throughout the Regulation.

We amended the valuation exemption in section 4.4(1)(a) to provide that listing on the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated

by PLUS Markets Group plc does not make the exemption unavailable. The same applies to similar exemptions throughout the Regulation.

Part 5 Related Party Transactions

The valuation exemption entitled, "Amalgamation or Equivalent Transaction with No Adverse Effect on Issuer or Minority", will be available in the context of a business combination and a related party transaction.

Part 7 Independent Directors

We amended section 7.1 of the Regulation to prohibit payments or benefits to members of an independent committee that are contingent on completion of a transaction under consideration by the committee.

Policy Statement

We made changes to the Policy Statement to add further guidance on best practices for directors compensation in the context of transactions to which the Regulation applies. We have also provided guidance on the application of the Regulation where related parties of an issuer involved in an acquisition transaction are provided an equity interest in the issuer or a successor issuer after completion of the transaction.

Local Repeals

Regulation Q-27 and Rule 61-501 will be repealed upon the coming into force of this Regulation. The Policy Statements to those Regulations will also be revoked.

Questions

Questions relating to this notice may be referred to:

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November 16, 2007

Proposed *Regulation 61-101 respecting Protection of Minority Holders in Special Transactions*
Notice and Request for Comments Dated August 25, 2006
Summary of Comments and Responses

REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
General	Four commenters strongly supported the objective of implementing a single harmonized instrument in Québec and Ontario.	We acknowledge the comment.
Definition of "beneficially owns"	Two commenters indicated that the proposed changes to the definition of "beneficially owns" could be interpreted as making a subsidiary the deemed owner of securities held by its parent, which would cause the subsidiary to be deemed to control its sister companies and even its own parent company that was in turn controlled by another parent company.	We have revised the definition of "beneficially owns" to takes into account comments received. We have clarified that "beneficial ownership" only applies to affiliated entities that are also subsidiary entities.
Definition of "business combination"	We received a comment suggesting that an equity termination transaction should not be subject to the business combination rules of the Regulation solely as a result of a related party being party to a connected transaction, where a related party does not receive non-identical consideration or a collateral benefit.	This provision came into force in Ontario in 2004 and was intended to clarify the application of Rule 61-501 where, for example, an amalgamation was carried out in conjunction with a sale of assets of one of the amalgamating issuers to a related party of that issuer. We are of the view that, as a policy matter, an equity termination transaction should be subject to the business combination requirements if another transaction involving a related party of the issuer is occurring at the same time or is conditional upon the business combination.

REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
	One commenter noted that the inclusion of connected related party transactions in the definition of business combination prevents the operation of the 90% exemption from the minority approval requirements. The 90% exemption for business combinations is available only if interested parties within the meaning of subparagraph (c)(i) of the definition of interested party (a related party that is acquiring or combining with the issuer) own 90% or more of the securities of the class. As a result, a transaction that is a business combination solely as a result of a connected related party transaction may not have the 90% exemption available to it under the business combination rules in situations where the 90% exemption in the related party transaction rules would be available for the connected related party transaction.	This result is intentional. The 90% exemption is only available for business combinations where the person acquiring the securities of the issuer owns 90% or more of the relevant class and for related party transactions where the party to the transaction owns 90% or more of the securities of a class. The respective 90% exemptions do not allow these interested parties to aggregate their ownership where an equity termination transaction is caught as a business combination because of a connected transaction.
Definition of "collateral benefit"	One commenter submitted that it is inconsistent to prohibit management buy outs by way of take-over bid in the take-over bid rules, while providing a comprehensive regime for their regulation as insider bids in the proposed Regulation. The Regulation regulates insider bids, which include take-over bids made by an acquiror acting jointly or in concert with directors or senior officers of the issuer. However, under the take-over bid rules in Part XX of the *Securities Act* (Ontario) and proposed *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, the prohibition on collateral benefits may restrict the ability to effect a management buy out by way of take-over bid as arrangements for management to retain equity in the continuing business could be viewed as a collateral	We acknowledge the comment and do not intend to make changes to the Regulation. The issue is not within the scope of this Regulation.

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REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
	benefit.	
Definition of “connected transaction”	Three commenters noted that the definition of connected transaction is extremely broad. For example, the definition of “connected transaction” does not exclude downstream transactions which could potentially make the otherwise “pro rata” transaction a “business combination”. In addition, the reference to transactions "negotiated or completed at approximately the same time" results in transactions which may be independent of each other being required to be aggregated for purposes of the 25% of market capitalization exemption.	We acknowledge the concerns raised regarding the breadth of the definition of connected transactions. However, we are of the view that in the rare circumstances where the definition would have inappropriate results, exemptive relief would be available.
Definition of “controlled”	One commenter indicated that the proposed Regulation 61-101 includes a change in the definition of the word “controlled” with the result that where a person is entitled to elect a majority of the directors of an entity, such entity would be considered to be a subsidiary of that person, notwithstanding that the person may not hold voting securities which carry 50% of the votes for the election of directors. The impact of the change in the definition is to introduce the notion of “control in fact”.	We have deleted the definition of “controlled” and introduced an interpretation section 1.7 to harmonize the notion of control with the definition used in Regulation 62-104, and in Ontario, with Part XX of the *Securities Act*. We agree with the comment and confirm that we are introducing the notion of “control in fact”.
Definition of “downstream transaction”	One commenter submitted that the limit of 5% of any class of voting or equity securities of the transacting related party is more restrictive than necessary, as it refers to exercising control or direction over securities and is calculated on a class by class basis	The limit of 5% is intentional. We are of the view that the exemption sets an appropriate limit and takes into account both the control and ownership of related parties.

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REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
	for voting and equity securities. The commenter suggested that the 5% limit should only refer to beneficial ownership and not the exercise of control or direction over and that the limit should be based on ownership of more than 5% of all outstanding equity securities and not on a separate class basis.	
Definition of "issuer insider"	One commenter did not support extending the issuer insider definition to officers, rather than just senior officers, especially with respect to subsidiaries.	Since the new definition of "insider" which refers to "officers" is not in effect, we will maintain the current reference to "senior officers" throughout the Regulation.
Definition of "prior valuation"	One commenter indicated that due to recent accounting changes, a number of issuers have been required to obtain valuations of certain material assets, including entire divisions in some circumstances. This commenter questioned whether these valuations would fit within the definition of "prior valuation".	The accounting change came into force in 2002. We are of the view that the valuations are prepared in the ordinary course of business for accounting purposes, without the participation of directors of an issuer and without having been made available to them. As such, they are not caught by the definition of "prior valuation".
Definition of "related party"	One commenter suggested that the definition of "bona fide lender" be amended so that a person could not be considered a related party by also being a bona fide lender.	We acknowledge the comment and amended the definition of "related party" to make it clear that a bona fide lender is only excluded from the definition of "related party" where the lender is a related party solely because of this status of bona fide lender. However, such a lender could be a related party if it is otherwise within the definition of "related party".

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Definition of "related party transaction"	One commenter suggested to include a concept of a sale of assets "or a group of related assets" in paragraph (d) of the definition of "related party transaction", which relates to joint sales, in order to clarify the requirement for an evaluation of the aggregate assets sold and the aggregate purchase price and not an evaluation of whether the related party has received its proportionate share of the consideration for each individual asset of the business.	We are not aware of any problem with the exemption and do not suggest any change to the exemption.
	Two commenters felt that service arrangements with related parties are currently regulated through general corporate governance rules and the usefulness of extending to service agreements had not been demonstrated. Five commenters indicated that "services agreements" would be difficult to interpret in the context of the 25% of market capitalization exemption as drafted, given the difficulty in valuing such arrangement in assessing whether such arrangements are exempt from the minority approval requirements. One commenter submitted that employment contracts with senior executives which are approved by the board of directors should be expressly excluded from the requirements of proposed Regulation 61-101 because the disclosure regime for executive compensation is prescribed by rules and regulations relating to proxy circulars. One commenter submitted services provided in the ordinary course	We have considered all the comments received and are of the view that the issues raised are important and an extensive analysis should be done before we propose any change to the definition. Accordingly, we have maintained the current definition.

Reference	Summarized Comment	AMF and OSC Response
	of business should not be subject to any form of minority approval.	
Sections 2.2(1)(d), 4.2(3) and 5.3(3)	One commenter suggested that subsection 2.2(1) of the proposed Regulation set out a specific description of the additional disclosure required of an insider bid circular without reference to a form that is used for a different purpose. It would be clear what additional information will be required and whether the information pertains to the offeror or the offeree issuer.	Part 4 of the Policy Statement gives guidance on how to interpret the words "to the extent applicable and with necessary modifications". We are of the view that changes to the Regulation are not necessary.
Valuation exemption – sections 4.1(c) and 5.1(c).	Three commenters did not believe that it was advisable to use the beneficial ownership approach to the *de minimis* exemption in sections 4.1(c) and 5.1(c). In addition, a commenter suggested that the threshold be 10% to be consistent with the proposals in Regulation 62-104. Two commenters indicated that with the ability of beneficial owners to elect to be objecting beneficial owners (OBOs) under Regulation 54-101, there is no way for an issuer to determine where those OBOs are located. Accordingly, an issuer cannot be certain whether the test in clauses 4.1(c) and 5.1(c) is satisfied.	The requirement is consistent with the requirement provided in Regulation Q-27 and *Regulation 62-104 respecting Take-over Bids and Issuer Bids*, and in Ontario, with Part XX of the *Securities Act*. The threshold of 10% is for foreign take-over bids and issuer bids; we do not believe that the threshold is appropriate in the context of this Regulation.
Valuation exemption – sections 4.4(1)(b) and 5.7(c)(i).	One commenter submitted that it did not make sense to subject a TSXV issuer that is also listed or quoted on a foreign exchange to the valuation requirement. The same comment was made in relation to the exemption in section 5.7(1)(c)(i).	The purpose of the exemption is to exempt junior issuers from the valuation requirement. If that issuer is listed on a senior exchange, we are of the view that the issuer is not a junior issuer and should not benefit from an exemption granted to a junior issuer.

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Valuation exemption – section 4.4(1)(d)	One commenter questioned whether the amendment to the auction exemption resulted in a different interpretation of the object of the valuation.	The change is intended to address a drafting issue and the requirement is the same as the current one. We believe that the text is now easier to read.
90% minority approval exemption - sections 4.6 (1)(b) and 5.7(1)(h)	One commenter submitted that the 90% exemption should be available where the relevant interested parties beneficially own or exercise control or direction over 90% or more of the outstanding securities of the class. Limiting the exemption to parties that own more than 90% could result in a scenario where minority approval would be based on a very small proportion of the class of securities due to an interested party owning less than 90% of the class, but controlling or directing additional securities of the class.	The purpose of the 90% exemption is to provide a narrow exemption for the owner of a significant economic interest in an issuer to acquire the remainder without minority approval. However, the minority approval determination must exclude not only the economic interest of interested parties but also any securities over which they exercise control or direction. We have recognized, in section 3.3 of the Policy Statement, that relief from minority approval may be appropriate in situation involving abusive minority tactics.
Transitional provision – section 5.1	One commenter indicated that removing the exemption for transactions agreed to prior to December 15, 2000 was not advisable, as there will be agreements entered into prior to that time that have not been fully performed.	We acknowledge the comment and will keep the transitional provision as it now exists.
Former section 5.5(9)	Two commenters noted that the exemption provided currently in section 5.5(9) of OSC Rule 61-501 could apply to types of transaction that will not necessarily be business combinations and accordingly they recommended leaving the exemption in the related party transaction section as well as including it under the business combinations section.	The exemption will be included in both Parts 4 and 5.

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REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
Valuation exemption – section 5.7(c)(i)	One commenter suggested that London's AIM stock market be treated as akin to the TSX-V and CNQ for the purposes of section 5.7(1)(c)(i) and similar exemptions.	We acknowledge the comment and have conformed the exemption with the definition of "venture issuer" in *Regulation 51-102 respecting Continuous Disclosure Obligations*.
Prohibition against directors receiving special benefits - section 7.1	Seven commenters believed that the concerns of the regulators could be addressed by prohibiting any such payments if they were contingent or otherwise conditional on completion of the transaction. One commenter similarly believed it was appropriate for an incumbent board of a target, at the conclusion of the special committee's work, but prior to completion of the transaction, to fix remuneration for the members of the special committee based on the board's analysis of the time and effort which the independent directors had just devoted to discharging their mandate and acting in the best interests of the shareholders of the target. This type of remuneration is compensation for time and talent expended and is not a "benefit" or a "payment for completion of the transaction" within the meaning of this section. The commenter believed this point should be acknowledged in the Policy Statement.	We agree that directors should be compensated for their time and effort. However, we believe that the independence of directors can be compromised if compensation is linked to completion of a transaction. We amended section 7.1 of the Regulation to prohibit payments by reason of completion of a transaction and limited the prohibition to the members of the independent committee. We also added further guidance in the Policy Statement on best practices for directors compensation in the context of transactions to which the Regulation applies.
	One commenter submitted that the current rule provides in section 7.1(2)(e) that a director will be deemed to not be independent for purposes of the current rule where such director would reasonably be expected to receive a benefit as a consequence of the transaction that is not also available on a *pro rata* basis to shareholders. The	This is not an issue as a result of proposed changes to section 7.1. However, we are of the view that where the exchange or acceleration of stock options is available to all holders of options, the independence of directors who hold options is not generally

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	commenter noted that OSC staff has in the past interpreted the term "benefit" in the definition of "collateral benefit" in connection with the exchange or acceleration of options of a target company held by directors and officers for options of the acquiror. Based on this broad interpretation of the term "benefit", section 7.1(2)(e) of the current rule and section 7.1(3) of the Regulation are problematic. The commenter submited that the Regulation or the Policy Statement should clarify these matters.	compromised.
	The commenter noted that section 7.1(2)(b) of the Regulation deems a current or former director of an affiliated entity of an interested party to be not independent. A group of companies with a common controlling shareholder may have an individual who is independent of management and the controlling shareholder serving on more than one board in the group (or within 12 months, move from one board in the group to another). The commenter submited that such a director should not be disqualified from serving on an independent committee solely as a result of serving as a director of an affiliated entity of the interested party.	This is not an issue as a result of proposed changes to section 7.1. We acknowledge the comment and do not intend to make any changes to the Regulation. We are of the view that in these circumstances, the independence of directors is compromised and directors should be disqualified from serving on an independent committee.
	One commenter suggested that the proposed prohibition against independent directors receiving special benefits could also be problematic if it would extend to their continuing role as directors (or acting in similar capacities, such as on an advisory board) of the issuer or its affiliates or their successors or assigns.	This is not an issue as a result of proposed changes to section 7.1.As stated in subsection 7.1(1) of the Regulation, it is a question of fact whether a director of an issuer is independent. It is the responsibility of the board to determine if a continuing position as director would constitute, in and by itself, an exclusion within the meaning of paragraph (e) of subsection 7.1 (2).

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	One commenter questioned the removal of "Subject to subsections (2) and (3)" in subsection (1). The Regulation should make it clear that subsections (2) and (3) qualify subsection (1).	We do not agree that there is an issue with the removal of the words. We do not propose to make the suggested change.
	One commenter had some difficulty with the drafting of proposed subsection (3), and recommended that the post-closing prohibition apply only to members of the independent committee, not to independent directors generally.	We agree with the comments and have made the suggested changes.
Part 5 of Regulation 62-103	One commenter suggested that the "Chinese wall" aggregation relief in Part 5 of Regulation 62-103 be extended to the minority approval requirements of the proposed Regulation.	We acknowledge the comment and do not intend to make changes to the Regulation at this time. We are of the view that this is an important issues that requires further analysis.
Valuation requirements in other securities acts	One commenter noted that securities legislation in other jurisdictions requires that a circular for an insider bid include a summary of a valuation of the offeree issuer and in some cases, imposes valuation requirements in connection with going private transactions. However, such securities legislation does not include analogous exemptions from the valuation requirement. The commenter suggested that the Commissions consider an initiative to harmonize the insider bid/going private transaction valuation requirements.	We acknowledge the comment. However, this issue is not within the scope of this Regulation.

REFERENCE	SUMMARIZED COMMENT	AMF AND OSC RESPONSE
Other	One commenter questioned why section 1.6 of current OSC Rule 61-501 was no longer required, unless certain relevant provisions of the Ontario *Securities Act* was amended prior to the Regulation coming into force.	The *Securities* Act (Ontario) has been amended to address this issue.

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