POLICY STATEMENT TO *REGULATION 61-101 RESPECTING PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS*

PART 1 GENERAL

1.1. General

The Autorité des marchés financiers and the Ontario Securities Commission (or "we") regard it as essential, in connection with the disclosure, valuation, review and approval processes followed for insider bids, issuer bids, business combinations and related party transactions, that all security holders be treated in a manner that is fair and that is perceived to be fair. We are of the view that issuers and others who benefit from access to the capital markets assume an obligation to treat security holders fairly, and that the fulfillment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.

We do not consider that the types of transactions covered by this Regulation are inherently unfair. We recognize, however, that these transactions are capable of being abusive or unfair, and have made the Regulation to address this.

This Policy Statement expresses our views on certain matters related to the Regulation.

PART 2 INTERPRETATION

2.1. Equal Treatment of Security Holders

(1) **Security Holder Choice** - The definitions of business combination, collateral benefit and interested party, as well as other provisions in the Regulation, include the concept of identical treatment of security holders in a transaction. For the purposes of the Regulation, if security holders have an identical opportunity under a transaction, then they are considered to be treated identically. For example, if under the terms of a business combination, each security holder has the choice of receiving, for each affected security, either $10 in cash or one common share of ABC Co., we regard the security holders as having identical entitlements in amount and form, and as receiving identical treatment, even though they may not all make the same choice. This interpretation also applies where the Regulation refers to consideration that is "at least equal in value" and "in the same form", such as in the provisions on second step business combinations.

(2) **Multiple Classes of Equity Securities** - The definitions of business combination and interested party, and the provisions on second step business combinations in section 8.2 of the Regulation, refer to circumstances where an issuer carrying out a business combination or related party transaction has more than one class of equity securities. The Regulation's treatment of these transactions depends on whether the entitlements of the holders of one class under the transaction are greater than those of the holders of the other classes in relation to the voting and financial participating interests in the issuer represented by the respective securities.

For example: An issuer has outstanding subordinate voting shares carrying one vote per share, and multiple voting shares carrying ten votes per share, with the shares of the two classes otherwise carrying identical rights. Under the terms of a business combination, holders of the subordinate voting shares will receive $10 per share. For the multiple voting shareholders to be regarded as not being entitled to greater consideration than the subordinate voting shareholders under the Regulation, the multiple voting shareholders must receive no more than $10 per share. As a second example: An issuer has the same share structure as the issuer in the first example. Under the terms of a business combination, subordinate voting shareholders will receive, for each subordinate voting Share, $10 and one subordinate voting share of a successor issuer, carrying one vote per share. For the multiple voting shareholders to be regarded as not being entitled to greater

consideration than the subordinate voting shareholders under the Regulation, the multiple voting shareholders must receive, for each multiple voting share, no more than $10 and one multiple voting share of the successor issuer, carrying no more than ten votes per share and otherwise carrying no greater rights than those of the subordinate voting shares of the successor issuer.

(3) **Related Party Holding Securities of Other Party to Transaction** - The Regulation sets out specific criteria for determining related party and interested party status. Without limiting the application of those criteria, a related party of an issuer is not considered to be treated differently from other security holders of the issuer in a transaction, or to receive a collateral benefit, solely by reason of being a security holder of another party to the transaction. For example, if ABC Co. proposes to amalgamate with XYZ Co., the fact that a director of ABC Co., who is not a control person of ABC Co., owns common shares of XYZ Co. (but less than 50 per cent) will not, in and of itself, cause the amalgamation to be considered a business combination for ABC Co. under the Regulation.

(4) **Consolidation of Securities** - One of the methods that may be used to effect a business combination is a consolidation of an issuer's securities at a ratio that eliminates the entire holdings of most holders of affected securities, through the elimination of post-consolidated fractional interests. Where this or a similar method is used, the security holders whose entire holdings are not eliminated are not considered to be treated identically to the general body of security holders under the Regulation.

(5) **Principle of Equal Treatment in Business Combinations** - The Regulation contemplates that a related party of an issuer might not be treated identically to all other security holders in the context of a business combination in which a person other than that related party acquires the issuer. There are provisions in the Regulation, including the minority approval requirement, that are intended to address this circumstance. Despite these provisions, we are of the view that, as a general principle, security holders should be treated equally in the context of a business combination, and that differential treatment is only justified if its benefits to the general body of security holders outweigh the principle of equal treatment. While we will generally rely on an issuer's review and approval process, in combination with the provisions of the Regulation, to achieve fairness for security holders, we may intervene if it appears that differential treatment is not reasonably justified. Giving a security holder preferential treatment in order to obtain that holder's support of the transaction will not normally be considered justifiable.

2.2. Equity Participation by a Related Party

If a related party of an issuer is provided with the opportunity to maintain or acquire an equity interest in the issuer, or in a successor to the business of the issuer, upon completion of a bid or business combination, the following provisions of the Regulation may be relevant.

If the equity interest will be derived solely through securities-based compensation for services as an employee, director or consultant, the provisions of the Regulation regarding collateral benefits may be applicable. In other cases, the acquisition of the equity interest or opportunity to maintain an equity interest may be a connected transaction. In either of these instances, votes attaching to the securities owned by the related party may be excluded from the minority vote required for a business combination, including a second step business combination following a bid. We are of the view that the employee compensation exemptions to the collateral benefit and connected transaction definitions do not generally apply to an issuance of securities in the issuer or a successor issuer upon completion of the transaction.

Without limiting the application of the definition of joint actor, we may consider a related party to be a joint actor with the offeror in a bid, or with the acquirer in a business combination, if the related party becomes a control person of the issuer or a successor issuer upon completion of the transaction or if the related party, whether alone or with joint

actors, beneficially owns securities with more than 20 per cent of the voting rights. We may also consider a related party's continuing equity interest in the issuer or a successor issuer upon completion of the transaction in making an assessment of joint actor status generally. A joint actor characterization could cause a bid to be regarded as an insider bid, or an otherwise arm's length transaction to be a regarded as a business combination, that requires preparation of a formal valuation.

2.3 Direct or Indirect Parties to a Transaction

(1) The Regulation makes references to direct and indirect parties to a transaction in the definition of connected transactions and in subparagraph 8.2(b)(i) regarding minority approval for a second step business combination. For the purposes of the Regulation, a person is considered to be an indirect party if, for example, a direct party to the transaction is a subsidiary entity, nominee or agent of the person. A person is not an indirect party merely because it negotiates or approves the transaction on behalf of a party, holds securities of a party or agrees to support the transaction in the capacity of a security holder of a party.

(2) For the purposes of the Regulation, we do not consider a person to be a direct or indirect party to a business combination solely because the person receives pro rata consideration in its capacity as a security holder of the issuer carrying out the business combination.

2.4. Amalgamations

Under the Regulation, an amalgamation may be a business combination, related party transaction or neither, depending on the circumstances. For example, an amalgamation is a business combination for an issuer if, as a consequence of the amalgamation, holders of equity securities of the issuer become security holders of the amalgamated entity, unless an exception in one of the lettered paragraphs in the definition of business combination applies. An amalgamation is a related party transaction for an issuer rather than a business combination if, for example, a wholly-owned subsidiary entity of the issuer amalgamates with a related party of the issuer, leaving the equity securities of the issuer unaffected.

2.5. Transactions Involving More than One Reporting Issuer

The characterization of a transaction or the availability of a valuation or minority approval exemption under the Regulation must be considered individually for each reporting issuer involved in the transaction. For example, an amalgamation may be a downstream transaction for one party and a business combination for the other, in which case the latter party is the only party to whom the requirements of the Regulation may apply.

2.6. Previous Arm's Length Negotiations Exemption

(1) For the purposes of the formal valuation exemptions based on previous arm's length negotiations in paragraph (b) of subsection 2.4(1) and paragraph (b) of subsection 4.4(1) of the Regulation for insider bids and business combinations, respectively, the arm's length relationship must be between the selling security holder and all persons that negotiated with the selling security holder.

(2) We note that the previous arm's length negotiations exemption is based on the view that those negotiations can be a substitute for a valuation. An important requirement for the exemption to be available is that the offeror or proponent of the business combination, as the case may be, engages in "reasonable inquiries" to determine whether various circumstances exist. In our view, if this requirement cannot be satisfied through receipt of representations of the parties directly involved or some other suitable method, the offeror or proponent of the transaction is not entitled to rely on this exemption.

2.7. Connected Transactions

(1) "Connected transactions" is a defined term in the Regulation, and reference is made to connected transactions in a number of parts of the Regulation. For example, subparagraph (a)(iii) of section 5.5 of the Regulation requires connected transactions to be aggregated, in certain circumstances, for the purpose of determining the availability of the formal valuation exemption for a related party transaction that is not larger than 25 per cent of the issuer's market capitalization. In other circumstances, it is possible for an issuer to rely on an exemption for each of two or more connected transactions. However, we may intervene if we believe that a transaction is being carried out in stages or otherwise divided up for the purpose of avoiding the application of a provision of the Regulation.

(2) One method of acquiring all the securities of an issuer is through a plan of arrangement or similar process comprised of a series of two or more interrelated steps. The series of steps is the "transaction" for the purposes of the definition of business combination. However, a related party transaction that is carried out in conjunction with a business combination, and that is not simply one of the procedural steps in implementing the acquisition of the affected securities in the business combination, is subject to the Regulation's requirements for related party transactions. This applies where, for example, a related party buys some of the issuer's assets that the acquirer in the business combination does not want.

(3) An agreement, commitment or understanding that a security holder will tender to a bid or vote in favour of a transaction is not, in and of itself, a connected transaction to the bid or to the transaction for purposes of the Regulation.

2.8. Time of Agreement

A number of provisions in the Regulation refer to the time a business combination or related party transaction is agreed to. This should be interpreted as the time the issuer first makes a legally binding commitment to proceed with the transaction, subject to any conditions such as security holder approval. Where the issuer does not technically negotiate the transaction with another party, such as in the case of a share consolidation, the time the transaction is agreed to should be interpreted as the time at which the issuer's board of directors determines to proceed with the transaction, subject to any conditions.

2.9. "Acquire the Issuer"

In some definitions and elsewhere in the Regulation, reference is made to a transaction in which a related party would "directly or indirectly acquire the issuer … through an amalgamation, arrangement or otherwise, whether alone or with joint actors". This refers to the acquisition of all of the issuer, not merely the acquisition of a control position. For example, a related party "acquires" an issuer when it acquires all of the securities of the issuer that it does not already own, even if that related party held a control position in the issuer prior to the transaction.

PART 3 MINORITY APPROVAL

3.1. Meeting Requirement

The definition of minority approval and subsections 4.2(2) and 5.3(2) of the Regulation provide that minority approval, if required, must be obtained at a meeting of holders of affected securities. The issuer may be able to demonstrate that holders of a majority of the securities that would be eligible to be voted at a meeting would vote in favour of the transaction under consideration. In this circumstance, the regulator or the securities regulatory authority will consider granting an exemption under section 9.1 of the Regulation from the requirement to hold a meeting, conditional on security holders being provided with disclosure similar to that which would be available to them if a meeting were held.

3.2. Second Step Business Combination Following an Unsolicited Take-over Bid

Section 8.2 of the Regulation allows the votes attached to securities acquired under a bid to be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if certain conditions are met. One of the conditions is that the security holder that tendered the securities in the bid not receive an advantage in connection with the bid, such as a collateral benefit, that was not available to other security holders. There may be circumstances where this condition could cause difficulty for an offeror who wishes to acquire all of an issuer through a business combination following a bid that was unsolicited by the issuer. For example, in order to establish that a benefit received by a tendering security holder is not a collateral benefit under the Regulation, the offeror may need the cooperation of an independent committee of the offeree issuer during the bid. This cooperation may not be forthcoming if the bid is unfriendly. In this type of circumstance, the fact that the bid was unsolicited would normally be a factor the regulator or the securities regulatory authority would take into account in considering whether exemptive relief should be granted to allow the securities to be voted.

3.3. Special Circumstances

As the purpose of the Regulation is to ensure fair treatment of minority security holders, abusive minority tactics in a situation involving a minimal minority position may cause the regulator or the securities regulatory authority to grant an exemption from the requirement to obtain minority approval. Where an issuer has more than one class of equity securities, exemptive relief may also be appropriate if the Regulation's requirement of separate minority approval for each class could result in unfairness to security holders who are not interested parties, or if the policy objectives of the Regulation would be accomplished by the exclusion of an interested party's votes in one or more, but not all, of the separate class votes.

PART 4 DISCLOSURE

4.1. Insider Bids - Disclosure

Subsection 2.2(1)(d) of the Regulation requires, for an insider bid, the disclosure required by Form 62-104F1 *Take-Over Bid Circular* of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F1 *Take-Over Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, and by Form 62-104F2 *Issuer Bid Circular* of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, appropriately modified. In our view, Form 62-104F2 and in Ontario, Form 62-504F2, disclosure would generally include, in addition to Form 62-104F1 and in Ontario, Form 62-504F1, disclosure, disclosure for the following items, with necessary modifications, in the context of an insider bid:

1. Item 9 – Purpose of the bid
2. Item 13 - Acceptance of issuer bid
3. Item 14 - Benefits from the bid
4. Item 16 - Other benefits
5. Item 17 - Arrangements between issuer and security holders
6. Item 18 - Previous purchases and sales
7. Item 20 - Valuation
8. Item 23 - Previous distribution
9. Item 24 - Dividend policy
10. Item 25 - Tax consequences
11. Item 26 - Expenses of bid

4.2. Business Combinations and Related Party Transactions - Disclosure

Paragraphs 4.2(3)(a) and 5.3(3)(a) of the Regulation require in the information circulars for a business combination and a related party transaction, respectively, the disclosure required by Form 62-104F2, and in Ontario, Form 62-504F2, to the extent applicable and with necessary modifications. In our view, Form 62-104F2, and in Ontario, Form 62-504F2, disclosure would generally include disclosure for the following items, with necessary modifications, in the context of those transactions:

1. Item 4 - Consideration
2. Item 9 – Purpose of the bid
3. Item 10 - Trading in securities to be acquired
4. Item 11 - Ownership of securities of issuer
5. Item 12 - Commitments to acquire securities of issuer
6. Item 13 - Acceptance of issuer bid
7. Item 14 - Benefits from the bid
8. Item 15 - Material changes in the affairs of issuer
9. Item 16 - Other benefits
10. Item 17 - Arrangements between issuer and security holders
11. Item 18 - Previous purchases and sales
12. Item 19 - Financial statements
13. Item 20 - Valuation
14. Item 21 - Securities of issuer to be exchanged for others
15. Item 22 - Approval of issuer bid circular
16. Item 23 - Previous distribution
17. Item 24 - Dividend policy
18. Item 25 - Tax consequences
19. Item 26 - Expenses of bid
20. Item 29 - Other material information
21. Item 30 - Solicitations

PART 5 FORMAL VALUATIONS

5.1. General

(1) The Regulation requires formal valuations in a number of circumstances. We are of the view that a conclusory statement of opinion as to the value or range of values of the subject matter of a valuation does not by itself fulfil this requirement.

(2) The disclosure standards for formal valuations in By-laws 29.14 to 29.23 of the Investment Dealers Association of Canada and Appendix A to Standard No. 110 of the Canadian Institute of Chartered Business Valuators each generally represent a reasonable approach to meeting the applicable legal requirements. Specific disclosure standards, however, cannot be construed as a substitute for the professional judgment and responsibility of the valuator and, on occasion, additional disclosure may be necessary.

(3) An issuer that is required to obtain a formal valuation, or the offeree issuer in the case of an insider bid, should work in cooperation with the valuator to ensure that the requirements of the Regulation are satisfied. At the valuator's request, the issuer should promptly furnish the valuator with access to the issuer's management and advisers, and to all material information in the issuer's possession relevant to the formal valuation. The valuator is expected to use that access to perform a comprehensive review and analysis of information on which the formal valuation is based. The valuator should form its own independent views of the reasonableness of this information, including any forecasts, projections or other measurements of the expected future performance of the enterprise, and of any of the assumptions on which it is based, and adjust the information accordingly.

(4) The disclosure in the valuation of the scope of review should include a description of any limitation on the scope of the review and the implications of the limitation on the

valuator's conclusion. Scope limitations should not be imposed by the issuer, an interested party or the valuator, but should be limited to those beyond their control that arise solely as a result of unusual circumstances. In addition, it is inappropriate for any interested party to exercise or attempt to exercise any influence over a valuator.

(5) Subsection 2.3(2) of the Regulation provides that in the context of an insider bid, an independent committee of the offeree issuer shall, and the offeror shall enable the independent committee to, determine who the valuator will be and supervise the preparation of the formal valuation. Although the subsection also requires the independent committee to use its best efforts to ensure that the valuation is completed and provided to the offeror in a timely manner, we are aware that an independent committee could attempt to use the subsection to delay or impede an insider bid viewed by the committee as unfriendly. In a situation where an offeror is of the view that an independent committee is not acting in a timely manner in having the formal valuation prepared, the offeror may seek relief under section 9.1 of the Regulation from the requirement that the offeror obtain a valuation.

(6) Similarly, in circumstances where an independent committee is of the view that a bid that has been announced will not actually be made or that the bid is not being made in good faith, the independent committee may apply for relief from the requirements of subsection 2.3(2) of the Regulation.

(7) Requirements in securities legislation relating to forward-looking information do not apply to a formal valuation for which financial forecasts and projections are relied on and disclosed.

5.2. Independent Valuators

While, except in certain prescribed situations, the Regulation provides that it is a question of fact as to whether a valuator (which for the purposes of this section includes a person providing a liquidity opinion) is independent, situations have been identified in the past that raise serious concerns for us. These situations, which are set out below, must be assessed for materiality by the board or committee responsible for choosing the valuator, and disclosed in the disclosure document for the transaction. In determining the independence of the valuator from an interested party, relevant factors may include whether

(a) the valuator or an affiliated entity of the valuator has a material financial interest in future business under an agreement, commitment or understanding involving the issuer, the interested party or an associated or affiliated entity of the issuer or interested party,

(b) during the 24 months before the valuator was first contacted for the purpose of the formal valuation or opinion, the valuator or an affiliated entity of the valuator

(i) had a material involvement in an evaluation, appraisal or review of the financial condition of the interested party, or an associated or affiliated entity of the interested party, other than the issuer,

(ii) had a material involvement in an evaluation, appraisal or review of the financial condition of the issuer, or an associated or affiliated entity of the issuer, if the evaluation, appraisal or review was carried out at the direction or request of the interested party or paid for by the interested party, other than the issuer in the case of an issuer bid,

(iii) acted as a lead or co-lead underwriter of a distribution of securities by the interested party, or acted as a lead or co-lead underwriter of a distribution of securities by the issuer if the retention of the underwriter was carried out at the direction or request of the interested party or paid for by the interested party, other than the issuer in the case of an issuer bid,

(iv) had a material financial interest in a transaction involving the interested party, other than the issuer in the case of an issuer bid, or

(v) had a material financial interest in a transaction involving the issuer other than by virtue of performing the services referred to in subparagraph (b)(ii) or (b)(iii), or

(c) the valuator or an affiliated entity of the valuator is

(i) a lead or co-lead lender or manager of a lending syndicate in respect of the transaction in question, or

(ii) a lender of a material amount of indebtedness in a situation where the interested party or the issuer is in financial difficulty, and the transaction would reasonably be expected to have the effect of materially enhancing the lender's position.

PART 6 ROLE OF DIRECTORS

6.1. Role of Directors

(1) Paragraphs 2.2(2)(d), 3.2(d), 4.2(3)(e), 5.2(1)(e) and 5.3(3)(e) of the Regulation require that the disclosure for the applicable transaction include a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer, including any materially contrary view or abstention by a director and any material disagreement between the board and the special committee.

(2) An issuer involved in any of the types of transactions regulated by the Regulation should provide sufficient information to security holders to enable them to make an informed decision. Accordingly, the directors should disclose their reasonable beliefs as to the desirability or fairness of the proposed transaction and make useful recommendations regarding the transaction. A statement that the directors are unable to make or are not making a recommendation regarding the transaction, without detailed reasons, generally would be viewed as insufficient disclosure.

(3) In reaching a conclusion as to the fairness of a transaction, the directors should disclose in reasonable detail the material factors on which their beliefs regarding the transaction are based. Their disclosure should discuss fully the background of deliberations by the directors and any special committee, and any analysis of expert opinions obtained.

(4) The factors that are important in determining the fairness of a transaction to security holders and the weight to be given to those factors in a particular context will vary with the circumstances. Normally, the factors considered should include whether the transaction is subject to minority approval, whether the transaction has been reviewed and approved by a special committee and, if there has been a formal valuation, whether the consideration offered is fair in relation to the valuation conclusion arrived at through the application of the valuation methods considered relevant for the subject matter of the formal valuation. A statement that the directors have no reasonable belief as to the desirability or fairness of the transaction or that the transaction is fair in relation to values arrived at through the application of valuation methods considered relevant, without more, generally would be viewed as insufficient disclosure.

(5) The directors of an issuer involved in a transaction regulated by the Regulation are generally in the best position to assess the formal valuation to be provided to security holders. Accordingly, we are of the view that, in discharging their duty to security holders, the directors should consider the formal valuation and all prior valuations disclosed and discuss them fully in the applicable disclosure document.

(6) To safeguard against the potential for an unfair advantage for an interested party as a result of that party's conflict of interest or informational or other advantage in connection

with the proposed transaction, it is good practice for negotiations for a transaction involving an interested party to be carried out by or reviewed and reported upon by a special committee of disinterested directors. Following this practice normally would assist in addressing our interest in maintaining capital markets that operate efficiently, fairly and with integrity. While the Regulation only mandates an independent committee in limited circumstances, we are of the view that it generally would be appropriate for issuers involved in a material transaction to which the Regulation applies to constitute an independent committee of the board of directors for the transaction. Where a formal valuation is involved, we also would encourage an independent committee to select the valuator, supervise the preparation of the valuation and review the disclosure regarding the valuation.

(7) A special committee should, in our view, include only directors who are independent from the interested party. While a special committee may invite non-independent board members and other persons possessing specialized knowledge to meet with, provide information to, and carry out instructions from, the committee, in our view non-independent persons should not be present at or participate in the decision-making deliberations of the special committee.

(8) We recognize that directors who serve on a special committee or independent committee must be adequately compensated for their time and effort. However, members of the committee should ensure that compensation for serving on the committee will not compromise their independence. Subsection 7.1(3) of the Regulation prohibits members of an independent committee reviewing a transaction from receiving any payment that is contingent on completion of the transaction. We are of the view that the compensation of committee members should ideally be set when the committee is created and be based on fixed sum payments or the work involved.