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DELIVERED

June 3, 2003

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, ON M5H 3S8

Dear Mr. Stevenson:

Re: Request for Comments – Proposed Amendments to Rule 61-501

We are pleased to submit this letter in response to the request for comments published February 28, 2003 on proposed amendments to Ontario Securities Commission ("OSC") Rule 61-501 (the "Amended Rule") and Companion Policy 61-501 (the "Policy").

GENERAL

In general, we are in favour of and support the changes set forth in the Amended Rule to better focus on the underlying policy purpose of the current OSC Rule 61-501 (the "Current Rule") dealing with enhanced shareholder procedural and disclosure protection in certain types of transactions where the interests of minority shareholders have the potential to be in conflict with the interests of insiders. The bulk of our comments which follow are of a technical nature intended to clarify, and provide for more consistent drafting in, the Amended Rule.

DETAILED COMMENTS

1. Independent Committee. The Amended Rule uses the defined term "independent committee" rather than the term that was previously used and is still being used by a number of people (i.e. special committee). However, in several places in the Amended Rule and the Policy reference is still made to the "special committee" rather than the "independent committee". We suggest that a global search be done in order to ensure consistency of reference to the new defined term.

2. Disclosure Document. In several places in the Amended Rule, there us a requirement for a "disclosure document". In certain cases, care has been taken to include the phrase "if any" after reference to the required disclosure in a "disclosure document", presumably to reflect the OSC's view that the Amended

Rule does not itself impose additional instances where a disclosure document may be required. However, in some places, this reference is missing, thereby seeming to impose the preparation of a disclosure document where one would otherwise not be required. It is possible, in the case of a non-material transaction, for example, that even a material change report will not be filed for the transaction with the result that there will be no disclosure document. Again, we suggest that a global search be done for the use of the phrase "disclosure document" in the Amended Rule to provide for the addition of the phrase "if any" in every case in which such defined term is used.

3. Affiliated Entity/Associated Entity. We note that there are two separate definitions, "affiliated entity" and "associated entity"; however, throughout the Amended Rule where these two defined terms are used in close association, the more convenient grammatical terminology "affiliated or associated entity" or "associated or affiliated entity" is used. As a drafting point, we suggest that neither the term "affiliated" nor "associated" should be used without the word "entity" after it. Again, a global search should be done to identify the instances in which this phraseology is used in order to correct the drafting.

4. Transaction. We note in the definition of "business combination" that reference is made to, among other things, an "amalgamation, arrangement, consolidation, amendment to the terms of a class of equity securities or any other transaction". In paragraph (d) of that definition and in various other places in the Amended Rule, only the term "transaction" is used. We have encountered situations in dealing with the Current Rule in which there has been uncertainty about the meaning of the term "transaction". We suggest that the term "transaction" be defined to clearly include all of the different types of "transactions" which are referenced in the definition of "business combination".

5. Timing References. A number of different references are used in the Amended Rule to identify the time at which certain things are to be determined. For example, in paragraph (d) of the definition of "business combination", reference is made to "at the time the transaction is agreed to". The phrase "in which the transaction is publicly announced" is used in section 1.2(1)(a)(iii). In section 4.6(1)2, reference is made to "at the time that the business combination is proposed". While in some cases the reason for the use of one or another of these three references is clear, in others, we think that there may be some confusion about which time is intended. This is partly as a result of the fact that not all "transactions " require an agreement and some, like an amalgamation or arrangement, typically have an agreement, but it may be entered into well after the "transaction" is originally proposed or announced. For example, it would seem as though the correct timing at which the determination should be made pursuant to the definition of "business combination" as to whether or not any of

the policy concerns set forth in paragraph (d) thereof are present is the time at which any such corporate reorganization has been approved or authorized by the board of directors, whether or not subject to conditions. It is not clear that this is the time at which "the transaction is agreed to". Another example of the confusion that could arise is found in the definition of "market capitalization" where the date at which certain calculations are to be made is the date on which "the transaction is agreed to". If that means the date that the parties involved agree to go ahead to prepare the necessary documents in order to obtain the necessary shareholder approval, that could be a different date from the date on which the amalgamation agreement itself is entered into and that itself could be a different date from the date upon which the shareholders actually approve that transaction. We think that these timing references should be reviewed to ensure that, in all cases, the correct terminology is used to ensure (a) clarity and (b) that the calculation is made at the right time from a policy perspective.

6. Controlled. In paragraph (b) of the definition of "controlled", should the reference to 50% of the "interests" in the partnership or other entity be a reference to "voting interests" to be consistent with the fact that it is voting interests that are the concern in paragraph (a) of that definition?

7. Fair Market Value. The definition of "fair market value" contains the language "except as provided in paragraph 6.4(2)(d)". We suggest that this phrase be replaced by the phrase "subject to paragraph 6.4(2)(d)" or that this reference be deleted in its entirety from this definition since paragraph 6.4(2)(d) itself contains the modification to the definition of fair market value to be used in that case.

8. Freely Tradeable. The definition of "freely tradeable" includes, as the first item, securities that are "transferable". Arguably, securities of a company that has restrictions on transfer subject to satisfaction of certain conditions (such as the approval of the shareholders or directors of the company) are still transferable, provided those conditions are met. Should paragraph (a) be amended to add the words "without satisfaction of any conditions" after the word "transferable"?

9. Interested Party. In the definition of "interested party" should the phrase "and any connected transaction" be added after the end of paragraph (b)(ii)?

10. Related Party Transaction. In the definition of "related party transaction" we suggest that, in paragraph (j), the word "creates" be changed to "enters into" if it is intended that both the person granting the credit facility and the recipient of the credit facility would be engaging in a related party transaction.

11. Discussion of Review Process. We note that there is some ambiguity in section 4.2(3)(f), and elsewhere in the Amended Rule and the Policy that this disclosure requirement is present or discussed, about the extent of the "discussion" that is required in respect of "any materially contrary view or abstention by a director

and any material disagreement between the board and the special [*sic*] committee". One of the issues that has arisen in practice is whether it is sufficient to discuss the review and approval process and, in so doing, simply to refer to the fact, for example, that a director voted against the transaction, without attempting to explain the director's expressed reasons for his or her position, or whether the word "discussion" is intended to also modify the disclosure concerning the materially contrary view or abstention and any material disagreement between the board and the special committee. In our view, it is likely the case that, at least in the case of any single director's abstention or contrary view, it would be difficult for the company to attempt to put itself in the shoes of the director in order to describe the reasons for the director's view in a document for which the company has responsibility. However, it could well be helpful to minority shareholders for them to receive disclosure of the reasons, if any, announced at the board meeting by the dissenting or abstaining director for his or her views. We think that clarification of the required level of disclosure should be provided in the Amended Rule.

12. <u>General Disclosure and Credit Facilities</u>. We note that through the operation of sections 5.7 and 5.1(h)(iii), which is explained in footnote 182 of the Amended Rule, it is intended that minority approval not be required for an advance under a credit facility that has already been entered into in compliance with the Amended Rule. However, we note that section 5.1(h)(iii) requires that the terms of the previous transaction have been "generally disclosed". In fact, the entering into of the credit facility may or may not be required, under timely or continuous disclosure requirements, to have been "generally disclosed". Only a credit facility which involved a material change or material information would have had to have been "generally disclosed". In the Current Rule where, admittedly, reference to the credit facility is not contained, this general disclosure requirement did not apply. It is submitted that Rule 61-501 should not result in an additional disclosure requirement in the absence of a transaction otherwise giving rise to the need to comply with timely or continuous disclosure requirements set forth in applicable securities legislation. Thus, we would suggest that different wording be used to meet the OSC's stated intent of ensuring that each advance under a credit facility which otherwise complies with the Amended Rule not be dealt with as a separate related party transaction.

13. <u>Entity Resulting from Combination</u>. We note that in part 9 of section 5.5 several different phrases are used, apparently to refer to the same kind of entity. These phrases are: "an entity resulting from the combination" (paragraph (a)), "a successor to the issuer" (paragraph (b)) and "the combined entity" (paragraph (d)). It is not clear to us that it is necessary to use these different terms in order to refer to the entity resulting from the combination and, since this is the

terminology used in the lead-in language to part 9 of section 5.5, we suggest that this language be used throughout.

14. Non-Cash Consideration. Section 6.3(2)(a) has been changed from the Current Rule. Is it intended that the non-cash consideration could consist of securities of a reporting issuer in a class that is newly created for the purposes of the transaction and for which there is no published market at all or is it intended that the phrase "for which there is a published market" modify both references to "securities" in section 6.3(2)(a)? If the latter is intended, we suggest that the drafting be clarified. If the former is intended, we question whether, in the case of a related party transaction for the issuer of the security, the conditions in subparagraphs 4(a) and (b) of section 5.5 are sufficient to ensure that the person to whom these securities are offered would have a sufficiently detailed knowledge of the value in order to justify no valuation.

15. Insider Bids and Valuations. Section 2.3(2)(c) requires the independent committee to "… use its best efforts to ensure that the formal valuation is completed and provided to the offeror in a timely manner." While we appreciate the policy reason behind imposing such an obligation on the independent committee, we think that the section as drafted may perhaps impose an unduly onerous standard of performance. We suggest that revising this provision as follows would be sufficient to meet the policy concerns behind the change: "… use reasonable efforts appropriate in the circumstances to facilitate the provision of the formal valuation in a timely manner."

Thank you for this opportunity to comment on the Amended Rule and the Policy. If you have any questions concerning this letter, please direct them to the writer at 416-865-4407, Richard Steinberg at 416-865-5443 or David Carbonaro at 416-868-3427.

Yours very truly,

Roxanne E. McCormick

REM/rh