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Ontario Securities Commission
20 Queen Street West
Suite 1800
Toronto, Ontario
M5H 3S8

Attention: Mr. John Stevenson, Secretary

Dear Mr. Stevenson:

Re: Proposed Amendments to OSC Rule 61-501

This letter reflects my personal comments (and not necessarily those of my firm) with respect to the proposed amendments to OSC Rule 61-501. My partner, Simon Romano, has submitted a comment letter with both conceptual and detailed technical comments on the proposed amendments with which submission I am in agreement.

Rather than rehash that material, I am writing to provide my own perspective on the key proposed change in the Rule which centres on the creation of a definition of "collateral benefit" and the significant change in treatment of "business combinations" (formerly "going private transactions").

Collateral Benefit

The proposed definition of "collateral benefit" and, more generally, the approach taken to "business combination" transactions will represent a significant change in practice (even if, as has been contended, the existing rules are susceptible of an interpretation consistent with that which is made explicit in the proposed new definition of collateral benefit). I am concerned that the impetus provided by criticisms levelled at a few high profile transactions will have the result of a significant change in approach to such transactions which has not been carefully thought through and, in particular, will come as a surprise to many shareholders and indeed capital markets participants generally. Before proceeding to implement these changes, I

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believe a wider debate is called for, not the least because with the plethora of regulatory changes, rule reformulations and policy initiatives in recent years, many commentators, observers and capital market participants are, I suspect, suffering the sort of burn-out that breeds apathy.

From a principled perspective, my chief objection to the definition of "collateral benefit" is that (with narrow exceptions for certain employment-related benefits in certain circumstances) it fails to appropriately differentiate between pre-existing entitlements of securityholders which existed separate and apart from any arrangements negotiated in the context of the business combination and those new arrangements and modifications to existing arrangements which have been negotiated in the context of the business combination. I am far from convinced that the mere prospect of "differential effect" provides a valid general policy basis for effectively disenfranchising those related parties with pre-existing entitlements from having an effective vote to approve a business combination. Indeed, the requirement that the existence of "offsetting costs" be ignored is precisely why it is indefensible in my view to generally consider pre-existing entitlements as collateral benefits - that is, it is the fact that absent fraud or corporate waste there will be an offsetting consideration for such entitlements (whether in terms of service provided, cash advanced for loans, etc.) that conceptually distinguishes such entitlements from new "collateral" arrangements negotiated in the context of the business combination transaction.

Even if I were convinced of the validity of the policy reason, however, the approach of such an open-ended definition, subject to narrow exceptions, will be that there will undoubtedly be overlooked various sorts of pre-existing arrangements or other benefits which do not raise policy concerns sufficient to call for a "dis-interested vote" but which will necessitate exemptive relief (and in the next revision to Rule 61-501, a host of new prescribed exemptions).

Indeed, to digress for a moment, those commentators who bemoan the ever increasing and bewildering complexity of the OSC's rules perhaps insufficiently appreciate that it is precisely this approach of "regulation by exemption" that inevitably leads to this complexity (e.g. by length, well over half of Rule 61-501 is comprised not of proscriptive rules or requirements but of the codification of the myriad exemptions that have been negotiated and obtained over time since the original enactment of Policy 9.1).

Specific Issues

Turning from my general conceptual objection to specific concerns, I am unconvinced that the exclusion for related party employment benefits in clause (c) is workable or fair. As others have no doubt commented the requirement that the benefit be "reasonably consistent with customary industry practices" will no doubt result in the expenditure (arguably waste) of money on compensation consultants to expertly validate non-controversial pre-existing contractual arrangements. Moreover, the blanket exclusion of employment arrangements with related parties that are, collectively, greater than 10% holders seems inappropriate and arguably perverse. Indeed, in almost every conceivable case, the value of "cashing in on" pre-existing contractual employment-related entitlements for significant securityholders will bulk less large in their minds than it will for directors and officers (and other related parties) who are less significant securityholders. I am at a loss to understand how the existence of such arrangements provides a sufficiently compelling policy basis to effectively disenfranchise such shareholders from a meaningful vote to approve a business combination in every transaction where there exist directors and senior officers with pre-existing employment entitlements who hold in excess of 10% of the shares.

Before codifying such an approach I would urge Staff to actually investigate (e.g. through a review of proxy circulars) the percentage of Canadian public companies where an arms-length acquisition transaction would trigger a "minority vote" solely because directors and senior officers with stock options or other pre-existing (and disclosed) employment arrangements collectively hold more than 10% of the shares. My instinct is that the percentage will be high. Accordingly, prospective acquirors of such companies will be faced with much less deal certainty since any lock-up agreements negotiated with such persons will be rendered much less meaningful. In this respect, I doubt very much if our capital markets fully appreciate the costs that will be paid in lost transaction value through adopting such a pristine standard of "equal treatment".

Thank you for considering these comments.

Yours truly,

Robert W.A. Nicholls