June 16, 2003 (revised)

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

This letter is submitted in response to the request for comment published February 28, 2003 on proposed amendments to Ontario Securities Commission (the “Commission”) Rule 61-501 (the “Rule”) and Companion Policy 61-501CP.

This submission is provided by the Securities Law Subcommittee (the "Subcommittee") of the Business Law Section of the Ontario Bar Association (the "OBA"). The members of the Subcommittee are listed in the attached Appendix. Please note that not all of the members of the Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the Subcommittee.

We support the Commission’s effort to clarify the application of the Rule, reduce the necessity to apply for exemptive relief and to make the Rule more user-friendly. However, the proposed Rule introduces a new concept of “collateral benefit” that will create uncertainty in its application and make business combinations more difficult to achieve.

“Business combination” is defined as any amalgamation, arrangement or other transaction by virtue of which equity security holders will have their equity interest terminated without their consent, regardless of whether the holder’s equity security is replaced with another security. Part 4 of the Rule applies minority shareholder requirements to business combinations if a related party of the issuer receives consideration not made available to all shareholders, including collateral benefits, unless an exemption is available.

“Collateral benefit” is defined as any benefit a related party of the issuer will be entitled to as a consequence of the transaction, including, without limitation, an increase in salary, a lump sum payment, payment for surrendering stock options or other benefit relating to past or future employment. Excluded from the definition are enhancements in employee benefits in a group plan (other than an incentive plan) if the benefits are “reasonably consistent with customary industry practices” and made generally available to employees, and benefits relating solely to past or future employment that is “reasonably consistent with customary industry practices” and not conditional on the related party supporting the transaction (if certain other conditions are met).

We understand that the intent of the amendment is to address conflicts of interest where management negotiate a transaction which provides them with significant personal benefits but which may not be in the best interests of shareholders. We also understand that the intent is to clarify a similar provision in the existing Rule. However, the proposed amendment goes too far and would create even more uncertainty. The broad definition will catch most, if not all, situations where an acquirer totally at arm's length wishes to induce management of the target to support the transaction and to stay with the company following the transaction. Unless an exemption is available, the transaction will be subject to the minority shareholder approval requirements, which may be an insurmountable barrier to concluding it.

Because the definition covers any benefit, rather than ones offered by the party proposing the transaction, many transactions will be caught even if the acquirer does not intend to retain the target's management. Any transaction with an issuer whose management has previously negotiated "golden parachutes" will be subject to the Rule, unless the issuer can demonstrate that the benefit is "reasonably consistent with industry practice." How will an issuer determine this? What is the "industry" for this purpose? Will the issuer have to show that it is common for companies in its business sector to provide golden parachutes for senior executives? Or will it be sufficient to show that golden parachutes commonly are provided in public companies? Will it have to go further and show that golden parachutes are commonly provided on comparable terms? If so, how comparable must those terms be? Will it matter if the issuer is a junior or senior company? How will it determine what is industry practice if companies do not make details public? Will the issuer be entitled to rely on a human resources consulting firm?

The same issue arises for enhancements in employee benefit plans, which also must be reasonably consistent with industry practice. The exclusion of incentive plans from this exclusion would appear to indicate that any participation in an incentive plan in the issuer resulting from the transaction is a collateral benefit.

Furthermore, the definition is much broader than the definition of "collateral benefits" in section 97(2) of the *Securities Act* (Ontario), which prohibits payment of such benefits in connection with a take-over bid. This could result in further uncertainty.

We believe the increased costs and uncertainty that will result from this amendment are out of proportion to the benefit sought. As an alternative, the Commission might consider simply requiring disclosure of any collateral benefit in materials sent to shareholders in connection with the transaction, so that the shareholders can make a decision whether or not to approve with knowledge of any potential conflicts.

We thank you for this opportunity to comment. If you have any questions, please contact Tim Baikie at 416-995-7844 (tbaikie@abanet.org).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

Appendix

OBA SECURITIES LAW SUBCOMMITTEE

Members:

Richard A. Lococo (Chair), *Manulife Financial*
Thomas W. Arndt, *407 ETR*
Aaron J. Atkinson/Janne M. Duncan, *Fasken Martineau DuMoulin LLP*
Timothy S. Baikie, *Barrister & Solicitor*
Colin B. Berryman (Secretary), *Osler, Hoskin & Harcourt LLP*
Robert G. Carillo, *Heenan Blaikie LLP*
James Clarke/Anoop Dogra, *Blake, Cassels & Graydon LLP*
Mary Condon, *Osgoode Hall Law School*
Gil Cornblum/D. Grant Vingoe, *Dorsey & Whitney LLP*
Pierre Dagenais/Victor R. Peter, *Ogilvy Renault*
Aaron S. Emes/David J. Nowak, *Torys LLP*
Allan Goodman, *Goodmans LLP*
Kevin J. Gormely, *CIBC World Markets*
Carol Hansell/Kenneth G. Klassen, *Davies Ward Phillips & Vineberg LLP*
Henry A. Harris/Todd M. May, *Gowling Lafleur Henderson LLP*
Barbara J. Hendrickson, *Baker & McKenzie*
David R. Kerr, *Manulife Financial*
Raymond A. McDougall/Darin R. Renton, *Stikeman Elliott LLP*
Nancy J. Ross, *RBC Global Asset Management Inc.*
Warren M. Rudick, *Mackenzie Financial*
Shea T. Small, *McCarthy Tétrault LLP*
Robert N. Spiegel, *Stikeman, Graham, Keeley & Spiegel LLP*
Robert M. Stewart, *Miller Thomson LLP*
Philippe Tardif, *Lang Michener*
Arlene D. Wolfe, *Barrister & Solicitor*
Richard Wyruch, *Rockwater Capital Corporation*

Liaison:

Michael Brady, *Market Regulation Services Inc.*
Julie K. Shin, *The Toronto Stock Exchange*
Iva Vranic, *Ontario Securities Commission*