Chapter 6

Request for Comments

6.1 Request for Comments

6.1.1 MI 33-105 & CP 33-105 Underwriting Conflicts

**NOTICE OF PROPOSED CHANGES
TO PROPOSED MULTILATERAL INSTRUMENT 33-105
AND COMPANION POLICY 33-105CP
UNDERWRITING CONFLICTS**

Substance and Purpose of Proposed Multilateral Instrument and Companion Policy

Introduction

On February 6, 1998, the Canadian Securities Administrators (the "CSA") published for comment proposed Multi-Jurisdictional Instrument 33-105 Underwriting Conflicts (the "1998 Draft Instrument") and proposed Companion Policy 33-105CP (the "1998 Draft Policy").[1]

During the comment periods on these instruments, the CSA received submissions from three commenters. The names of these commenters and the summary of their comments, together with the CSA's responses to those comments, are contained in Appendix A of this Notice. As a result of consideration of the comments and further consideration of these instruments, the CSA are proposing a number of amendments to the 1998 Draft Instrument and 1998 Draft Policy, and are therefore republishing these instruments for a second comment period.

Since February 1998, the CSA have decided to refer to instruments adopted in some, but not all, of the jurisdictions of the CSA as "Multilateral", rather than "Multi-Jurisdictional", instruments; therefore, the instrument published as Multi-Jurisdictional Instrument 33-105 is now referred to as proposed Multilateral Instrument 33-105.

The proposed Multilateral Instrument is an initiative of the CSA, and is expected to be adopted as a rule in each of British Columbia, Alberta, Manitoba, Ontario and Nova Scotia, as a commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA other than Quebec. The proposed Companion Policy is expected to be implemented as a policy in all of the jurisdictions represented by the CSA other than Quebec.

The proposed Multilateral Instrument and Companion Policy are not being proposed for adoption at this time by the Commission des valeurs mobilières du Québec (the "CVMQ").

[1] In Ontario, at (1998) 21 OSCB 781.

Substance and Purpose of the Proposed Multilateral Instrument and Companion Policy

The substance and purpose of the proposed Multilateral Instrument is to impose appropriate regulatory requirements on distributions of securities in which the relationship between the issuer or selling securityholder of the securities and the registrant acting as underwriter raises the possibility that the registrant will be in an actual or perceived position of conflict between its own interests or those of the issuer or selling securityholder, and those of investors. The proposed Multilateral Instrument imposes certain disclosure requirements on these transactions and, in some cases, the requirement that an independent dealer participate in the distribution.

The purpose of the proposed Companion Policy is to state the views of the Canadian securities regulatory authorities on various matters relating to the proposed Multilateral Instrument, and to provide market participants with guidance in understanding the operation of the proposed Multilateral Instrument and the policy concerns that lie behind some of its provisions.

Summary of Changes to the Proposed Multilateral Instrument from the 1998 Draft Instrument

This section describes the substantive changes made in the proposed Multilateral Instrument from the 1998 Draft Instrument. For a detailed summary of the contents of the 1998 Draft Instrument, reference should be made to the Notice that was published with that draft (the "1998 Notice").

The definition of "approved rating", and the definition of "approved rating organization", have been expanded to include Duff & Phelps Credit Rating Co., Fitch IBCA, Inc. and Thomson BankWatch Inc. This approach is consistent with the approach of the CSA in other national instruments.

The definition of "foreign issuer" is new, and is used in section 2.2 for the purpose of setting out the applicable rules for calculating the required involvement of an independent underwriter for distributions that are effected in more than one jurisdiction, or only partly in Canada.

The definition of "influential securityholder" has been amended by the addition of subparagraphs (a)(iii) and (a)(iv), which prescribe when a person or company or professional group will be an "influential securityholder" of an issuer that is a partnership.

A definition of "special warrants" has been added in conjunction with the amendments to paragraph 2.1(2) that provide that the independent underwriter requirement and certain disclosure requirements will be applicable when special warrants are distributed.

The 1998 Draft Instrument prohibited a registrant from acting as a direct underwriter in a distribution of securities of or by a connected issuer, unless, among other requirements, an independent underwriter was involved in the distribution. Since the definition of "connected issuer" in the 1998 Draft Instrument included any person or company who was a "related issuer", the 1998 Draft Instrument necessarily required the involvement of an independent underwriter both in the case of connected issuer distributions and in the case of related issuer distributions.

In response to comments and following further consideration of the 1998 Draft Instrument, the CSA have amended the proposed Multilateral Instrument to eliminate the requirement for independent underwriter involvement for most distributions. Under the Draft Instrument, an independent underwriter will only be required for distributions of special warrants and distributions made under a prospectus, where the registrant is acting as a direct underwriter, and the issuer or selling securityholder in the distribution is a related issuer of the registrant. This change has been effected by means of an amendment to subsection 2.1(2) of the proposed Multilateral Instrument, and an amendment to the definition of "connected issuer" to delete the reference to related issuer within that definition. Although a related issuer of a registrant will be a connected issuer of that registrant, since the definitions of connected issuer and related issuer refer to different concepts, it was decided to delete the reference to related issuer within the definition of connected issuer to keep the definitions conceptually distinct.

As with the 1998 Draft Instrument, the proposed Multilateral Instrument recognizes the relative degrees of concern, and the resulting potential for conflict, associated with distributions by i) registrants, ii) related issuers of registrants, and iii) connected issuers of registrants, and imposes additional requirements for distributions which fall in the first two of these categories. The CSA is satisfied that, in recognition of the lesser potential for actual or perceived conflict associated with connected issuer distributions, the requirement of full disclosure of potential underwriting conflicts is sufficient to address this concern.

As a consequence of this amendment, the CSA have deleted the definitions of "specified party" and "minor debt relationship" in Part 1 of the Proposed Instrument, and the exemption from the requirement for independent underwriter involvement based on these definitions in Part 3 of the Proposed Instrument. Since the exemption previously found in section 3.2 of the 1998 Draft Instrument was only available where the issuer or selling securityholder was a connected issuer but not a related issuer, and since the requirement for independent underwriter involvement is now restricted to issuers or selling securityholders which are related issuers, the exemption found in section 3.2 of the 1998 Draft Instrument is no longer necessary, and has been deleted.

In response to a comment, the CSA have amended the proposed Multilateral Instrument to clarify their position that the requirements of the proposed Multilateral Instrument are applicable in connection with the issuance of special warrants in a special warrant transaction. Section 2.1 of the proposed Multilateral Instrument now provides that the disclosure and independent underwriter requirements of that section arise in the case of a distribution of special warrants.

The CSA have also added, as section 2.2 and subsection 3.2, provisions clarifying how the calculation of the size of a distribution (measured either as the dollar value of the distribution or the amount of management fees paid or payable in connection with the distribution) will be made under the proposed Multilateral Instrument. Proposed section 2.2 provides as follows:

- For a distribution that is made entirely in Canada, but in more than one jurisdiction, the size of the distribution and the involvement of the independent underwriter are to be measured on an aggregate basis, having regard to the aggregate amount of the distribution taken by the independent underwriter in relation to the aggregate size of the distribution in all jurisdictions; that is, it is not necessary that an independent underwriter satisfy the requirements of the proposed Multilateral Instrument on a jurisdiction-by-jurisdiction basis;

- For a distribution made partly in Canada and partly outside Canada by a foreign issuer, the independent underwriter requirement will apply in respect of the portion of the distribution made in Canada;

- For a distribution made partly in Canada and partly outside Canada by a Canadian issuer, the proposed Multilateral Instrument will apply based on the global size of the distribution; an independent underwriter could, it is noted, be a non-Canadian underwriter.

Subsection 3.2 provides that the independent underwriter requirement will not apply to the distribution of securities of a foreign issuer if more than 85 percent of the total distribution is effected outside of Canada.

In response to a comment, the CSA have moved section 12 of Appendix C of the 1998 Draft Instrument into the proposed Multilateral Instrument as section 4.1.

Summary of Changes to the Proposed Companion Policy from the 1998 Draft Policy

This section describes the substantive changes made in the proposed Companion Policy from the 1998 Draft Policy. For a detailed summary of the contents of the 1998 Draft Policy, reference should be made to the 1998 Notice.

The CSA have added subsection 2.3(2) to the proposed Companion Policy, which notes that distributions made under National Instrument 71-101 The Multijurisdictional Disclosure System are exempted from the disclosure requirements of the proposed Multilateral Instrument.

The CSA have also added subsection 2.4(4) to the proposed Companion Policy, which refers to the application of section 2.2 of the proposed Multilateral Instrument.

The CSA have also added subsection 2.4(5) to the proposed Companion Policy, which reminds market participants that National Instrument 44-102 Shelf Distributions contains

provisions on how the requirements of the proposed Multilateral Instrument are satisfied for shelf distributions.

Regulations to be Amended - Ontario

In Ontario, the Ontario Securities Commission will amend the following provisions of Regulation 1015 of the Revised Regulations of Ontario, 1990 in conjunction with the making of the proposed Multilateral Instrument as a rule in Ontario:

1. (1) Subsection 219(1) of the Regulation will be amended by revoking the definition of "connected issuer" and substituting the following:

"connected issuer" has the meaning ascribed to that term in Multilateral Instrument 33-105 Underwriting Conflicts".

(2) Subsection 219(1) of the Regulation will be amended by revoking the definition of "influence".

(3) Subsection 219(1) of the Regulation will be amended by revoking the definition of "related issuer" and substituting the following:

"related issuer" has the meaning ascribed to that term in Multilateral Instrument 33-105 Underwriting Conflicts".

(4) Subsections 219(2) and (4) of the Regulation will be revoked.

2. Section 224 of the Regulation will be revoked.

Comments

Interested parties are invited to make written submissions with respect to the proposed Multilateral Instrument. Submissions received by August 22, 2001 will be considered.

Submissions should be sent to all of the Canadian securities regulatory authorities listed below in care of the Ontario Commission, in duplicate, as indicated below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Department of Government Services and Lands, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

A diskette containing the submissions (in DOS or Windows format, preferably WordPerfect) should also be submitted. As securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published, confidentiality of submissions received cannot be maintained.

Questions may be referred to any of:

Brenda Benham
British Columbia Securities Commission
(604) 899-6635
or 1-800-373-6393 (in B.C.)

Jane Brindle
Alberta Securities Commission
(403) 297-4482

Barbara Shourounis
Saskatchewan Securities Commission
(306) 787-5842

Tanis J. MacLaren
Ontario Securities Commission
(416) 593-8259

Text of Proposed Multilateral Instrument and Companion Policy

The text of the proposed Multilateral Instrument and Companion Policy follows, together with footnotes that are not part of the Multilateral Instrument or Companion Policy but have been included to provide background and explanation.

June 22, 2001.

APPENDIX A

SUMMARY OF COMMENTS RECEIVED
ON
DRAFT MULTILATERAL INSTRUMENT 33-105
AND
DRAFT COMPANION POLICY 33-105CP
AND
RESPONSE OF THE CANADIAN SECURITIES ADMINISTRATORS

1. INTRODUCTION

On February 6, 1998, the Canadian Securities Administrators (the "CSA") published for comment proposed Multi-Jurisdictional Instrument 33-105 Underwriting Conflicts (now referred to as proposed Multilateral Instrument 33-105) and proposed Companion Policy 33-105CP.

In this Notice, the versions of the proposed Multilateral Instrument and Companion Policy published in 1998 are called the "1998 Draft Instrument" and "1998 Draft Policy", respectively. The versions published with this Notice are called the "proposed Instrument" and "proposed Policy", respectively.

The CSA received submissions on the 1998 Draft Instrument and 1998 Draft Policy from three commenters, as follows:

1. Canadian Bar Association - Ontario (letter dated May 29, 1998);
2. BCE Inc. (letter dated May 15, 1998); and
3. Ladner Downs (letter dated August 4, 1998).

Copies of the comment letters may be viewed at the office of Micromedia, 20 Victoria Street, Toronto, Ontario (416) 312-5211 or (800) 387-2689; the office of the British Columbia Securities Commission, 12th Floor, 701 West Georgia Street, Vancouver, British Columbia (604) 899-6500; and the office of the Alberta Securities Commission, 10025 Jasper Avenue, Edmonton, Alberta (403) 427-5201.

The CSA have considered the comments received and thank all commenters for providing their comments. The 1998 Draft Instrument and 1998 Draft Policy have been amended to reflect a number of the comments and are being republished for further comment.

The following is a summary of the comments received, together with the CSA's responses and, where applicable, the proposed changes in response to the comments.

2. GENERAL COMMENTS

General

Each of the commenters commented favourably on the initiative of the CSA to reform the existing underwriting conflict rules. One commenter indicated that the 1998 materials represented an "improvement over the current regulatory regime by clarifying a number of ambiguities in the current regulatory framework". Another commenter stated that "the Proposal is a thoughtful and careful balancing by the CSA of the various factors that come into play when dealing with underwriting conflicts. The Proposal contains both a sound analysis of these factors, and helpful analytical tools to assist underwriters, issuers and their counsel in determining whether connected or related issuer relationships exist, and if so, what the appropriate response to such relationships is. We support the principles in the Proposal...." Finally, another commenter commended the CSA for proposing the adoption of a clearer conflict regime, although the commenter had concerns over the scope of the regime.

Harmonization

A commenter noted with disappointment that the proposed Instrument and Policy are not being proposed for adoption at this time by the CVMQ. The commenter also noted that, assuming Bill 187 is adopted, Quebec would take an approach with respect to conflicts that would be entirely different from the approach set out in the 1998 Draft Instrument and from the position that has been taken in the past by the CVMQ. The commenter stated that "obviously, this would not be consistent with the attempt of the CSA in recent years to harmonize securities regulations in Canada and would not, unfortunately, promote efficiency in Canada's capital markets".

CSA Response

The CSA are committed to harmonization across Canada wherever possible, while recognizing that on some occasions, regional concerns or issues prevent complete uniformity across Canada.

Need for an Independent Underwriter

A commenter stated that the 1998 Draft Instrument did not adequately recognize the practical realities involved in introducing independent underwriters into underwriting syndicates in cases where timing is critical. The commenter noted that in bought deals, the structuring and pricing of the distribution and related due diligence have often been settled or completed prior to the lead underwriter selecting an independent underwriter. The commenter questioned why an independent underwriter is required for any distribution and suggested that the requirement for an independent underwriter may give a false sense of security to potential investors. The commenter stated that "provided that adequate disclosure is made of potential underwriting conflicts, we question why investors should not be able to evaluate for themselves, based on all of the information in the prospectus, whether to subscribe for the securities that are the subject of the distribution".

CSA Response

The CSA remain of the view that the presence of an independent underwriter in certain circumstances provides protection for investors from abuses arising from conflicts of interest that disclosure alone cannot provide. The CSA note, of course, that one of the functions of an independent underwriter is to provide some discipline in the process of preparing the disclosure document, thereby ensuring that the adequate disclosure is made of underwriting conflicts, and that the disclosure is otherwise complete and accurate.

However, following further consideration of the 1998 Draft Instrument, the CSA have amended the proposed Multilateral

Instrument to eliminate the requirement for independent underwriter involvement for most distributions. Under the proposed Instrument, an independent underwriter will only be required for distributions of special warrants and distributions made under a prospectus, where the registrant is acting as a direct underwriter, and the issuer or selling securityholder in the distribution is a related issuer of the registrant. As with the 1998 Draft Instrument, the proposed Multilateral Instrument recognizes the relative degrees of concern, and the resulting potential for conflict, associated with distributions by i) registrants, ii) related issuers of registrants, and iii) connected issuers of registrants, and imposes additional requirements for distributions which fall in the first two of these categories. The CSA is satisfied that, in recognition of the lesser potential for actual or perceived conflict associated with connected issuer distributions, the requirement of full disclosure of potential underwriting conflicts is sufficient to address this concern.

Alternative Proposal

A commenter proposed an alternative conflicts regime to the one contemplated by the 1998 Draft Instrument. The commenter made this proposal out of a concern that the conflict regime contemplated by the 1998 Draft Instrument was excessively far-reaching and burdensome for some issuers. The commenter stated that a conflict regime should not "excessively and unjustly disrupt the distribution process carried out by financially healthy senior 'POP' issuers".

The following is an outline of the general problems that the commenter submitted were raised by the 1998 Draft Instrument, and the proposed alternative regime:

- The commenter submitted that several of the definitions in the 1998 Draft Instrument are too broad in scope. It was noted that the definition of "connected issuer" was based on the existence of a "relationship" between an issuer and its underwriters (and other related parties). The commenter stated that this definition is "much too broad" and should be made more specific in order that it be less subjective and to reduce the potential for abuse.

- The commenter stated that the definitions of "related issuer" and "influential securityholder" contained in the 1998 Draft Instrument have far-reaching effects for a large corporate group. The commenter stated that, in the case of a distribution by it or any other company of the group that is a related issuer of it, the issuer of the securities would be required to verify whether any company of the group (i.e., in excess of 250 companies) has a relationship with an underwriter or a related issuer of an underwriter of the type contemplated by the 1998 Draft Instrument. The commenter stated that this was "unfeasible and totally unacceptable".

- The commenter submitted that a preferable approach would be to have the proposed Instrument focus only on relationships involving important related issuers of the issuer. The commenter proposed that, except in exceptional circumstances, the definition of a "related issuer" of an issuer be limited to a direct or indirect subsidiary (not an affiliate) representing at least 20 percent of the issuer's consolidated assets or revenues. The commenter indicated that the 20 percent threshold was the level associated with equity accounting.

- The commenter submitted that the holding by an underwriter or related entity of investment grade negotiable securities, such as commercial paper, debentures, notes and preferred shares, should not be considered in determining whether an issuer is a "related issuer" or a "connected issuer" of the underwriter. The commenter stated that because of the active secondary market for most of those securities, the holding of investment grade negotiable securities does not create a relationship between an issuer and another entity that is relevant to the conflicts concerns of the proposed Instrument.

- In addition, the commenter submitted that the holding of securities other than investment grade negotiable securities below certain thresholds by an underwriter or related entity should automatically be considered not to create a connected issuer relationship with an issuer. The commenter suggested the use of one or more of the following thresholds:

  - if the amount of indebtedness owed by an issuer to one or more underwriters or their related issuers does not exceed 10 percent of the issuer's consolidated equity;

  - if the distribution for which the determination is made is less than a certain minimal size, perhaps 10 percent of the issuer's consolidated equity or an amount equal to the issuer's annual dividend on its common and preferred shares; or

  - if the percentage of the proceeds of the distribution to be used to repay debt owed to an affiliate of an underwriter was less than some specified amount, perhaps 10%.

CSA Response

Although the CSA have not adopted the suggestions of the commenter in the proposed Instrument, the CSA appreciate the comments.

The CSA's specific responses to the comments are as follows.

In respect of the definition of "connected issuer", the CSA are of the view that the only appropriate way to define the definition is through use of the concept of "relationship". Although, as the commenter suggests, the concept is broad, the CSA believe that the concept is necessary to capture the

wide range of possible relationships that could lead to concerns over conflicts of interest.

The CSA do not accept the suggestion that the application of the proposed Instrument should be restricted to "material" subsidiaries or some similar concept. The issue being addressed by the proposed Instrument is the possibility of conflicts of interest arising in connection with the distribution of securities of an issuer; these conflicts could arise because of the influence of a parent company of the issuer, for instance, even if the issuer was very small in relation to the size of the parent. The CSA recognize the wide ranging application of the proposed Instrument in the case of a large corporate structure like that of the commenter, and will entertain applications for exemption from the application of the normal rules in appropriate circumstances.

The CSA do not agree with the suggestion that investment grade negotiable securities should be excluded from the conflicts regime. The CSA are not willing to delegate, in effect, the application of its rules concerning conflicts of interest to rating agencies.

The CSA do not agree with the suggestion that certain holdings of securities below certain thresholds should be excluded from the operation of the regime. The CSA note that the proposed Instrument has been designed to eliminate the need for an independent underwriter, in non-related issuer relationships. The CSA believe that these exemptions should substantially reduce the need for independent underwriters in distributions.

Special Warrants and "Two-Step" Transactions

Two submissions addressed the application of the 1998 Draft Instrument to special warrant transactions and other "two-step" transactions.

A commenter submitted that the proposed Instrument should state, for the purposes of clarity, that special warrant and other similar financings are deemed not be distributions made under a prospectus for the purposes of the proposed Instrument. Another commenter, on the other hand, submitted that it is appropriate to require an independent underwriter for a special warrant transaction at both the private placement stage and the prospectus certification stage, on the basis that a special warrant transaction is essentially a priced public financing.

The latter commenter provided a detailed and thoughtful analysis of the appropriate application of the proposed Instrument to a particular type of "two-step" transaction. The following is an outline of the analysis and recommendations:

- The comments related to two-step transactions that are used to effect the purchase of an existing business by institutional investors. The transactions are characterized by an initial private placement of convertible or exchangeable securities, followed by the qualification, by way of a prospectus, of underlying securities derived from the conversion or exchange of the initial private placement securities. In those transactions, the institutional investors put up the first tranche of the purchase price through a private placement; that acquisition is usually followed by a public offering that provides the second tranche of the required equity financing.

- The commenter submitted that there are two main reasons why it is unnecessary or impractical to have participation by an independent underwriter in the first step of a business acquisition two-step transaction. The first reason is that the transaction is negotiated by the underwriter with sophisticated parties that are at arm's length – the vendor of the business and institutional investors. An independent underwriter is not required to ensure that the terms negotiated by arm's length parties are appropriate; that issue is best left to the parties themselves. The second reason is the practical difficulty in involving an independent underwriter in the transaction; in a heavily negotiated transaction, an independent dealer will add little value being brought into the transaction at a late stage.

- The commenter submitted that there is an even weaker case for requiring the involvement of an independent underwriter in the second, or prospectus, stage of a business acquisition two-step transaction. At that point, the business transaction has been negotiated and an independent underwriter has no ability to change the business terms of the transaction. Further, it would be unfair to expose the independent underwriter to accept liability for prospectus disclosure, as this liability would be to sophisticated institutional purchasers with whom they have had no dealings and for a transaction in which they were not involved.

- The commenter therefore proposed that an independent underwriter not be required for a two-step transaction if

  - the transaction involved the acquisition of a business (whether by the purchase of assets, securities or otherwise) by or on behalf of an issuer that is not a reporting issuer at the time the transaction is agreed to; and

  - the majority by value of investors at the private placement stage are 'qualified institution buyers', who are not themselves related to or connected with the issuer or the non-independent underwriters in the transaction. The commenter provided a list of proposed qualified institutional buyers, including insurance companies, financial institutions, governments and governmental bodies and others.

CSA Response

The CSA have amended the proposed Instrument to clarify their position that the requirements of the proposed Instrument are applicable in connection with the issuance of special warrants in a special warrant transaction. The proposed Instrument now provides that section 2.1 applies to the issue of special warrants. The CSA have also added a definition of a "special warrant" to the proposed Instrument.

The CSA have not made any changes to reflect the issues raised about the use of two-step transactions in connection with business acquisitions. In the experience of the CSA, transactions of this nature have taken a variety of forms and structures. Accordingly, the CSA are of the view that the appropriate response to such transactions at this time is to review such transactions on a case-by-case basis in the context of an application for exemptive relief. The CSA will consider this issue going forward, and may propose that such transactions be the subject of a multilateral instrument at a later date.

3. COMMENTS ON SPECIFIC PROVISIONS OF THE 1998 DRAFT INSTRUMENT

Part 1 - Definitions, Interpretation and Application

Definition of "related party" and "professional group"

A commenter expressed concern over the inclusion of the concept of "professional group" in the determination of whether an entity is a related party to another entity. The commenter stated that it would appear from the definition of "professional group" "that in order for a registrant to determine whether it is related to an issuer, the registrant would be required to send a memorandum to each of the persons or companies referred to under the definition of 'professional group', to wait for a response and to tabulate the results. This is a fairly cumbersome process, especially when the timing of the distribution is critical...".

CSA Response

The CSA have made no changes in response to this comment. The CSA note that registrants are required to monitor on an ongoing basis the constitution of a professional group under existing and proposed self-regulatory organization rules.

Definitions of "specified party" and "minor debt relationship"

A commenter indicated its agreement with the concept of "specified party" and the exemption from the requirement for an independent underwriter for issuers that were not specified parties. The commenter made a number of suggestions as to how certain aspects of this exemption and the definition of "specified party" could be clarified or otherwise improved.

CSA Response

The CSA have deleted the definitions of "specified party" and "minor debt relationship" in Part 1 of the Proposed Instrument, and the exemption from the requirement for independent underwriter involvement based on these definitions in Part 3 of the Proposed Instrument. As noted above, the CSA have amended the Proposed Instrument to eliminate the requirement for independent underwriter involvement where the issuer or selling securityholder in the distribution is a connected issuer of the registrant, but is not a related issuer of the registrant. Since the exemption from the requirement for independent underwriter involvement previously found in section 3.2 of the 1998 Draft Instrument was only available where the issuer or selling securityholder was a connected issuer but not a related issuer, and since the requirement for independent underwriter involvement is now restricted to issuers or selling securityholders which are related issuers, the exemption found in section 3.2 of the 1998 Draft Instrument is no longer necessary, and has been deleted.

Section 3.1

A commenter submitted that a connected issuer that is exempted from the independent underwriter requirements on the basis of the exemption found in section 3,2 of the 1998 Draft Instrument should also be exempted from the disclosure requirements of the proposed Instrument.

CSA Response

In response to this comment, the CSA made no changes. Disclosure of connected issuer relationships is crucial to the regime contemplated by the proposed Instrument. The CSA also note that disclosure of relationships is fundamental to all conflict of interest regimes.

Section 4.2

A commenter stated that this section does not appear to address offerings made by prospectus supplements under the shelf procedures. It was suggested that provision should be made for the granting of exemptions on an expedited basis for this type of offering.

CSA Response

The application of the proposed Instrument to shelf distributions has been addressed in National Instrument 44-102 Shelf Distributions. The issue was addressed in section 6.5 of National Instrument 44-102, which came into force December 31, 2000. The CSA added subsection 2.4(5) to the proposed Policy to refer to National Instrument 44-102, which contains the applicable requirements on how the National Instrument applies to shelf distributions.

Appendix C

A commenter argued that the valuation requirements in section 12 of Appendix C are not warranted, given the other disclosure mandated by the Appendix and the limited circumstances in which such requirement applies. The commenter also stated that if the CSA wish to maintain the valuation requirement, the requirement would be better included in the Instrument itself rather than in a schedule.

CSA Response

The CSA agree with the latter part of this comment and have moved the valuation provision into the proposed Multilateral Instrument as section 4.1.

MULTILATERAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

TABLE OF CONTENTS

MULTILATERAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS[1]

PART 1 DEFINITIONS, INTERPRETATION AND APPLICATION[2]

1.1 Definitions - In this Instrument

"associated party" means, if used to indicate a relationship with a person or company

(a) a trust or estate in which

(i) that person or company has a substantial beneficial interest, unless that trust or estate is managed under discretionary authority by a person or company that is not a member of any professional group of which the first mentioned person or company is a member, or

(ii) that person or company serves as trustee or in a similar capacity,

(b) an issuer in respect of which that person or company beneficially owns or controls, directly or indirectly, voting securities carrying more than 10 percent of the voting rights attached to all outstanding voting securities of the issuer, or

(c) a relative, including the spouse, of that person, or a relative of that person's spouse, if

(i) the relative has the same home as that person, and

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[1] This proposed Multilateral Instrument is expected to be adopted as a rule in British Columbia, Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the Canadian Securities Administrators, other than Québec. In Ontario, this proposed Multilateral Instrument will replace parts of section 219 and all of section 224 of the Regulation to the *Securities Act* (Ontario). The proposed Multilateral Instrument and Companion Policy are not being proposed for adoption at this time by the Commission des valeurs mobilières du Québec.

[2] A national definition instrument has been adopted as National Instrument 14-101 Definitions. It contains definitions of certain terms used in more than one national instrument and also applies to multilateral instruments. National Instrument 14-101 also provides that a term used in a national instrument and defined in the statute relating to securities of the applicable jurisdiction, the definition of which is not restricted to a specific portion of the statute, will have the meaning given to it in that statute, unless the context otherwise requires. National Instrument 14-101 also provides that a provision or a reference within a provision of a national instrument that specifically refers by name to a jurisdiction, other than the local jurisdiction, shall not have any effect in the local jurisdiction, unless otherwise stated in the provision. National Instrument 14-101 includes both national instruments and multilateral instruments.

(ii) the person has discretionary authority over the securities held by the relative;

"connected issuer" means, for a registrant,

(a) an issuer distributing securities, if the issuer or a related issuer of the issuer has a relationship with any of the following persons or companies that may lead a reasonable prospective purchaser of the securities to question if the registrant and the issuer are independent of each other for the distribution:

(i) the registrant,

(ii) a related issuer of the registrant,

(iii) a director, officer or partner of the registrant,

(iv) a director, officer or partner of a related issuer of the registrant, or

(b) a selling securityholder distributing securities, if the selling securityholder or a related issuer of the selling securityholder has a relationship with any of the following persons or companies that may lead a reasonable prospective purchaser of the securities to question if the registrant and the selling securityholder are independent of each other for the distribution:

(i) the registrant,

(ii) a related issuer of the registrant,

(iii) a director, officer or partner of the registrant,

(iv) a director, officer or partner of a related issuer of the registrant;[3]

"direct underwriter" means, for a distribution,

(a) an underwriter that is in a contractual relationship with the issuer or selling securityholder to distribute the securities that are being offered in the distribution, or

(b) a dealer manager, if the distribution is a rights offering;

"foreign issuer" has the meaning ascribed to that term in National Instrument 71-101 The Multijurisdictional Disclosure System;[4]

"independent underwriter" means, for a distribution, a direct underwriter that is not the issuer or the selling securityholder in the distribution and in respect of which neither the issuer nor the selling securityholder is a connected issuer or a related issuer;

"influential securityholder" means, in relation to an issuer,

(a) a person or company or professional group

(i) that holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of, voting securities entitling the person or company or professional group to cast more than 20 percent of the votes for the election or removal of directors of the issuer,

(ii) that holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of, equity securities[5] entitling the person or company or professional group to receive more than 20 percent of the dividends or distributions to the holders of the equity securities of the issuer, or more than 20 percent of the amount to be distributed to the holders of equity securities of the issuer on the liquidation or winding up of the issuer,

(iii) that controls or is a partner of the issuer if the issuer is a general partnership, or

(iv) that controls or is a general partner of the issuer if the issuer is a limited partnership,[6]

(b) a person or company or professional group

(i) that holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of,

(A) voting securities entitling the person or company or professional group to cast more than 10 percent of the votes for the election or removal of directors of the issuer, or

(B) equity securities entitling the person or company or professional group to receive more than 10 percent of the dividends or distributions to the holders

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3 This definition has been amended by the removal of the definition of "related issuer", which is now a separate definition. This keeps the use of the term "connected issuer" consistent with current usage.

4 This definition is new, and is used in section 2.2 for the purpose of setting out the applicable rules for calculating the required involvement of an independent underwriter for distributions that are effected in more than one jurisdiction, or only partly in Canada.

5 The term "equity security" is defined in National Instrument 14-101 as having the meaning ascribed to that term in securities legislation.

6 This definition has been amended by the addition of subparagraphs (a)(iii) and (a)(iv), which describe when a person or company or professional group will be an "influential securityholder" of an issuer that is a partnership.

of the equity securities of the issuer, or more than 10 percent of the amount to be distributed to the holders of equity securities of the issuer on the liquidation or winding up of the issuer, and

(ii) that either

(A) together with its related issuers

(I) is entitled to nominate at least 20 percent of the directors of the issuer or of a related issuer of the issuer, or

(II) has officers, directors or employees who are also directors of the issuer or a related issuer of the issuer, constituting at least 20 percent of the directors of the issuer or of the related issuer, or

(B) is a person or company of which the issuer, together with its related issuers,

(I) is entitled to nominate at least 20 percent of the directors of the person or company or at least 20 percent of the directors of a related issuer of the person or company, or

(II) has officers, directors or employees who are also directors of the person or company or a related issuer of the person or company, constituting at least 20 percent of the directors of the person or company or of the related issuer of the person or company, or

(c) a person or company

(i) of which the issuer holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of,

(A) voting securities entitling the issuer to cast more than 10 percent of the votes for the election or removal of directors of the person or company, or

(B) equity securities entitling the issuer to receive more than 10 percent of the dividends or distributions to the holders of the equity securities of the person or company, or more than 10 percent of the amount to be distributed to the holders of equity securities of the person or company on the liquidation or winding up of the person or company, and

(ii) either

(A) that, together with its related issuers

(I) is entitled to nominate at least 20 percent of the directors of the issuer or of a related issuer of the issuer, or

(II) has officers, directors or employees who are also directors of the issuer or a related issuer of the issuer, constituting at least 20 percent of the directors of the issuer or of the related issuer, or

(B) of which the issuer, together with its related issuers

(I) is entitled to nominate at least 20 percent of the directors of the person or company or at least 20 percent of the directors of a related issuer of the person or company, or

(II) has officers, directors or employees who are also directors of the person or company or a related issuer of the person or company, constituting at least 20 percent of the directors of the person or company or of the related issuer of the person or company, or

(d) if a professional group is within paragraph (a) or (b), the registrant of the professional group;

"professional group" means a group comprised of a registrant and all of the following persons or companies:

(a) any employee of the registrant,

(b) any partner, officer or director of the registrant,

(c) any affiliate of the registrant,

(d) any associated party of any person or company described in paragraphs (a) through (c) or of the registrant;

"registrant" means a person or company registered or required to be registered under securities legislation, other than as a director, officer, partner or salesperson;

"related issuer" means a party described in subsection 1.2(2); and

"special warrant" means a security that, by its terms or the terms of an accompanying contractual obligation, entitles or requires the holder to acquire

another security without payment of material additional consideration and obliges the issuer of the special warrant or the other security to undertake efforts to file a prospectus to qualify the distribution of the other security.[7]

1.2 Interpretation

(1) For the purposes of calculating a percentage of securities that are owned, held or under the direction of a person or company in the definition of "influential securityholder"

(a) the determination shall be made

(i) first, by including in the calculation only voting securities or equity securities that are outstanding, and

(ii) second, if the person or company is not an influential securityholder by reason of a calculation under subparagraph (i), by including all voting securities or equity securities that would be outstanding if all outstanding securities that are convertible or exchangeable into voting securities or equity securities, and all outstanding rights to acquire securities that are convertible into, exchangeable for, or carry the right to acquire, voting securities or equity securities, are considered to have been converted, exchanged or exercised, as the case may be, and

(b) securities held by a registrant in its capacity as an underwriter in the course of a distribution are considered not to be securities that the registrant holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of.

(2) A person or company is a "related issuer" of another person or company if

(a) the person or company is an influential securityholder of the other person or company,

(b) the other person or company is an influential securityholder of the person or company, or

(c) each of them is a related issuer of the same third person or company.

(3) Calculations of time required to be made in this Instrument in relation to a "distribution" shall be made in relation to the date on which the underwriting or agency agreement for the distribution is signed.

1.3 Application of Instrument - This Instrument does not apply to a distribution of

(a) securities described in the provisions of securities legislation listed in Appendix A; or

(b) mutual fund securities.

PART 2 RESTRICTIONS ON UNDERWRITING

2.1 Restrictions on Underwriting

(1) No registrant shall act as an underwriter in a distribution of securities in which it is the issuer or selling securityholder, or as a direct underwriter in a distribution of securities of or by a connected issuer or a related issuer of the registrant, unless the distribution is made under a prospectus or another document that, in either case, contains the information specified in Appendix C.

(2) For a distribution of special warrants or a distribution made under a prospectus no registrant shall act

(a) as an underwriter if the registrant is the issuer or selling securityholder in the distribution; or

(b) as a direct underwriter if a related issuer of the registrant is the issuer or selling securityholder in the distribution.

(3) Subsection (2) does not apply to a distribution

(a) in which

(i) at least one registrant acting as direct underwriter acts as principal, so long as an independent underwriter underwrites not less than the lesser of

(A) 20 percent of the dollar value of the distribution, and

(B) the largest portion of the distribution underwritten by a registrant that is not an independent underwriter, or

(ii) each registrant acting as direct underwriter acts as agent and is not obligated to act as principal, so long as an independent underwriter receives a portion of the total management fees equal to an amount not less than the lesser of

[7] This definition is new, and has been added in conjunction with the amendments to section 2.1 that provide that the independent underwriter requirement and certain disclosure requirements sometimes will be applicable when special warrants are distributed.

(A) 20 percent of the total management fees for the distribution, and

(B) the largest portion of the management fees paid or payable to a registrant that is not an independent underwriter; and

(b) the identity of the independent underwriter and disclosure of the role of the independent underwriter in the structuring and pricing of the distribution and in the due diligence activities performed by the underwriters for the distribution is contained in

(i) a document relating to the special warrants that is delivered to the purchaser of the special warrants before that purchaser enters into a binding agreement of purchase and sale for the special warrants, for a distribution of special warrants, or

(ii) the prospectus, for a distribution made under a prospectus.[8]

2.2 Calculation Rules - The following rules shall be followed in calculating the size of a distribution and the amount of independent underwriter involvement required for purposes of subsection 2.1(3):

(a) For a distribution that is made entirely in Canada, the calculation shall be based on the aggregate dollar value of securities distributed in Canada or the aggregate management fees relating to the distribution in Canada, and the aggregate dollar value of the distribution underwritten, or aggregate dollar value of management fees received, by the independent underwriter in Canada.

(b) For a distribution that is made partly in Canada of securities of an issuer that is not a foreign issuer, the calculation shall be based on the aggregate dollar value of securities distributed in Canada and outside of Canada or the aggregate management fees relating to the distribution in Canada and outside of Canada, and the aggregate dollar value of the distribution underwritten, or aggregate dollar value of management fees received, by the independent underwriter in Canada and outside of Canada.

(c) For a distribution that is made partly in Canada by a foreign issuer and that is not exempt from the requirements of subsection 2.1(2) by subsection 2.1(3) or by section 3.2, the calculation shall be based on the dollar value of securities distributed in Canada or the management fees relating to the distribution paid or payable in Canada, and the dollar value of the distribution underwritten, or aggregate dollar value of management fees received, by the independent underwriter in Canada.[9]

PART 3 NON-DISCRETIONARY EXEMPTIONS

3.1 Exemption from Disclosure Requirement - Subsection 2.1(1) does not apply to a distribution that

(a) is made under a document other than a prospectus if each of the purchasers of the securities

(i) is a related issuer of the registrant,

(ii) purchases as principal, and

(iii) does not purchase as underwriter; or

(b) is made under a provision of securities legislation listed in Appendix B.

3.2 Exemption from Independent Underwriter Requirement - Subsection 2.1(2) does not apply to a distribution of securities of a foreign issuer if more than 85 percent of the aggregate dollar value of the distribution is made outside of Canada or if more than 85 percent of the management fees relating to the distribution are paid or payable outside of Canada.[10]

PART 4 VALUATION REQUIREMENT

4.1 Valuation Requirement - A purchaser of securities offered in a distribution for which information is required to be given under subsection 2.1(3) shall be given a document that contains a summary of a valuation of the issuer by a chartered accountant or by a registered dealer of which the issuer is not a related issuer, and that specifies a reasonable time

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8 This section has been amended to eliminate the requirement for independent underwriter involvement in the case of connected issuer distributions. That requirement remains only for related issuer distributions. This section has also been amended to provide that the independent underwriter requirement and certain disclosure requirements will be applicable when special warrants are distributed on the same basis as for distributions made under a prospectus.

9 This section is new, and has been added to set out the applicable rules for calculating the required involvement of an independent underwriter for distributions that are effected in more than one jurisdiction, or only partly in Canada. The section should be read in conjunction with section 3.2, which provides an exemption from the independent underwriter requirement for distributions of securities of a foreign issuer, if more than 85 percent of the distribution is effected outside of Canada.

10 This section is new and provides an exemption from the independent underwriter requirement for certain distributions of securities of a foreign issuer, if more than 85 percent of the distribution is effected outside of Canada.

and place at which the valuation may be inspected during the distribution, if

(a) the issuer in the distribution

(i) is not a reporting issuer,

(ii) is a registered dealer, or an issuer all or substantially all of whose assets are securities of a registered dealer,

(iii) is issuing voting securities or equity securities, and

(iv) is effecting the distribution other than under a prospectus; and

(b) there is no independent underwriter that satisfies subsection 2.1(3).[11]

PART 5 EXEMPTION

5.1 Exemption

(1) The regulator[12] or securities regulatory authority[13] may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

5.2 Evidence of Exemption - Without limiting the manner in which an exemption under section 5.1 may be evidenced, the issuance by the regulator of a receipt for a prospectus or an amendment to a prospectus is evidence of the granting of the exemption if

(a) the person or company that sought the exemption has delivered to the regulator, on or before the date that the preliminary prospectus or an amendment to the preliminary prospectus was filed, a letter or memorandum describing the matters relating to the exemption and indicating why consideration should be given to the granting of the exemption; and

(b) the regulator has not sent written notice to the contrary to the person or company that sought the exemption before, or concurrent with, the issuance of the receipt.

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11 This section has been moved from Appendix C, and is substantively unchanged.

12 The term "regulator" is defined in National Instrument 14-101 Definitions as meaning, in a local jurisdiction, the person set out in an appendix to that instrument opposite the name of the local jurisdiction.

13 The term "securities regulatory authority" is defined in National Instrument 14-101 Definitions as meaning, for a local jurisdiction, the securities commission or similar regulatory authority set out in an appendix to that instrument opposite the name of the local jurisdiction.

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APPENDIX A

EXEMPT SECURITIES

JURISDICTION	SECURITIES LEGISLATION REFERENCE
ALBERTA	Section 66 of the *Securities Act* (Alberta)
BRITISH COLUMBIA	Section 46 of the *Securities Act* (British Columbia)
MANITOBA	Subsection 19(2) of the *Securities Act* (Manitoba)
NEWFOUNDLAND (Newfoundland)	Subsection 36(2) of the *Securities Act*
NEW BRUNSWICK	Section 4 of the Exemption Regulation - *Security Frauds Prevention Act* (New Brunswick)
NOVA SCOTIA	Subsection 41(2) of the *Securities Act* (Nova Scotia)
ONTARIO	Subsection 35(2) of the *Securities Act* (Ontario)
PRINCE EDWARD ISLAND	Subsection 2(4) of the *Securities Act* (Prince Edward Island)
SASKATCHEWAN	Subsection 39(2) of *The Securities Act, 1988* (Saskatchewan)

MULTILATERAL INSTRUMENT 33-105

APPENDIX B

PROVISIONS REFERRED TO IN PARAGRAPH 3.1(b)

JURISDICTION	SECURITIES LEGISLATION REFERENCE
ALBERTA	Subsections 112(1) and 112(3) of the *Securities Act* (Alberta)
BRITISH COLUMBIA	Section 128(d) of the *Securities Rules* (British Columbia)
NEWFOUNDLAND	Subsection 73(7)(b) of the *Securities Act* (Newfoundland)
NOVA SCOTIA	Subsection 77(11)(b) of the *Securities Act* (Nova Scotia)
ONTARIO	Clause 72(7)(b) of the *Securities Act* (Ontario)
SASKATCHEWAN	Clauses 81(10) and 81(11) of *The Securities Act, 1988* (Saskatchewan)

MULTILATERAL INSTRUMENT 33-105

APPENDIX C

REQUIRED INFORMATION

REQUIRED INFORMATION FOR THE FRONT PAGE OF THE PROSPECTUS OR OTHER DOCUMENT

1. A statement in bold type, naming the relevant registrant or registrants, that the issuer or the selling securityholder is a connected issuer or a related issuer of a registrant or registrants in connection with the distribution.

2. A summary, naming the relevant registrant or registrants, of the basis on which the issuer or selling securityholder is a connected issuer of the registrant or registrants.

3. A cross-reference to the applicable section in the body of the prospectus or other document where further information concerning the relationship between the issuer or selling securityholder and registrant or registrants is provided.

REQUIRED INFORMATION FOR THE BODY OF THE PROSPECTUS OR OTHER DOCUMENT

4. A statement, naming the relevant registrant or registrants, that the issuer or the selling securityholder is a connected issuer or a related issuer of a registrant or registrants for the distribution.

5. The basis on which the issuer or selling securityholder is a connected issuer or a related issuer for each registrant referred to in paragraph 4, including

   (a) if the issuer or selling securityholder is a related issuer of the registrant, the details of the holding, power to direct voting, or direct or indirect beneficial ownership of, securities that cause the issuer or selling securityholder to be a related issuer;

   (b) if the issuer or selling securityholder is a connected issuer of the registrant because of indebtedness, the disclosure required by paragraph 6 of this Appendix; and

   (c) if the issuer or selling securityholder is a connected issuer of the registrant because of a relationship other than indebtedness, the details of that relationship.

6. If the issuer or selling securityholder is a connected issuer of the registrant because of indebtedness,

   (a) the amount of the indebtedness;

   (b) the extent to which the issuer or selling securityholder is in compliance with the terms of the agreement governing the indebtedness,

   (c) the extent to which a related issuer has waived a breach of the agreement since its execution;

   (d) the nature of any security for the indebtedness; and

   (e) the extent to which the financial position of the issuer or selling securityholder or the value of the security has changed since the indebtedness was incurred.

7. The involvement of each registrant referred to in paragraph 4 and of each related issuer of the registrant in the decision to distribute the securities being offered and the determination of the terms of the distribution, including disclosure concerning whether the issue was required, suggested or consented to by the registrant or a related issuer of the registrant and, if so, on what basis.

8. The effect of the issue on each registrant referred to in paragraph 4 and each related issuer of that registrant, including

   (a) information about the extent to which the proceeds of the issue will be applied, directly or indirectly, for the benefit of the registrant or a related issuer of the registrant, or

   (b) if the proceeds will not be applied for the benefit of the registrant or a connected issuer of the registrant, a statement to that effect.

9. If a portion of the proceeds of the distribution is to be directly or indirectly applied to or towards

   (a) the payment of indebtedness or interest owed by the issuer, an associate or related issuer of the issuer, a person or company of which the issuer is an associate, the selling securityholder, an associate or related issuer of the selling securityholder, a person or company of which the selling securityholder is an associate, to the registrant or a related issuer of the registrant, or

   (b) the redemption, purchase for cancellation or for treasury, or other retirement of shares other than equity securities of the issuer, an associate or related issuer of the issuer, a person or company of which the issuer is an associate, the selling securityholder, an associate or related issuer of the selling securityholder, or of a person or company of which the selling securityholder is an associate, held by the registrant or a related issuer of the registrant

   particulars of the indebtedness or shares in respect of which the payment is to be made and of the payment proposed to be made.

10. Any other material facts with respect to the relationship or connection between each registrant referred to in paragraph 4, a related issuer of each registrant and the issuer that are not required to be described by the foregoing.

REGISTRANT AS ISSUER OR SELLING SECURITYHOLDER

11. If the registrant is the issuer or selling securityholder in the distribution, then the information required by this Appendix shall be provided to the extent applicable.

COMPANION POLICY 33-105CP
TO MULTILATERAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

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COMPANION POLICY 33-105CP
TO MULTILATERAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

PART 1 INTRODUCTION

1.1 Purpose - The purpose of this Policy is to state the views of the participating Canadian securities administrators ("CSA") on various matters relating to Multilateral Instrument 33-105 Underwriting Conflicts (the "Instrument"), and to provide market participants with guidance in understanding the operation of the Instrument and the policy concerns that lie behind some of the provisions of the Instrument. This Policy includes, as Appendix A, a series of flow charts designed to illustrate the analysis required to be made in determining whether a party falls under certain of the defined terms of the Instrument and whether the requirements of the Instrument apply to a given distribution. The flow charts are for illustrative purposes only and, in all cases, reference should be made to the precise language of the Instrument.

1.2 General Policy Rationale for the Instrument

(1) Two of the basic objectives of securities legislation are to ensure that investors purchasing securities in the course of a distribution purchase those securities at a price determined through a process unaffected by conflicts of interest, and receive full, true and plain disclosure of all material facts regarding the issuer and the securities offered. The Instrument is based upon the premise that those objectives are best achieved if the issuer and the underwriters deal with each other as independent parties, free of any relationship that might negatively affect the performance of their respective roles.

(2) The Instrument seeks to protect the integrity of the underwriting process in circumstances in which there is a direct or indirect relationship between the issuer or selling securityholder and the underwriter that might give rise to a perception that they are not independent of each other in connection with a distribution. The Instrument imposes two basic requirements in those circumstances. First, full disclosure of the relationships giving rise to the potential conflict of interest is required to be given to investors, and second, an independent underwriter is required in certain circumstances to participate in the transaction.

PART 2 GENERAL STRUCTURE OF THE INSTRUMENT

2.1 Relationships of Concern

(1) The Instrument identifies three types of relationships between a registrant acting as underwriter on a distribution and the issuer or selling securityholder of securities in the distribution that give rise to concerns over conflicts of interest; each of these relationships may be subject to the requirements of the Instrument.

(a) The registrant as issuer or selling securityholder. This relationship represents the relationship with the highest degree of conflict of the three recognized by the Instrument.

(b) An issuer or selling securityholder that is a "related issuer" of the registrant. This relationship is created primarily as the result of cross-ownership between an issuer or selling securityholder and the registrant. Subsection 1.2(2) of the Instrument provides that an entity is a related issuer to another entity if one of them is an "influential securityholder" of the other, or each of them is a related issuer of the same third party.

(c) An issuer or selling securityholder that is not a related issuer of the registrant, but that has some other relationship with the registrant that would cause a reasonable prospective purchaser of the securities being offered to question if the registrant and the issuer or selling securityholder are independent of each other for the distribution. This type of issuer is a "connected issuer" of the relevant registrant.

(2) The Instrument recognizes the relative degrees of relationships and the resulting potential for conflict by imposing additional requirements for distributions by registrants and their related issuers than for distributions by connected issuers.

(3) The term "independent underwriter" is defined in the Instrument to mean a registrant acting as direct underwriter in a distribution if the registrant does not have one of the relationships with the issuer or selling securityholder described in this section. The term "non-independent underwriter" is used in this Policy to describe a registrant acting as direct underwriter that does have one of those relationships.

2.2 General Requirements of the Instrument - The general requirements of the Instrument, contained in section 2.1, provide, in effect, that a registrant that would be a non-independent underwriter on a distribution may not act as a direct underwriter in the distribution, unless certain requirements are satisfied or an exemption is available. The requirements are the disclosure obligation, required by subsection 2.1(1) of the Instrument and discussed in section 2.3 of this Policy, and, in the case of a related issuer distribution, the independent underwriter obligation, required by the combination of subsections 2.1(2) and (3) of the Instrument and discussed in section

2.4 of this Policy. An exemption from the independent underwriter obligation is contained in section 3.2 of the Instrument and discussed in Part 3 of this Policy.

2.3 Disclosure Obligation

(1) The disclosure obligation applicable to a distribution in which a non-independent underwriter participates, contained in subsection 2.1(1) of the Instrument, requires that the distribution be made under a prospectus or other document that contains the information described in Appendix C of the Instrument. This requirement is applicable both to transactions made under a prospectus and to those done by way of a private placement without a prospectus. Appendix C is designed to require full disclosure of the relationship between the underwriter and issuer or selling securityholder.

(2) Market participants are reminded that section 10.1 of National Instrument 71-101 The Multijurisdictional Disclosure System exempts distributions under that National Instrument from the disclosure requirements of the Instrument.

2.4 Requirement for Independent Underwriter Involvement

(1) Subsection 2.1(2) of the Instrument provides that, in the case of a distribution of special warrants or a distribution made under a prospectus, a registrant may not act

(a) as an underwriter if the registrant is the issuer or selling securityholder in the distribution; or

(b) as a direct underwriter if a related issuer of the registrant is the issuer or selling securityholder in the distribution.

(2) Subsection 2.1(3) of the Instrument provides that subsection 2.1(2) of the Instrument does not apply to a distribution otherwise caught by that subsection if there is an independent underwriter and if certain disclosure is made in a disclosure document or prospectus. The requirement for independent underwriter involvement is satisfied if at least one independent underwriter participates in the offering to the extent specified in subsection 2.1(3). Subsection 2.1(3) provides alternate threshold criteria for such involvement, depending upon whether the distribution is a "firm commitment" underwriting or a "best efforts agency" offering.

In the case of a firm commitment underwriting, an independent underwriter is required to underwrite not less than the lesser of

(a) 20 percent of the dollar value of the distribution, and

(b) the largest portion of the distribution underwritten by a registrant that is not an independent underwriter.

In the case of a best efforts agency offering, an independent underwriter must receive a portion of the total management fees equal to an amount not less than the lesser of

(a) 20 percent of the total management fees for the distribution, and

(b) the largest portion of the management fees paid or payable to a registrant that is not an independent underwriter.

(3) Subsection 2.1(3) of the Instrument requires the relevant disclosure document to disclose what role the independent underwriter played in the structuring, pricing and due diligence activities of the distribution. The Instrument does not specify what functions the independent underwriter must fulfil, because it is recognized that the appropriate role will vary according to the nature of the distribution and the issuer or selling securityholder, and because it is expected that the requirement to disclose the role actually played will impose a measure of market discipline on the process. Subsection 2.1(3) of the Instrument also requires the name of the independent underwriter to be disclosed.

(4) Section 2.2 of the Instrument sets out the rules for calculating the size of a distribution and the requirements for independent underwriter involvement. These rules deal with issues that may arise when distributions occur in more than one jurisdiction, or only partly in Canada.

(5) Market participants are directed to National Instrument 44-102 Shelf Distributions for applicable provisions on how the requirements of the Instrument are satisfied for shelf distributions.

PART 3 EXEMPTION FROM INDEPENDENT UNDERWRITER REQUIREMENT

3.1 Exemption from Independent Underwriter Requirement - Section 3.2 of the Instrument provides an exemption from the independent underwriter requirement for distributions of securities of a foreign issuer if more than 85 percent of the dollar value of the distribution is effected outside of Canada or if more than 85 percent of the management fees relating to the distribution are paid or payable outside of Canada. This exemption is expected to be primarily used in the context of international offerings of major issuers.

PART 4 COMMENTARY ON RELATIONSHIPS DESCRIBED IN THE INSTRUMENT

4.1 Related Issuers

(1) Common ownership is the traditional measure of a non-arm's length relationship in which a conflict of interest is seen to arise. The definition of "related issuer", together with the definitions of "influential securityholder" and "professional group", contain the test used in the Instrument for these non-arm's length relationships.

(2) The Instrument provides that two persons or companies are related issuers of each other if one of them is an influential securityholder of the other, or if each of them are related issuers to a third person or company.

(3) The term "influential securityholder" is defined to include relationships between an issuer and another person or company or, in some cases, a professional group, that involve specified thresholds of share ownership or rights to elect directors, as summarized in subsection (4).

(4) Briefly stated, a person or company or professional group ("A") is an influential securityholder of an issuer ("I") under the definition of "influential securityholder" in the following circumstances.

(a) A owns or controls 20 percent of the voting or equity securities of I (paragraph (a) of the definition), or controls or is a general partner of the issuer, if the issuer is either a general partnership or a limited partnership.

(b) A owns or controls 10 percent of the voting or equity securities of I and either

(i) A is entitled to nominate 20 percent of the directors of I or has officers, directors or shareholders that constitute 20 percent of the directors of I; or

(ii) I is entitled to nominate 20 percent of the directors of A or has officers, directors or shareholders that constitute 20 percent of the directors of A (paragraph (b) of the definition).

(c) I owns or controls 10 percent of the voting or equity securities of A (other than a professional group) and either

(i) A is entitled to nominate 20 percent of the directors of I or has officers, directors or shareholders that constitute 20 percent of the directors of I; or

(ii) I is entitled to nominate 20 percent of the directors of A or has officers, directors or shareholders that constitute 20 percent of the directors of A (paragraph (c) of the definition).

Paragraph (c) of the definition contains no reference to professional groups in recognition of the fact that it is not possible to hold a voting or equity interest in such an entity nor does such an entity have a board of directors.

(d) If a professional group is an influential securityholder of I within paragraphs (a) or (b) of the definition, then the registrant that is part of that professional group will also be an influential securityholder of I (paragraph (d) of the definition).

(5) It is noted that under subsection 1.2(2) of the Instrument only a person or company can be a related issuer of another person or company; therefore, a professional group cannot be a related issuer of a person or company even if it is an influential securityholder of that person or company. Professional groups have been included in the definition of "influential securityholder" in order to allow paragraph (d) of the definition of "influential securityholder" to operate; this ensures that the registrant that is part of a professional group that is an influential securityholder of a person or company is itself an influential securityholder, and therefore a related issuer, of that person or company.

(6) The CSA note the following matters relating to the "influential securityholder" tests:

(a) The definition of "influential securityholder" requires an aggregation of all securities held, directly or indirectly beneficially owned and ones over which the holder has the right to direct the voting.

(b) Paragraphs 1.2(2)(a) and (b) provide that A is a related issuer of B if A is an influential securityholder of B or if B is an influential securityholder of A. Paragraph 1.2(2)(c) of the Instrument ties together all related issuers by providing that two persons or companies that are related issuers of a third person or company are related issuers of each other. The following examples illustrate the operation of paragraph 1.2(2)(c).

(i) If A is an influential securityholder of B, meaning that A is a related issuer of B under paragraph 1.2(2)(a), and B is an influential securityholder of C, meaning that C is a related issuer of B under paragraph 1.2(2)(b), then A is a related issuer of C, since both A and C are related issuers of the same person, B.

(ii) If D is an influential securityholder of both E and F, meaning that D is a related issuer of both E and F, then E and F are related issuers of each other.

(c) There is no provision in the Instrument for "diluting" indirect ownership interests in making calculations. Therefore, if A owns 45 percent of the voting shares of B that in turn owns 22 percent of the voting shares of C, all three of A, B, and C are related issuers of each other.

(d) The operation of paragraph 1.2(1)(a) of the Instrument requires, in effect, the calculation of a person or company's percentage ownership in another person or company to be done twice; first, only the outstanding voting or equity securities held would be counted, and, second, if the 10 percent or 20 percent ownership level is not reached, the calculation should be repeated on a fully diluted basis, assuming all convertible or exchangeable securities of the relevant class issued and outstanding were converted or exchanged.

4.2 Connected Issuers

(1) One relationship described in section 2.1 of this Policy as being of concern in connection with conflict matters is that of an issuer that is a connected issuer, but not a related issuer, to a registrant in a distribution. This relationship historically has led to some difficulties of interpretation under analogous provisions of securities legislation. The definition of "connected issuer" in the Instrument provides that the test for whether an issuer/selling securityholder and registrant are "connected" is whether the relationship between the issuer or selling securityholder (or their related issuers) and a registrant (or its related issuers) would lead a reasonable prospective purchaser of the securities to question the independence of such parties for purposes of the distribution.

(2) The test contained in the definition requires that the question of independence, or lack of independence, of a registrant be determined with reference to the activities of concern in a distribution and from the viewpoint of a reasonable prospective purchaser. The key issues in making that assessment are

(a) whether the investor would perceive that the relationship would interfere with the ability or inclination of the registrant to do proper due diligence, or to ensure complete disclosure of all material facts related to the issuer or affect the price placed on the securities being distributed; and

(b) whether the investor would perceive that the relationship would make the issuer or selling securityholder more subject to influence in the disclosure, due diligence or pricing process from the underwriter or its related issuer.

In either case, would the result be that some party's interests are perceived to be favoured to the detriment of those of investors?

(3) As in the case of related issuers, a relationship of concern may arise directly between the issuer or selling securityholder and the registrant or indirectly through one or more related issuers of either the issuer or selling securityholder or the registrant or any of them.

4.3 Issues Relating to "Connected Issuer" Relationships

(1) The definition of "connected issuer" is designed to catch relationships of concern between the issuer/selling securityholder and the registrant that are not related issuer relationships. For example, if a significant shareholder of the registrant is the chairman of the board of directors of the issuer and another related issuer of the registrant owns a large number of preferred shares that are to be repaid out of the proceeds of a distribution, the issuer may be a connected issuer of the registrant for the purposes of the distribution. In each case, the issuer, registrant and their advisers will have to weigh the totality of the relationships between the issuer and the registrant against whether a prospective purchaser might question the independence of the issuer and dealer to determine if there is a connected issuer relationship.

(2) The mere existence of a debtor/creditor relationship between the issuer and the registrant, or any of their respective related issuers, does not necessarily give rise to a connected issuer relationship. The test is whether in the circumstances the relationships among the parties might, in the view of a reasonable prospective purchaser, affect their independence from one another. Factors that may be relevant in reaching the conclusion in cases in which the relationship is debtor/creditor may include the size of the debt, the materiality of the amount of the debt to both the creditor and debtor, the terms of the debt, whether the lending arrangement is in good standing, and whether the proceeds of the issue are being used for repayment of the debt.

(3) Preference shares are not presently treated by Canadian GAAP as liabilities on the balance sheet of issuers, although they may be held by investors as an alternative to making loans or holding securities more conventionally thought of as debt. If there is cross-ownership of a material number of preference shares, there may be a relationship of concern between the issuer or

selling securityholder and the registrant. Factors to be considered include the terms of the preference shares (whether the shares are term preferred shares, redeemable at the option of the holder, or represent relatively permanent capital of the issuer or selling securityholder) and the materiality of the shareholding to the issuer or selling securityholder or to the preference shareholder.

(4) Most relationships of concern are likely to arise through debtor/creditor relationships or cross-ownership. However, in some circumstances there may be other relationships between the issuer or selling securityholder and the underwriter that raise concerns. These other business relationships would have to be material to the issuer, selling securityholder, underwriter or one or more of their related entities and give rise to some special interest in the continued viability of the other entity or the success of the distribution over and above that of other entities with a similar relationship with that company. The following relationships, among others, could be material in this context.

(a) A relationship in which an issuer was a joint venture partner with a person that owed money to a related party of a registrant could raise conflict issues. In circumstances in which the joint venture party needed funds to be able to satisfy its obligations to the related party of the registrant, and those funds would be provided by the issuer following a distribution, there is the possibility that the registrant might be motivated in an underwriting for the issuer by interests other than those of an independent underwriter.

(b) A relationship in which an issuer's supplier was a related party of a registrant could also raise conflict issues, particularly if the financial condition of the issuer could put the supply arrangements in jeopardy. The registrant could be motivated to act inappropriately in raising equity for the issuer.

(c) Franchise relationships could also raise conflict issues. An issuer that is a franchisor might need to raise funds to support its franchisees or to keep the entire franchise arrangement in place. If the registrant was a related party of creditors of the franchisees that were dependent upon a successful offering to raise such funds, the independence of the registrant might be compromised.

PART 5 APPENDICES

5.1 **Appendices** - To illustrate the analysis required to be made in determining the application of the Instrument to a distribution, Appendices A-1, A-2, A-3 and A-4 have been included in this Policy. Appendices A-1 and A-2 assist in determining whether parties are related issuers. Appendix A-3 assists in determining whether parties are connected issuers to registrants. Appendix A-4 provides a general analysis of whether, or how, the Instrument applies to a given distribution.

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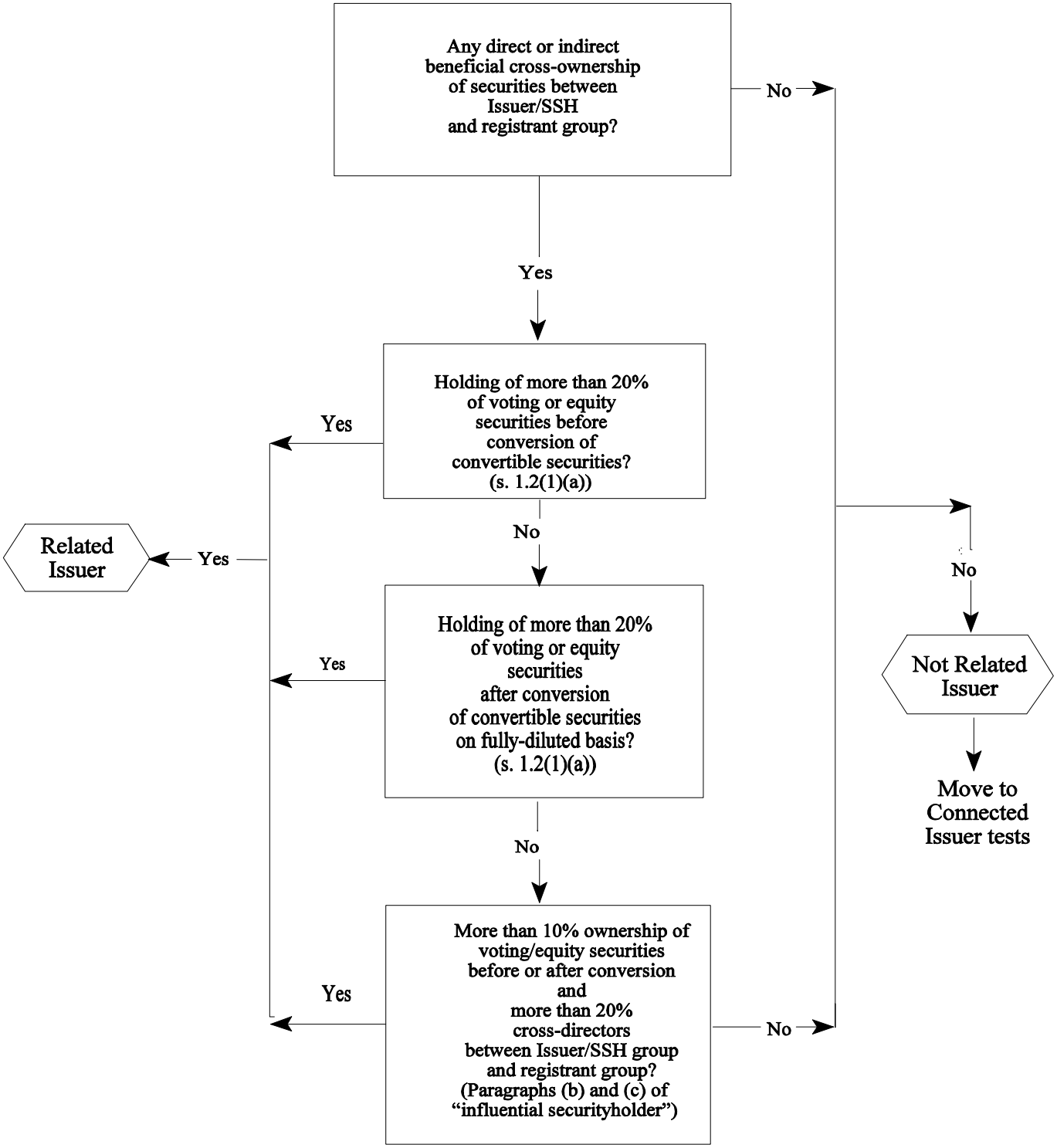
APPENDIX A-1

RELATED ISSUER

Relevant provisions: s.1.1: "influential securityholder" & s.1.2(1), (2)



COMPANION POLICY 33-105CP
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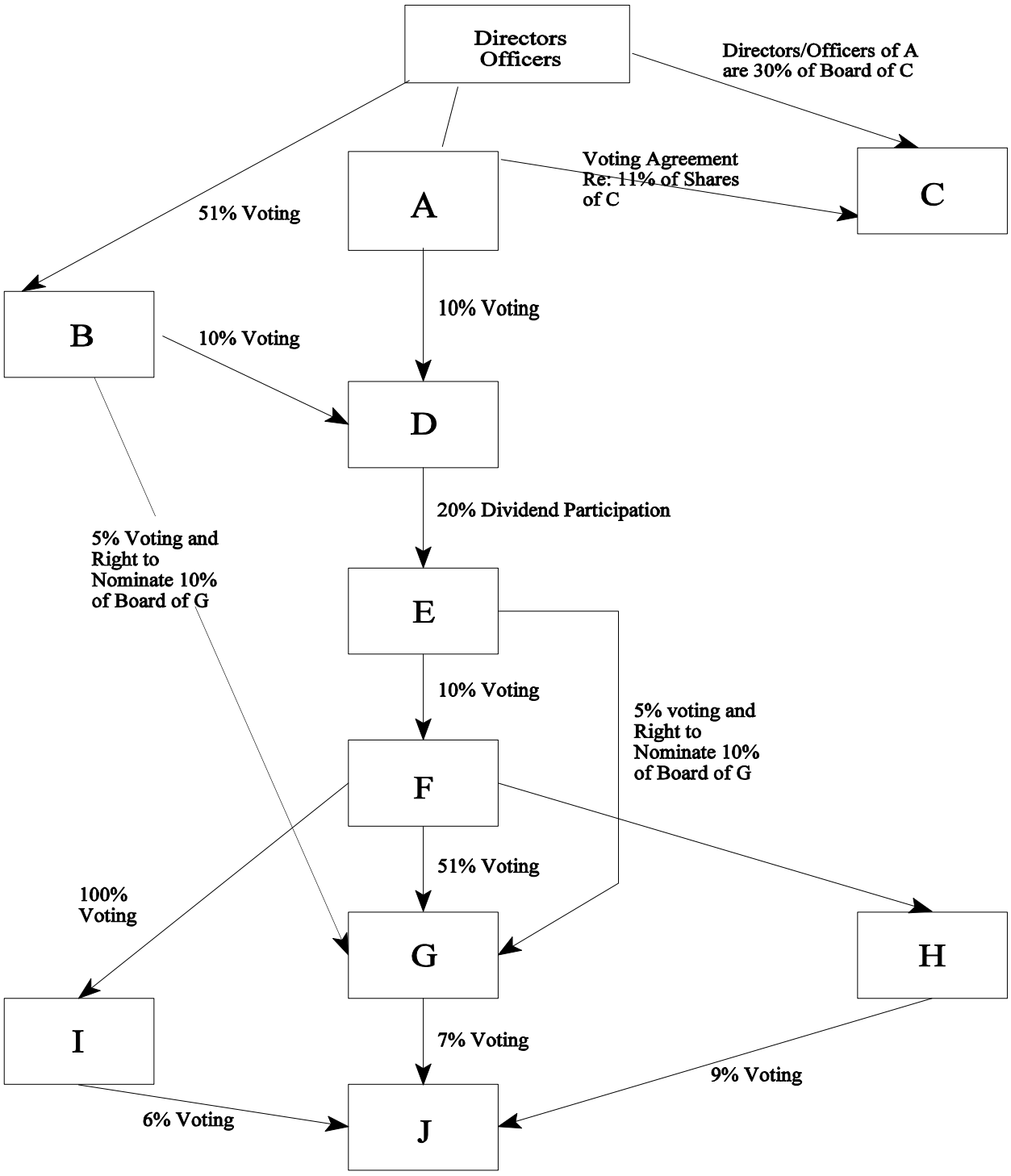
APPENDIX A-2

RELATED ISSUER - INFLUENTIAL SECURITYHOLDER

All of A-J are Related Issuers of Each Other
Relevant provisions: s. 1.1: "influential securityholder" & s.1.2(1), (2)



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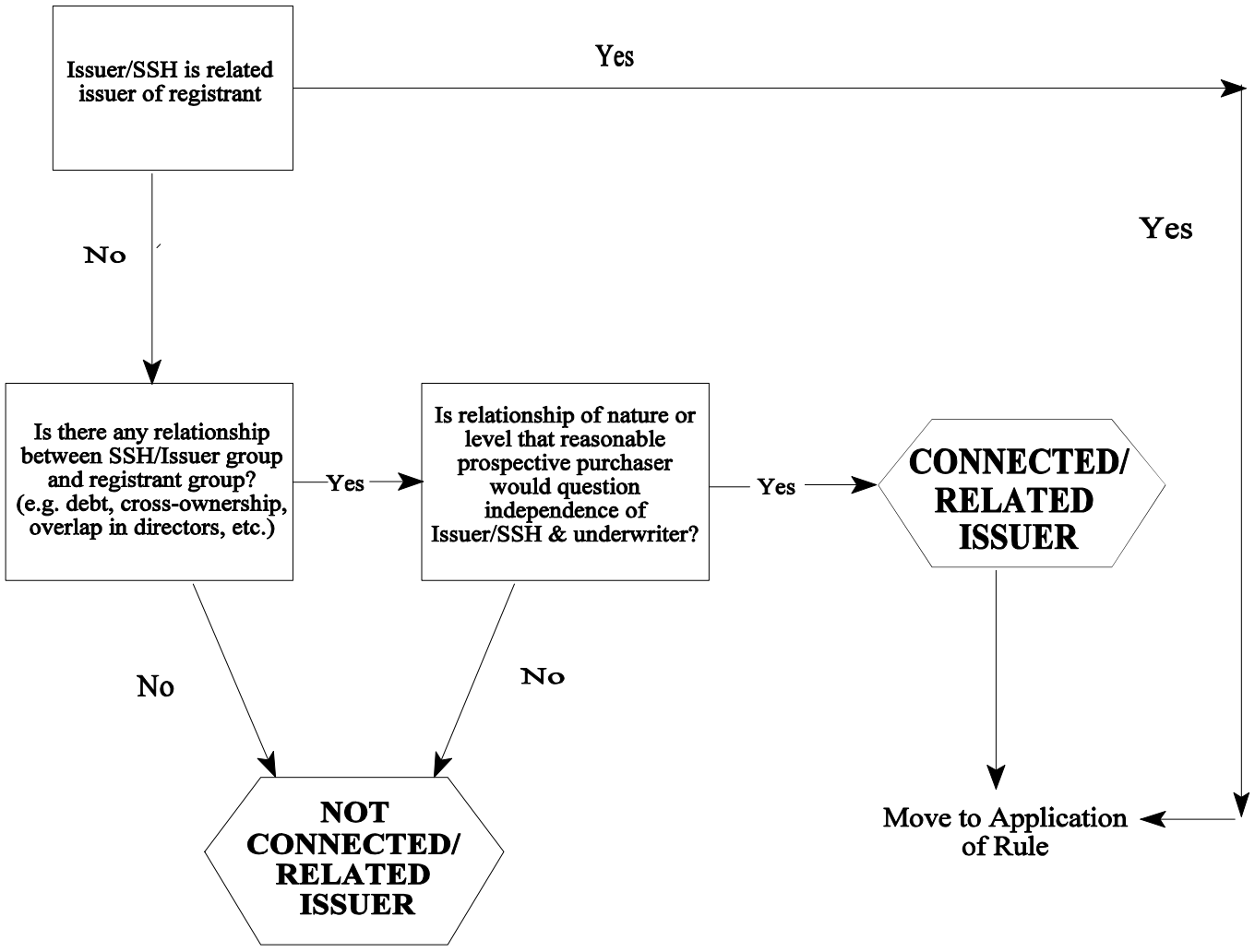
APPENDIX A-3

CONNECTED/RELATED ISSUER

Relevant provisions: s.1.1: "connected issuer"



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APPENDIX A-4

APPLICATION OF RULE