Chapter 5

Rules and Policies

5.1 Rules and Policies

5.1.1 NI 33-105 & 33-105 CP - Underwriting Conflicts

NOTICE OF NATIONAL INSTRUMENT 33-105
AND COMPANION POLICY 33-105CP
UNDERWRITING CONFLICTS
AND
CERTAIN AMENDMENTS TO
REGULATION 1015 OF
THE REVISED REGULATIONS OF ONTARIO, 1990

Notice of Rule and Policy

The Commission has, under section 143 of the *Securities Act* (the "Act"), made National Instrument 33-105 Underwriting Conflicts (the "National Instrument") as a Rule under the Act, and has adopted Companion Policy 33-105CP to National Instrument 33-105 Underwriting Conflicts (the "Companion Policy") as a Policy under the Act.

The National Instrument and the material required by the Act to be delivered to the Minister of Finance were delivered on October 19, 2001. If the Minister does not reject the National Instrument or return it to the Commission for further consideration by December 18, 2001, or if the Minister approves the National Instrument, the National Instrument will come into force, pursuant to section 6.1 of the National Instrument, on January 3, 2002. The Companion Policy will come into force on the date that the National Instrument comes into force.

The National Instrument and Companion Policy are initiatives of the Canadian Securities Administrators (the "CSA"). Drafts of the National Instrument and Companion Policy were previously published for comment in June 2001 (the "2001 Draft Instrument and Policy"),[1] and in February 1998 (the "1998 Draft Instrument and Policy")[2] (collectively, the "Draft Instruments").

At the time of the publication of the Draft Instruments, it was not anticipated that the Draft Instruments would be proposed for adoption by the Commission des valeurs mobilières du Québec (the "Québec Commission"). Accordingly, the 2001 Draft Instrument was referred to as a Multilateral Instrument rather than a National Instrument. The CSA previously referred to instruments which were being proposed for adoption in some, but not all, of the jurisdictions of the CSA as "Multi-Jurisdictional", rather than "Multilateral", instruments; accordingly, the 1998 Draft Instrument was published in 1998 as Multi-Jurisdictional Instrument 33-105.

Since the date of publication of the 2001 Draft Instrument, the Québec Commission has determined that, as a consequence of the amendments made to and included in the 2001 Draft Instrument, and in the interest of harmonizing the requirements facing market participants in Québec with those of market participants in the other CSA jurisdictions, the underwriting conflicts regime contemplated by the National Instrument and the Companion Policy should be adopted in the Province of Québec.

Accordingly, concurrently with the publication of this Notice, the Québec Commission will be publishing the National Instrument and Companion Policy for comment in accordance with the requirements of Québec securities law. Although the Québec Commission has not previously published the National Instrument and Companion Policy for comment, the Québec Commission has worked closely with the other CSA jurisdictions in the development of the National Instrument and Companion Policy and has had the opportunity to review and consider the comments previously raised in response to the requests for comments published by the other CSA jurisdictions. In the event that, following its review of comments received in response to the publication of the National Instrument and Companion Policy for comment, the Québec Commission determines that further amendment to the National Instrument or Companion Policy is necessary prior to adoption by that jurisdiction, it is anticipated that the National Instrument will take effect as a Multilateral Instrument in the other CSA jurisdictions, and the Québec Commission will consult with the other CSA jurisdictions as to the most appropriate course of action. Interested parties are advised to contact staff at the Québec Commission if they have any questions with respect to the status of the National Instrument and Companion Policy in that jurisdiction.

The National Instrument has been, or is expected to be, adopted as a rule in each of British Columbia, Alberta, Ontario, Newfoundland and Nova Scotia, a Commission regulation in Saskatchewan, and a policy in all other jurisdictions represented by the CSA. The Companion Policy

[1] In Ontario, at (2001), 24 OSCB 3805 (June 22, 2001).

[2] In Ontario, at (1998), 21 OSCB 781 (February 6, 1998).

has been, or is expected to be, implemented as a policy in all the jurisdictions represented by the CSA.

Drafts of the National Instrument and Companion Policy were previously published for comment in February 1998 and June 2001. A summary of the comments received in respect of the 1998 Draft Instrument and Policy together with the CSA's responses may be found in Appendix A to the Notice which accompanied the publication of the 2001 Draft Instrument in June 2001.

During the most recent comment period on the Draft Instruments which ended on August 22, 2001, the CSA received two submissions. The comments provided in these submissions have been considered by the CSA and the final versions of the National Instrument and Companion Policy being published with this Notice reflect the decisions of the CSA in this regard. Appendix A of this Notice identifies the commenters on the Draft Instruments and provides a summary of the comments received and the responses of the CSA.

Substance and Purpose of the Proposed Multilateral Instrument and Companion Policy

The substance and purpose of the National 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 National 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 Companion Policy is to state the views of the CSA on various matters relating to the National Instrument, and to provide market participants with guidance in understanding the operation of the National Instrument and the policy concerns that lie behind some of its provisions.

Summary of Changes to the National Instrument from the 2001 Draft Instrument

There have been no material changes made in the National Instrument from the 2001 Draft Instrument. For a detailed summary of the contents of the 2001 Draft Instrument and the 1998 Draft Instrument, reference should be made to the Notices that were published with the Draft Instruments.

Summary of Changes to the Proposed Companion Policy from the 2001 Draft Policy

The CSA have amended the Companion Policy in accordance with a comment made by the Québec Commission by adding a new Part 5 to the Companion Policy, entitled Control Measures. This amendment states that registrants are encouraged to adopt written internal control measures to ensure that, in connection with the distribution of securities of a "related issuer" or a "connected issuer", they deal with the issuer as an independent party, as if acting at arm's length.

As indicated in the amendment, the amendment is not intended to represent a new requirement or obligation for registrants, but rather is intended to reflect the CSA's views as to registrant best practices in connection with underwriting activities where there is a connected or related issuer relationship. Accordingly, the CSA do not regard this amendment as constituting a material change to the Companion Policy.

For a detailed summary of the contents of the 2001 Draft Policy and the 1998 Draft Policy, reference should be made to the Notices which accompanied the Draft Instruments.

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 National 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 National 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 National 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.

3. Subsection 230(3) will be amended by deleting the words "Sections 224 and 225 do not apply", and substituting the following: "Section 225 does not apply".

Text of Proposed Multilateral Instrument and Companion Policy

The text of the National Instrument and Companion Policy follows.

October 19, 2001.

APPENDIX A

SUMMARY OF COMMENTS RECEIVED
ON
DRAFT NATIONAL 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 (the "1998 Draft Instrument") and proposed Companion Policy 33-105CP (the "1998 Draft Policy"). The CSA received submissions on the 1998 Draft Instrument and 1998 Draft Policy from three commenters. The names of these commenters and a summary of their comments, together with the CSA's responses, were previously published in the Appendix to the Notice of Proposed Changes to Proposed Multilateral Instrument 33-105.[3]

As a consequence of these comments and further consideration of the instruments, the CSA republished proposed Multilateral Instrument 33-105 (the "2001 Draft Instrument") and proposed Companion Policy 33-105 (the "2001 Draft Policy") for a second comment period in June 2001.[4] This comment period ended August 22, 2001. During the comment period, the CSA received submissions on the 2001 Draft Instrument and 2001 Draft Policy from one commenter, Mr. Simon Romano (the "Commenter"), a partner with the law firm of Stikeman Elliott in Toronto. The CSA subsequently received an additional comment from Canaccord Capital Corporation ("Canaccord").

Copies of these 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, Suite 400, 300-5th Avenue SW, Calgary, Alberta, T2P 3C4 (403) 297-6454.

The CSA have considered these comments received and thank the commenters for providing their comments. The CSA have made a number of minor amendments to the 2001 Draft Instrument and 2001 Draft Policy which reflect these comments. The CSA have determined that these amendments do not represent material changes to the 2001 Draft Instrument or the 2001 Draft Policy. Accordingly, in the jurisdictions that have previously published the Draft Instruments, the instruments are not 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

The Commenter noted that his comments represented his personal comments and not those of his firm. The Commenter prefaced his comments by noting that the 2001 Draft Instrument generally represented a very welcome addition to the regulatory landscape governing underwriting conflicts.

1. Participation by Québec

The Commenter noted that it would be very helpful if the reasons why the QSC was not proposing to adopt MI 33-105 were specified in some detail in order that parties may know where they are likely to experience divergence, if anywhere.

CSA Response

As noted previously, at the time of the publication of the Draft Instruments, it was not anticipated that the Draft Instruments would be proposed for adoption by the Québec Commission. However, since the publication of the 2001 Draft Instrument and Policy, the Québec Commission has determined that the underwriting conflicts regime contemplated by the National Instrument and the Companion Policy should be adopted in the Province of Québec. Accordingly the 2001 Draft Instrument has been renamed National Instrument 33-105 to reflect participation by all of the CSA jurisdictions.

2. Distinction between issuers and selling securityholders

The Commenter noted that the distinction between issuers and selling securityholders, while clear in the definition of "connected issuer", may not be clear in the definition of "related issuer". In addition, the Commenter noted that the distinction may be lost in the words "of or by" in subsection 2.1(1) and by the word "or" in subsection 2.1(1) and paragraphs 2.1(2)(a) and (b). The Commenter further noted that, as presently drafted, it would appear that the instrument could apply in the case of a purely secondary transaction, in which the registrant had a connected or related relationship with the issuer, but not the selling securityholder, and questioned whether it was intended that the instrument apply in this case.

CSA Response

[3] In Ontario, at (2001), 24 OSCB 3808 (June 22, 2001).

[4] In Ontario, at (2001), 24 OSCB 3805 (June 22, 2001).

The CSA have not amended the National Instrument in response to this comment. The CSA note that, in the case of a secondary market transaction, where the registrant has a connected or related relationship with the issuer, it may generally be expected that the registrant will also have a connected or related relationship with the selling securityholder.

It is a precondition to the application of subsections 2.1(1) and 2.1(2) of the National Instrument that there be a distribution of securities. Accordingly, in the case of a secondary market transaction, subsections 2.1(1) and (2) will only apply where the selling securityholder holds a sufficient number of securities of the issuer materially to affect the control of that issuer. Consequently, the selling securityholder will generally be an "influential securityholder" of the issuer, and a "related issuer" of the issuer.

The extended definition of "connected issuer" in section 1.1 of the National Instrument provides that a selling securityholder distributing securities may be a "connected issuer" of a registrant if the selling securityholder, or a related issuer of the selling securityholder, has a relationship with, *inter alia*, the registrant 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.

Accordingly, if the registrant has a connected or related relationship with the issuer, with the result that a reasonable prospective purchaser may question the independence of the registrant vis-à-vis the issuer, it will generally be the case that "...the selling securityholder or a related issuer of the selling securityholder has a relationship with [the prescribed group of persons and companies, including the registrant] 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".

Where the registrant has a connected or related relationship with the issuer, but does not have either a related or connected relationship with the selling securityholder, the CSA believe that, in many cases, the National Instrument should continue to have application to the distribution of securities. The CSA note that, while the distribution of securities is made by a selling shareholder, rather than the issuer, the pricing and due diligence activities undertaken by the registrant will nevertheless relate to the connected or related issuer.

Finally, the CSA note that these comments would appear to apply also to the 1998 Draft Instrument. The CSA believe that the proposed underwriting conflicts regime set out in the 1998 Draft Instrument is well understood by market participants, and has served as the basis for a significant number of exemptive relief applications. In the course of reviewing these applications, the CSA have not been made aware of any significant concern on the part of market participants with respect to this issue. However, in the event this issue later proves to be of general concern to market participants, the CSA may revisit this issue in a future amendment to the National Instrument.

3. Definition of "Connected Issuer"

The Commenter expressed the view that the definition of "connected issuer" was unduly broad, and that the words "may lead" in the definition ought to be replaced with the words "would lead". The Commenter noted that section 4.2 of the 2001 Draft Policy used the words "would lead".

CSA Response

The CSA have not amended the National Instrument in response to this comment. The CSA have amended section 4.2 of the Companion Policy to be consistent with the National Instrument. The CSA note that this aspect of the definition of "connected issuer" remains unchanged from the definition found in the 1998 Draft Instrument, and a similar comment was raised in response to the publication of that instrument and was considered by the CSA at that time.

The CSA note that, as a consequence of the amendments previously made to the National Instrument, the independent underwriter requirement contained in subsection 2.1(2) of the National Instrument applies only in the case of distributions involving a related issuer. Where there is a connected issuer relationship, but not a related issuer relationship, the National Instrument simply requires that certain prescribed disclosure be made. The CSA are of the view that, where there exists a relationship between an issuer or selling shareholder and the registrant that may lead a reasonable prospective purchaser of the securities to question the independence of the registrant, such disclosure is appropriate. In view of the disclosure-based approach to regulating actual or perceived conflicts of interest, the CSA believe that the standard represented by the word "may" is widely understood by and is not unduly onerous towards market participants.

4. Definition of "Independent Underwriter"

In view of the amendments to the 2001 Draft Instrument which essentially create a disclosure-only regime for connected issuers, the Commenter questioned whether the definition of "independent underwriter" should be amended to refer only to related, and not connected, issuers.

CSA Response

The CSA have not amended the National Instrument in response to this comment. The National Instrument seeks to protect the integrity of the underwriting process in circumstances in which there is a perceived or actual conflict of interest between the issuer or selling securityholder and the registrant by requiring full disclosure of the relationships giving rise to the potential conflict of interest, and, in the case

of a distribution involving a related issuer, by requiring an independent underwriter to participate in the transaction.

By definition, a registrant which is in a connected issuer relationship with an issuer will not be considered to be independent of that issuer, since the definition of "connected issuer" requires that there exist "a relationship 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."

5. Qualification of securities other than by prospectus

The Commenter noted that in the 1998 Draft Instrument, the independent underwriter requirement (found in subsection 2.1(b) of the 1998 Draft Instrument) applied only in the case of a "distribution made under a prospectus", whereas in the 2001 Draft Instrument the independent underwriter requirement (found in subsections 2.1(2) and (3) of the 2001 Draft Instrument) applied in the case of "a distribution of special warrants or a distribution made under a prospectus".

The Commenter questioned whether, in view of this extension of the independent underwriter requirement to include distributions involving special warrants, the independent underwriter requirement should also be extended to include situations where securities are qualified other than by way of a prospectus, such as by way of a securities exchange issuer bid or an amalgamation circular.

CSA Response

The CSA have not amended the National Instrument in response to this comment. The independent underwriter requirement contained in subsections 2.1(2) and 2.1(3) of the National Instrument applies only in the case of a distribution involving special warrants or a distribution made under a prospectus. In the case of other forms of distributions, there is no specific requirement in the National Instrument for independent underwriter involvement. The CSA amended subsections 2.1(2) and 2.1(3) expressly to make reference to a distribution of special warrants for the reason that, in substance, the distribution represents a distribution under a prospectus.

6. Calculation rules

The Commenter noted that section 2.2 of the National Instrument sets out different tests for Canadian issuers (i.e., non-foreign issuers) and foreign issuers, and suggested that this distinction may place Canadian issuers at a disadvantage. As an alternative, the Commenter proposed that Canadian issuers be able to select either the “full deal” or “Canada-only” approach.

CSA Response

The CSA have not amended the National Instrument in response to this comment. The CSA believe that the regime contained in the National Instrument represents an appropriate and balanced approach to regulating underwriting conflicts in connection with distributions of securities in Canada. As a consequence of the amendments previously made to the 2001 Draft Instrument, the requirement for independent underwriter involvement in a distribution of special warrants or a distribution made under a prospectus has been limited to those cases where the registrant is the issuer or selling shareholder, or where a related issuer of the registrant is the issuer or selling shareholder.

Where the registrant, or a related issuer of the registrant, is the issuer or selling securityholder in the distribution, the CSA believe that participation by an independent underwriter in the distribution represents an important means of protecting the integrity of the underwriting process. In these cases, the CSA believe that the interest of investors in an underwriting process free of any actual or perceived conflict outweighs the potential inconvenience to issuers from involving independent underwriters in the distribution.

However, the National Instrument also recognizes that it will not always be appropriate to impose the full range of Canadian securities regulatory requirements on international offerings by foreign issuers. Such requirements may unnecessarily duplicate requirements to which the foreign issuer is already subject. In other cases, imposing such requirements may result in foreign issuers choosing to avoid Canadian capital markets altogether. Consequently, in order to facilitate international offerings within Canada, the CSA is generally prepared to relax certain regulatory requirements where the degree of connection with Canada is reduced, and the CSA is satisfied that the interest of investors in being able to participate in such offerings outweighs the concern over the lesser degree of regulation. Accordingly, section 3.2 of the National Instrument provides that if more than 85 percent of the offering takes place outside of Canada, the independent underwriter requirement does not apply. Similarly, where an offering is made only partly in Canada, and where the issuer qualifies as a "foreign issuer", in calculating the size of the distribution and the required degree of involvement by an independent underwriter, it is only necessary to look to the size of the distribution in Canada.

7. Definition of "Influential Securityholder"

a) The Commenter expressed the view that, with respect to the definition of “influential securityholder”, it may be very difficult, if not impossible, to determine the holdings of all employees of a large registrant in a particular company at any given time, and felt that this was excessive.

b) The Commenter also noted that, as a consequence of the “power to direct the voting of" concept, managed funds would appear to be caught. The Commenter was of the view that this was inconsistent with National Instrument 62-103 and the alternative monthly reporting system, which is designed

to relieve passive institutional investors from the need to monitor their positions on a daily basis.

c) The Commenter further felt that the definition was unnecessarily complex, and proposed, as an alternative, a single 20% standard.

d) The Commenter further questioned whether it was necessary, in section 1.2(1)(a)(ii), to include securities which are not currently exercisable.

e) Finally, the Commenter felt that, the definition of "registrant", by adding the words "or required to be registered", seems to complicate the analysis tremendously by requiring all business activities to be reviewed.

CSA Response

The CSA have not amended the National Instrument in response to these comments. The CSA note that, other than 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, the definition of "influential securityholder" is essentially unchanged from that found in the 1998 Draft Instrument.

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

a) The relevant part of the definition of "influential securityholder" found in the National Instrument is based on proposals put forward by the Joint Securities Industry Committee on Conflicts of Interest (the "Hagg Committee")[5] in their final report published in September 1997. The Hagg Committee's final report recommended that the concept of a "professional group" be introduced into the rules governing underwritings by related or connected issuers. The concept of "professional group" was recommended to deal with the perception that, even though the amount of stock of an issuer held by a registrant firm may be small, the combined holding of that issuer's shares by individuals within that firm, including directors, officers, brokers and corporate finance personnel, may be significant. The final report recommended that the conflict of interest rules relating to underwritings be applicable to holdings by a professional group of 20 percent or more of an issuer.

The CSA accept the conclusions and recommendations of the Hagg Committee in this regard and accordingly, in determining whether a person or company or professional group comes within the definition of "influential securityholder", it will be necessary for registrants to monitor the holdings of its employees. The CSA do not believe that this represents an inappropriate requirement and note that the Investment Dealers Association of Canada (the "IDA") proposed by-laws contain similar requirements.

The CSA also note that it is the practice of dealers to review the trading of securities by all employees as part of normal compliance procedures.

(b) The CSA do not believe that the definition of "influential securityholder" is inconsistent with National Instrument 62-103 -- The Early Warning System and Related Take-Over Bid and Insider Reporting Issues. The CSA note that under NI 62-103, the list of eligible institutional investors does not include dealers. Accordingly dealers would not ordinarily be exempt from the requirement to keep track, on a daily basis, of the shares of companies that they own or vote. To the extent that dealers act as portfolio managers for managed funds, the National Instrument would have application.

The CSA further note that NI 62-103 was generally designed to reduce the scope of the obligation to put in place a system to aggregate share positions across financial conglomerates on a daily basis. In contrast, the National Instrument would require both the issuer and the dealer to determine the scope of their relationship at the time of the underwriting (i.e., a discrete point in time, rather than on a continuous basis). This requirement is not new to the National Instrument. Rather, since the introduction of the underwriting conflicts regime in the late 1980s, issuers and registrants have been required to make this determination.

Finally, the CSA note that this comment is similar to that previously raised by another commenter in response to the request for comments in respect of the 1998 Draft Instrument. The CSA believe that the earlier response, reproduced below, remains appropriate.

> 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.

(c) The CSA believe that the definition of "influential securityholder" in the National Instrument represents a

[5] In 1996, the Investments Dealers Association of Canada, and the Montreal, Toronto, Calgary and Vancouver Stock Exchanges formed the Joint Security Industry Committee on Conflicts of Interest to examine the potential conflicts of interest that occur when dealers participate in emerging company investments. The Joint Committee (often referred to as the "Hagg Committee" after its Chairman, John Hagg, of Northstar Energy Corporation) delivered its final report in September 1997.

significant improvement over the existing standard in the securities legislation of the jurisdictions, which is based on the concept of "influence". A single test based on a simple 20% ownership threshold would fail to capture those situations where factors other than direct ownership might allow a person or company to exercise significant leverage over an issuer. The CSA believe that the definition of "influential securityholder" is simpler and clearer than the present test based on "influence" yet nonetheless flexible enough to address these other circumstances.

The CSA further note that the definition of "influential securityholder" is essentially unchanged from the 1998 Draft Instrument. Since the publication of the 1998 Draft Instrument for comment, the CSA have had the opportunity to consider a considerable number of applications for discretionary relief based on the proposed regime, including the key concept of "influential securityholder". In view of this large number of applications, the CSA believe that market participants have not encountered significant difficulties in working within this regime, and believe that this regime reflects an effective and workable approach to regulating underwriting conflicts.

d) For the purposes of the determination described in subsection 1.2(1) of the National Instrument, if a security is outstanding at the time of the determination but is not then convertible or exchangeable, the CSA would not ordinarily consider it necessary to include these securities in the determination.

e) The CSA do not believe that the definition of registrant in the National Instrument is unduly complicated and note that the words “or required to be registered” generally appear within the definition of "registrant" within the securities legislation of the CSA jurisdictions.

8. Exempt Securities

The Commenter further questioned whether section 1.3(a) of the 2001 Draft Instrument was intended also to include exempt securities that are restricted in regulations or rules, such as subordinated bank debt.

CSA Response

Section 1.3 of the National Instrument only exempts those securities described in that section. Other than an amendement to reflect the fact that it is now anticipated that the instrument will be adopted in Québec, section 1.3 of the National Instrument remains unchanged from the 1998 Draft Instrument. The CSA believe that the exemption created by section 1.3 is clear on its terms. The CSA will consider applications for exemptive relief in respect of other classes of securities which may be analogous to the classes of securities described by section 1.3 on a case-by-case basis.

9. Management Fees

The Commenter questioned the use of the term “management fees” in subparagraph 2.1(3)(a)(ii) and section 2.2 of the instrument, and suggested that the term “agents’ fees” or “commissions” may be preferable. The Commenter further questioned whether, in section 2.2 of the instrument, the test was to be assessed against deal value, or fees received in Canada, or both, and noted that these measures could diverge.

CSA Response

The CSA agree with the first comment and have amended the National Instrument and Companion Policy accordingly. With respect to the second comment, the CSA do not believe that section 2.2 is unclear. Section 2.2 should be read in context with subsection 2.1(3). Subparagraph 2.1(3)(a)(ii) provides that, in the case of a distribution in which “each registrant acting as direct underwriter acts as agent and is not obligated to act as principal”, the degree of independent underwriter involvement is to be measured by reference to agents’ fees. Accordingly, in the case of an agency deal, section 2.2 requires that the calculation be based on the aggregate agents’ fees.

10. Valuation Requirement

The Commenter proposed that section 4.1 should be amended to permit the valuation of the issuer referred to in that section to be prepared by valuators who are members of the Canadian Institute of Chartered Business Valuators (the "CICBV"). The Commenter further expressed the view that the reference to a “distribution other than under a prospectus” in subparagraph 4.1(a)(iv) of the instrument should extend to take-over bids and mergers and sought clarification in this regard.

CSA Response

The CSA agree with the first comment, and have amended the National Instrument to make reference to valuations prepared by members of the CICBV. With respect to the second comment, the CSA note that the reference to a “distribution other than under a prospectus” in subparagraph 4.1(a)(iv) remains unchanged from the corresponding reference in subsection 12(b) of Appendix C to the 1998 Draft Instrument. In view of the large number of exemptive relief applications which have been received based on the 1998 Draft Instrument, the CSA believe that market participants have not encountered significant difficulties in working with the disclosure requirements set forth in Appendix C and accordingly do not propose to amend this provision.

11. Appendix C

The Commenter expressed the view that item 6(e) seemed difficult to answer, particularly in the absence of a definition of “financial position”, and suggested that a materiality qualification would assist registrants and issuers in making this determination.

CSA Response

The CSA have not amended the National Instrument in response to this comment. Item 6(e) remains unchanged from the 1998 Draft Instrument. Since the publication of the 1998 Draft Instrument, the CSA have received a large number of applications whereby applicants have sought relief from the independent underwriter requirement as set out in the regulations and have undertaken to provide the disclosure contemplated by that draft instrument. Accordingly, the CSA believe that market participants have been able to understand and are able to comply with the disclosure requirements contained in Appendix C, and that greater uncertainty would result from an amendment to this appendix.

The Canaccord Comment

The CSA have received an additional comment from Canaccord Capital Corporation ("Canaccord"). Although this comment was received outside of the comment period, the CSA were able to consider the comment and have summarized the comment and the CSA response below.

Canaccord expressed its view that the amendments to Part 2 of the 2001 Draft Instrument which generally restrict the requirement for independent underwriter involvement to distributions in which a related issuer relationship exists were of significant concern. This commenter noted that, when the underwriting conflicts regime as it presently exists was first enacted in the late 1980s, there were a large number of independent investment dealers. However, many of these dealers have now disappeared, with most having been acquired by the banks. This commenter further expressed its belief that the banks were increasingly integrating their lending activities with the investment banking activities of their subsidiaries, and were now engaging in "tied selling", suggesting that the banks have indicated to corporate issuers that they would only lend to such issuers if they also received the most profitable investment banking fees.

Canaccord further expressed its belief that, in many cases where there exists a connected issuer relationship but not a related issuer relationship, such as the case of an issuer in financial difficulty seeking to make a public offering in order to reduce or eliminate indebtedness to one or more banks, simple disclosure relating to the relationship was not sufficient, and an independent underwriter should be involved. This commenter suggested that an independent underwriter would provide some balance on whether the issue, pricing, size and targeted capital structure was appropriate. This commenter disputed the suggestion that an independent underwriter would not provide protection for the reason that it would simply be co-opted.

CSA Response

The CSA have not amended the National Instrument in response to this comment. The amendments to Part 2 of the 2001 Draft Instrument referred to by this commenter were made following careful consideration by the CSA of the comments and recommendations contained within the Reports of the Canadian Securities Administrators Committee on Conflicts of Interest in Underwriting,[6] and the Hagg Report, the overall experience of the CSA with the present underwriting conflicts regime since its inception in 1987, and the experience of the CSA in considering applications for discretionary relief based on the underwriting conflicts regime contained in the 1998 Draft Instrument.

As explained in Part 2 of the Companion Policy, the National Instrument identifies a hierarchy 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:

(a) The registrant as issuer or selling securityholder;

(b) An issuer or selling securityholder that is a "related issuer" of the registrant; and

(c) An issuer or selling securityholder that is a "connected issuer" of the registrant.

As described in the Companion Policy, the National 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. The relationship described in (a) represents the relationship with the highest degree of conflict of the three recognized by the Instrument. Conversely, the relationship described in (c) represents the relationship with the least degree of conflict.

Ultimately, in their review of the appropriate regulatory response to concerns raised by a connected issuer relationship, the question before the CSA was whether these concerns could be adequately addressed by mandating certain specified disclosure about this relationship, or whether a greater degree of regulatory intervention was required. This question, and the concerns raised by the commenter, received extensive consideration by the CSA. The CSA eventually concluded that, in the case of a connected issuer relationship, a disclosure-based approach was sufficient, and it was not necessary to regulate the composition of the underwriting syndicate involved in the distribution.

[6] The Committee Report and the Dissent Report were published in Ontario on July 7, 1995 at (1995), 18 OSCB 3157 and (1995), 18 OSCB 3195, respectively.

The CSA note that, where a registrant is in a position of actual or perceived conflict of interest, the registrant is under a duty at law generally not to allow this conflict of interest in any way to interfere with the registrant's performance of its obligations in the underwriting process. As reflected by the new Part 5 of the Companion Policy, registrants are encouraged to adopt appropriate internal control measures to ensure that this is in fact the case. The CSA are of the view that, where a connected issuer relationship exists, and particularly where the issuer would be considered a "specified party" as that term is defined in the 1998 Draft Instrument, in many cases it may be prudent for the registrant to involve an independent underwriter in order to demonstrate that it has in fact complied with its obligations generally not to be influenced by such conflict of interest.

Finally, with respect to the concern that certain financial sector participants may be engaging in unlawful or anticompetitive activities, the CSA believe that appropriate recourse may be had to the federal and provincial statutes which directly regulate such activities.

NATIONAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

TABLE OF CONTENTS

NATIONAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

PART 1 DEFINITIONS, INTERPRETATION AND APPLICATION

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

(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,

(ii) 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;

"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;

"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 that

(i) 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) holds, has the power to direct the voting of, or has direct or indirect beneficial ownership of, equity securities 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) controls or is a partner of the issuer if the issuer is a general partnership, or

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

(b) a person or company or professional group that

(i) 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 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) 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.

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 agents' fees equal to an amount not less than the lesser of

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

(B) the largest portion of the agents' 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.

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 agents' fees relating to the distribution in Canada, and the aggregate dollar value of the distribution underwritten, or aggregate dollar value of agents' 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 agents' 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 agents' 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 agents' fees relating to the distribution paid or payable in Canada, and the dollar value of the distribution underwritten, or aggregate dollar value of agents' fees received, by the independent underwriter in Canada.

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 agents' fees relating to the distribution are paid or payable outside of Canada.

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(1) shall be given a document that contains a summary of a valuation of the issuer by a member of the Canadian Institute of Chartered Business Valuators, a chartered

accountant or by a registered dealer of which the issuer is not a related issuer, and that specifies a reasonable time 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).

PART 5 EXEMPTION

5.1 Exemption

(1) The regulator or securities regulatory authority 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.

PART 6 EFFECTIVE DATE

6.1 Effective Date - This National Instrument comes into force on January 3, 2002.

NATIONAL INSTRUMENT 33-105

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	Subsection 36(2) of the *Securities Act* (Newfoundland)
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)
QUÉBEC	Section 41 of the *Securities Act* (Québec)
SASKATCHEWAN	Subsection 39(2) of *The Securities Act, 1988* (Saskatchewan)

NATIONAL 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)

NATIONAL 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 or a related 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 related 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 NATIONAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS

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

PART 1 INTRODUCTION

1.1 Purpose - The purpose of this Policy is to state the views of the Canadian Securities Administrators (the "CSA") on various matters relating to National 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 related issuer distributions, 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 agents' fees equal to an amount not less than the lesser of

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

(b) the largest portion of the agents' 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 agents' 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) may 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 CONTROL MEASURES

5.1 Control Measures – The CSA encourage registrants to adopt written internal control measures to ensure that, in connection with the distribution of securities of a "related issuer" or a "connected issuer", they deal with the issuer as an independent party, as if acting at arm's length. Although this recommendation is not intended to be prescriptive, registrants should note that they may be asked, in the normal course of inspections, whether such control measures have been adopted and a copy thereof may be requested in the course of such inspections.

PART 6 APPENDICES

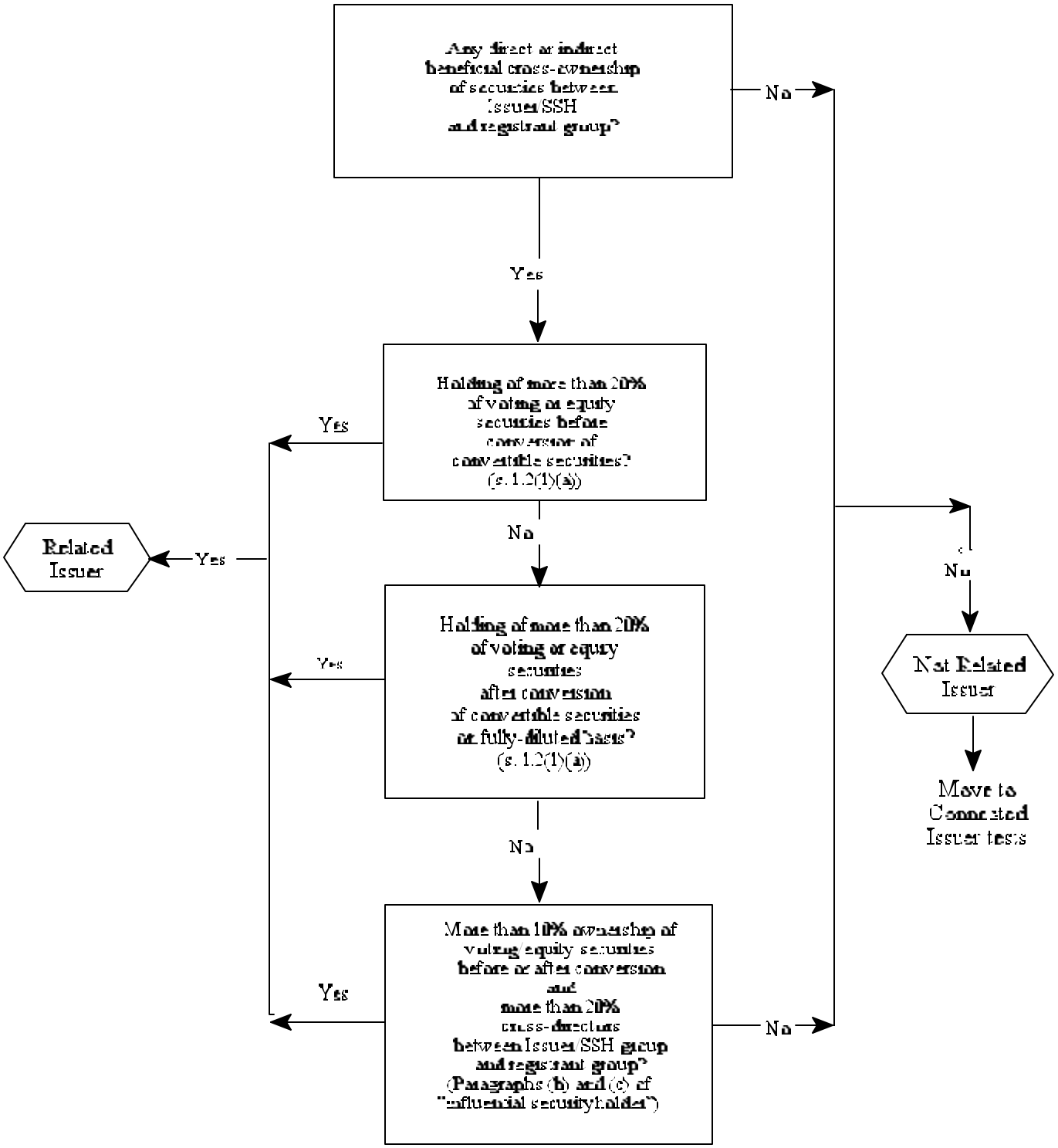
6.1 **Appendices** - To illustrate the analysis required to be made in determining the application of the Instrument to a distribution, Appendices A-1, A-2, A-3 and A-4 have been included in this Policy. Appendices A-1 and A-2 assist in determining whether parties are related issuers. Appendix A-3 assists 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.

COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105

APPENDIX A-1

RELATED ISSUER

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

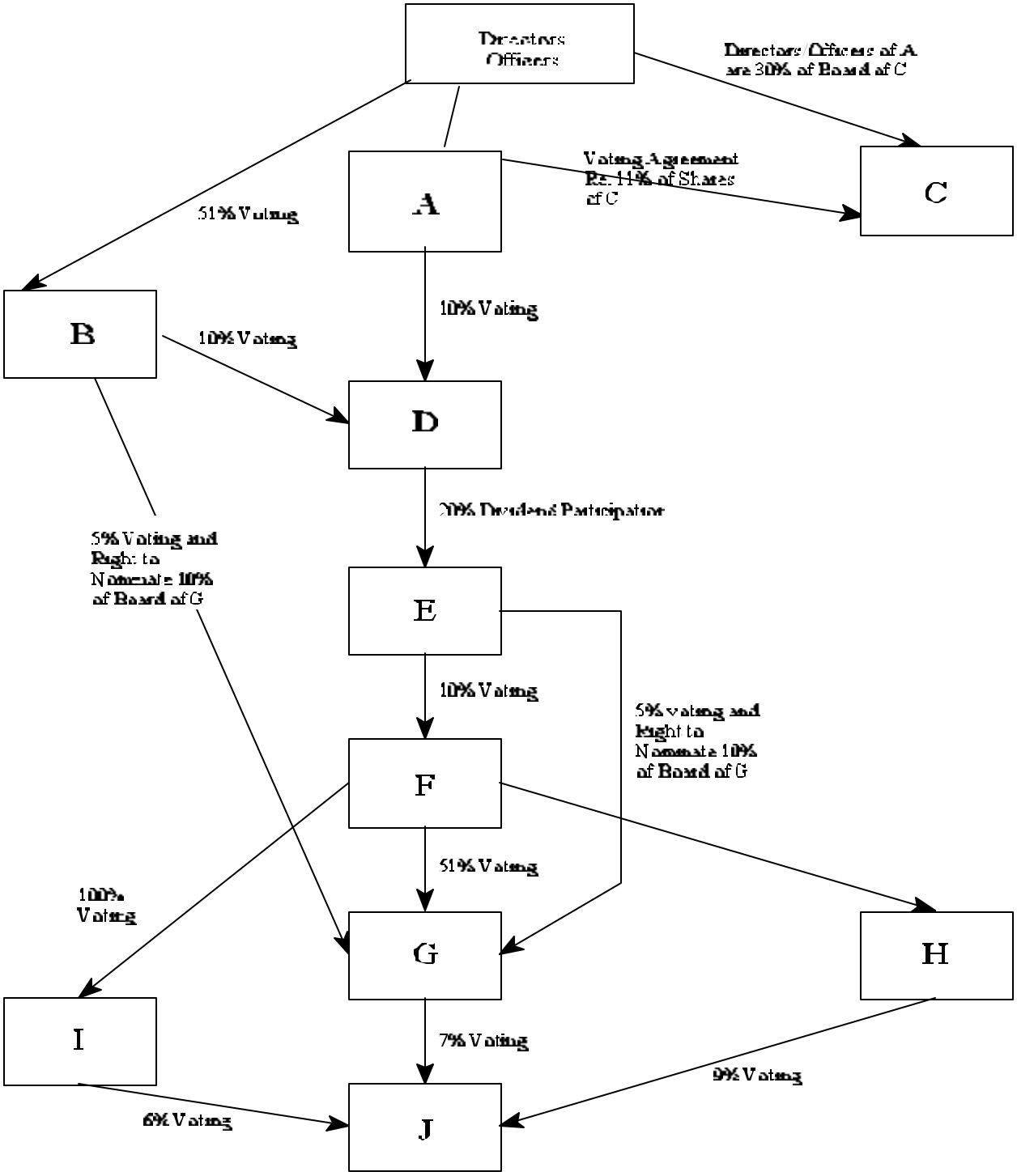


COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105

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)

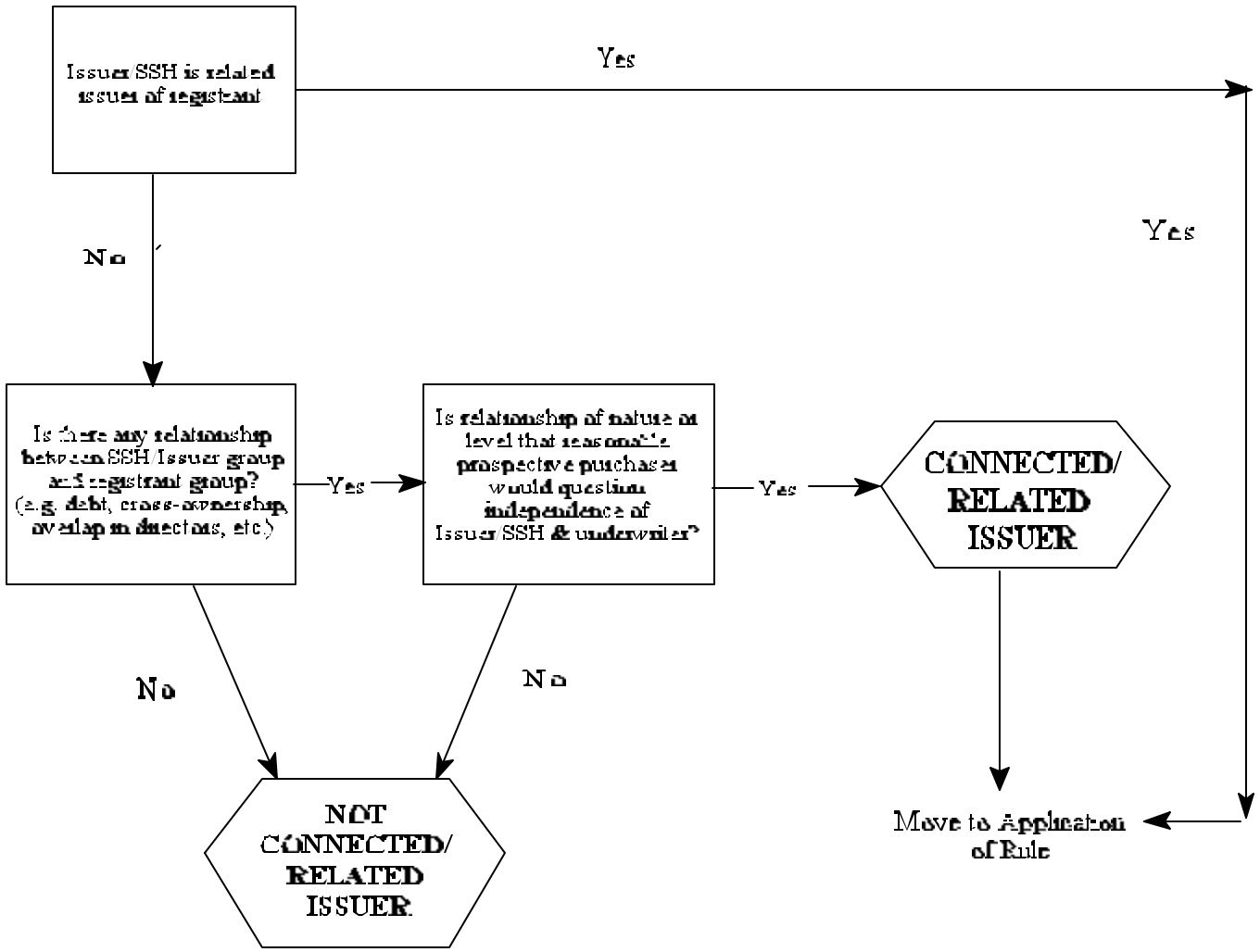


COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105

APPENDIX A 3

CONNECTED/RELATED ISSUER

Relevant provisions: s.1.1 "connected issuer"



COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105

APPENDIX A-4

APPLICATION OF RULE