

This document is an unofficial consolidation of all amendments to National Instrument 33-105 *Underwriting Conflicts*, and its companion policy current to **September 19, 2008**. This document is for reference purposes only and is not an official statement of the law.

**NATIONAL INSTRUMENT 33-105
UNDERWRITING CONFLICTS**

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**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,
 - (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;

“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) section 2.8 of National Instrument 45-102 Resale of Securities.

- 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.

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APPENDIX A

EXEMPT SECURITIES

Jurisdiction	Securities Legislation Reference
All	Sections 2.20, 2.21 and 2.34 to 2.39 of National Instrument 45-106 <i>Prospectus and Registration Exemptions</i>
Alberta	Section 87(h), (h.1) and (h.2) of the <i>Securities Act</i> (Alberta)
British Columbia	Section 46 of the <i>Securities Act</i> (British Columbia)
Manitoba	Subsection 19(2)(g) and (h) of the <i>Securities Act</i> (Manitoba)
Newfoundland and Labrador	Subsections 36(2)(h) and (i) of the <i>Securities Act</i> (Newfoundland and Labrador)
Nova Scotia	Clause 41(2)(i) of the <i>Securities Act</i> (Nova Scotia)
Ontario	Sections 2.4 to 2.6 of OSC Rule 45-501
Prince Edward Island	Subsection 2(4)(f) and (g) of the <i>Securities Act</i> (Prince Edward Island)
Quebec	Section 41 of the <i>Securities Act</i> (Québec)
Saskatchewan	Subsection 39(2)(i) and (j) of <i>The Securities Act, 1988</i> (Saskatchewan)

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APPENDIX B

[Repealed]

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**

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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 fulfill, 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

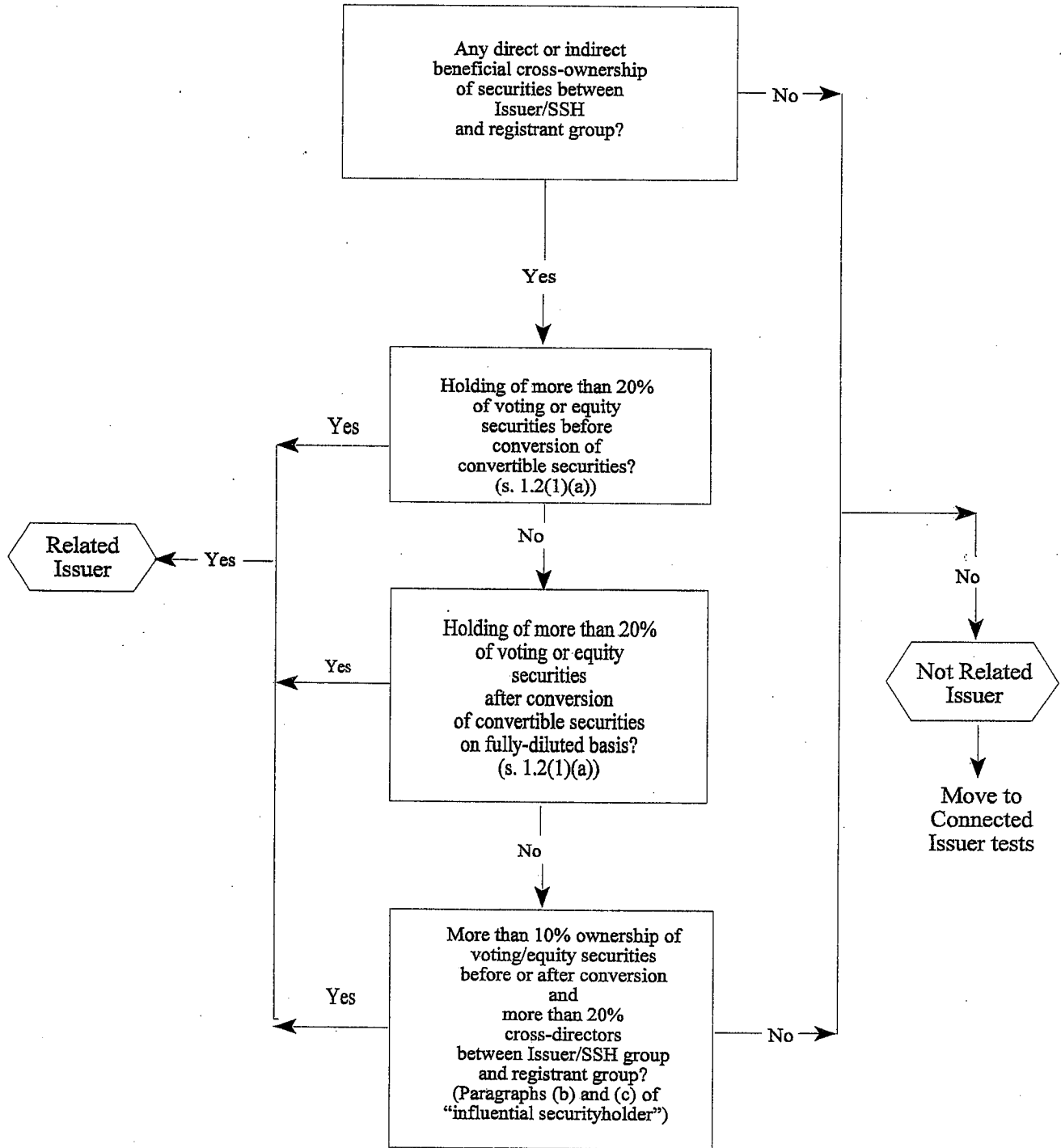
- 6.1 Appendices** - To illustrate the analysis required to be made in determining the application of the Instrument to a distribution, Appendices A-1, A-2, A-3 and A-4 have been included in this Policy. Appendices A-1 and A-2 assist in determining whether parties are related issuers. Appendix A-3 assists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

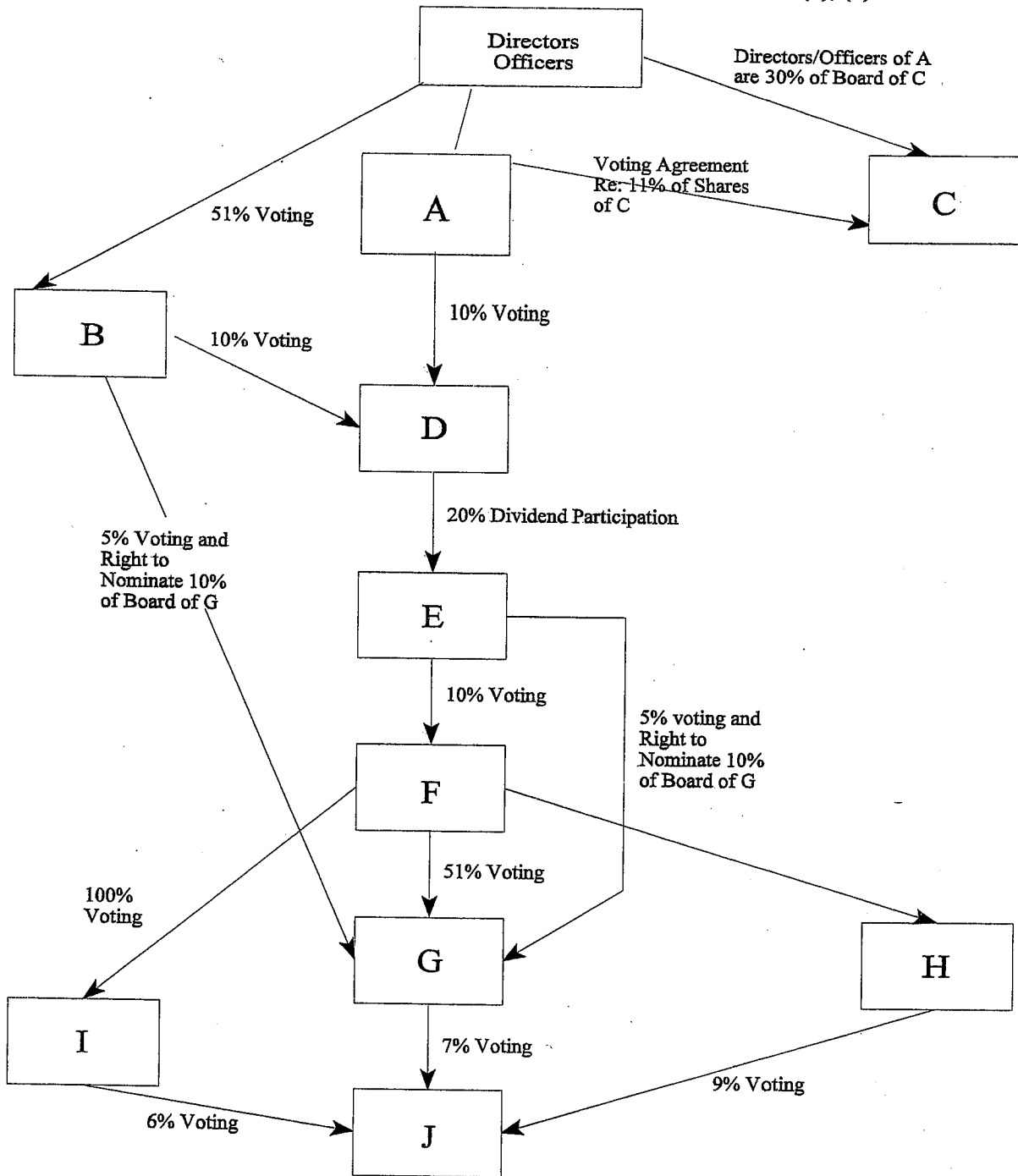


**COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105**

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)

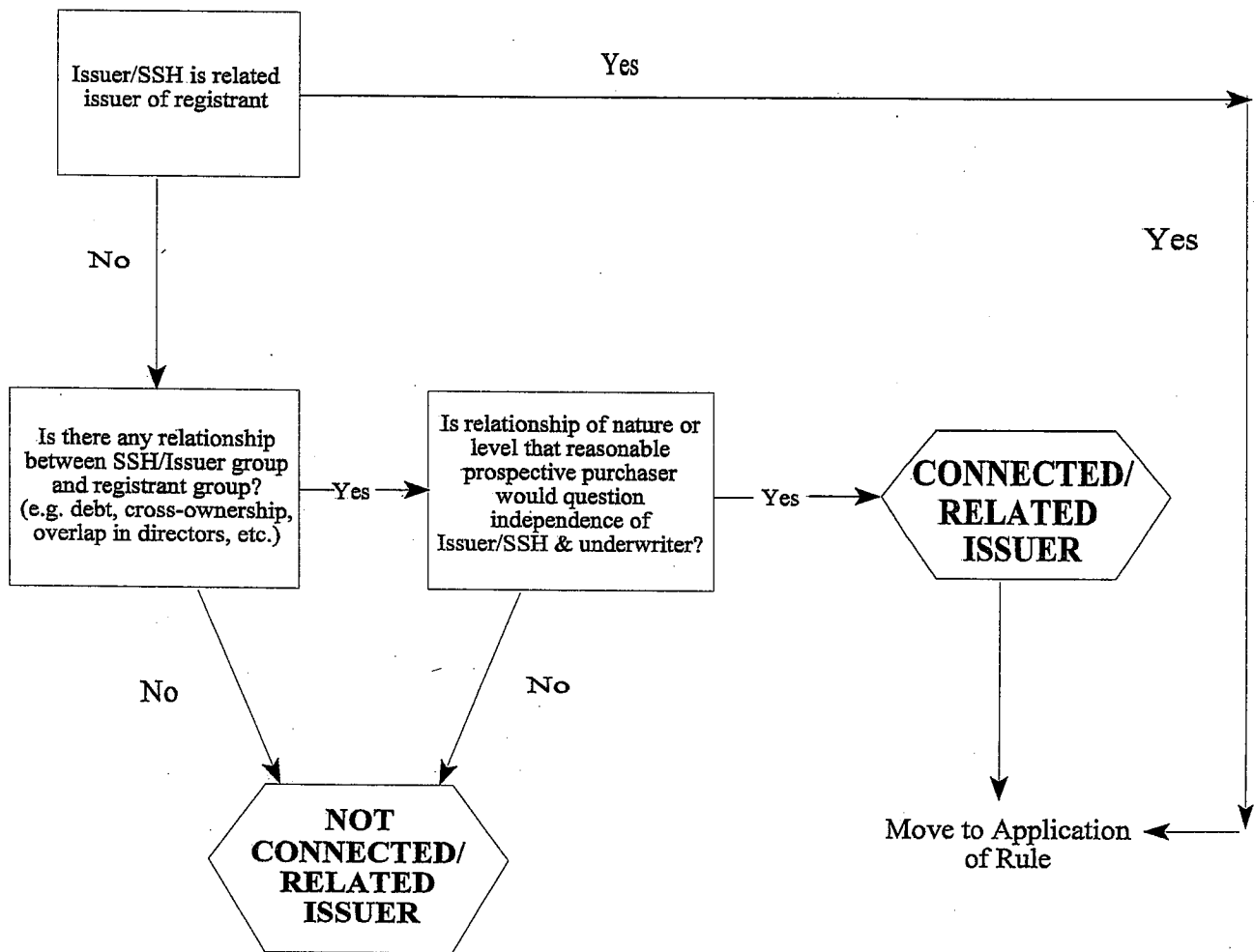


**COMPANION POLICY 33-105CP
TO NATIONAL INSTRUMENT 33-105**

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

