

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.01, INTRODUCTION**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.01 (11th and 12th Editions 2014-2017)

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The SEC has long recognized that U.S. disclosure requirements generally are the most rigorous in the world and that foreign issuers often have excluded the U.S. public from multinational securities offerings to avoid the need to comply with U.S. disclosure standards. The U.S. disclosure requirements for public offerings often require foreign issuers to expand their selling documents to include information not required under the rules of their home jurisdiction. The need to comply with U.S. disclosure rules as well as those of the home jurisdiction can add substantial costs to an offering and can cause delays—accountants and lawyers have to be retained in both jurisdictions and additional time is usually required because of the need to comply with two sets of rules. Any delay caused by U.S. regulatory requirements can be a significant impediment because advantageous market conditions for a particular securities issue may last for only a short period. These concerns are relevant not only for traditional public offerings but also for tender and exchange offers, offers in connection with business combinations and rights offerings. In these latter cases, the practical effect of the offeror's unwillingness to comply with U.S. requirements is that U.S. securityholders are not treated on an equal basis with non-U.S. holders.

The multijurisdictional disclosure system (the "MJDS") <sup>[1]</sup> between the SEC and provincial securities regulators in Canada (the "Canadian Securities Administrators," or the "CSA") was the SEC's first comprehensive effort toward

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meeting these concerns. <sup>[2]</sup> The MJDS, which became effective July 1, 1991, is a complex reciprocal initiative, adopted by the SEC and the CSA, intended to facilitate certain U.S./Canadian cross-border securities offerings, business combinations and tender and exchange offers by allowing such transactions to

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proceed in both jurisdictions on the basis principally of home country disclosures and rules, and by permitting issuers that have used the system (as well as other eligible issuers) to satisfy their ongoing disclosure obligations in both jurisdictions through the use of home country disclosures, supplemented as necessary by disclosures mandated by the Sarbanes-Oxley and Dodd-Frank Acts (and the equivalent regulations in Canada, where applicable). The MJDS also provides accommodations in related areas, including regulation of trust indentures and trustees and market regulation. In conjunction with the MJDS, the SEC extended its "foreign private issuer integrated disclosure system" (the "FPI System") to Canadian issuers on an equal basis with other foreign issuers, which, among other things, gives all Canadian foreign private issuers a complete exemption from the U.S. proxy requirements and insider reporting/short-swing profit recovery rules. <sup>[3]</sup>

The MJDS represented a significant milestone for the SEC in terms of its recognition of the securities laws of Canada. Since its adoption, the system has made it substantially easier for eligible Canadian issuers to access the U.S. capital markets and has encouraged the equal treatment of U.S. securityholders in

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rights offerings and offers in connection with business combinations, exchange offers and tender offers eligible

for MJDS treatment. The mutual recognition premise of the MJDS has become an outlier in SEC regulatory policy, however, as following its adoption the SEC shifted away from mutual recognition and toward a unified system of disclosure for foreign private issuers. <sup>141</sup> The two most notable examples of this shift are the SEC's revised Form 20-F, which replaced almost all of the former Form 20-F requirements with international disclosure standards adopted by the International Organization of Securities Commissions ( "IOSCO"), and the SEC's acceptance from foreign private issuers of financial statements prepared in accordance with the International Financial Reporting Standards ( "IFRS") as issued by the IASB. <sup>142</sup>

An earlier indication of the SEC's ambivalence toward the MJDS mutual recognition approach was the so-called "Aircraft Carrier Release" of 1998, whose sweeping proposed revisions to the securities offering process likely would have eliminated the MJDS if they had been adopted. <sup>143</sup> The proposed elimination of the MJDS never occurred, partially due to criticism from both Canadian and U.S. groups, including Canadian securities regulators, Canadian issuers, the Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association) and the Securities Law Committee of the Business Law Section of the New York State Bar Association, which argued that the elimination of the MJDS would increase disclosure costs, result in regulatory and

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administrative impediments to cross-border Canadian offerings (which had been eliminated for MJDS-eligible offerings) and effectively reduce U.S. investor access to securities of Canadian issuers. <sup>144</sup>

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#### Footnotes

1 SEC Release No. 33-6902 (July 1, 1991) (the "Adopting Release"). The MJDS was initially introduced in Canada as National Policy Statement No. 45, 14 O.S.C.B. 2889 (June 28, 1991), which was replaced by National Instrument 71-101, The Multijurisdictional Disclosure System, 21 O.S.C.B. 5104 (Aug. 14, 1998) ("National Instrument 71-101") and Companion Policy 71-101CP, 21 O.S.C.B. 5136 (Aug. 14, 1998).

The development of the MJDS was initiated by the SEC in 1985 with the issuance of a concept release, SEC Release No. 33-6568 (Feb. 28, 1985), requesting comment on two alternative methods of facilitating multijurisdictional offerings: the "common prospectus" or "harmonization" approach, which would require participating jurisdictions to agree on a common set of disclosure requirements; and the "reciprocal prospectus" or "mutual recognition" approach, which would provide that a prospectus prepared pursuant to the requirements of the issuer's home jurisdiction would be accepted for securities offerings in every other participating jurisdiction. Originally proposed in July 1989 (SEC Release No. 33-6841 (July 24, 1989); Multijurisdictional Disclosure System (Outline) 12 O.S.C.B. 2919 (July 28, 1989); and repropoed in October 1990, SEC Release No. 33-6879 (Oct. 16, 1990); Draft National Policy Statement No. 45, 13 O.S.C.B. 4573 (Nov. 2, 1990)), the MJDS is a hybrid of the two approaches—although the SEC generally recognizes and accepts Canadian disclosures, it requires U.S. disclosures in limited (but important) areas, such as certain disclosures required under the Sarbanes-Oxley and Dodd-Frank Acts. The greatest burden historically faced by issuers was the requirement to include a Canadian GAAP to U.S. GAAP reconciliation of financial statements in certain offerings. However, for fiscal years beginning on or after January 1, 2011 (or January 1, 2012 in the case of certain issuers in rate-regulated industries), Canadian public companies are required to report under IFRS as issued by the International Accounting Standards Board ( "IASB") rather than Canadian GAAP, pursuant to National Instrument 52-107, Acceptable Accounting Principles and Auditing Standards, and related amendments. As the SEC exempts foreign private issuers reporting under IFRS as issued by IASB from the requirement to provide a U.S. GAAP reconciliation, the transition from Canadian GAAP to IFRS has eliminated the need for Canadian foreign private issuers to provide a U.S. GAAP reconciliation under the MJDS. See 4.05[1] and § 13.02.

The SEC chose Canada as its initial partner for the MJDS because of the similarity of the U.S. and Canadian regulatory regimes and the significant presence of Canadian companies in the U.S. trading markets. In his opening statement at the meeting adopting the MJDS, then-SEC Chairman Breeden stated:

[The] MJDS was developed initially in Canada due to its developed capital markets and strong regulatory tradition. While the disclosure requirements of the United States and Canada differ in detail, the regulatory systems share the common purpose of ensuring that investors are given information adequate to make an informed investment decision. This system represents in a sense reciprocity based on equality of reporting and disclosure.

Richard C. Breeden, Chairman, SEC, Opening Statement on Adoption of Rules, Forms and Schedules for Multijurisdictional Disclosure with Canada at Open Meeting (May 30, 1991).

Interestingly, the "equality" of Canadian and U.S. requirements was achieved in certain important respects by initiatives adopted in Canada during the negotiation of the MJDS. See, e.g., Ontario Securities Commission ("OSC") Policy Statement 5.10, O.S.C.B. 4275 (1989) (adopting "management's discussion and analysis" requirement); National Policy Statement No. 44, 14 O.S.C.B. 1844 (1991) (adopting shelf and post-receipt pricing rules); Amendments to OSC Policy Statement 5.1 and OSC Policy Statement 5.6, 14 O.S.C.B. 2956 (1991) (requiring prospectus-level disclosure in proxy materials used for business combinations); Market Regulation Amendments to OSC Policy Statement 5.1, 14 O.S.C.B. 4137 (1991); Policy Statement Q-26, Volume XXI, Issue 35, Quebec Securities Commission Bulletin 2 (Aug. 30, 1991) (adding certain market regulation requirements). Each of the foregoing has been amended, reformulated or replaced one or more times since it was originally issued.

- 2 The SEC's efforts in this area continued with its adoption in 2000 of a number of exemptions to the tender offer rules and registration requirements under the U.S. securities laws to facilitate the extension of a broad class of cross-border tender and exchange offers, business combinations and rights offerings to U.S. holders, regardless of the issuer's home jurisdiction. Effective January 24, 2000, these rules established principally: (i) an exemption from most of the rules under the Exchange Act governing tender offers for securities of non-U.S. companies if U.S. ownership is 10% or less, (ii) more limited relief from rules under the Exchange Act to eliminate conflicts between U.S. and foreign takeover regimes in tender offers where U.S. ownership is 40% or less, and (iii) an exemption from the registration requirements of the Securities Act for securities issued to holders of securities in non-U.S. companies in exchange offers, business combinations and rights offerings, in each instance if U.S. ownership is 10% or less. See SEC Release No. 34-42054 (Oct. 22, 1999). In 2008, the SEC further amended these rules and provided additional guidance on how U.S. registration and tender offer rules legitimately may be avoided in cross-border business combination transactions. See SEC Release No. 33-8957 (Sept. 19, 2008); see also text accompanying *infra* Notes 28, 48 and 54; [§ 10.05\[2\]](#) (for a discussion of cross-border rights offerings in light of the 1999 and 2008 SEC releases and resulting reforms); [§ 9.05](#) (for a discussion of cross-border tender and exchange offers). As noted in §§ 13.04 and 13.05, for certain Canadian companies, utilizing the MJDS for business combinations/exchange offers may be a superior alternative.

Securities regulators in Canada are working towards the creation of a national cooperative regulatory regime expected to come into force no earlier than 2018. Current drafts of the rules and regulations of the cooperative regulatory regime adopt the current MJDS system with conforming/ consequential amendments to reflect the new regime and provide for certain additional exemptions available to issuers who comply with National Instrument 71-101.

- 3 The extension of the FPI System to Canadian foreign private issuers was the culmination of a shift in SEC policy toward equal treatment of Canadian foreign private issuers. Historically, the SEC had taken the position that, due to the geographical proximity of the United States, Canada and Mexico and the substantial economic links among the three countries, Canadian and Mexican companies should be treated similarly to U.S. companies for certain purposes under the U.S. securities laws. As a result, Canadian and Mexican

foreign private issuers were generally required to comply with U.S. domestic issuer registration forms and reporting requirements. In SEC Release No. 33-6437 (Nov. 19, 1982), the SEC eliminated its definition of "North American issuer" and began treating Mexican foreign private issuers the same as other foreign private issuers; however, the special treatment of Canadian foreign private issuers was retained. With the adoption of Regulation S under the Securities Act in April 1990 (Regulation S governs offers and sales of securities outside the United States), the SEC signaled its changing position toward Canada by treating offers and sales of securities in Canada (and by Canadian issuers) the same as offers and sales involving other foreign countries. See the discussion of Regulation S in § 8.02.

The SEC historically accorded special treatment in one respect to Canadian issuers not filing under either the MJDS or the FPI System. Whereas other non-U.S. issuers not meeting the definition of foreign private issuer were required to prepare financial statements included in Securities Act registration statements in accordance with U.S. GAAP, the SEC allowed non-MJDS, nonforeign private issuer Canadian issuers to prepare their financial statements under Canadian GAAP, but file Securities Act registration statements on U.S. domestic forms (the "S" forms), provided they also prepared a U.S. GAAP reconciliation pursuant to Item 18 of Form 20-F. In connection with Canada's transition to IFRS, the SEC determined that "[a] Canadian company that is not a foreign private issuer that has historically used Canadian GAAP and Canadian dollars in filings with the SEC may continue to do so for fiscal years prior to 2011[;]" however, "[b]eginning with fiscal year 2011, a Canadian company that is not a foreign private issuer must use U.S. GAAP in filings with the SEC. The financial statements and selected financial data should be recast into U.S. GAAP for all periods presented in the financial statements." See SEC, Division of Corporation Finance, Financial Reporting Manual, Topic 6120.5 (Mar. 17, 2016 Ed.). See also *infra*, Note 10.

- 4 Outside the offering and exchange context, the SEC has appeared more open toward mutual recognition regimes. In 2008, the SEC entered into a mutual recognition arrangement with the Australian government and the Australian Securities and Investments Commission, permitting U.S. and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions without the need in certain respects for separate regulation in both countries. See Press Release, SEC, SEC, Australian Authorities Sign Mutual Recognition Agreement (Aug. 25, 2008). Similarly, the SEC and the Chairmen of four Canadian securities regulators announced in 2008 a schedule for completing a U.S.-Canadian mutual recognition process agreement, which was to lay out the process for discussion of an eventual U.S.-Canada stock exchange and broker-dealer mutual recognition agreement. See Press Release, SEC, Schedule Announced for Completion of U.S.-Canadian Mutual Recognition Process Agreement (May 29, 2008). No process agreement, however, has yet been signed. The financial crisis and the departure of then-SEC Chairman Christopher Cox, a supporter of mutual recognition regimes, drew resources and attention away from the mutual recognition process, which appears to be on hold.
- 5 See SEC Release No. 33-7745 (Sept. 28, 1999) (revised 20-F); SEC Release No. 33-8879 (Dec. 21, 2007) (acceptance of IFRS); see also the discussions of Form 20-F in §§ 3.03[1][b] and 4.04 and of the SEC's acceptance of IFRS from foreign private issuers in § 4.05[1]. The acceptance of IFRS also contributed to the elimination of Form F-9. See text accompanying *infra* Note 21.
- 6 See SEC Release No. 33-7606 (Nov. 3, 1998), amended by SEC Release No. 33-7606A (Nov. 13, 1998). The Aircraft Carrier Release was largely withdrawn. See § 1.01. Portions of the proposal, however, have been pursued individually ( see, e.g., SEC Release No. 33-7943 (Jan. 26, 2001) (discussing mixed public/private offerings and Rule 155, dealing with integration concerns)), and in 2005 the SEC adopted new rules that implemented significant reforms to the U.S. public securities offering process. See § 3.02.
- 7 See *U.S. SEC Urged to Reconsider Plan to End Expedited Prospectus Approval*, WORLD SECURITIES LAW REPORT (Oct. 1999).

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.02, U.S. OFFERINGS BY “SUBSTANTIAL” CANADIAN ISSUERS**

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1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.02 (11th and 12th Editions 2014-2017)

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The centerpiece of the MJDS is its provision for "substantial" Canadian issuers (*i.e.*, those meeting certain Canadian reporting history and "size" tests) to offer securities in the United States by means of a prospectus prepared in accordance with Canadian disclosure requirements (with certain U.S. additions). <sup>[1]</sup> Such offerings may be made in conjunction with a contemporaneous Canadian offering or on a "U.S.-only" basis. For Canadian issuers eligible to use Canada's short-form system, the Canadian prospectus may be a "short-form" prospectus. <sup>[9]</sup>

With the adoption of IFRS by Canadian public companies on January 1, 2011, <sup>[10]</sup> which generally eliminated the need for U.S. GAAP reconciliations, very little additional information is required to be included in MJDS prospectuses. Other than the home country prospectus, Canadian issuers need only include a

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few informational legends and similar technical disclosures. <sup>[11]</sup> Significantly, however, MJDS prospectuses are required to include all "material" information (within the meaning of the U.S. securities laws), <sup>[12]</sup> and issuers and underwriters (as well as other statutorily responsible parties) are subject to liability under the U.S. civil liability and antifraud provisions if the MJDS filing contains a material misstatement or omission.

The application of the U.S. antifraud rules to MJDS offerings particularly needs to be borne in mind in light of the additional disclosures mandated by the Sarbanes-Oxley and Dodd-Frank Acts and the related SEC rules and proposals, <sup>[13]</sup> particularly in circumstances in which responsive disclosures in annual reports on Form 40-F may need to be updated in MJDS registration statements even when not literally required by those acts and rules, as they may be considered indicia of complete and accurate disclosure.

### **[1] Eligibility for MJDS “Substantial Issuer” Forms**

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To be eligible to use the SEC "substantial issuer" Form F-10 <sup>[14]</sup> to register a public offering of securities in the United States under the MJDS, an issuer must:

- be incorporated or organized in Canada;
- be a "foreign private issuer"; <sup>[15]</sup>
- have a 12-month reporting history with one or more of the provincial securities authorities in Canada; <sup>[16]</sup>

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- be in compliance with its Canadian reporting obligations; and
- not be an "investment company" registered or required to be registered under the U.S. Investment Company Act.

Where a Canadian foreign private issuer that does not satisfy one or more of these criteria is required to file a Securities Act registration statement or Exchange Act report with the SEC, it must use the forms prescribed for foreign private issuers generally. <sup>[17]</sup>

MJDS offerings by "substantial issuers" are registered with the SEC by filing the Canadian prospectus under cover of a "wrap-around" registration statement on Form F-10. The "wrap-around" registration statement consists of a cover page, the Canadian prospectus, a signature page, <sup>[18]</sup> required U.S. disclosure regarding indemnification and certain specified exhibits. <sup>[19]</sup> The MJDS is not

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available if no Canadian offering document is prepared because the issuer is relying on an exemption from prospectus requirements in Canada. <sup>[20]</sup>

In 2011, the SEC released a final rule relating to the use of security ratings by credit rating agencies in SEC rules and forms, pursuant to the requirements of § 939A of the Dodd-Frank Act. <sup>[21]</sup> Among other items, the rule "rescind[ed] Form F-9 and adopt[ed] amendments to the Securities Act and Exchange Act forms and rules that refer to Form F-9 to eliminate those references." The elimination of Form F-9 primarily reflected the transition among Canadian public companies from Canadian GAAP to IFRS effective January 1, 2011 and took effect on December 31, 2012, by which time all Canadian public companies had transitioned to IFRS. The primary difference in disclosure requirements between Form F-9 and Form F-10 is that Form F-9 did not require a U.S. GAAP reconciliation of financial statements prepared using Canadian GAAP. The transition to IFRS, however, means that issuers on Form F-10 are also no longer required to provide a U.S. GAAP reconciliation. As the disclosure requirements would have been the same under each form, the SEC viewed Form F-9 as "unnecessary."

Although the disclosure requirements between Forms F-9 and F-10 converged, different eligibility standards between the two forms means that not all issuers that were eligible to use Form F-9 are able to use Form F-10 for their offerings. In particular, investment grade majority-owned subsidiaries may lack the U.S. \$75 million public float or parent guarantee required by Form F-10, which was not required for offerings of nonconvertible securities under Form F-9. <sup>[22]</sup>

Form F-10 is used for all "substantial issuer" offerings under the MJDS, including offerings of (i) common shares, (ii) noninvestment grade debt or preferred shares (iii) convertible debt or preferred shares that may be converted

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within one year of issuance and (iv) "A/B" exchange offers. <sup>[22.1]</sup> Issuers wishing to use Form F-10 must have a public float of U.S. \$75 million or more. <sup>[23]</sup>

Form F-10 may not be used for offerings of derivative securities except for (i) warrants, options and rights where such securities and the underlying securities are issued by the registrant, its parent or an affiliate of either and (ii) convertible securities that are convertible into securities of the registrant, its parent or an affiliate of either. Accordingly, securities such as currency warrants, stock index warrants and debt securities paying interest based on the performance of a stock index may not be offered on Form F-10.

A majority-owned, Canadian-incorporated subsidiary of a parent that meets all of the applicable eligibility tests for Form F-10 may use such form to offer debt securities or preferred shares even though the subsidiary does not have a 12-month Canadian reporting history or does not meet the public float test (if applicable), provided that the parent fully and unconditionally guarantees the securities being registered and the securities, if convertible or exchangeable, are convertible or exchangeable only into securities of the parent.

The Canadian shelf and post-receipt pricing ("PREP") rules <sup>[24]</sup> may be used in the United States as well as in Canada in the context of MJDS offerings. Eligible Canadian issuers may establish a single "cross-border shelf," based on Canadian disclosures and shelf rules that may be used for takedowns in either jurisdiction as market conditions warrant. <sup>[25]</sup> Cross-border medium-term note programs can be established in this manner. <sup>[26]</sup> The PREP rules are available to all issuers and are not restricted to short-form system issuers (generally issuers

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whose equity securities are listed on certain recognized Canadian stock exchanges). <sup>[27]</sup> Offering procedures

under the Canadian shelf rules are generally comparable to the procedures that have developed under the SEC's Rule 415, which served as the model for the Canadian rules. <sup>[28]</sup> SEC Rules 415 and 430B do not apply to MJDS offerings by Canadian issuers. <sup>[29]</sup>

## [2] SEC Review

As adopted, the MJDS provides that, absent special circumstances, the SEC staff will not review MJDS registration statements, but will instead rely on review procedures applied in Canada. <sup>[30]</sup> Where the MJDS is used for the U.S. portion of an offering being made simultaneously in Canada and the United States, the registration statement on Form F-10 is effective upon filing with the SEC (unless designated as preliminary material on the form, e.g., where the Canadian preliminary prospectus will be used for marketing in the United States). Accordingly, the U.S. offering can proceed immediately after the final prospectus has been cleared in Canada without any special notice or certification to the SEC. <sup>[31]</sup> The virtual elimination of SEC review was one of the most important aspects of the MJDS as adopted and has to date solved, in most cases, what had previously been a difficult coordination problem for offerings made simultaneously in both jurisdictions (i.e., the fact that SEC review generally takes substantially longer than review in Canada).

For U.S.-only offerings, the issuer is required to designate a review jurisdiction in Canada and file a copy of the registration statement and prospectus

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with the review jurisdiction concurrently with the SEC filing. <sup>[32]</sup> The issuer may designate on the cover page of the registration statement a date and time for the registration statement to become effective that is not earlier than seven calendar days after the date of filing with the SEC, and the registration statement will become effective in accordance with the designation, unless (i) the filing is selected for review by the review jurisdiction, in which case effectiveness may be delayed, or (ii) the review jurisdiction issues a receipt or notification of clearance prior to the designated date, in which case effectiveness may be accelerated by order of the SEC. <sup>[33]</sup> MJDS offerings are subject to the SEC's "stop order" authority to stop an offering for the public interest and for the protection of investors.

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### Footnotes

- 8 See Rule 467 under the Securities Act and § 13.02[2]. Although the SEC reserves the right to review any MJDS registration statement, MJDS filings are automatically effective in the United States (unless designated as preliminary material), so any review would generally be after effectiveness (absent the issuance of a stop order pursuant to § 8(d) of the Securities Act).
- 9 The short-form system, available to Canadian issuers meeting specified eligibility tests, provides for the qualification of offerings of securities by means of a "short-form" prospectus that incorporates by reference the issuer's Canadian continuous disclosure filings. The short-form system provides for an expedited regulatory review period of three business days in the principal review jurisdiction. It essentially parallels the provisions for Form S-3 issuers in the SEC's integrated disclosure system.  

The MJDS is particularly attractive to Canadian short-form system issuers that have not previously had access to the U.S. markets. Without the MJDS, such issuers, although qualifying for a short-form prospectus in Canada, would be required to prepare a long-form prospectus (generally, Form F-1) to offer securities in the United States. By allowing Canadian short-form prospectuses to be used in the United States under the MJDS, the SEC recognized the Canadian integrated disclosure system, even though many eligible Canadian issuers have no substantial market following in the United States.
- 10 Calendar year-end reporting issuers began reporting using IFRS as of January 1, 2011, followed by noncalendar year-end reporting issuers at the start of their next fiscal year thereafter. See CSA National Instrument 52-107, Acceptable Accounting Principles and Auditing Standards. In connection with Canada's transition to IFRS, the SEC determined that "[a] Canadian company that is not a foreign private issuer must

use U.S. GAAP in filings with the SEC. The financial statements and selected financial data should be recast into U.S. GAAP for all periods presented in the financial statements." See SEC, Division of Corporation Finance, Financial Reporting Manual, Topic 6120.5 (Mar. 17, 2016 Ed.)

- 11 MJDS prospectuses must include four SEC-mandated legends addressing, respectively, use of foreign disclosures, tax consequences, enforcement of U.S. civil liabilities and absence of SEC approval of the prospectus. Any legends required under state securities laws must also be included. The SEC's "red herring" legend (which states that the information is subject to completion or amendment and that offers and sales may not be made until the related registration statement becomes effective) must be included in all preliminary prospectuses under the MJDS. MJDS prospectuses must include a list of all documents filed with the SEC as part of the MJDS registration statement, including all documents incorporated by reference in the prospectus. Incorporated documents need not be delivered to offerees together with the prospectus unless required under the laws of the principal jurisdiction in Canada. If the prospectus is in the French language only, it must be translated into English.

Certain required Canadian disclosures applicable solely to Canadian offerees or purchasers (and not material to offerees or purchasers in the United States) may be omitted from MJDS prospectuses. These items include: (i) the "red herring" legend used in Canada, (ii) any discussion of Canadian tax considerations not material to U.S. offerees or purchasers, (iii) the names of any Canadian underwriters not acting as underwriters in the United States and a description of the Canadian plan of distribution (except to the extent necessary to describe the material facts of the U.S. plan of distribution), (iv) any description of purchasers' statutory rights under applicable Canadian, provincial or territorial securities laws (except where such rights are available to U.S. purchasers), and (v) issuer's and underwriters' prospectus certificates. These omissions are permitted in order to allow MJDS prospectuses to have a "U.S. look."

Companies should also take into consideration other cross-border harmonizing issues, including coordination on the content of "road show" presentations and other marketing materials. These marketing materials may be required to be filed with the OSC in Canada, but are customarily not filed with the SEC in the United States. See § 3.02[3][c][iii][B] for more information about road shows.

- 12 See, e.g., Form F-10, General Instruction II.C.; Adopting Release, 56 Fed. Reg. 30,036, 30,087 (June 21, 1991); see also [Chapter 11](#). In addition to the supplemental prospectus information required by the MJDS rules, certain additional disclosures (e.g., a discussion of U.S. tax consequences, disclosure of exchange rates, etc.) historically have been provided because of their relevance to U.S. purchasers. Marketing considerations and investor expectations in the United States increasingly have led issuers also to include certain supplemental disclosures not required in Canada but normally included in U.S. disclosure documents (e.g., capitalization tables and summary financial information).
- 13 See §§ 4.07 and 4.08.
- 14 Pursuant to the requirements of the Dodd-Frank Act, the SEC rescinded Form F-9, effective December 31, 2012, in a release relating to the use of security ratings by credit agencies in SEC rules and forms. SEC Release No. 33-9245 (July 27, 2011). This release is further discussed later in this chapter.
- 15 See § 3.01, Note 1 for a discussion of the "foreign private issuer" definition. Issuers are required to test their foreign private issuer status annually on the last day of their second fiscal quarter. See SEC Release No. 33-8959 (Sept. 23, 2008).

Prior to December 31, 2012, a "crown corporation" was also eligible to use a "substantial issuer" form. A "crown corporation" is a corporation all of whose common shares or comparable equity shares are owned directly or indirectly by the government of Canada or a province or territory of Canada. Because the MJDS relies on Canadian disclosure requirements and Canadian regulatory review as a replacement for the SEC's disclosure rules and review procedures, only those crown corporations that file prospectuses with Canadian securities regulators are able to use the MJDS for U.S. financings. Relatively few Canadian crown corporations are subject to prospectus requirements in Canada, as they generally finance through exempt transactions with government guarantees. Moreover, because crown corporations, by definition, do not have a "public float," their use of the MJDS was effectively limited to offering nonconvertible investment grade



debt or preferred shares on Form F-9, due to there being no public float eligibility test for such offerings. Following the rescission of Form F-9 effective December 31, 2012, crown corporations are no longer eligible to use the MJDS for these offerings.

- 16 A special reporting history test is provided under Form F-10 (and other MJDS forms that include a reporting history eligibility requirement) for successor issuers ( *i.e.*, issuers subsisting after a business combination) that do not themselves have the requisite reporting history. An alternative test is important in these circumstances because under corporate statutes in Canada, the surviving corporation in a business combination is generally viewed as a new entity (as in a consolidation in the United States). The test is satisfied if each company participating in the business combination other than the successor issuer has been a reporting company for at least 12 calendar months. A predecessor company may be disregarded for purposes of the test if the assets and gross revenues from continuing operations of the remaining predecessor(s) account for at least 80% of the successor issuer's *pro forma* combined assets and gross revenues from continuing operations, as measured based on *pro forma* combination of the participating companies' most recently completed fiscal years. A similar test applies to successor issuers subject to a listing history eligibility requirement ( *e.g.*, for use of Form F-7 in connection with a rights offering, see § 13.03, or Form F-8 or F-80 in connection with a business combination, see § 13.04, or exchange offer, see § 13.05) that do not themselves have the requisite listing history.
- 17 For a discussion of forms prescribed for foreign private issuers generally, see §§ 3.03[1][b], 4.04 and 4.02[3][c]. In addition, some Canadian issuers do not satisfy one or more of the criteria for foreign private issuer status. When any such issuer is required to file a Securities Act registration statement or Exchange Act report, it must use the forms prescribed for U.S. domestic issuers.
- 18 The MJDS Securities Act registration forms specifically exempt Canadian issuers from complying with Regulation C under the Securities Act, which sets forth requirements for preparing and filing registration statements and prospectuses. Each such registration form states that "[t]he rules comprising Regulation C under the Securities Act shall not apply to filings on this form unless specifically referred to in the form." Thus, among other requirements, the plain English requirements are not applicable to the MJDS Securities Act registration forms. Similarly, Form 40-F, the Exchange Act annual report form available to MJDS issuers, states that "Rules 12b-2, 12b-5, 12b-10, 12b-11, 12b-12, 12b-13, 12b-14, 12b-21, 12b-22, 12b-23, 12b-25, 12b-33 and 12b-37 under the Exchange Act," which govern the form and method of preparation of Exchange Act reports, "shall not apply to filings on this [f]orm." Each of the MJDS Securities Act registration forms and Form 40-F specify that, instead, "the rules and regulations applicable in the home jurisdiction regarding the form and method of preparation of disclosure documents shall apply." As of November 4, 2002, all foreign private issuers, including MJDS filers, are required to make filings with the SEC electronically using the EDGAR system. SEC Release No. 33-8099 (May 14, 2002). The SEC's rule requiring interactive data reporting using XBRL applies to Forms F-10 and 40-F, but did not require or permit the filing of interactive data related to these forms when the financial statements are prepared in accordance with Canadian GAAP or as a U.S. GAAP reconciliation. SEC Release No. 33-9002 (Jan. 30, 2009), as amended by SEC Release No. 33-9002A (Apr. 1, 2009). As Canadian MJDS filers transitioned to reporting under IFRS by January 1, 2011, they were required to comply with the interactive data requirements applicable to those filings. The SEC, however, has issued a no-action letter relieving foreign private issuers of their obligation to submit interactive data files with their IFRS financial statements until the SEC has specified a taxonomy for preparing such information. *The Center for Audit Quality* (avail. Apr. 8, 2011). The SEC staff is continuing to review taxonomies for use by foreign private issuers. The IFRS Foundation periodically publishes versions of the IFRS taxonomy for public comment.
- 19 Required exhibits include (i) all publicly available documents filed concurrently with the prospectus in Canada, (ii) copies of all documents incorporated by reference and (iii) consents of experts named in the filing. These documents must be filed electronically using the SEC's EDGAR system. See SEC Release No. 33-8099 (May 14, 2002).
- 20 In the case of U.S.-only offerings on Form F-10, the MJDS may be used despite the availability of an exemption from the Canadian prospectus requirements as long as a Canadian offering document is

- prepared and filed with the Canadian securities regulator in the review jurisdiction. See § 13.02[2].
- 21 SEC Release No. 33-9245 (July 27, 2011). Section 939A of the Dodd-Frank Act required that the SEC "review any regulation issued by the SEC that requires the use of an assessment of credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings." Following this review, the Dodd-Frank Act required the SEC to modify its regulations to "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness" as the SEC determined to be appropriate.
  - 22 To address this issue, the SEC introduced a temporary "grandfather" provision for Form F-9 filers. This provision, which expired on December 31, 2015, allowed any issuer that disclosed in its registration statement that it had a reasonable belief that it would have been eligible to make an offering of investment grade, nonconvertible securities on Form F-9 as of December 31, 2012, and disclosed the basis for that belief, to file a final prospectus for an offering on Form F-10. See SEC Release No. 33-9245 (July 27, 2011).
  - 22.1 For more information about "A/B" exchange offers, see SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms, Question 109.06 (Feb. 27, 2009) and § 7.05[2].
  - 23 See § 4.05[1]. Filings on Form F-10 must include a full U.S. GAAP reconciliation of all financial statements in the Canadian prospectus to the extent that the required financial statements have not been prepared in accordance with IFRS. Given that all Canadian issuers must present their financial statements in accordance with IFRS, however, this requirement is moot. Historically, the U.S. GAAP reconciliation requirement imposed substantial costs and was, for some Canadian issuers, an impediment to their use of MJDS.
  - 24 See National Instrument 44-102, Shelf Distributions, 23 O.S.C.B. (Supp) 985 (Dec. 22, 2000) (amended by 28 O.S.C.B. 10449 (Dec. 30, 2005)) and Companion Policy 44-102, 23 O.S.C.B. (Supp) 1005 (Dec. 22, 2000) (amended by 28 O.S.C.B. 10456) (Dec. 23, 2005), and by National Instrument 44-103, Post-Receipt Pricing, 23 O.S.C.B. (Supp) 1013 (Dec. 22, 2000) (amended by 28 O.S.C.B. 10458) and Companion Policy 44-103CP, 23 O.S.C.B. (Supp) 1025 (amended by 28 O.S.C.B. 10460).
  - 25 A number of large Canadian issuers eligible to use the short-form registration statement for U.S. domestic issuers (Form S-3) currently have shelf debt programs in the United States. Without the MJDS, Canadian issuers would need, among other things, to establish a 12-month U.S. reporting history in order to be eligible to use the U.S. shelf procedures.
  - 26 Interest income paid to U.S. residents on certain Canadian issuer debt securities previously may have been subject to Canadian withholding tax. However, since January 1, 2008, Canadian tax legislation eliminated Canadian withholding tax on interest paid or credited on all arm's-length and nonparticipating debt to non-Canadian lenders.
  - 27 Short-form eligible exchanges include the Toronto Stock Exchange, Tier 1 and Tier 2 of the TSX Venture Exchange, Aequitas NEO Exchange Inc., and the Canadian Securities Exchange.
  - 28 Like the U.S. shelf rules, the Canadian shelf procedures permit offerings to be made on a continuous or delayed basis after a "base" prospectus has been cleared by the Canadian securities regulatory authorities as evidenced by the issuance of a final receipt. Once the terms of a particular tranche are determined, the specific terms are provided by a supplement to the prospectus that is not subject to advance clearance by the Canadian securities regulatory authorities.
  - 29 Allowing the U.S. rules to apply in place of the Canadian rules would put home jurisdiction regulators in Canada (who have the responsibility for reviewing MJDS filings) in the difficult position of having to evaluate disclosures prepared under U.S. rules ( e.g., the content and format of the "base" prospectus used for a shelf program).
  - 30 The Adopting Release states the SEC's review standard as follows: "[E]xcept in the unusual case where the [SEC] staff has reason to believe there is a problem with the filing or the offering, the documents generally will be given a 'no review' status...." Adopting Release, 56 Fed. Reg. 30,036, 30,046 (June 21, 1991).
  - 31 Note, however, that FINRA review may still be required in certain circumstances. For example, FINRA Rule

5110(b)(7)(C)(ii) exempts F-10 filings from FINRA review only if the securities are offered pursuant to Canadian shelf prospectus offering procedures.

- 32 A jurisdiction designated to act as the review jurisdiction must agree to act in that capacity. The securities regulatory authorities of New Brunswick, Prince Edward Island, Newfoundland, the Yukon Territory and the Northwest Territories have indicated that they will not act as the review jurisdiction in connection with U.S.-only offerings. As a practical matter, based on the home jurisdictions of Canadian companies, most U.S.-only offerings are cleared through Ontario, Quebec, Alberta or British Columbia.
- 33 The SEC's effective no-review policy with respect to MJDS filings has continued despite concerns expressed regarding compliance by certain filings with MJDS requirements. In 1996, a member of the SEC accounting staff publicly indicated that the staff had conducted an informal review of selected filings under the MJDS, which review had revealed instances of noncompliance with, or significant inaccuracies with respect to, the U.S. GAAP reconciliation requirement, as well as noncompliance with certain other technical requirements of the MJDS. As a result of these shortcomings, and in particular the inadequate compliance with the U.S. GAAP reconciliation requirement, the SEC staff member indicated at that time that MJDS filings, especially annual reports on Form 40-F but also potentially filings to register securities for offering in the United States (in particular Form F-10, which requires a U.S. GAAP reconciliation for financial statements not prepared in accordance with IFRS), might be subject to review by the SEC, either in conjunction with that of the securities regulatory authority in the Canadian review jurisdiction or in lieu of a review by such regulatory authority. Having in effect placed issuers and others on notice as to the possibility of SEC review (perhaps in an effort to bring about voluntary compliance without undermining a key aspect of the MJDS), the SEC has continued its MJDS no-review practice other than to the extent review is required under the Sarbanes-Oxley Act. (The fact that financial statements of Canadian filers are now prepared in accordance with IFRS as a practical matter may further reduce the likelihood of SEC review.) See *supra* Note 30.

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.03, RIGHTS OFFERINGS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.03 (11th and 12th Editions 2014-2017)

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Because many Canadian companies, including those that have not financed in the United States or established a U.S. trading market for their securities, have U.S. shareholders, U.S. regulatory requirements are frequently implicated in Canadian rights offerings. Prior to adoption of the MJDS, U.S. shareholders of Canadian companies were frequently excluded from rights offerings or "cashed out" to avoid the need for the issuer to comply with the U.S. securities laws. As a result, U.S. shareholders lost the opportunity to participate in the offering on

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an equal basis with Canadian and other non-U.S. holders. The rights offering provisions of the MJDS (as well as the provisions governing business combinations, exchange offers and tender offers discussed below) are intended to encourage equal treatment of U.S. shareholders by reducing the burdens on Canadian issuers extending such offers into the United States. <sup>[34]</sup>

Eligible Canadian issuers may use the MJDS to extend rights offerings to U.S. shareholders by means of a Canadian prospectus or rights offering circular. The Canadian disclosure document is filed with the SEC under cover of a "wrap-around" registration statement on Form F-7. <sup>[35]</sup> To be eligible to use Form F-7, an issuer must:

- be incorporated or organized in Canada;
- be a foreign private issuer;
- have had a class of its securities listed on the Toronto Stock Exchange ("TSX") or the TSX Venture Exchange <sup>[36]</sup> for the 12 calendar months immediately preceding the filing;
- have a three-year reporting history with one or more of the provincial securities authorities in Canada;
- be in compliance with its Canadian listing and reporting obligations; and
- not be an "investment company" registered or required to be registered under the U.S. Investment Company Act.

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Canadian issuers need not meet any "size" tests to use the MJDS for rights offerings, and no U.S. GAAP reconciliation is required for financial statements included in the Canadian offering document using IFRS. Thus, a broad class of Canadian issuers is eligible for the rights offering component of the MJDS, which is appropriate because rights offerings were included in the system to encourage equal treatment of U.S. shareholders. The MJDS contains other special accommodations intended to encourage rights offerings. <sup>[37]</sup>

Form F-7 requires that the rights granted to securityholders in the United States be granted on terms and conditions not less favorable than those extended to any other holder of the same class of security. The rights granted to U.S. holders <sup>[38]</sup> may not be transferred except outside the United States in accordance with Regulation S under the Securities Act. <sup>[39]</sup> Securities purchased by U.S. holders upon exercise of rights are, however, not restricted and therefore are freely transferable in the United States. Unlike Rule 801 rights offerings by foreign private issuers, <sup>[40]</sup> Form F-7 is available without regard to the percentage of the class of securities being issued that is held by U.S. holders.

Registration statements on Form F-7 are effective upon filing with the SEC. Accordingly, the rights may be issued in the United States as soon as the Canadian securities regulators have completed their review of the Canadian prospectus or rights offering circular and have cleared the issuance of the rights in Canada.

Although the MJDS rules are intended to make it as easy as possible for Canadian issuers to extend their rights offerings to U.S. shareholders, the system does not eliminate all the potential burdens for Canadian issuers. Many Canadian rights offerings are made pursuant to an exemption from Canadian prospectus requirements that permits the rights to be offered by means of a rights offering circular, a brief disclosure document that is not required to contain

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Canadian "prospectus-level" disclosure and typically includes very little information about the issuer. Although the MJDS expressly contemplates the use of rights offering circulars, the fact that the disclosure is less complete than Canadian prospectus disclosures can, in certain circumstances, raise concerns under the U.S. civil liability and antifraud rules. This result may lead issuers to involve U.S. lawyers in the preparation of the disclosure document, which increases the costs of the offering. <sup>[41]</sup>

State securities laws <sup>[42]</sup> can also increase the difficulty and costs of MJDS rights offerings. For Canadian issuers that cannot rely on the federal preemption of state securities registration requirements provided by the National Securities Markets Improvement Act of 1996 (the "NSMIA") <sup>[43]</sup> applicable to certain "covered securities" (e.g., based on an NYSE or Nasdaq listing), a number of states will subject the rights offering to their "merit review" procedures, potentially delaying the offering or making it impossible to extend the rights offering to shareholders in those states. Determining and complying with applicable state law requirements demands specialized U.S. lawyers, raising offering costs.

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#### Footnotes

- 34 In 2000, the SEC adopted rules that facilitate cross-border tender and exchange offers, business combinations and rights offerings of equity securities by all foreign private issuers (including Canadian issuers) by, among other things, extending the MJDS principle of recognition of home country disclosures. See text accompanying *supra* Note 2 and text accompanying *infra* Notes 52 and 60; see also §§ 10.05[2] and 9.05. Consistent with the approach taken in the MJDS, rights offerings under Rule 801 under the Securities Act generally must be extended to U.S. holders on terms and conditions not less favorable than those extended to any other holder of such securities, and issuers using Rule 801 remain subject to the civil liability and antifraud provisions of the U.S. securities laws. See § 10.05[2].
- 35 The securities registered on Form F-7 are those issued upon exercise of the rights. The rights themselves generally are not required to be registered based on a "no-sale" theory. It does not appear that Form F-7 (or the documents used for rights offered to existing Canadian shareholders pursuant to a prospectus exemption under National Instrument 45-101) allows for rights to be offered to persons who do not hold the securities in respect of which the rights were issued. Any offering of a "rump" would have to be qualified by another prospectus or pursuant to an exemption from registration in Canada and not pursuant to Form F-7 in the United States. One possible option would be to rely on the private placement rules of both regimes.
- 36 Form F-7 also references the Montreal Exchange and the Senior Board of the Vancouver Stock Exchange. Both of these exchanges have since been merged into the TSX and the TSX Venture Exchange.
- 37 For example, the SEC's auditor independence rules, discussed in § 13.07[4], do not apply to MJDS rights offerings, and Form F-X, which provides, among other things, for the appointment of an agent for service of process, is not required in connection with MJDS rights offerings ( *but see infra* Note 68). Although the special MJDS exemption from the reporting requirements of § 15(d) of the Exchange Act contained in Rule 12g3-2(b) under the Exchange Act has been eliminated, MJDS filers can qualify for the exemption on the same basis as other foreign private issuers. See § 13.10.
- 38 "U.S. holder" is defined to include "any person whose address appears on the records of the registrant, any

voting trustee, any depositary, any share transfer agent or any person acting on behalf of the registrant as being located in the United States." 17 C.F.R. § 239.37(d).

- 39 Regulation S under the Securities Act provides a safe harbor from SEC registration for persons (other than the issuer, a distributor, their respective affiliates and any person acting on behalf of any of the foregoing) reselling securities in an offshore transaction (including offers and sales on the TSX and the TSX Venture Exchange not prearranged with a U.S. buyer) and without directed selling efforts in the United States. See § 8.02.
- 40 See § 10.05[2].
- 41 Despite potential concerns as to the U.S. civil liability and antifraud rules, many rights offerings circulars filed under Form F-7 have been prepared following the standard Canadian approach to rights offerings with little or no modification to conform to U.S. disclosure practices.
- 42 See § 13.07[7].
- 43 National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.04, BUSINESS COMBINATIONS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.04 (11th and 12th Editions 2014-2017)

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The MJDS permits the registration in the United States of securities issued by Canadian corporations in connection with a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a "business combination"). <sup>[44]</sup> Eligible Canadian issuers may register these securities with the SEC by filing the information circular prepared in accordance with applicable proxy solicitation rules in Canada <sup>[45]</sup> under cover of a "wrap-around" registration statement on SEC Forms F-8 or F-80

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(or Form F-10 if the applicable eligibility tests are satisfied). Forms F-8 and F-80 do not require a U.S. GAAP reconciliation of the financial statements included in the Canadian information circular. The MJDS is not available if no information circular is prepared because of the availability of an exemption from such requirements. <sup>[46]</sup>

To be eligible to use the MJDS in connection with a business combination, each corporation participating in the business combination (other than the successor registrant) must satisfy the eligibility criteria identified above for use of the MJDS in connection with a rights offering and must also have a public float of at least U.S. \$75 million. <sup>[47]</sup> However, a participating company is not required to satisfy the public float or the reporting and listing eligibility criteria if other participating companies that do satisfy these criteria have assets and gross revenues from continuing operations that in the aggregate would contribute, on a *pro forma* basis for the most recently completed fiscal year, at least 80% of the successor registrant's total assets and gross revenues from continuing operations. In addition, the successor registrant must be a foreign private issuer that is incorporated or organized in Canada.

The securities being registered under the MJDS in connection with a business combination must be issued to U.S. holders on terms and conditions not less favorable than those extended to any other holder of the same class of security. For Form F-8, less than 25%, and for Form F-80, less than 40%, of the class of securities being offered by the successor registrant in connection with the business combination must be held by U.S. holders <sup>[48]</sup> measured on a *pro forma* basis as of immediately after completion of the business combination. The disclosure

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requirements under Forms F-8 and F-80 are the same. <sup>[49]</sup> Registration statements on Forms F-8 and F-80 are effective upon filing with the SEC.

Registrants participating in business combinations that are ineligible to use Forms F-8 or F-80 because, for example, the limitation on securities issued to U.S. holders is not satisfied ( *i.e.*, if more than 40% of the class of securities being offered by the successor registrant will be held by U.S. holders) may use Form F-10 if participating companies accounting for at least 80% of the total assets and gross revenues from continuing operations of the successor registrant meet the eligibility criteria for Form F-10.

The business combination (and exchange offer) provisions of the MJDS are limited to transactions in which all of the participating companies are Canadian. Thus, although Form F-10-eligible Canadian companies can use Canadian disclosures under the MJDS to make a traditional common share offering in the United States and to list common shares on a U.S. stock exchange, these companies, even after a longstanding U.S. presence, will

be required to use the FPI System forms or U.S. domestic issuer forms (with the attendant costs and delays) <sup>1501</sup> to register securities offered in business combinations or exchange offers involving U.S. companies.

Canadian issuers are also eligible to use the rules adopted by the SEC in January 2000 and October 2008 <sup>1511</sup> for cross-border tender and exchange offers, business combinations and rights offerings. These rules include Rule 802 under the Securities Act, under which exchange offers for a foreign private issuer's securities and securities issued in business combinations involving foreign private issuers are exempt from the registration requirements of the Securities Act if U.S. securityholders hold 10% or less of the subject class of securities. <sup>1521</sup>

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#### Footnotes

- 44 Many Canadian business combinations can be structured so that they are effected with the approval of a Canadian court, in which case the securities being offered are generally exempt from Securities Act registration requirements pursuant to § 3(a)(10) of the Securities Act. For a discussion of issues that frequently arise in connection with this exemption, see SEC, Division of Corporation Finance, Staff Legal Bulletin No. 3A, Fed. Sec. L. Rep. (CCH) ¶60,003 (June 18, 2008).
- 45 Provincial securities laws generally exempt securities issued in a business combination from prospectus requirements on the theory that the information circular required under the proxy rules provides sufficient disclosure to shareholders. Canadian securities regulators have taken action to require prospectus-level disclosure in information circulars prepared in connection with business combinations, which enabled the SEC to determine that such circulars are adequate for purposes of the MJDS. See OSC Rule 51-801, Implementing National Instrument 51-102, Continuous Disclosure Obligations (the "Implementing Rule"), 27 O.S.C.B. 3555 (Mar. 30, 2004) (amended by 28 O.S.C.B. 4559 (May 16, 2005), amended by 29 O.S.C.B. (Supp-2) (Dec. 29, 2006), a local Ontario rule implementing National Instrument 51-102, Continuous Disclosure Obligations, 27 O.S.C.B. 3439 (in force on Mar. 30, 2004) (amended by 28 O.S.C.B. 10384 (June 1, 2005), amended by 28 O.S.C.B. 10463 (Dec. 30, 2005), amended by 30 O.S.C.B. (Supp-1) 1 (Dec. 29, 2006) ("NI 51-102"), in Ontario. NI 51-102 requires prospectus-level disclosure, including updated financial statements, for information circulars prepared in connection with a business combination.
- 46 See *supra* Note 23.
- 47 For second-step business combinations occurring within 12 months after the termination of an exchange offer or cash tender offer that was or could have been extended into the United States under the MJDS, public float may be measured as of the date immediately prior to the commencement of the exchange offer or cash tender offer (and therefore prior to any reduction in a participating company's public float resulting from the offer).
- 48 For purposes of applying the U.S. holder tests under Forms F-8 and F-80 (used in connection with business combinations and exchange offers) and Schedules 14D-1F and 13E-4F (used in connection with third-party and issuer tender offers), except as described in § 13.06 in certain cases involving competing tender offer bids, the calculation of U.S. holders is made as of the end of the participating companies' (in business combinations) or subject issuer's (in exchange offers) last quarter (or, if such quarter terminated within 60 days of the filing date, as of the end of the preceding quarter).
- 49 The distinction between Forms F-8 and F-80 is limited to the permissible percentage ownership of the subject securities by U.S. holders (25% for Form F-8 and 40% for Form F-80). The SEC provided separate forms as an accommodation to state securities regulators, who have not been willing to recognize a threshold above 25% for purposes of the application of four model rules (discussed in § 13.07[7]) that provide for, *inter alia*, expedited review of MJDS registration statements by the state securities regulators. Offers for which the 25% threshold is exceeded are filed on Form F-80 so that they may be readily identified by the states for review purposes.
- 50 Canadian companies meeting certain specified eligibility requirements and having previously filed annual reports on Form 40-F will be entitled, however, to incorporate by reference such reports into a registration statement on Form F-4, the form under the FPI System used to register securities in the case of business



combinations, to satisfy the disclosure requirements concerning the acquiror, thereby limiting certain of the additional costs and delays. In the case of a Canadian company that does not meet these requirements, the company would be required to provide in the Form F-4 the information required by the long-form foreign private issuer registration form ( *i.e.*, Form F-1).

51 See SEC Release No. 33-8957 (Sept. 19, 2008).

52 See text accompanying *supra* Notes 2 and 34 and text accompanying *infra* Note 60; see also § 9.05[9].

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.05, EXCHANGE OFFERS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.05 (11th and 12th Editions 2014-2017)

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Exchange offers for a Canadian issuer's securities may be extended into the United States under the MJDS through use of Forms F-8 or F-80 (or Form F-10 if the applicable eligibility tests are satisfied), which "wrap-around" the Canadian securities exchange takeover bid circular or issuer bid circular. <sup>[53]</sup> The MJDS is not available if no takeover or issuer bid circular is prepared due to the availability of an exemption from such requirements.

The eligibility criteria applicable to registrants for the use of Forms F-8 or F-80 in an exchange offer are the same as identified above for use of the MJDS in connection with a rights offering, except that, for third-party exchange offers, the registrant must also have a public float of at least U.S. \$75 million. <sup>[54]</sup> The target must be a foreign private issuer that is incorporated or organized in Canada and must not be an "investment company" registered or required to be registered under the U.S. Investment Company Act. The registrant must offer its securities to U.S. holders on terms and conditions not less favorable than those offered to any other holder of the same class of securities subject to the exchange offer.

For Form F-8, less than 25%, and for Form F-80, less than 40%, of the class of subject securities outstanding may be held by U.S. holders. For third-party exchange offers, the registrant may rely on a conclusive presumption <sup>[55]</sup> that the target is a foreign private issuer and that less than 25% (for Form F-8) or 40% (for Form F-80) of the subject securities is held by U.S. holders, unless (i) published data on trading volumes indicates that the aggregate trading volume of the subject securities in the United States exceeds the aggregate trading volume in Canada, (ii) the most recent annual report filed in Canada or the United States by the target indicates that the applicable threshold is exceeded or (iii) the registrant has actual knowledge to the contrary. As discussed with respect to business combinations and tender offers, Canadian issuers are also eligible to use the rules adopted by the SEC for certain foreign private issuer cross-border tender and exchange offers, business combinations and rights offerings, including Rule 802 under the Securities Act. <sup>[56]</sup>

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### **Footnotes**

53 Exchange offers made in the United States are generally subject to the requirements of the Williams Act in addition to the registration requirements of the Securities Act. The MJDS relief from Williams Act requirements is discussed in § 13.06.

54 There is an additional eligibility requirement for third-party exchange offers because, unlike in a rights offering or issuer exchange offer, the investor has not made a prior investment decision with respect to the issuer.

55 There is no presumption (either in Form F-8 or F-80 or in the tender offer provisions of the MJDS) regarding the target's investment company status.

56 See text accompanying *supra* Notes 2, 34 and 52 and text accompanying *infra* Note 60; see also § 9.05[9].

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.06, TENDER OFFERS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.06 (11th and 12th Editions 2014-2017)

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Under the MJDS, eligible third-party and issuer cash tender offers or exchange offers for a class of securities of a Canadian issuer may be extended to U.S. securityholders, without regard to the application of the Williams Act and the SEC rules thereunder governing such offers, by using a Canadian takeover or issuer bid circular and complying with Canadian procedural rules governing the offers, provided that the transaction is subject to and not exempt from the substantive provisions of Canadian law governing the terms and conditions of the offer. <sup>[57]</sup> SEC Schedules 14D-1F (for third-party offers) and 13E-4F (for issuer offers), which "wrap-around" the Canadian takeover or issuer bid circular, are filed with the SEC concurrently with filing in Canada.

The target must be a foreign private issuer incorporated or organized in Canada, must not be an "investment company" registered or required to be registered under the U.S. Investment Company Act and less than 40% of the Canadian target's securities that are subject to the tender offer may be held by U.S. holders (including affiliates of the target). <sup>[58]</sup> There are no eligibility requirements for bidders in third-party cash tender offers and such bidders accordingly may include U.S. entities. The bidder must extend the cash tender offer to U.S. holders on terms and conditions not less favorable than those extended to any other holder of such securities.

Third-party bidders in a tender offer may rely on a conclusive presumption that the target is a foreign private issuer and that less than 40% of the subject securities are held by U.S. holders on the same basis as described above for exchange offers. There are no market value or public float tests for tender offers under the MJDS. However, if securities form part of the consideration, the MJDS

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requirements discussed above for registering the exchange offer under the Securities Act are applicable. <sup>[59]</sup> As a result, a U.S. bidder may follow Canadian bid rules if the MJDS eligibility requirements are met and the offer is limited to cash, but must comply with the normal U.S. registration requirements if securities are offered as part of the consideration, which could put a U.S. bidder at a disadvantage.

In addition, Canadian issuers are eligible to use rules adopted by the SEC to facilitate certain foreign private issuer cross-border tender and exchange offers, business combinations and rights offerings, extending the MJDS principle of recognition of home country disclosure and bid rules. <sup>[60]</sup> In the case of tender offers, these rules establish a two-tier system. The "Tier I exemption" provides that where 10% or less of the subject securities is held by U.S. holders, <sup>[61]</sup> third-party and issuer tender offers for a foreign private issuer may be conducted in the United States in accordance with the procedural and disclosure requirements of the target's home jurisdiction and without compliance with the Williams Act. Under the Tier I exemption, offering materials required by the target's home jurisdiction are to be submitted to the SEC under cover of Form CB. The "all-holders" and "best price" rules of Rule 14d-10 under the Exchange Act, as well as the "going private" disclosure and procedural requirements of Rule 13e-3 and Rule 14e-5 under the Exchange Act (which restricts purchases of securities outside a tender or exchange offer), are inapplicable to Tier I exempt offers.

The "Tier II exemption" provides more limited relief from the U.S. tender offer rules and applies where 40% or less of the subject securities is held by U.S. holders. <sup>[62]</sup> Under the Tier II exemption, the offeror has a right to divide a bid into two separate offers, one for U.S. and the other for non-U.S. holders, to offer "loan notes" or

similar securities to non-U.S. holders only and to announce extensions of an offer in accordance with home jurisdiction practice rather than under U.S. rules. Furthermore, the Tier II exemption permits relaxation of the prompt payment rules to permit an offeror to pay for securities in accordance with requirements of the subject company's home jurisdiction and allows an offeror to reduce or waive the minimum tender condition without extending the offer if certain disclosure procedures and timing requirements are met. Offerors relying on the Tier II exemption are subject to the SEC's disclosure and filing obligations, certain other procedural obligations and the "going private" requirements of Rule 13e-3 under the Exchange Act. In addition, Rule 14e-5 under the Exchange Act continues to apply to bids made under the Tier II exemption, with limited exceptions. With respect to the Securities Act registration requirements

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for cross-border exchange offers, the rules establish an exemption from registration under Rule 802 where the Tier I exemption is available. Consistent with the approach taken in the MJDS, under the rules the offeror generally must extend the cash tender or exchange offer to U.S. holders on terms and conditions not less favorable than those extended to any other holder of such securities, and issuers and bidders remain subject to the civil liability and antifraud provisions of the U.S. securities laws.

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### Footnotes

57 Certain tender offers are exempt from provincial or territorial securities regulation, including, for example, issuer bids conducted on a recognized Canadian stock exchange such as the TSX, provided that the bid is conducted in accordance with the rules and policies of such exchange. The MJDS is available if the tender offer remains fully subject to at least one set of bid rules in Canada.

An issuer that has obtained a limited grant of exemptive relief from the application of bid regulations in Canada, which relief implicates protections corresponding to certain Williams Act protections, must seek an SEC order for the offer to proceed under the MJDS. The order may be conditioned on compliance with the relevant Williams Act provisions with respect to U.S. holders or without conditions. The SEC has indicated that it will respond to requests for such orders on an expedited basis.

58 If a Schedule 14D-1F or 13E-4F is filed while another cash tender or exchange offer for the same class of securities is ongoing and the earlier offer was commenced or was eligible to be commenced under the MJDS, the calculation of U.S. holders for purposes of the 40% limit is made as of the date applicable to the initial bid. Although the MJDS treatment of tender offers is intended by the SEC to encourage Canadian issuers to extend predominantly Canadian offers into the United States by removing the costs associated with complying with applicable U.S. securities regulations, the SEC has indicated that its adoption of a U.S. ownership threshold is not indicative of any belief that it may lack the jurisdiction to compel extension into the United States of a predominantly Canadian offer.

59 See § 13.05.

60 See § 9.05[9].

61 See § 9.05[9][a].

62 See § 9.05[9][b].

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.07, OTHER RELEVANT U.S. LEGAL CONSIDERATIONS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.07 (11th and 12th Editions 2014-2017)

11th and 12th Editions

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The SEC's accommodations for MJDS securities offerings consist principally of the acceptance of Canadian disclosure documents and waiver of SEC review (although both accommodations are now directly or indirectly affected by the additional requirements of the Sarbanes-Oxley and Dodd-Frank Acts—namely, substantive disclosure requirements and mandate for SEC review of company disclosures once every three years <sup>[63]</sup>). MJDS securities offerings generally are subject to all other customary requirements for U.S. public offerings ( e.g., broker-dealer registration requirements for underwriters, prospectus delivery obligations, <sup>[64]</sup> limitations on publicity during the offering period, <sup>[65]</sup> etc.). The continued application of certain U.S. requirements, discussed below, may offset some of the benefits of the MJDS for Canadian issuers.

### **[1] U.S. Liability Rules**

As noted above, the MJDS does not affect the applicability of U.S. civil liability and antifraud rules. Thus, Canadian issuers using the MJDS are subject to potential liability under U.S. law if their registration statements, prospectuses, circulars, Exchange Act disclosure filings or other communications contain material misstatements or omissions, with "materiality" and other elements of claims determined under U.S. law. <sup>[66]</sup> Although the relevant U.S. liability provisions for registration statements and prospectuses are phrased much like their Canadian counterparts, <sup>[67]</sup> Canadian issuers generally have been concerned that their potential exposure to civil liabilities is greater in the United States due to, among other things, differences in certain procedural rules ( e.g., the wider availability of class

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actions and contingency fee arrangements in the United States) and the generally higher incidence of securities litigation in the United States. <sup>[68]</sup>

The SEC clarified in the Adopting Release that, by adopting the MJDS, it in essence was adopting as its own requirements the disclosure requirements of the applicable Canadian forms, with the same effect as if such requirements were specifically spelled out in the MJDS forms. Accordingly, "good faith compliance with the disclosure requirements of the home jurisdiction, as construed by Canadian regulatory authorities, will constitute compliance with the applicable U.S. federal securities disclosure requirements, even if such compliance results in the omission of information which might otherwise have been required as a line item in registration statements filed by U.S. issuers on the [SEC's] other registration forms." <sup>[69]</sup> As to certain specified disclosures, however, the Sarbanes-Oxley and Dodd-Frank Acts have in effect modified the MJDS to impose such disclosure requirements on Form 40-F filers.

Although the clarification in the Adopting Release confirmed that the SEC did not expect Canadian issuers using the MJDS to comply with the line-item disclosure requirements of other U.S. disclosure forms, the requirement that MJDS disclosure documents contain all "material information" necessary to make the required statements "not misleading" (within the meaning of the U.S. securities laws) and the applicability of the U.S. civil liability and antifraud rules effectively require Canadian issuers to consider general U.S. disclosure principles and practices in preparing their MJDS filings. <sup>[70]</sup> Moreover, to help establish their "due diligence" defense under § 11 of the Securities Act, U.S. underwriters in MJDS offerings generally request Canadian issuers to provide,

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among other things, customary representations, and, under certain circumstances, a legal opinion or negative comfort letter from U.S. counsel, <sup>[71]</sup> as to the adequacy of the disclosure (from the perspective of the U.S. liability rules) in MJDS registration statements and prospectuses.

## [2] Investment Companies

The restrictions of the U.S. Investment Company Act apply to MJDS offerings. Accordingly, Canadian issuers that are registered or required to register as an "investment company" under the U.S. Investment Company Act may not make securities offerings under the MJDS. The definition of "investment company" under the U.S. Investment Company Act is very broad, <sup>[72]</sup> and Canadian issuers whose assets include a substantial proportion of securities may constitute "investment companies." Thus, absent an exemption, such issuers may not use the MJDS for U.S. securities offerings.

Rule 3a-6 under the U.S. Investment Company Act excludes from the definition of "investment company" foreign banks and insurance companies and specifically extends the exclusion to Canadian trust and loan companies, which otherwise might not satisfy the rule's definition of "foreign bank." <sup>[73]</sup> Entities within the scope of the rule are not subject to regulation under the act and are therefore able to use the MJDS for offerings of any type, including common share offerings. In addition, by operation of the rule, finance subsidiaries of those entities (and of their holding companies) that make U.S. offerings of guaranteed debt or nonvoting preferred stock are eligible for an exemption from the U.S. Investment Company Act pursuant to Rule 3a-5 thereunder. Similarly, because

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foreign banks and insurance companies are effectively treated as operating companies by virtue of Rule 3a-6, the exceptions from investment company status available to holding companies of operating entities <sup>[74]</sup> are also available to foreign bank and insurance holding companies. <sup>[75]</sup>

Other Canadian issuers that are caught by the broad "investment company" definition ( e.g., holding companies with substantial nonmajority or noncontrolling investments) and cannot rely on Rule 3a-1, Rule 3a-5 or Rule 3a-6 or another exemption must seek individual discretionary exemptive orders from the SEC pursuant to § 6(c) of the U.S. Investment Company Act (which can be time-consuming) in order to use the MJDS for public offerings.

## [3] Market Regulation Rules

Regulation M under the Exchange Act generally prohibits, during a distribution of securities, bids for or purchases of those securities (and certain "reference securities") by distribution participants ( e.g., issuers, underwriters and members of the dealer group and certain of their affiliates), and governs stabilization and certain post-offering activities. <sup>[76]</sup> Where any part of a distribution is being made in the United States, the SEC staff generally applies these rules to the conduct of both U.S. and non-U.S. distribution participants outside the United States, which can have the effect of disrupting normal market practices in the home jurisdiction. <sup>[77]</sup>

## [4] Auditor Independence

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Audited financial statements included in MJDS registration statements (other than registration statements on Form F-7 in respect of rights offerings) and in certain other MJDS filings are subject to the SEC's auditor independence requirements commencing with the most recent fiscal year for which audited financial statements are presented. For prior periods, compliance with Canadian independence standards is sufficient. Accordingly, where the auditor for a Canadian issuer does not meet the U.S. independence requirements on a current basis and cannot obtain discretionary relief from the SEC staff, the issuer will not be able to effect such an MJDS offering without undertaking one of the following steps: (i) engaging an independent accounting firm to audit at least the most recent fiscal year or (ii) adopting the SEC's auditor independence requirements and allowing at

least one year to pass so that the report of an independent accounting firm would cover the then most recently completed fiscal year.

## [5] “Bought Deals”

Securities laws in Canada allow short-form system issuers to sell securities in "bought deals" in which the underwriters that have committed to purchase an issue are permitted to solicit indications of interest during a four-day window period after an underwriting agreement is signed but before the preliminary

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prospectus is filed. <sup>[79]</sup> Bought deals are an important distribution technique in Canada, both for common stock and debt offerings.

The MJDS does not change the basic Securities Act prohibition against public offers prior to the filing of a registration statement. Accordingly, if the normal Canadian bought deal timing is followed and the MJDS registration statement is not filed until the Canadian preliminary prospectus is filed four business days after the underwriting agreement is signed, U.S. underwriters and dealers will not be permitted to engage in any solicitation activities during the four-business day window period. In a successful bought deal, however, Canadian underwriters generally would expect to have obtained indications of interest from prospective investors covering the entire amount of securities being offered well before the end of the window period. Therefore, to the extent that marketing efforts for the U.S. offering can begin only after the end of the window period, the U.S. offering would serve the function only of a delayed "safety valve" for the Canadian underwriters—that is, the U.S. market would be tapped only if marketing efforts in Canada during the window period did not produce sufficient indications of interest from Canadian investors.

To address this issue and permit the U.S. and Canadian markets to be accessed simultaneously on a public basis, an "accelerated filing" bought deal technique has been used in a number of transactions. <sup>[79]</sup> Under this approach, the filings of the preliminary prospectus in Canada and the MJDS registration statement in the United States are accelerated and made either concurrently with the signing of the underwriting agreement, if the agreement is signed in the morning, or at the open of business the following morning if the agreement is signed in the evening after the close of the Canadian stock exchanges. This approach makes it possible for U.S. marketing efforts to begin as soon as solicitation activity begins in Canada. As bought deals are often commenced with little prior

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notice, this approach is a practicable alternative only if the issuer has a form of Canadian bought deal prospectus (and MJDS registration statement) prepared in advance of a bought deal proposal. <sup>[80]</sup>

In circumstances where a public offering in the United States is either not desired by the issuer or is impracticable because the preliminary prospectus cannot be made available on an accelerated basis, Canadian underwriters may resell securities purchased in bought deals in the U.S. private market through their U.S.-registered broker-dealer affiliates (including resales under Rule 144A under the Securities Act where available or on a § 4(1 ½) basis) <sup>[81]</sup> because private offers and sales can be effected on the same timetable as offers and sales in Canada. In circumstances where the resale safe harbor under Regulation S under the Securities Act does not provide sufficient liquidity for U.S. private purchasers, the Canadian prospectus, once available and with appropriate additions, could be used under the MJDS in conjunction with the Canadian shelf rules to register the securities sold privately in the United States so that they may be resold freely from time to time by U.S. purchasers. <sup>[82]</sup>

## [6] “At-the-Market” or “Dribble-Out” Offerings

At-the-Market ("ATM" or "dribble-out") offerings are an alternative to traditional follow-on public offerings and bought deals. ATM offerings allow an issuer to sell equity securities into the market from time to time at the

market price.

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MJDS issuers that conduct ATM offerings must file a base shelf prospectus in Canada, which may be reviewed by the Canadian securities regulators and a corresponding registration statement on Form F-10 in the United States, which (absent unusual circumstances) is not reviewed by the SEC. <sup>[83]</sup> If selected for review by the Canadian securities regulators, the review process generally takes one to two weeks to complete. Upon completion of the Canadian review process, a final base prospectus and an amended registration statement must be filed in Canada and the United States, respectively.

The placement agent or agents and the issuer enter into a distribution agreement for the ATM offering that typically includes customary representations, warranties, covenants and closing conditions. The execution of the distribution agreement in an ATM offering triggers the requirement to file a prospectus supplement disclosing the terms of the ATM offering and a requirement to issue a press release. The prospectus supplement must disclose the identity of the placement agent or agents, the commissions payable to the placement agent or agents and the maximum number of shares to be sold in the offering or the aggregate offering size. <sup>[84]</sup> Because equity issuances may occur frequently under an ATM program, disclosure of equity issuances off of an ATM shelf is often effected through disclosure in quarterly and annual reports in Canada and the United States.

Generally, Canadian securities laws require a broker-dealer to deliver a prospectus to purchasers of securities. <sup>[85]</sup> However, because an ATM offering is usually executed anonymously over a securities exchange, it is generally impracticable to physically deliver a prospectus to purchasers in an ATM offering. Therefore, to conduct an ATM offering in Canada, an MJDS issuer must obtain exemptive relief from the requirement to physically deliver a prospectus to each purchaser in an ATM offering and from certain form requirements, including the requirement to include therein a statement regarding the purchasers' statutory rights and a certificate of the issuer, each in the prescribed form. Exemptive relief is typically granted by Canadian securities regulators, subject to a cap on the number of shares sold on the TSX of 25% of the trading volume of shares on the TSX on the trade date. <sup>[86]</sup> Exemptive relief is not required if the ATM offering

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is conducted solely on a U.S. securities exchange. <sup>[87]</sup> An MJDS issuer must also consider whether conducting an ATM offering requires additional disclosure or raises considerations under Regulation M, <sup>[88]</sup> FINRA rules or securities exchange rules.

## [7] State Securities Laws

In addition to the registration requirements of the SEC at the federal regulatory level, state securities or "blue sky" laws are also applicable to MJDS offerings. <sup>[89]</sup> However, the NSMIA amended the Securities Act to create a number of general exemptions from certain state securities law requirements. As a result, the need to register securities at the state level has been eliminated in connection with virtually all significant securities offerings in the United States by non-U.S. issuers.

As amended by the NSMIA, § 18 of the Securities Act provides exemptions for several categories of "covered securities" (or any security that will be a "covered security" upon completion of a transaction), including:

- securities that are listed on the NYSE or any national securities exchange that the SEC determines has substantially similar listing standards, <sup>[90]</sup> or securities of the same issuer that are equal or senior in rank to a security that is so listed; and
- securities offered or sold in certain transactions exempt from registration under the Securities Act, including ordinary secondary market transactions (provided the issuer of the security is a reporting issuer under the Exchange Act). <sup>[91]</sup>

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A "covered security" is exempt from all state requirements with respect to (i) registration and qualification of securities or securities transactions, (ii) prohibitions, limits or conditions on the use of any offering document "prepared by or on behalf of the issuer" of the security, <sup>192</sup> and (iii) prohibitions, limits or conditions on offers or sales of the security based on the merits of the offering or the issuer. <sup>193</sup> The NSMIA generally does, however, preserve each state's authority to maintain and enforce its own antifraud laws and notice filing requirements. <sup>194</sup>

In circumstances where state law registration requirements do apply, however, absent an available state exemption from registration, the MJDS issuer must register the securities under the applicable state securities statutes (which can involve a filing, comment and clearance process similar in some respects to SEC registration <sup>195</sup>). Because the majority of states have adopted the Uniform Securities Act, the states' securities laws are similar to a substantial degree.

The state securities regulators were consulted extensively during the process of drafting the MJDS. Although state regulators would not agree to recommend a general exemption from state securities laws' registration requirements for MJDS offerings, the North American Securities Administrators Association ("NASAA"), which represents all state securities regulators, endorsed the MJDS and, in 1990, recommended model rules designed to facilitate MJDS offerings in the various states. The rules, as updated in 2005, are designed to accommodate registration of MJDS offerings with the states by, among other things: (i) harmonizing the state review period with Canadian review periods, (ii) providing for state acceptance of financial information presented in the registration statement in accordance with the requirements of the registration statement, and (iii) providing an exemption to facilitate secondary trading in the securities offered under the MJDS. <sup>196</sup>

Adoption of the model rules does not, however, alter the substantive standards of review that may be applied by a state to MJDS offerings subject to state registration. Accordingly, the "merit review" states may continue to apply their

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standards of fairness to any MJDS offering required to be registered. <sup>197</sup> As a result, certain Canadian issuers wishing to use the MJDS that are unable to rely on federal preemption of a "covered security" or an exemption from blue sky registration may have difficulty obtaining clearance in the merit review states. This difficulty is likely to arise most frequently in MJDS offerings by smaller Canadian companies, such as those electing to use the MJDS for rights offerings. Such issuers may have difficulties clearing their rights offerings in those merit review states (including California) that do not have an exemption for sales of securities to the issuer's existing shareholders.

It therefore remains important for MJDS offerings of securities not subject to the federal preemption under the NSMIA to fall within exemptions from state registration requirements to the extent possible. Where exemptions are not available, the need to obtain state clearances can result in additional costs and delays, and, in certain circumstances, state clearances may be impossible to obtain.

## **[8] Oil, Gas and Mining Disclosure**

The SEC adopted revisions to its oil and gas reporting disclosures that became effective as of January 1, 2010. The revisions are intended to provide investors with a more meaningful and comprehensive understanding of oil and gas reserves to facilitate their assessment of the relative value of oil and gas companies. In its adopting release, the SEC clarified that the new disclosure requirements do not apply to MJDS issuers that file annual reports on Form 40-F so long as they comply with the disclosure requirements of Canadian National Instrument 51-101, Standards of Disclosure for Oil and Gas Activities ("National Instrument 51-101"). <sup>198</sup> In the past, some Canadian issuers obtained exemptions in Canada permitting them to estimate reserves and disclose related oil and gas activities in accordance with SEC oil and gas disclosure requirements instead of complying with National Instrument 51-101. In July 2015, National Instrument 51-101 was amended to significantly alter its disclosure requirements as well as allow Canadian reporting issuers to provide oil and gas disclosure and reserve estimates in accordance with alternative standards, including SEC rules, without the need for a specific

exemption. However, reserve estimates must still be prepared and audited by a qualified reserve evaluator or auditor.

In 2016, the SEC proposed changes to its mining disclosure policies, which are designed to modernize its requirements and more closely align them with industry standards, including Canadian National Instrument 43-101, Standards of

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Disclosure for Mineral Projects ("National Instrument 43-101").<sup>[99]</sup> The proposed changes would rescind Industry Guide 7 and update Section 102 of Regulation S -K (for domestic issuers) and Item 4.D of Form 20-F (for foreign private issuers). These changes would apply to Canadian issuers that file as foreign private issuers and prepare annual reports on Form 20-F. However, Canadian issuers that file under MJDS would be exempt and could continue to provide disclosure pursuant to National Instrument 43-101.<sup>[100]</sup>

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### Footnotes

63 See, e.g., *supra* Note 30.

64 See § 3.02[4].

65 See § 3.02[3].

66 Although liability for material misstatements or omissions can arise under various federal and state law provisions, the principal provisions under which civil liability can be asserted are §§ 11 and 12(a)(2) of the Securities Act and §§ 18 and 10(b) of, and Rule 10b-5 under, the Exchange Act. See also § 11.03[1] and [2].

67 See, e.g., § 130 of the Securities Act (Ontario).

68 The provisions of the MJDS relating to consent to service of process may raise related concerns. At the time of filing a registration statement under the MJDS (other than on Form F-7, which separately imposes a requirement to appoint an agent for service of process), as well as certain other MJDS filings, Canadian issuers must file with the SEC a Form F-X containing an irrevocable consent to service of process in SEC proceedings or civil actions arising out of or relating to the offering or the securities being offered, an appointment of a U.S. person as agent for service of process, a consent to service of an administrative subpoena and an undertaking to assist the SEC with an administrative investigation. If the agent for service of process resigns, is dismissed or is unable to continue serving as agent, the issuer generally must appoint a successor agent unless the issuer has ceased filing reports under the Exchange Act for a period of more than six years. The agent for service designated in Form F-X is authorized to accept service of process on the issuer's behalf in connection with any investigations or administrative proceedings conducted by the SEC and any civil suits relating to the offering or the offered securities brought against the issuer in any federal or state court in the United States.

69 Adopting Release, 56 Fed. Reg. 30,036, 30,049 (June 21, 1991).

70 In transactions where there is a high risk of litigation, such as hostile tender or exchange offers, Canadian issuers using the MJDS may elect voluntarily to comply with certain line-item disclosure requirements of the U.S. disclosure forms in an effort to minimize their risk of liability under the U.S. liability rules.

71 In U.S.-only offerings underwritten by U.S. investment banking firms, negative comfort letters generally have been obtained from U.S. counsel to the issuer. Negative comfort letters generally have not been provided by U.S. counsel to the issuer in the context of dual offerings in Canada and the United States that are underwritten on a "bought deal" basis by Canadian investment banking firms (as more fully discussed in § 13.07[5] below) with sales in the United States of a portion of the securities typically effected by the U.S. affiliates of the Canadian underwriters. Negative comfort letters of U.S. counsel to the issuer generally have not been provided in these offerings because of (i) the extra cost being viewed as unwarranted given the relatively small size of the U.S. component of the offering compared to the Canadian component, (ii) insufficient time in the bought deal context for U.S. counsel to undertake the necessary due diligence in

order to deliver such letters and (iii) the fact that generally only the U.S. affiliates of the Canadian underwriters of such offerings have participated in the sales in the United States.

- 72 See § 3(a)(1) of the U.S. Investment Company Act. See Chapter 15, for a discussion of U.S. regulation of foreign investment companies.
- 73 Rule 3a-6 was adopted in SEC Release No. IC-18381 (Oct. 29, 1991) and replaced Rule 6c-9 under the U.S. Investment Company Act, which provided a more limited exemption from the Act for U.S. offerings of debt securities and nonvoting preferred stock by foreign banks and their finance subsidiaries, but did not extend to Canadian trust and loan companies. See § 15.05[2].
- 74 § 3(a)(1)(C) of the U.S. Investment Company Act and Rule 3a-1 thereunder. See § 15.05[2].
- 75 Foreign banks and insurance companies seeking to rely on Rule 3a-6 to make a U.S. registered public offering of their securities, as well as their holding companies and finance subsidiaries relying on Rules 3a-1 and 3a-5, respectively, must file Form F-N under the Securities Act. The Form, which replaced Form N-6C9, calls for certain information about the proposed offering and also includes an appointment of a U.S. agent for receipt of service of process. See Rule 489 under the Securities Act. Canadian entities that have filed a Form F-X ( see *supra* Note 68) or that are filing a registration statement relating to debt securities or nonvoting preferred stock and have a "currently accurate" Form N-6C9 on file with the SEC are, however, excepted from this requirement. See Rule 489(b) under the Securities Act.
- 76 See § 3.02[9].
- 77 As a result of the SEC's extra-territorial approach and because the applicable rules in the United States and in Canada differ in some respects, problems may arise with respect to market stabilization activities conducted in both jurisdictions. OSC Rule 48-501, Trading During Distributions, Formal Bids and Share Exchange Transactions ("Rule 48-501"), regulates, among other things, trading by issuers and underwriters during a distribution by prospectus of TSX-listed securities. Issuers and underwriters are prohibited, throughout the period of distribution, from bidding for or purchasing the class of securities being distributed by an underwriter or dealer. The period of distribution commences on the later of two trading days prior to fixing the offering price and the date on which the underwriter agrees to participate in the prospectus offering and continues through the period of distribution that is deemed to end when the underwriter has distributed its participation and the stabilization arrangements have terminated. The foregoing restrictions do not apply in connection with market stabilization or market balancing activities that occur at or below the distribution price or last independent sale price for the restricted security for the purpose of maintaining a fair and orderly market by reducing price volatility. Also, the restrictions do not apply to a "highly-liquid security," which is defined as a listed security with an average of at least 100 trades per trading day during a 60-day period and with an average trading value of at least Cdn \$1 million per trading day, or a security that is an "actively traded security" under Regulation M. The Universal Market Integrity Rules governing trading on all of Canada's major stock exchanges have been amended to ensure consistency with Rule 48-501.
- In connection with the adoption of Regulation M, which became effective in 1997 and replaced the SEC's former market regulation rules set forth in Rules 10b-6, 10b-6A, 10b-7, 10b-8 and 10b-21 under the Exchange Act (the "Prior Trading Rules"), the SEC withdrew its prior exemptive and no-action positions taken with respect to the Prior Trading Rules. As a consequence, the limited exemptive relief granted by the SEC in 1991 with respect to the Prior Trading Rules (the "1991 MJDS Relief") for certain Canadian and other non-U.S. market activities in connection with certain U.S. offerings by Canadian issuers (predicated on the adoption in Canada of certain market regulation rules) is no longer applicable and can no longer be relied on in connection with those market activities. See Letter from William H. Heyman, Director, SEC Division of Market Regulation, to Pamela S. Hughes, Director of International Markets Branch, Ontario Securities Commission, and Daniel Laurion, Chief of Registration, *Commission des valeurs mobilières du Québec* (Aug. 22, 1991).
- 78 An alternative approach often used in practice is for the issuer and the underwriters to sign a binding "bought deal agreement" committing (i) the parties to execute an underwriting agreement within four days, (ii) the issuer to print the preliminary prospectus within four days and (iii) the issuer to issue a press release

announcing the offering upon the signature of the bought deal agreement, among other things. The "bought deal agreement" is a written agreement (i) under which one or more underwriters has agreed to purchase all of the securities to be offered under the short form prospectus on a firm commitment basis (other than any over-allotment option), (ii) does not have a "market-out" clause, (iii) that, other than in the case of an over-allotment option, does not provide an option for any party to increase the number of securities to be purchased and (iv) that, other than in prescribed circumstances, is not conditional on one or more additional underwriters agreeing to purchase any of the securities offered.

79 Some recent examples of MJDS bought deals include Platinum Group Metals, Prospectus Supplement (Oct. 24, 2016), Cordiorne Pharma Corp., Short Form Prospectus (July 28, 2016), Suncor Energy Inc., Short Form Prospectus (June 8, 2016), Enbridge Inc., Prospectus Supplement (June 19, 2014), Rubicon Minerals Corporation, Short Form Prospectus (Mar. 3, 2014), Novadaq Technologies Inc., Prospectus Supplement (May 1, 2013).

80 Historically, the U.S. GAAP reconciliation requirement was a particular problem under the quick timetable of bought deals, where the time delay occasioned by the need to prepare a U.S. GAAP reconciliation effectively precluded use of the MJDS unless the issuer had done the necessary work in advance of the offering. For Form F-10 filings, this required advance preparation of a U.S. GAAP reconciliation in accordance with Item 18 of Form 20-F of all the relevant financial statements, which could be time-consuming for issuers that had not previously developed a "long-form" reconciliation. In practice, the U.S. GAAP reconciliation requirement effectively limited use of the MJDS for bought deal offerings to Canadian issuers that were Exchange Act-reporting companies (and thus at a minimum had financial statements that were reconciled to U.S. GAAP in accordance with Item 17 of Form 20-F). The transition to IFRS in Canada has eliminated the need for a U.S. GAAP reconciliation.

81 See § 7.04.

82 The registration of the privately placed securities under the MJDS in conjunction with the Canadian shelf rules would, however, impose upon the issuer the costs of having to maintain an "evergreen" registration statement. In addition, the selling shareholders may have statutory underwriters' liability in the United States and may need to be named in the MJDS prospectus. The possibility of incurring such liability in connection with subsequent resales may be significant enough to dissuade certain institutional investors from purchasing in the private placement.

Form F-10 may also be used to register "A/B" exchange offers where the issuer of securities that have been sold in a private placement offers to exchange those securities that are otherwise identical in all respects. SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms, Question 109.06 (Feb. 27, 2009). For further information on "A/B" exchange offers, see § 7.05[2].

83 See § 13.02[2].

84 Under National Instrument 44-102, the market value of shares distributed in an ATM offering pursuant to a prospectus supplement may not exceed 10% of the aggregate market value of the Canadian issuer's outstanding shares measured at the last trading day of the month before the month in which the first trade under the ATM distribution is made.

85 An ATM offering in Canada may be made pursuant to Part 9 of National Instrument 44-102.

86 For recent examples of exemptive relief granted for ATM offerings, see Oncolytics Biotech Inc. and Canaccord Genuity Corp., 39 O.S.C.B. 3612 (Jan. 27, 2016) and Mongolia Growth Group Ltd. and Cantor Fitzgerald Canada Corporation, 37 O.S.C.B. 9913 (June 6, 2014).

87 Although the United States has similar prospectus delivery requirements, under Rule 172 of the Securities Act, access is deemed to equal delivery and ATM offerings require no SEC exemptive relief to be conducted in the United States. See SEC Release No. 33-8591 (July 19, 2005). See text accompanying *supra* Note 29.

88 See § 13.03 and § 3.02[9].

89 See § 3.02[8].

90 Rule 146(b)(1) under the Securities Act contains a list of U.S. securities exchanges the SEC has determined

have listing standards substantially similar to those of the NYSE.

- 91 The practical result of this provision of the NSMIA is to preempt blue sky laws with respect to secondary market trading in securities issued by an SEC-reporting issuer, in addition to all transactions in any security of an issuer with common stock listed on a major U.S. securities exchange. This preemption would not extend to secondary trades in all types of securities; for example, state registration requirements with respect to unlisted securities of a foreign issuer that satisfies the requirements of Rule 12g3-2(b) under the Exchange Act are not preempted.
- 92 The SEC has adopted Rule 146 under the Securities Act, which defines the phrase "prepared by or on behalf of the issuer" to include an offering document if the issuer or an agent or representative (i) authorizes its production and (ii) approves the document before its use. SEC Release No. 33-7418 (May 6, 1997).
- 93 *See infra* Note 96.
- 94 Generally, state notice filings (and corresponding payment of a filing fee) are required in connection with certain private placements of securities and not for offerings registered under the Securities Act or secondary market transactions. However, U.S. sales to qualified institutional buyers, including those made under Rule 144A, and to other institutional investors, as defined by each state, are exempt from state notice filings and filing fee requirements.
- 95 *But see infra* Note 96.
- 96 The Adopting Release indicated that NASAA anticipated that substantially all the states would adopt the model rules. Adopting Release, 56 Fed. Reg. 30,036, 30,051 (June 21, 1991). To date, more than 40 states have adopted one of the two versions of the NASAA model rules.
- 97 "Merit review" states apply a fairness standard of review that differs from the SEC's "full disclosure" requirements. In these states, the securities administrator may deny registration if the offering is determined to be unfair, unjust or inequitable from the individual investor's perspective. *See* § 3.02[8][a].
- 98 *See* SEC Release No. 33-8995 (Dec. 31, 2008), 74 Fed. Reg. 2157, 2179 (Jan. 14, 2009).
- 99 *See* SEC Release No. 33-10098 (June 16, 2016).
- 100 In the proposing release, the SEC clarified that the new regulations would apply the same standards to domestic and foreign private issuers, as the SEC stated that it "[B]elieve[s] that the proposed rules should apply equally to foreign private issuers and domestic registrants."

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.08, LISTING OF SECURITIES ON A U.S. NATIONAL SECURITIES EXCHANGE**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.08 (11th and 12th Editions 2014-2017)

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Canadian issuers eligible to use Form F-10 may use Canadian disclosures to list their securities on a U.S. stock exchange and to effect the required registration of such securities under the Exchange Act.<sup>[101]</sup> The Canadian disclosures filed under the Exchange Act for this purpose are filed under cover of Form 40-F and consist of all information material to an investment decision that the registrant, since the beginning of its last full fiscal year, (i) made or was required to make public pursuant to the law of any Canadian jurisdiction, (ii) filed or was required to file with a stock exchange on which its securities are traded and which was made public by such exchange or (iii) distributed or was required to distribute to its securityholders. The registrant also must provide the portion of its home jurisdiction reports, forms or listing applications that contain a description of the securities to be registered.

Canadian issuers using Form 40-F to register their securities under the Exchange Act also must file a consent to service of process on Form F-X. The SEC's approach of not reviewing MJDS Securities Act registration statements absent unusual circumstances is also applied to Form 40-F registration statements.<sup>[102]</sup>

Rules adopted by the SEC under § 301 of the Sarbanes-Oxley Act, however, require U.S. national securities exchanges and national securities associations to prohibit the listing of any issuer, including an MJDS issuer, that among other things does not comply with specified requirements concerning the independence of the issuer's audit committee.<sup>[103]</sup>

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### **Footnotes**

101 Section 12(a) of the Exchange Act requires all issuers listing on a U.S. stock exchange to register the listed securities under the Exchange Act.

102 See § 13.02[2].

103 See Rule 2-01 of [Regulation S -X](#).

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.09, EXCHANGE ACT REPORTING REQUIREMENTS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.09 (11th and 12th Editions 2014-2017)

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The MJDS provides the broadest relief for Canadian issuers that become subject to the Exchange Act reporting requirements solely as a result of one or more MJDS offerings (*i.e.*, issuers that do not publicly offer securities in the United States on non-MJDS forms, do not obtain a U.S. stock exchange listing for their securities and do not otherwise register their securities under § 12(g) of the Exchange Act). These issuers may use Canadian disclosures (filed on Forms 40-F and 6-K), together with the additional disclosures mandated by the Sarbanes-Oxley Act <sup>[104]</sup> and Dodd-Frank Act <sup>[105]</sup> and reflected in Form 40-F, to satisfy their ongoing Exchange Act reporting requirements (which would arise under § 15(d) of the Exchange Act) regardless of whether they continue to satisfy the eligibility requirements of the MJDS Securities Act registration forms subsequent to the offering. If these issuers use only Forms F-7, F-8 or F-80 (relating to rights offerings, business combinations and exchange offers), they may be entitled to a complete exemption from the § 15(d) reporting requirements provided that they comply with the requirements of Rule 12g3-2(b) under the Exchange Act. <sup>[106]</sup>

The MJDS accommodations for other Canadian issuers are more limited. Canadian issuers that use (or have used) non-MJDS registration forms for U.S. public offerings or that list their securities on a U.S. stock exchange (or otherwise register their securities under § 12(g) of the Exchange Act) must meet the "substantial issuer" eligibility tests (*i.e.*, the eligibility tests for Form F-10, depending on the type of securities to which the reporting obligation relates) <sup>[107]</sup> in order to use Canadian disclosures (as supplemented by Form 40-F) to satisfy their Exchange Act reporting obligations. <sup>[108]</sup> These issuers must continue to meet

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the "substantial issuer" tests in order to remain eligible to use Canadian disclosures in the United States, which raises a potential problem for issuers that do not exceed the relevant eligibility tests by a significant amount. <sup>[109]</sup>

Canadian issuers using the MJDS for Exchange Act reporting are required to file their Canadian annual information form, audited annual financial statements and management's discussion and analysis, together with the additional disclosures mandated by the Sarbanes-Oxley and Dodd-Frank Acts and reflected in Form 40-F, as an MJDS annual report under cover of Form 40-F, with such annual report certified by the CEO and CFO as required by § 302 and § 906 of the Sarbanes-Oxley Act. Form 6-K is used as a cover form for the issuer's quarterly reports, material change reports and all other material disclosure documents made public in Canada, filed with Canadian stock exchanges or distributed to securityholders. <sup>[110]</sup>

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### **Footnotes**

104 The Sarbanes-Oxley Act generally applies to issuers that file periodic reports under the Exchange Act or registration statements under the Securities Act with the SEC and does not expressly authorize the SEC, in adopting rules thereunder, to draw distinctions between U.S. domestic issuers and foreign private issuers (including MJDS-eligible issuers). As a result, with limited exceptions, all provisions of the Sarbanes-Oxley Act and the rules thereunder that the SEC has adopted apply to MJDS issuers. See § 4.02 for a more complete discussion of the Sarbanes-Oxley Act.

105 The Dodd-Frank Act also requires all issuers who file reports with the SEC, including Canadian issuers who

- file under the MJDS system, to furnish information to the SEC on Form SD about "conflict minerals" used in their business, as well as payments made to government officials to further the commercial development of oil, natural gas or minerals. See § 4.07[4] and [5].
- 106 See SEC Release No. 34-58465 (Sept. 5, 2008). For a discussion of Rule 12g3-2(b) under the Exchange Act, see §§ 4.02[3][iv] and 13.10.
- 107 See § 13.02[1] for a discussion of the eligibility requirements for use of Forms F-10 (and, therefore, Form 40-F).
- 108 These obligations may arise under § 15(d) of the Exchange Act (as the result of a public offering), §§ 12(b) and 13(a) of the Exchange Act (as the result of a stock exchange listing) or §§ 12(g) and 13(a) of the Exchange Act (as the result of an OTC Bulletin Board quotation, exceeding a specified threshold of U.S. shareholders or a voluntary registration under § 12(g)). See § 4.02[3].
- 109 The Adopting Release clarifies that if the "substantial issuer" tests are met as of the end of a fiscal year, the issuer will be presumed to continue to meet such tests until the end of the next fiscal year. See Adopting Release, 56 Fed. Reg. 30,036, 30,050 (June 21, 1991).
- 110 Canadian issuers are required to submit to the SEC, under cover of Form 6-K, information concerning specified matters of relevance to securityholders that is material with respect to the issuer and its subsidiaries and that the issuer (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange or (iii) distributes or is required to distribute to its securityholders. The certification requirements of §§ 302 and 906 of the Sarbanes-Oxley Act do not apply to reports submitted on Form 6-K. See § 5.04[4].



## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.10, EFFECTS OF SEC DEREGISTRATION RULES AND AMENDMENTS TO EXCHANGE ACT RULE 12g3-2 ON MJDS ISSUERS**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.10 (11th and 12th Editions 2014-2017)

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In March 2007, the SEC adopted Rule 12h-6 under the Exchange Act to liberalize Exchange Act deregistration rules for foreign private issuers, as well as amendments to Rule 12g3-2 under the Exchange Act, which provides an exemption from Exchange Act registration. <sup>[111]</sup> The impact of Rule 12h-6 on MJDS issuers has been limited. The SEC stated that it did not expect Rule 12h-6 to have as great an effect on MJDS filers as on other reporting foreign private issuers because, typically, the percentage of an MJDS filer's shares held by U.S. residents and the U.S. trading volume relating to those shares is significant, facts that would disqualify an MJDS filer from meeting the conditions that are necessary for a foreign private issuer to delist under Rule 12h-6 under the Exchange Act. In addition, the SEC expected that due to the close proximity of MJDS filers to the U.S. capital markets, these filers would be less likely to seek to terminate

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their Exchange Act registration, and related U.S. listing, than other foreign private issuers. <sup>[112]</sup>

Similarly, the March 2007 amendments to Rule 12g3-2 under the Exchange Act have had a limited impact on MJDS issuers. Prior to adoption of those amendments, the Rule 12g3-2(b) exemption from Exchange Act registration requirements generally was not available to foreign private issuers that had an active or suspended reporting obligation under § 15(d) of the Exchange Act as a result of having filed a Securities Act registration statement. The amendments to Rule 12g3-2 made the Rule 12g3-2(b) exemption available to foreign private issuers that terminate § 15(d) reporting obligations pursuant to Rule 12h-6. Even prior to adoption of the amendments, however, the Rule 12g3-2(b) exemption was available to foreign private issuers that had an active or suspended § 15(d) reporting obligation arising from the filing of an MJDS registration statement ( e.g., Form F-7, F-8, F-9, F-10 or F-80). In effect, therefore, the amendments simply extended to non-MJDS foreign private issuers a benefit that MJDS issuers had already enjoyed.

In September 2008, the SEC further amended Rule 12g3-2(b), among other things, to eliminate the reporting exemption for MJDS filers. <sup>[113]</sup> Historically, this rarely used exemption allowed MJDS filers to avoid registration of a class of equity securities under § 12(g) of the Exchange Act based on the submission to the SEC of certain information provided by the issuer in its home country. As a result, the MJDS exemption enabled MJDS filers to claim the Rule 12g3-2(b) exemption in respect of a class of equity securities while simultaneously having Exchange Act reporting obligations regarding a class of debt securities. With the elimination of this special exemption, MJDS issuers are now afforded the 12g3-2(b) reporting exemption on the same basis as other foreign private issuers. As this exemption was, according to the SEC, "rarely used, if at all," the amendment has had minimal impact on MJDS filers. <sup>[114]</sup>

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### **Footnotes**

111 For a discussion of Rule 12h-6 and the amendments to Rule 12g3-2(b), see § 4.11[2].

112 SEC Release No. 34-55005 (Dec. 22, 2006), 72 Fed. Reg. 1384, 1404 n.144 (Jan. 11, 2007).

113 See SEC Release No. 34-58465 (Sept. 5, 2008).

114 SEC Release No. 34-58465 (Sept. 5, 2008), 73 Fed. Reg. 52,752, 52,761 (Sept. 10, 2008).

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.11, PROXY AND INSIDER RULES**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.11 (11th and 12th Editions 2014-2017)

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All Canadian foreign private issuers have a complete exemption from the U.S. proxy requirements and U.S. insider reporting/short-swing profit recovery rules because Canadian issuers are treated on an equal basis with other foreign private issuers under the FPI System. <sup>[115]</sup> Canadian issuers had traditionally viewed these rules as substantial deterrents to U.S. equity financings. The

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exemption is available whether or not the issuer uses the MJDS or the FPI System. Thus, a Canadian foreign private issuer that files Form 40-F, 20-F or 10-K annual reports is nevertheless exempt from such proxy requirements and insiders are exempt from insider reporting/short-swing profit recovery rules. <sup>[116]</sup>

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### **Footnotes**

- 115 Like other foreign private issuers, however, holders of voting equity securities of Canadian issuers remain subject to the beneficial ownership reporting requirements of §§ 13(d) and 13(g) of the Exchange Act. See §§ 6.04[1] and 6.04[2][a] for a discussion of such requirements.
- 116 It should be emphasized, however, that Canadian foreign private issuers that choose to file Form 10-K annual reports remain subject to those substantive disclosure requirements of the U.S. proxy requirements that are also required to be included in a Form 10-K filing, specifically in Part III thereof, as to executive compensation, related party transactions and security ownership by management. The SEC staff has accepted an approach whereby a Canadian reporting company incorporates this information by reference from its proxy circular that it attaches as an exhibit to its annual report on Form 10-K. See also § 13.13 for a discussion of the Exchange Act reports that are available to Canadian issuers.

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.12, TRUST INDENTURE ACT**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.12 (11th and 12th Editions 2014-2017)

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In connection with the MJDS, the SEC adopted exemptive rules under the U.S. Trust Indenture Act intended to facilitate MJDS debt offerings. Rule 10a-5 under the U.S. Trust Indenture Act generally permits eligible Canadian trust companies (*i.e.*, those subject to supervision or examination under the Trust Companies Act (Canada) or the Canada Deposit Insurance Act)<sup>[117]</sup> to act as sole trustees under indentures used for MJDS debt offerings, avoiding the need to appoint a U.S. co-trustee. The exemption provided by Rule 10a-5 is self-executing, so that eligible Canadian trustees are not required to file any application or statement of eligibility and qualification on Form T-1. <sup>[118]</sup> Canadian trustees are required, however, to file a consent to service of process on Form F-X together with the MJDS registration statement.

Rule 4d-9 under the U.S. Trust Indenture Act exempts trust indentures used for MJDS debt offerings from virtually all substantive requirements of the U.S. Trust Indenture Act, provided that the indenture is subject to regulation in Canada under the Canada Business Corporations Act, the Business Corporations Act (Ontario) or the Bank Act (Canada). Section 316(b) of the U.S. Trust

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Indenture Act, which provides that the right of each securityholder to receive principal and interest when due and to institute suit therefor shall not be impaired without the consent of such holder, continues to apply to MJDS offerings because Canadian law does not contain corresponding protections. <sup>[119]</sup> Rule 4d-9 requires that the Canadian trust indenture be filed with the SEC together with the MJDS registration statement and, for debt offerings with a Canadian trustee, the consent to service of process on Form F-X.

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### **Footnotes**

117 Canadian trust companies subject to such Regulation M may not necessarily be eligible to act as sole trustees under indentures used for MJDS debt offerings. Rules 4d-9 and 10a-5 under the U.S. Trust Indenture Act exempt such trust companies from all but two of the eligibility requirements set forth in § 310(a) of the U.S. Trust Indenture Act: the minimum capital requirement (§ 310(a)(2)) and the requirement that the trustee not be an affiliate of the obligor (§ 310(a)(5)). Although the SEC apparently construed the Canadian trustee eligibility rules as disqualifying affiliates of the obligor from acting as trustees under the obligor's indenture in all cases, this appears to be a fact-specific determination under Canadian law, and affiliation alone may not be deemed to give rise to an impermissible conflict. Consideration, therefore, must be given as to whether, in cases where the trustee and the obligor are affiliates, it is necessary to appoint an eligible co-trustee under an indenture used in connection with MJDS debt offerings.

118 Form T-1 is filed by the trustee in public debt offerings to demonstrate the trustee's compliance with the eligibility requirements under the U.S. Trust Indenture Act.

119 Section 316(b) is intended to protect minority holders from debt restructuring plans that are not supervised by a bankruptcy court.

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.13, FOREIGN PRIVATE ISSUER INTEGRATED DISCLOSURE SYSTEM**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.13 (11th and 12th Editions 2014-2017)

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Canadian issuers have equal access to the FPI System, which provides special reduced disclosure forms for public offerings and less burdensome periodic reporting requirements for foreign private issuers (Forms F-1, F-3, F-4, 20-F and 6-K). <sup>[120]</sup> This availability is most beneficial for smaller Canadian issuers that do not meet the MJDS eligibility tests or for any Canadian company seeking to effect an initial public offering. <sup>[121]</sup> Historically, before the extension of the FPI System, Canadian issuers were, in many cases, required to file full U.S. domestic issuer Securities Act and Exchange Act forms ( e.g., Form S-1 registration statements and Form 10-K annual reports). <sup>[122]</sup>

The Securities Act registration forms that allow for incorporation by reference of Exchange Act reports (Forms F-1 (to a limited extent), F-3 and F-4) also may be used by Canadian issuers. Canadian issuers are able to incorporate filings on Forms 10-K, 10-Q and 8-K (in addition to Forms 20-F and 6-K) into such registration forms. Thus, eligible Canadian issuers that have used the U.S. domestic issuer forms are able to switch at any time to the FPI System registration forms.

In addition, Canadian issuers are able to incorporate into such registration statements Canadian annual information forms filed under the MJDS under cover of Form 40-F, provided that the issuer is eligible to use Form F-10. <sup>[123]</sup> Thus, the core "company" disclosures in certain FPI System registration statements filed by "substantial" Canadian issuers can be provided by Canadian continuous disclosure documents filed under the MJDS. Although this accommodation is

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significant (and may be particularly useful in the context of acquisitions and related issuances of securities under Form F-4), customary SEC review procedures do apply to FPI System registration statements incorporating Canadian continuous disclosures.

Canadian issuers are not required to use the MJDS or the FPI System and may, at their option, use the Securities Act registration forms for U.S. domestic issuers provided that the issuer files the same Exchange Act reporting forms as U.S. domestic issuers ( i.e., Forms 10-K, 10-Q and 8-K). <sup>[124]</sup> The SEC has not modified such registration forms to permit incorporation of MJDS filings on Forms 40-F and 6-K.

Canadian issuers meeting the "substantial issuer" eligibility criteria have three U.S. disclosure systems from which to choose: (i) Canadian disclosures under the MJDS, (ii) reduced U.S. disclosures under the FPI System, and (iii) full U.S. disclosures of the type filed by domestic U.S. issuers. The determination of which system is most advantageous depends on the particular situation and needs of the issuer. On the one hand, Canadian issuers that are not eligible to use a short-form prospectus under the FPI System or the U.S. domestic issuer regime (and would thus be forced to prepare a long-form prospectus under those systems and would face a high probability of SEC review) may find the MJDS to be the best alternative because it will, among other things, allow U.S. offerings to proceed on the basis of a short-form system prospectus and, absent special circumstances, without SEC review. On the other hand, certain Canadian issuers that have regularly accessed the U.S. markets using the U.S. domestic issuer short-form prospectus (Form S-3) may find it attractive to continue to do so under the U.S. domestic issuer regime based on U.S. investor relations and other considerations. Although the FPI System generally appears to offer "substantial" Canadian issuers few, if any, benefits over the MJDS, the FPI System benefits Canadian issuers that do not meet the "substantiality" tests

under the MJDS and do not wish to use the U.S. domestic issuer system.

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**Footnotes**

120 See §§ 3.03[1][b], 3.02[1][b], 4.04 and 4.04[3][c].

121 No matter how large, a Canadian company that has not publicly offered or listed its securities will not meet the reporting history requirements of the MJDS.

122 See *supra* Note 3.

123 Form S-8, which may be used to register securities offered in connection with certain employee compensation arrangements, also permits incorporation of Form 40-F and 6-K filings by "substantial" Canadian issuers.

124 See § 13.02[1].

## **U.S. Regulation of the International Securities and Derivatives Markets, § 13.14, USE OF MJDS BY U.S. ISSUERS FOR FINANCINGS IN CANADA**

U.S. Regulation of the International Securities and Derivatives Markets

1 Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar & Adam E. Fleisher, U.S. Regulation of the International Securities and Derivatives Markets § 13.14 (11th and 12th Editions 2014-2017)

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The Canadian MJDS is essentially reciprocal to the MJDS adopted by the SEC. Eligible U.S. issuers may use prospectuses prepared in accordance with SEC requirements to offer securities in Canada, generally without Canadian regulatory review. The U.S. shelf rules may be used by eligible U.S. issuers for MJDS shelf offerings in Canada. The relatively small size of the Canadian capital markets and the ability with relative ease for U.S. issuers and their underwriters to access the Canadian capital markets in connection with registered U.S.

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offerings on a Canadian private placement basis, however, has resulted in very limited use of the Canadian MJDS by eligible U.S. issuers. <sup>[124.1]</sup>

The "northbound" MJDS has been used in recent years by several U.S. mining companies, which have taken advantage of the Canadian capital markets' strength in the resource sector. <sup>[125]</sup> Such offerings are typically made by filing a shelf prospectus and a supplement or supplements to that shelf. Section 11.3 of National Instrument 71-101, The Multijurisdictional Disclosure System ("National Instrument 71-101") exempts U.S. issuers from having to comply with the Canadian disclosure regime as it relates to mineral exploration and development and mining properties, <sup>[126]</sup> thus allowing U.S. standards to be incorporated into northbound MJDS prospectuses. <sup>[127]</sup>

Another noteworthy use of the northbound MJDS involved the offering of common shares into Canada by newly organized General Motors Company ("New GM") as part of its global initial public offering (the "New GM IPO")

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subsequent to the bankruptcy proceedings involving General Motors Corporation. <sup>[128]</sup> As a general rule, a company that has not publicly offered or listed its securities will not be MJDS-eligible (northbound or southbound) in light of the reporting history requirements of the MJDS. <sup>[129]</sup> New GM succeeded in effecting a northbound MJDS offering by obtaining exemptive relief from the certain northbound MJDS requirements, including waiver of the twelve-month reporting history, U.S. \$75 million public float and Canadian GAAP reconciliation requirements. <sup>[130]</sup>

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### **Footnotes**

124.1 In 2016, the CSA adopted amendments to the exempt distribution trade requirements in Canada that significantly changed the reporting requirements for issuers, including the United States and other non-Canadian issuers, that sell securities into Canada by way of private placements and rely on a Canadian "wrapper" or Canadian wrapper exemption. The United States and other non-Canadian issuers are still able to take advantage of the use of a Canadian wrapper and wrapper exemption, but the form of post-trade reporting to be filed in provinces where the securities are sold has been amended. The amended form requires additional information about the purchasers and the issuer, which may, in some cases, be difficult or time-consuming to obtain. For example, the new form requires disclosure of information about the specific basis on which the purchaser is relying to qualify as an accredited investor. The form also requires disclosure as to whether the purchaser is a "registrant" or an "insider" of the issuer; the CSA has, however, scaled back these disclosure requirements for non-Canadian issuers provided they meet the

criteria of the relief. In addition, the new form requires specific information about the issuer that may not traditionally be included in an offering document. The new form must also be signed by an officer or director of the issuer or the underwriter. All provinces and territories require disclosure of the same information, but they may have different requirements on how and where to submit the form.

- 125 See, e.g., Royal Gold, Inc., Prospectus (Mar. 12, 2009). Some more recent examples include Royal Gold, Inc., Prospectus Supplements (June 22, 2010, Dec. 22, 2011, Jan. 10, 2012, June 14 and 2012, Oct. 10, 2012), Uranerz Energy Corp., Prospectus Supplements (Nov. 30, 2010, Aug. 27, 2013 and July 17, 2014), Mercer International Inc., Prospectus Supplements (Dec. 14, 2012, July 17, 2013 and Mar. 27, 2014) and Prospectus (Sept. 26, 2016), Allied Nevada Gold Corp., Prospectus (June 14, 2013), General Moly, Inc., Prospectus (Apr. 24, 2014) and Uranium Energy Corp., Prospectus Supplement (Jan. 10, 2014). The "northbound" MJDS has also recently been used in other industries including, pharmaceuticals (Delmar Pharmaceuticals, Inc., Prospectus (Oct. 6, 2016)), oil and gas (Gran Tierra Energy Inc., Prospectus Supplements (Aug. 5, 2016 and Nov. 21, 2016)) and power (Pattern Energy Group Inc., Prospectus (Aug. 8, 2016)).
- 126 National Instrument 43-101, 34 O.S.C.B. 7043 (June 30, 2011).
- 127 It is worth noting that Section 11.3 of National Instrument 71-101 does not exempt U.S. oil and gas issuers from the disclosure required by National Instrument 51-101, 26 O.S.C.B 6615 (amended by 28 O.S.C.B 7181, 28 O.S.C.B 10461, 31 O.S.C.B 419 and 33 O.S.C.B 11945). See also §§ 4.07 and 4.08 for a discussion of oil and gas issuers in the southbound context.
- 128 General Motors Company, Prospectus (Nov. 17, 2010).
- 129 See *supra* Note 122.
- 130 In the Matter of General Motors Company (Aug. 11, 2010). Canada and the Province of Ontario were each major stockholders in New GM, owning prior to the New GM IPO approximately 11.7% of the common shares of the company through Canada GEN Investment Corporation, a crown corporation. The U.S. Department of the Treasury owned, prior to the New GM IPO, approximately 61% of the common shares of the company. However, given these specific facts and circumstances, this precedent may be of limited applicability in other contexts.