Raising Capital in the United States

A Guide to Using MJDS for U.S. Public Offerings and Periodic Reporting

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Introduction

Canadian issuers frequently turn to the U.S. capital markets for both financing needs and other strategic reasons. A public offering of securities in the United States provides an opportunity to reach a broader and deeper range of institutional and retail investors than is available in the Canadian capital markets.

Further, a listing on the New York Stock Exchange (the "NYSE"), NYSE MKT LLC ("NYSE MKT") or the Nasdaq Stock Market® (the "NASDAQ") enhances the potential for coverage of a company by research analysts, which in turn may result in a higher valuation of the company. Finally, many Canadian companies are expanding their businesses through acquisitions in the United States. Securities that are publicly traded in the United States can be valuable as acquisition currency and can facilitate equity-based compensation plans for U.S. employees.

The U.S. securities markets are regulated at both the federal and the state level. Canadian issuers will need to be aware of, and comply with, two principal U.S. federal statutes:

- the U.S. Securities Act of 1933, as amended (the "Securities Act"), which governs the offer and sale of securities by an issuer, an affiliate of the issuer, or an underwriter; and
- the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), which, among other things, governs the subsequent trading of those securities in the secondary market, imposes periodic and current reporting requirements on public companies, and establishes various requirements for the directors, officers and significant shareholders of those companies.

Canadian issuers subject to the Exchange Act will also need to know about the Sarbanes-Oxley Act, which amended the Exchange Act to impose a wide range of additional corporate governance and related disclosure requirements on U.S. public companies, with very few accommodations for Canadian or other non-U.S. companies. Generally, a Canadian issuer that becomes subject to Exchange Act reporting obligations must comply with Sarbanes-Oxley Act requirements to the same extent as a U.S. domestic issuer does. In addition, while it primarily focused on wide-ranging reforms to the U.S. financial regulatory environment, the Dodd-Frank Act also introduced new compliance and disclosure obligations that apply to Canadian issuers subject to the Exchange Act. Finally, the Jumpstart Our Business Startups Act of 2012, as amended (the "JOBS Act") and the Fixing America's Surface Transportation Act (the "FAST Act") have also introduced further changes to the U.S. public offering process for early stage companies.

Since 1991, MJDS has enabled eligible Canadian issuers to file a registration statement with the SEC that becomes effective immediately at the election of the Canadian issuer, generally without SEC review – a benefit that was not available to any other category of U.S. or non-U.S. issuer until December 2005, when "well-known seasoned issuers" (or "WKSIs") having (among other certain eligibility requirements) a public float of at least US$700 million also became able to do so.

Finally, the NYSE, NYSE MKT and NASDAQ rules all contain varying standards and requirements for eligibility to list on those exchanges. They also prescribe corporate governance requirements that augment those of the U.S. federal securities laws. Although Canadian issuers may be entitled to foreign issuer exemptions under some of the U.S. stock exchange corporate governance requirements and may instead follow applicable Canadian corporate governance requirements, it is necessary for those Canadian issuers to publicly disclose in their periodic filings how their practices differ from U.S. domestic companies and the fact that an exemption is being relied upon.

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Overview of the Multi-jurisdictional Disclosure System

MJDS is a reciprocal initiative adopted by the SEC and the Canadian Securities Administrators designed to facilitate cross-border public offerings of securities by allowing issuers to meet their disclosure obligations in both Canada and the United States by complying with the issuer's home country disclosure standards, and permitting the review of that disclosure solely by the securities regulator in the issuer's home country.

MJDS has made it significantly easier for Canadian issuers to gain access to the U.S. capital markets.[1] MJDS offerings can be made in connection with a concurrent Canadian public offering or they can be made on a U.S.-only basis. MJDS issuers are also able to use their Canadian disclosure documents to meet their periodic reporting obligations in the United States (subject to complying with certain additional corporate governance and disclosure requirements mandated by the Sarbanes-Oxley Act, the Dodd-Frank Act and other U.S. federal legislation) and, in certain cases, to make tender offers to U.S. holders by complying with Canadian take-over bid rules instead of U.S. tender offer rules.

PRINCIPAL ADVANTAGES OF MJDS

MJDS offers Canadian issuers a number of significant advantages over using other types of Securities Act registration forms when accessing the U.S. public capital markets:

Canadian Prospectus Requirements Apply: The MJDS registration statement filed with the SEC will include a prospectus prepared in accordance with Canadian form and content requirements, with only slight modifications. Generally, the MJDS registration statement is "wrapped around" the Canadian prospectus, and requires the addition to the Canadian prospectus of certain legends notifying U.S. investors that the prospectus has been prepared by a Canadian issuer in accordance with Canadian disclosure standards. Disclosure relating to U.S. federal tax consequences of the offering is usually also added to the prospectus. Because the MJDS forms allow the deletion of information that would only be relevant to Canadian investors, the conventional practice is to remove the Canadian prospectus certificate pages from the U.S. version of the prospectus and to

1 Canadian companies can access the U.S. public capital markets by three different means of registration permitted by the SEC. The vast majority of eligible Canadian companies, for the reasons noted in this publication, will prefer to use MJDS. If, however, a Canadian company does not meet MJDS eligibility criteria, it can utilize the foreign issuer registration forms available to all non-U.S. companies, if eligible, or the registration forms available to U.S. companies. Some Canadian companies voluntarily use the registration forms applicable to U.S. companies in order to be evaluated by investors and analysts on the same basis as their U.S. competitors. Canadian companies can also access the U.S. capital markets through non-registered offerings, including offerings under Rule 144A and traditional private placements.

include a U.S.-style prospectus cover page in place of the Canadian prospectus cover page. There are usually only a few other minor differences between the U.S. version and the Canadian version of the prospectus, including the deletion of the section that discloses a Canadian investor's statutory right to rescind its acquisition of the offered securities in a prescribed period of time.

Although an MJDS prospectus is subject to the same liability standards for material misstatements and omissions as a prospectus forming part of a non-MJDS registration statement will be, only the substantive affirmative disclosure requirements (or "form calls") for a Canadian prospectus need be complied with. While they are sometimes followed voluntarily by MJDS filers, the usual U.S. requirements governing required financial statement presentation and disclosure, the specific U.S. form and content requirements for risk factor disclosure, executive compensation disclosure, management's discussion and analysis ("MD&A") and other SEC form requirements do not apply to an MJDS registration statement.

The exhibits to an MJDS registration statement do not follow the usual requirements for a non-MJDS registration statement; rather they include only copies of all documents incorporated by reference into the Canadian prospectus (such as the issuer's annual information form, financial statements, MD&A, proxy circular and material change reports) and all documents required to be filed publicly in Canada in connection with the offering (such as certain material agreements and experts' consents).

Canadian issuers eligible to use the Canadian "short-form" prospectus system, which allows the issuer to incorporate by reference its Canadian continuous disclosure documents, will use a Canadian short-form prospectus as the base document for the MJDS registration statement. A significant amount of additional information may be added voluntarily for marketing purposes depending on the extent of the issuer's market following in the United States.

Canadian regulators will generally complete their review of a short-form prospectus within three business days.

No SEC Review: Although the SEC reserves the right to review an MJDS registration statement, it will generally not review MJDS filings except possibly to confirm that the issuer meets the MJDS form eligibility requirements. Unless a Canadian preliminary prospectus is being filed initially as part of the MJDS registration statement (as would be necessary in a marketed offering to permit offers in the United States prior to effectiveness of the registration statement), an MJDS registration statement may become effective automatically upon filing if there is a concurrent Canadian offering and the issuer makes the applicable "check the box" election on the MJDS registration statement cover.[2] If the MJDS registration statement relates to a U.S.-only offering, it will be declared effective by the SEC only after the SEC receives a copy of the final receipt or notification of clearance issued by the Canadian principal reviewing authority.[3]

Simplified Ongoing Periodic Reporting: Like any other Securities Act registration statement, filing an MJDS registration statement will, except in limited circumstances, subject a Canadian company to ongoing periodic reporting obligations under the Exchange Act if it was not already subject to SEC reporting requirements.[4] However, under the MJDS regime, eligible Canadian issuers can meet these disclosure obligations by filing their Canadian continuous disclosure documents with the SEC, subject to the addition of limited supplemental information.[5]

2 Examples of situations where this approach may be followed include registered exchange offers and shelf registration statements.

3 Although the prospectus will be subject to review by the securities regulatory authority in each province where it is filed, one Canadian regulator will act as the principal reviewing authority and will coordinate the clearance of comments. The principal reviewing authority is usually the securities commission in the issuer's home province.

4 A Canadian issuer will, however, be exempt from the duty to file reports under the Exchange Act solely as a result of registering securities on SEC Form F-7, Form F-8 or Form F-80, provided the issuer is exempt from the obligations of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b). See Rule 12h-4.

5 In order to comply with U.S. requirements for periodic reports using MJDS, the Canadian disclosure documents must contain certain supplemental information mandated by the Sarbanes-Oxley Act, the Dodd-Frank Act and other U.S. federal legislation.

OTHER CONSIDERATIONS

Other considerations relevant to an MJDS offering are as follows:

Liability Standards, Due Diligence and Other Regulatory Filings: The use of MJDS does not change the fact that Canadian issuers, their directors, certain executive officers who sign the registration statement and the underwriters involved in offering securities in the United States will be subject to and must comply with the civil liability standards and anti-fraud provisions of the U.S. securities laws. As such, the Canadian prospectus that forms the basis of the MJDS registration statement must contain all material information as may be necessary to make the statements contained in the Canadian prospectus not misleading. The underwriters and their counsel, in order to help to establish a "due diligence" defense under the U.S. securities laws[6] will expect to conduct their customary business and legal due diligence in connection with the MJDS offering and to receive from Canadian and U.S. legal counsel opinions and negative assurance letters that relate to the absence of material misstatements or omissions in the MJDS registration statement. MJDS offerings are also generally subject to all of the normal course requirements of U.S. public offerings, such as broker-dealer registration, Financial Industry Regulatory Authority, Inc. ("FINRA") clearance of underwriter compensation[7] and publicity restrictions. Although recent reforms, including those under the JOBS Act, have eased some of the publicity restrictions under U.S. law for SEC-registered offerings, the Canadian restrictions must still be complied with if there is a concurrent Canadian public offering.

Marketing Considerations: While MJDS offers Canadian issuers the ability to offer securities to the U.S. public primarily on the basis of a Canadian prospectus, U.S. marketing considerations raised by the underwriters may sometimes result in the inclusion of information or a method of presentation that more closely aligns with the expectations of U.S. investors. As a result, for example, a Canadian issuer that is eligible to use a "short-form" prospectus in Canada may decide to include additional information about its business and additional financial information instead of solely incorporating by reference to the applicable Canadian continuous disclosure filings if U.S. investors are not already familiar with the Canadian issuer. Voluntary inclusion of this additional information will generally not delay the review by the Canadian securities regulators.

No U.S. GAAP Reconciliation Required for IFRS Financial Statements: Since January 1, 2011, International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board (the "IASB") have been the applicable accounting principles for Canadian public companies.

The SEC has adopted rules allowing foreign private issuers to present their financial statements in accordance with IFRS without a reconciliation to U.S. GAAP.[8] Accordingly, financial statements of Canadian public companies included or incorporated by reference in registration statements (including MJDS registration statements) which are presented in IFRS as issued by the IASB do not require a reconciliation to U.S. GAAP.[9]

6 For a more detailed discussion of the due diligence defense available under U.S. securities laws, see page 23 under the caption "Principal Sources of Liability for the Contents of a Registration Statement and Prospectus".

7 For details regarding FINRA's review of underwriter compensation arrangements and related matters, please see "Additional Considerations for an MJDS Offering – FINRA Review of Underwriting Arrangements" on page 14.

8 SEC Release Nos. 33-8879; 34-57026.

9 Foreign companies that do not qualify, or which cease to qualify, as foreign private issuers are generally required to present their financial statements in SEC-filed documents using U.S. GAAP, and are not permitted to use their home country GAAP with only a reconciliation to U.S. GAAP (see the "International Reporting and Disclosure Issues" in the Division of Corporation Finance publication, dated November 1, 2004, published by the Division of Corporation Finance of the SEC, http://www.sec.gov/divisons/corpfin/internatl/cfirdissues1104.htm). With limited exceptions, a Canadian issuer that does not qualify as a foreign private issuer will be required to present its financial statements in U.S. GAAP in addition to or instead of IFRS financial statements, and would not be permitted to satisfy the U.S. GAAP financial statements requirement with only a reconciliation of its IFRS financial statements to U.S. GAAP.

Generally, all U.S. and foreign private issuers filing registration statements and reports with the SEC are required to include financial statements that have been audited in accordance with United States generally accepted auditing standards (Auditing Standard No. 1 ("AS 1") of the Public Company Accounting Oversight Board ("PCAOB"))[10]. An exception to this rule is made for Canadian companies filing MJDS registration statements and annual reports. Those Canadian companies are permitted to include or incorporate by reference financial statements that have been audited in accordance with Canadian generally accepted auditing standards ("Canadian GAAS"). As a result, it is generally not necessary for Canadian issuers to engage their auditors to perform an audit review that complies both with Canadian GAAS and AS 1. The SEC staff has confirmed, in discussions with us in an effort to clarify certain published statements, that audit reports for Canadian companies do not have to refer to, and audits do not have to be conducted in accordance with, AS 1 for audited financial statements included or incorporated by reference in MJDS filings, registration statements or reports filed with the SEC.[11]

10 The PCAOB is responsible for the oversight of the auditing of U.S.-registered public companies and for establishing various standards, including auditing, quality control, ethics and independence standards relating to the preparation of audit reports. The PCAOB is a private entity that is subject to SEC supervision and regulation.

11 The SEC staff has confirmed that this position would also apply to Canadian companies using a non-MJDS form such as Form S-8 for compensation plans, or Form F-3 to register other securities (whether in the context of an automatically effective filing, such as for a dividend reinvestment plan, or for a financing) that incorporates by reference the financial statements originally included or incorporated by reference in an MJDS annual report. The SEC staff has indicated that the only circumstances where Canadian GAAS audited financial statements for a Canadian MJDS filer will not be accepted is in the context of an M&A transaction where a non-MJDS filer is required to include or incorporate by reference financial statements of the Canadian MJDS-filer target. In that case, a Canadian GAAS audit review would not be acceptable, and financial statements for the target audited in accordance with AS 1 would be required. The SEC's current stated position on this point may lead to a number of interesting consequences in the context of a contested M&A transaction, as MJDS filers may have a strategic advantage over non-MJDS filers when making unsolicited non-cash bids for targets that are Canadian MJDS filers.

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Registered Offers and Sales of Securities under MJDS

ELIGIBILITY REQUIREMENTS FOR MJDS REGISTRATION STATEMENTS

In order to be eligible to use any MJDS form, as a starting point, the following three conditions must be met:

- the issuer must be a foreign private issuer incorporated or organized under the laws of Canada or a province or territory of Canada;
- the issuer must have been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for at least 12 months (or, in some cases, 36 months) immediately preceding the filing of the applicable form and be currently in compliance with those disclosure requirements; and
- the issuer must not be an "investment company" within the meaning of the Investment Company Act of 1940, as amended (the "1940 Act"), registered or required to be registered under the 1940 Act.[12]

Foreign Private Issuer Status: A corporation incorporated under the *Canada Business Corporations Act* or a provincial corporate statute, or a non-corporate issuer formed under the laws of a province of Canada will be a foreign private issuer unless it is disqualified from that status as a result of having the substantial connections to the United States described below.

Disqualification from foreign private issuer status will occur if, as of the last business day of its most recently completed second fiscal quarter (i) more than 50% of an issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States, and (ii) the issuer has any one of the following three additional connections to the United States:

- a majority of either its executive officers or directors, considered as separate groups, are either United States citizens or residents;
- more than 50% of its assets are located in the United States; or
- its business is administered principally in the United States.

Canadian issuers, like all other foreign issuers, are required to test their status as "foreign private issuers" annually on the last day of their most recently completed second fiscal quarter. Companies that are filing their initial registration statement with the SEC under either the Securities Act or the Exchange Act, however, determine their foreign private issuer status within 30 days of the filing.

12 For a general discussion of this statute, please see page 16 under the caption "Investment Company Status".

An issuer that has a majority of its shares held of record by U.S. residents but that continues to qualify as a foreign private issuer because it does not have any of the other relevant connections to the United States should be especially aware that taking certain voluntary actions could create an unintentional additional connection (such as allowing a majority of its board of directors or executive officers to consist of individuals who are U.S. citizens or residents) that would trigger a loss of foreign private issuer status. An MJDS issuer that does not qualify as a foreign private issuer on the last day of its second fiscal quarter will know immediately that it is not eligible to file its next annual report on Form 40-F and will no longer be able to use MJDS for offerings registered under the Securities Act. The issuer will, however, be able to use the other foreign private issuer registration statement forms, such as Form F-3, until the end of its fiscal year. It can also provide current reports on Form 6-K, rather than Exchange Act reports on Forms 10-Q and 8-K until the end of its fiscal year.

In addition, loss of foreign private issuer status will have potential consequences under the listing rules of the NYSE, NYSE MKT and NASDAQ. For additional details, please see "Part IV: Corporate Governance Requirements of the NYSE, NYSE MKT and NASDAQ." The consequences to insiders of public companies (officers, directors and beneficial owners of more than 10% of the issuer's equity securities) are also significant: six months after the test date, they will become subject to the U.S. insider reporting requirements (which generally only allow two business days to file reports of trades) and potential civil liability under the short-swing profit rules under the Exchange Act.

Guaranteed Debt Offerings: For offerings of guaranteed debt, it is important to recognize that unlike in Canada, in the United States a guaranteed debt offering is considered to be a concurrent offering of two separate securities: the debt obligation issued by the borrower and the guarantee issued by the guarantor. If the guaranteed debt is being offered to the public in the United States, both the debt security of the issuer and the guarantee security of the guarantor must be registered. In order to register the offering using MJDS forms, both the issuer and the guarantor must meet the applicable eligibility requirements for use of those forms, except that the subsidiary issuer or guarantor is deemed to meet the public float and/or reporting history requirements if those requirements are met by its parent. As only Canadian issuers are permitted to register securities on MJDS forms, MJDS may not be used to register guarantees of a Canadian issuer's debt securities given by a U.S. or other non-Canadian entity.[13]

ADDITIONAL CONSIDERATIONS FOR AN MJDS OFFERING

Execution and Filing of the Registration Statement: A registration statement under the Securities Act, including an MJDS registration statement, must be signed by the issuer and its principal executive officer, its principal financial officer, its principal accounting officer, at least a majority of the members of its board of directors and, in the case of a foreign issuer, a duly authorized representative in the United States. The board of directors must pass a resolution authorizing the filing of the registration statement and related amendments. Often, individuals who are required to sign a registration statement may do so by way of granting a power of attorney, which can facilitate filing mechanics. An issuer filing a registration statement on an MJDS form is also required to appoint an agent for service of process in the United States by filing a Form F-X with the SEC for that purpose. Unlike a Canadian prospectus, a U.S. registration statement and the prospectus forming part of it are not required to contain a certificate of the company or the underwriters as to the contents of the document. It is usual practice to omit the Canadian issuer and underwriter certificate pages from the U.S. version of an MJDS prospectus in accordance with the instructions to the MJDS forms, which permit the deletion of certain portions of the Canadian prospectus not considered necessary information for U.S. investors.

13 In some cases, a combined registration statement on both Form F-10 and also on a U.S. domestic or other foreign issuer registration statement form may be used where one or more issuers is not MJDS eligible.

Trading and Settlement Issues: The usual practice in a U.S. public offering is to close the offering on the basis of the "T+3" settlement cycle. This means that if the offering is priced before the market closes on a particular day ("T"), the closing of the offering would be on the third trading day thereafter. If the offering is priced after the market closes, then the next business day would be "T" and the closing of the offering would occur on the third trading day thereafter. Because Canadian rules allow purchasers to withdraw from trades until two business days have passed following their receipt of the final prospectus, it is the strong preference of Canadian underwriters not to follow the usual T+3 settlement cycle in order to allow enough time before closing for the Canadian final prospectus to be delivered to Canadian purchasers and for the two business day withdrawal period to expire. Accordingly, MJDS cross-border offerings will often close on the basis of a T+5 settlement cycle. In that case, the prospectus or a pricing term sheet, if applicable, should contain disclosure regarding this delay in the usual T+3 settlement process.

In the United States, it is usual practice for securities to start trading on the NYSE, NYSE MKT or NASDAQ at the opening of the market on the first trading day after the pricing of the offering. This is unlike the usual practice in Canada, where formal trading of the newly-issued securities generally does not commence on the Toronto Stock Exchange (the "TSX") until the morning of closing. In cross-border offerings under MJDS, it has become a common practice to synchronize the start of trading on both markets on the business day following pricing by making special arrangements with the TSX to commence trading on an "if, as and when issued" basis.

FINRA Review of Underwriting Arrangements: Unless an exemption is available, U.S. public offerings involving dealers that are FINRA members are subject to the review and approval of FINRA. FINRA is a self-regulatory organization that, among other things, governs the underwriting activities of U.S. broker-dealers. FINRA review of a securities offering is generally limited to the compensation arrangements between the issuer and the underwriter in order to confirm that the compensation payable to the underwriter is fair and not excessive in the circumstances.[14] There is a general exemption from FINRA review for registered offerings of non-convertible investment grade debt securities. Offerings registered on MJDS Form F-10 generally will be subject to FINRA review unless the offering is in accordance with Canadian shelf prospectus offering procedures.[15] Whether or not review by FINRA is required, U.S. broker-dealers must comply with FINRA rules regarding disclosure of actual or potential conflicts of interest.[16] In addition, in some cases it may be necessary to appoint a syndicate member to act as a "qualified independent underwriter" in order to ensure that certain traditional functions of an underwriter and disciplines of the underwriting process are followed fully notwithstanding an actual or potential conflict of interest between the issuer and one or more of the other underwriters.

The underwriters' U.S. counsel is generally responsible for ensuring compliance with FINRA requirements. As part of this process, the underwriters' U.S. counsel will typically send the issuer and its insiders a questionnaire addressing whether any relationships are present between the issuer and the underwriters which may be of relevance under the FINRA rules.

FINRA rules also restrict the ability of U.S. broker-dealers to offer equity securities in an initial public offering to purchasers who are affiliated with, or have certain other prescribed relationships with, FINRA members or their officers, directors or personnel, and individuals having prescribed relationships with any of those persons.[17] However, these rules will usually not apply to MJDS

14 See FINRA Rule 5110 (Corporate Financing Rule), which governs certain underwriting terms and arrangements.

15 See FINRA Rule 5110(b)(7)(C)(ii). Note that the FINRA filing exemption in connection with such an offering on Form F-10 is based on standards for use of Form F-10 approved in Securities Act Release No. 6902 (June 21, 1991). At that time, Form F-10 issuers were required to have an aggregate market value of C$360 million or more, which is no longer an eligibility criterion for the current version of Form F-10.

16 See FINRA Rule 2720 (Distributions of Securities of Members and Affiliates – Conflicts of Interest).

17 See FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings).

offerings given that there is an exemption for offerings by an issuer that already has an existing public trading market in Canada.

Regulation M: Regulation M is intended to preserve the integrity of the U.S. trading market by imposing certain restrictions on securities trading activities by issuers, their affiliates and underwriters participating in a distribution of securities during the course of that distribution which could have, or be perceived to have, the effect of manipulating the trading price of the offered security. Subject to a limited number of exceptions, such as permitted market stabilization activities, it is unlawful for a party involved in a distribution to bid for or purchase a security of the class that is being distributed or certain "reference" securities, such as securities convertible into the class being distributed. One of the exemptions from the application of Regulation M applies to "actively traded" securities, which are securities that have an average daily trading volume of at least US$1 million and the issuer of the securities has outstanding common equity with a public float of at least US$150 million. In a cross-border offering under MJDS, it will also be necessary to ensure compliance, to the extent applicable, with the Canadian Universal Market Integrity Rules of the Investment Industry Regulatory Organization of Canada and Ontario Securities Commission Rule 48-501, which prohibit certain trading activities by distribution participants in Canada.

Shelf and Post-Receipt Pricing Rules: The Canadian shelf and post-receipt pricing rules can be and often are used in connection with MJDS offerings. The Canadian shelf rules are similar to the U.S. rules for delayed or continuous offerings of securities under Rule 415 of the Securities Act. The post-receipt pricing rules, or "PREP rules", allow a final receipt to be issued for a Canadian prospectus before the offering price is determined and are functionally equivalent to Rule 430A and Rule 424(b) under the Securities Act. Although the MJDS forms do not allow Rule 415, Rule 430A or Rule 424(b) to be relied upon in an MJDS offering, they do permit the use of the corresponding Canadian rules in accordance with the general instructions to the MJDS forms.

An MJDS issuer may use the Canadian shelf rules, together with MJDS, to put in place a cross-border debt, equity or combined debt and equity "universal" Canadian base shelf prospectus and U.S. base shelf registration statement. The issuer would file the Canadian base shelf prospectus in all provinces of Canada (including the required French translation in Québec), and concurrently file an MJDS registration statement on Form F-10 with the SEC that also contains the base shelf prospectus. Upon completion of their review of the base shelf prospectus, the Canadian securities regulators would issue a receipt for the final Canadian base shelf prospectus. The MJDS registration statement will become effective once the SEC receives a copy of that final prospectus receipt or an amendment to the Form F-10 is filed post-receipt containing the final base shelf prospectus which elects to become automatically effective upon filing and no further "effective order" is required to be delivered by the SEC. The issuer may then do any combination of debt or equity take-downs off the shelf (depending on the type of security contemplated by the shelf prospectus) in Canada, the United States or both markets, during the 25-month period that the Canadian shelf rules will allow the base shelf prospectus to be used before a new base shelf prospectus must be filed (which is less than the three-year period during which a U.S. shelf registration statement may be used). The prospectus supplement setting out the terms of the specific take-down will be filed with the securities regulators in Canada in compliance with the Canadian shelf prospectus rules, but is not reviewed. A corresponding U.S. supplement to the base shelf prospectus is filed with the SEC under General Instruction II.L. to Form F-10 and is also not reviewed by the SEC.

The Canadian PREP rules allow the size of an offering to be increased or decreased by up to 20% from the offering size stated in the final base PREP prospectus without requiring an amendment to be filed. Upsizing an MJDS registered offering, however, requires filing a new MJDS registration statement (as opposed to filing a post-effective amendment) with the SEC to cover the full increased amount of the offered securities, although the registration fees previously paid may be applied to the filing fee for the new MJDS registration statement. The time required and steps necessary to prepare and make this filing should be taken into consideration so that, in the event an upsizing is required, there will not be any unexpected or undesired delay in the transaction timetable.

Registered Exchange Offers and Resale Registrations: The MJDS registration forms may also be used to conduct registered exchange offers for previously issued restricted nonconvertible debt securities or for resale registration statements. As a result, an MJDS issuer is able to grant registration rights to U.S. investors in connection with Rule 144A or other non-registered offerings in the United States, and to use MJDS to satisfy those registration rights by preparing an exchange offer or resale registration statement that will be subject to review only by Canadian securities regulators, and not the SEC, within the usual three business day review period for a Canadian short-form prospectus.

Soliciting Expressions of Interest in a "Bought Deal": Ordinarily, in Canada, in a "bought deal" transaction (where the underwriters commit to purchase the entire offering at the time the transaction is first announced) it is permissible for the underwriters to solicit expressions of interest immediately following the announcement of the transaction, provided that a preliminary prospectus for the offering is filed in Canada within four business days thereafter. Generally, in the United States, the "gun jumping" rules under the Securities Act prohibit the solicitation of expressions of interest for a registered public offering until after the registration statement pertaining to that offering has been filed with the SEC.[18] The JOBS Act has liberalized the gun-jumping restrictions in the United States for companies that meet the criteria for emerging growth companies ("EGCs")[19]. EGCs or any person authorized to act on behalf of an EGC may engage in oral or written communications with potential investors that are qualified institutional buyers (as defined in Rule 144A under the Securities Act) or institutions that are accredited investors (as defined in Regulation D under the Securities Act) prior to the filing of a registration statement with the SEC in order to determine whether those investors would have any interest in purchasing the EGC issuer's securities in a U.S. public offering. This ability to "test the waters" allows Canadian ECGs and their investment bankers to talk to institutional U.S. accounts to assess their interest in potential registered offerings before the registration statement (including an MJDS registration statement in a bought deal) is filed with the SEC and to not proceed with the registration statement filing in the United States if U.S. interest is insufficient. It is the usual practice in an MJDS bought deal for a Canadian issuer to ensure that both the Canadian prospectus and the MJDS registration statement can be filed concurrently in Canada and with the SEC immediately following the entering into of the purchase commitment by the underwriters and the public announcement of the transaction so that solicitations of expressions of interest or the making of offers may be lawfully commenced on both sides of the border immediately following the announcement.[20] MJDS issuers who already have an effective shelf registration statement on Form F-10 will not be subject to the U.S. gun jumping constraints when conducting a takedown from that shelf.

Investment Company Status: An "investment company" is subject to registration requirements under the 1940 Act unless an exemption is available. The 1940 Act is principally intended to regulate the activities of investment vehicles such as mutual funds, and an issuer that inadvertently becomes an "investment company" would effectively become subject to requirements that are virtually impossible for it to comply with, resulting in a contravention of the 1940 Act and potentially severe consequences, such as the avoidance of its contracts.

18 For a further discussion of gun jumping and the related SEC rules, please see page 21 under the caption "Dissemination of Information While an Issuer is in Registration".

19 For a discussion of EGCs and other JOBS Act reforms, please see page 30 under the caption "Jumpstart Our Business Startups Act."

20 For Canadian issuers that qualify as WKSIs, Rule 163(a) under the Securities Act provides an exemption from the gun jumping restrictions that permits solicitations of expressions of interest in the United States before the registration statement is filed. However, most Canadian issuers eligible to do so will file their annual reports on MJDS Form 40-F and therefore, do not qualify as WKSIs as an issuer's status as a WKSI is dependent in part on utilizing Form 10-K or Form 20-F as its annual report form. See SEC C&DI 203.12 [January 26, 2009].

As Canada does not have a similar statutory concept, Canadian issuers are sometimes not aware that they may inadvertently be investment companies for U.S. securities law purposes. Absent an exemption, an issuer that holds or proposes to hold more than 40% of its assets (other than cash and U.S. government-issued securities) on an unconsolidated basis in "investment securities" will be an investment company. Investment securities include virtually all securities except for U.S. government-issued securities and shares of controlled subsidiaries that are not themselves investment companies. There are exemptions from investment company status for issuers that have fewer than 100 U.S. beneficial securityholders and for issuers whose U.S. securityholders are comprised solely of "qualified purchasers" (a sophisticated investor standard that includes most "qualified institutional buyers" as defined by Rule 144A under the Securities Act).[21]

Canadian issuers raising capital for future acquisitions, or as working capital, need to be particularly attentive to potential 1940 Act issues if they are intending to make short-term investments of the proceeds of an offering pending expenditure. If the proceeds of the offering, together with existing investments, constitute more than 40% of total assets (other than cash and U.S. government-issued securities) on an unconsolidated basis, the issuer may inadvertently become an investment company following the closing of the offering.[22]

State Securities Laws and Federal Pre-Emption: Virtually all U.S. states have laws regulating the offer and sale of securities. These laws, commonly known as "blue sky" laws, must be considered in addition to the applicable U.S. federal securities laws. In general, blue sky laws contain three distinct types of regulatory provisions: (a) anti-fraud provisions, (b) provisions requiring the registration or licensing of certain persons engaging in the securities business, and (c) provisions requiring the registration or qualification of securities. In 1996, the U.S. Congress enacted The National Securities Markets Improvement Act of 1996 ("NSMIA"), which provides for federal pre-emption of state laws and regulations requiring registration or qualification of securities or securities transactions in a number of situations (most importantly, for an offering of any class of securities that is or, upon closing will be, listed on a U.S. national stock exchange, and certain other securities of an issuer that has a listed class of securities). As a result, the need for state registration or qualification in offerings of U.S. listed securities has effectively been eliminated. However, for issuers whose securities are not listed on a U.S. national stock exchange, state registration and clearance requirements, or exemptions therefrom, must still be considered on a state-by-state basis. In addition, state requirements for broker-dealer registration are not pre-empted by NSMIA, so all offers and sales of securities to U.S. purchasers may only be made by U.S. broker-dealers who are registered and in good standing with the SEC, FINRA and the state securities commission of the state where a particular purchaser is resident (unless exemptions are available[23]). Also, Canadian issuers should be aware that NSMIA does not pre-empt the application of state anti-fraud provisions. Consequently, a Canadian issuer offering securities in the United States under MJDS could face liability under both U.S. federal

21 There is also an exemption for companies that hold no more than 45% of their total assets in, and derive no more than 45% of their after-tax net income from, securities other than U.S. government securities, securities of majority-owned non-investment company subsidiaries and certain other permitted securities, provided that specified additional conditions are also met. Research and development companies may also be able to claim an exemption from investment company status if they meet the precise terms of an exemption specifically intended to recognize that these companies may have a legitimate need to hold more than 40% of their assets in investment securities pending expenditure.

22 There is an exemption available for issuers that temporarily become investment companies (referred to as "transient investment companies"), but a number of procedural requirements must be followed and appropriately documented in order for an issuer to use this exemption. Availability of this exemption is conditioned upon the adoption of a resolution by the issuer's board of directors undertaking to ensure that the company will cease to be an investment company within the following year. The issuer must also evidence its intent—by its activities and by resolutions adopted by its board of directors—to be engaged primarily in a business other than that of investing, reinvesting, owning, holding or trading in securities either directly or through majority-owned subsidiaries or through controlled companies conducting similar types of business. Issuers may rely on this exemption no more than once during any three-year period.

23 For example, Rule 15a-6 under the Exchange Act exempts foreign brokers and dealers conducting securities activities in the United States from the broker-dealer registration requirements under the Exchange Act if specified conditions are met, including conducting those securities activities with the involvement of a U.S. registered broker-dealer.

securities law and applicable state securities laws (as well as all applicable Canadian securities laws) in the event that the prospectus contains a material misstatement or omits to state a material fact.

Plain English: In the United States, registration statements (and the information that is incorporated by reference) are required to be written in a clear, concise and understandable manner.[24] In addition, under the SEC's "Plain English" requirements, an issuer is required to use "plain English" on the front and back cover pages of the prospectus as well as in the summary and risk factors sections. These Plain English rules, prescribed by the SEC in 1998 in order to facilitate the creation of clear and more informative disclosure documents, require the issuer to use short sentences and to present complex information in tables or in bulleted lists. Although these rules do not as a technical matter apply to MJDS registration statements, for marketing purposes it will often be decided that the Canadian MJDS prospectus will follow the style of a domestic U.S. prospectus, which will result in plain English principles being applied. There is also a similar though less strict Canadian requirement for clear and concise presentation of the entire contents of a prospectus.

MJDS REGISTRATION STATEMENT FORMS[25]

Form F-10: Form F-10 can be used to register any kind of security, including common shares, non-investment grade debt and preferred shares, except a derivative security (other than certain warrants, options, rights and convertible securities), by an issuer meeting the conditions described above under "Eligibility Requirements for MJDS Registration Statements" and having a public float[26] of its outstanding equity securities of at least US$75 million. A Canadian subsidiary of a Canadian parent that meets all of the other eligibility requirements of Form F-10 may also use Form F-10 to offer the subsidiary's debt securities or preferred shares even if the subsidiary does not have a 12-month Canadian reporting history or does not meet the US$75 million public float test, provided that the Canadian parent fully and unconditionally guarantees the securities being registered. In addition, any offer of convertible securities of such a Canadian subsidiary can only be convertible into securities of the guaranteeing Canadian parent.[27]

Derivative securities may not be registered using Form F-10 unless they fall within the scope of permitted exceptions. The permitted exceptions are warrants, options and rights to acquire other securities of the same issuer, or securities of an affiliate of the issuer, and convertible securities, provided such securities are convertible only into securities of the same issuer, or securities of an affiliate of the issuer. For this purpose, however, the term "affiliate" has a special, restricted definition, and includes only a person who owns or controls 10% or more of the equity shares of another person – and not a person whose equity shares are owned or controlled as to 10% or more by another person, or a person under common control. So, debt issued by a Canadian subsidiary that is convertible into common shares of its Canadian parent would be a permitted derivative that could (assuming all other eligibility requirements were satisfied) be registered on Form F-10.[28]

24 See Rule 421(b) under the Securities Act.

25 See Exhibit A for a more detailed summary of the various MJDS registration statement forms.

26 For each of Forms F-8, F-10 and F-80 "public float" means only those securities that are held by persons other than affiliates of the issuer. An "affiliate" is anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10% of the outstanding equity securities determined as of the end of the issuer's most recently completed fiscal year. The market value of the public float is computed by use of the price at which such shares were last sold, or the average of the bid and asked price of such shares, in the principal market for such shares as of the date within 60 days prior to the filing date.

27 In some cases, a combined registration statement on both Form F-10 and also on a U.S. domestic or other foreign issuer registration statement form may be used where one or more issuers is not MJDS eligible.

28 In contrast, if a controlling shareholder wishes to register warrants to acquire shares of the company it controls, Form F-10 would not be available because the underlying shares are not securities of an "affiliate" for this purpose. A way to achieve the same economic effect, however, and still be able to register the transaction on Form F-10 is to have the issuer register warrants of its own issue and to adopt arrangements whereby the shares necessary to satisfy the issuer's obligations under the warrants would be delivered to the issuer by the controlling shareholder pursuant to a back-to-back warrant.

Rescinded Form F-9 for Investment Grade Securities: Form F-9 was an MJDS registration statement form used to register investment grade debt or preferred shares. In connection with the removal of references to credit ratings from SEC forms required by the Dodd-Frank Act, the SEC rescinded Form F-9, effective as of December 31, 2012, with certain transitional relief that expired on December 31, 2015.

M&A Transactions on Form F-8 and Form F-80: Forms F-8 and F-80 are intended for use in registering securities offered as consideration in M&A transactions and not with respect to securities offered for sale in financing transactions. These forms can be used to register securities of a Canadian issuer in connection with an exchange offer or business combination, as a "wrap around" of a Canadian proxy circular or take-over bid circular. Both forms require that the issuer have at least a 36-month public reporting history in Canada, and at least a one-year trading history on a Canadian stock exchange. Generally, Form F-8 may be used where less than 25% of the target securities are held by U.S. holders and Form F-80 may be used where less than 40% of the target securities are held by U.S. holders. Securities registered on these forms must still be offered in compliance with state blue sky securities laws, absent an exemption or federal pre-emption[29]. The issuer in an exchange offer or all participants in a business combination must have a minimum public float of CDN$75 million. In addition, all of the companies involved in the business combination must be Canadian, and the surviving entity must be a foreign private issuer that is incorporated or organized in Canada. If Form F-8 or Form F-80 is not available to a Canadian issuer to register securities in a business combination, Form F-10 may still be used if participating companies that account for at least 80% of the total assets and gross revenues of the surviving entity meet the Form F-10 eligibility criteria and the target is a Canadian foreign private issuer. It should be noted that, in lieu of registering securities on Form F-8 or Form F-80, Canadian companies may also use the exemption in Rule 802 under the Securities Act to issue securities without a U.S. registration statement if the business combination or exchange offer involves a foreign private issuer target and U.S. holders hold 10% or less of the target class of securities. Further, in a court-approved plan of arrangement transaction, the exemption in Section 3(a)(10) of the Securities Act may also be available in lieu of registering securities under the Securities Act. A Canadian issuer will be exempt from the duty to file Exchange Act reports as a result of having registered securities on Form F-8 or Form F-80 provided that the issuer is exempt from reporting obligations under Section 12(g) of the Exchange Act under Rule 12g3-2(b).

Rights Offerings on Form F-7: Canadian issuers can use Form F-7 to extend a Canadian rights offering to U.S. shareholders under MJDS. Form F-7 can be used to register securities offered for cash upon the exercise of rights to purchase shares that are granted on a pro rata basis to existing securityholders. To be eligible to use this form, the issuer must have been listed on the TSX or another recognized Canadian exchange for at least 12 months, have a three-year reporting history with one or more Canadian securities regulators, and be in compliance with its Canadian continuous disclosure requirements. There is no public float requirement. The rights that are issued to U.S. holders may not be transferred except outside the United States in accordance with Regulation S under the Securities Act.[30] A Canadian issuer will be exempt from the duty to file Exchange Act reports as a result of having registered rights on Form F-7 provided that the issuer is exempt from reporting obligations under Section 12(g) of the Exchange Act under Rule 12g3-2(b).

29 The only purpose for the distinction between Form F-8 and Form F-80 is that some states grant blue sky law registration or qualification exemptions where the U.S. ownership level of the target is below 40%, while other states only grant an exemption where the U.S. ownership level is below 25% (and some states have not adopted any exemption at all relating to the use of these forms).

30 Regulation S consists of a General Statement of applicability of the Securities Act registration provisions in Rule 901 (the "General Statement") and two safe harbors in Rule 903 and 904. The General Statement provides that the registration provisions of Section 5 of the Securities Act do not apply to offers or sales of securities that occur outside the United States if both the sale and the offer relating to the sale are made outside the United States. Rules 903 and 904 are non-exclusive safe harbors for extraterritorial offers, sales and resales of securities. The safe harbor contained in Rule 903 applies to offers and sales by issuers, distributors, their respective affiliates, and persons acting on their behalf. The safe harbor contained in Rule 904 applies to resales by persons other than the issuer, a distributor, their respective affiliates (other than officers and directors who are only affiliates by virtue of these positions), and persons acting on their behalf.

FINANCIAL STATEMENT REQUIREMENTS

Canadian securities laws will determine what financial statements (and accompanying management's discussion and analysis) must be included or incorporated by reference in a prospectus forming part of an MJDS registration statement. Assuming that the issuer is eligible to use the short-form prospectus system in Canada, only the most recent two years of audited annual financial statements for the issuer need be included or incorporated by reference, together with any unaudited statements for the current quarter (the Canadian rules only require the inclusion or incorporation by reference of the most recent quarterly financial statements, and not all quarterly financial statements since the last fiscal year end). In addition, similar to the corresponding U.S. rules, if the issuer has recently completed or is contemplating a significant acquisition of assets, additional financial statements may be required, including historical financial statements for the acquired business (with the level of materiality determining the number of prior years that must be covered), as well as pro forma financial statements giving effect to the transaction. Although Canadian rules will allow short-form issuers to incorporate these financial statements by reference, for marketing purposes the necessary financial statements will sometimes be included in the prospectus. As U.S. rules typically require a prospectus to contain audited financial statements for the three most recently completed financial years, as well as five years of summary and selected financial information[31], marketing considerations will sometimes lead to the inclusion of the audited, summary and selected statements for those periods even though they go beyond what would be required by the Canadian rules.

Since January 1, 2011, IFRS has been the applicable reporting standard for Canadian public companies. Some Canadian companies, however, report in U.S. GAAP, either under a discretionary exemption obtained from the Canadian securities regulators or under an exemption available for any Canadian company subject to U.S. reporting obligations. The SEC's rules allow foreign private issuers to present their financial statements in accordance with IFRS (as issued by the IASB) without a reconciliation to U.S. GAAP. Accordingly, IFRS financial statements of Canadian public companies included or incorporated by reference in MJDS or non-MJDS registration statements do not require a reconciliation to U.S. GAAP.

XBRL REQUIREMENTS

XBRL (eXtensible Business Reporting Language) is an "interactive data" format for business and financial reporting that requires the use of a standard set of definitions, or taxonomies, to code the data so that users can access and compare it more easily using sophisticated analysis tools.[32] The SEC has already adopted an XBRL taxonomy for U.S. GAAP financial statements, and the SEC requires all issuers reporting in U.S. GAAP, including foreign private issuers, to file XBRL versions of their financial statements. An XBRL taxonomy for IFRS is in development, and all issuers reporting in IFRS will also be required to file XBRL versions of their financial statements once the taxonomy has been finalized and approved.

U.S. domestic issuers and foreign private issuers voluntarily filing annual reports on Form 10-K are required to include XBRL versions of their financial statements in each Form 10-K and Form 10-Q report they file, and also in certain cases in Form 8-K reports containing revised financial statements.

31 The JOBS Act reforms allow EGCs to provide only two years (rather than three years) of audited financial statements and related MD&A in its IPO registration statement and to omit selected financial data from any registration statement or periodic report for any period prior to the earliest audited period presented in connection with its IPO (instead of providing selected financial data for the preceding five fiscal years as would otherwise be required).

32 The SEC has stated that requiring issuers to provide their financial information in XBRL format in addition to providing it in the traditional format will:

(a) make financial information easier for investors to analyze and reduce costs involved in capturing and analyzing financial information;

(b) help companies automate preparation of regulatory filings and processing business information; and

(c) reduce costs for issuers by increasing the speed and accuracy of financial disclosure and by eliminating repetitive data entry and possibilities for human error.

For foreign private issuers, the first required filing of any XBRL financial statements will be the first annual report on Form 40-F or Form 20-F that is due to be filed after the issuer becomes subject to Exchange Act reporting obligations (and, for IFRS filers, after the XBRL taxonomy for IFRS has been approved and adopted by the SEC). Thereafter, XBRL financial statements will be required in each subsequent annual report. Although interim financial statements furnished on Form 6-K will not normally require XBRL tagging, an XBRL version of the financial statements may be required if previously filed annual financial statements are being revised, or if the financial statements are being updated in order to satisfy the nine-month updating requirement for financial statements incorporated by reference into a Securities Act registration statement.

As of the date of this publication, there is still no XBRL taxonomy approved by the SEC for use with IFRS. We are hopeful that the SEC will provide sufficient notice of the finalization of the XBRL taxonomy for IFRS, and the adoption of XBRL filing requirements for issuers reporting in IFRS, to allow ample time for issuers to comply without imposing any undue timing constraints or hardships. It is also to be hoped that the SEC will provide some accommodations during the initial implementation period similar to those that were previously made available to U.S. GAAP filers, such as extended filing deadlines for the XBRL version of the financial statements and a simplified "tagging" requirement for first-time XBRL filers.

TRUST INDENTURE ACT OF 1939

The Trust Indenture Act of 1939, as amended (the "TIA"), mandates the appointment of an independent and qualified trustee to protect the interests of holders of debt securities and contains a number of provisions that must be included in a related trust indenture, subject to available exemptions. Rule 4d-9 of the TIA exempts trust indentures filed in connection with offerings made on MJDS registration statement forms from almost all of the substantive requirements of the TIA relating to the qualifications of the trustee and the contents of the trust indenture, provided that the trust indenture is subject to either The Canada Business Corporations Act, The Bank Act, The Business Corporations Act (Ontario) or The Company Act (British Columbia).[33]

DISSEMINATION OF INFORMATION WHILE AN ISSUER IS IN REGISTRATION

U.S. securities laws, like Canadian securities laws, impose restrictions on the manner in which an issuer may communicate with the public immediately prior to and during a public offering of securities. Communications about a proposed offering prior to filing a registration statement could be deemed to be offers in contravention of the Securities Act. Any public announcement about the issuer and its business or plans (other than factual business developments made in the ordinary course of business and consistent with past practice) raises a concern that the issuer may be engaging in marketing or publicity activities that are intended, in whole or in part, to heighten investor interest in the issuer and demand for its securities.

Given the increased use of websites and electronic media, issuers and their counsel must carefully and regularly review the contents of the issuer's website to ensure that none of the information posted on the website could be deemed to be an improper solicitation of investors contrary to the registration requirements of the Securities Act. The antifraud provisions of the Securities Act apply to company statements made on the internet in the same way they would apply to any other statement made by or attributable to a company. All website communications should be reviewed, dated and evaluated for continued accuracy and relevance. Previously posted materials on company websites do not have to be updated so long as they are not being reissued or republished by the

33 Among the substantive provisions of the TIA that do continue to apply is the requirement in Section 316(b) to obtain the consent of each holder in order to affect or impair such holder's right to receive principal and interest on the debt security or their right to bring suit to enforce that right.

company. As such, it is advisable to archive previously posted material or to clearly label such materials as historical or previously posted. During an offering, an issuer should purge its website of any information that is inconsistent with registration statement disclosure. An issuer should also add a clear and noticeable disclaimer on the same page as any hyperlinks to third party websites indicating that the user is leaving the issuer's website. Statements containing information falling within the following categories are frequently posted on the issuer's website: (i) advertisements concerning the issuer's products and services; (ii) reports required to be filed with the SEC pursuant to the Exchange Act and Canadian continuous disclosure documents required to be filed with Canadian securities regulators; (iii) proxy statements, annual reports to security holders and dividend notices; (iv) press announcements concerning business and financial developments; and (v) answers to frequently asked questions concerning business matters. Companies that host blogs or shareholder forums on their website should be mindful that the antifraud provisions of the Securities Act will apply to statements made by the company.

Because MJDS-eligible issuers will be reporting issuers in Canada, they will have obligations under Canadian securities law and TSX rules to make disclosure of material facts and material changes that affect them. The extent to which Securities Act rules will permit that disclosure to be made in the United States will depend on whether the contents of any press release containing disclosure of material developments complies with the requirements of the applicable safe harbor provisions under the Securities Act.

The SEC's rules concerning gun jumping permit, among other things (i) well-known seasoned issuers to engage in oral and written communications at any time, subject to certain conditions, (ii) "test the waters" communications by an EGC with qualified institutional buyers and institutional accredited investors about a potential registered offering prior to the filing of a registration statement, (iii) reporting issuers to continue to publish regularly released factual business information and forward-looking statements, and (iv) communications by issuers more than 30 days before filing a registration statement to not be prohibited offers (so long as they do not refer to a securities offering that is or will be the subject of a registration statement).[34]

In addition, there are three other rules under the Securities Act that are relevant to managing the balance between an issuer's obligation to make public disclosure of material information and the concern that such disclosure may constitute improper publicity regarding an offering:

Rule 135e: This rule recognizes the obligation for non-U.S. companies to issue press releases in their home market (such as Canada) by providing a safe harbor for press releases that are issued outside the United States, so long as they contain a prescribed legend.[35] In Canada, in order to ensure that such press releases are only released by the issuer or its agents outside the United States, it has become the usual practice to include an additional legend in the press release to the effect that it is not intended for dissemination in the United States or for release to U.S. news and wire services.

Issuers should bear in mind that posting press releases that were issued in reliance upon Rule 135e on their website may raise issues as to whether dissemination in the United States has been restricted, as Internet web pages generally are available to prospective investors in the United States without restriction.[36]

34 See Rules 163A, 168 and 169 under the Securities Act and the SEC's "Securities Offering Reform" Release No. 33-8591 July 19, 2005.

35 The legend must state: (i) that the materials do not constitute an offer of any securities for sale in the United States; (ii) the securities may not be offered or sold in the United States absent registration or an exemption from registration; (iii) that any public offering to be made in the United States will be made by means of a prospectus that may be obtained from the issuer and that will contain detailed information about the issuer and management, as well as financial statements; and (iv) whether the issuer intends to register any part of the offering in the United States.

36 The SEC has in the past stated the position that dissemination through the Internet by an issuer or other person covered by Rule 135e of any press-related materials or press conferences will not comply with Rule 135e unless procedures are implemented to assure that only permitted recipients under the rules are able to access the information.

Rule 135: This rule permits issuers to make specific public statements with respect to a proposed public offering prior to the filing of a registration statement. Press releases that rely on this safe harbor may only contain a statement that an offering will be made by means of a prospectus and limited information regarding the identity of the issuer and the securities proposed to be offered. The statement may not identify the underwriters or provide information regarding the business of the issuer. However, it is typical to provide the names of underwriters in a press release issued in Canada, and it is sometimes necessary or desirable to issue a press release announcing the offering before any registration statement or prospectus filing is made (such as, for example, in the case of a bought deal offering). In this situation, some Canadian issuers making a registered offering in the United States have produced two versions of the press release. The first will have the legend and restriction on U.S. dissemination necessary to comply with Rule 135e and will also contain the names of the underwriters. The second version, intended for release in the United States, will comply with the legending requirements and content limitations of Rule 135 (typically, the only difference will be that the names of the underwriters will not be included).

Rule 134: Following the initial public filing of an MJDS registration statement, Rule 134 of the Securities Act allows a broader range of contents in published notices, circulars, advertisements, letters and other communications, including press releases. Issuers rely primarily on this rule to announce the filing of their registration statement relating to a proposed offering. The information that the issuer may publish or transmit under Rule 134 includes, among other things, its name, the full title and amount of the security being offered, a limited description of the issuer's type of business, the price or method of determining the price of the security, the name and address of the sender of the communication, the names of the underwriters and the approximate commencement date of the proposed offering.

A press release issued in Canada by an issuer that is already subject to reporting requirements under the Exchange Act will have to be furnished to the SEC as a report on Form 6-K. As there is a statutory requirement under the Exchange Act to furnish these reports, the fact that the contents of the report will be available to prospective U.S. investors without restriction upon being furnished to the SEC on Form 6-K generally does not raise a concern about improper solicitation in the United States.

Free Writing Prospectus: In recognition of the prevalence of technologies that have increased the market's demand for more timely corporate disclosure and the increased importance of electronic dissemination of information, including the use of the Internet, the SEC's 2005 securities offering reforms introduced rules permitting the delivery of a "free writing prospectus"[37] which may be used in addition to a preliminary prospectus to offer securities prior to the effectiveness of a registration statement. In an MJDS offering, the benefit of these rules will be constrained by the need to comply with the applicable Canadian rules regarding acts in furtherance of a trade, which have not yet been similarly liberalized. Generally, to comply with these Canadian constraints, the contents of a free writing prospectus used in an MJDS offering must be limited to information already contained in the Canadian prospectus.

PRINCIPAL SOURCES OF LIABILITY FOR THE CONTENTS OF A REGISTRATION STATEMENT AND PROSPECTUS

Section 11 of the Securities Act: Section 11 of the Securities Act imposes statutory liability for material misstatements and omissions in any registration statement filed under the Securities Act, including MJDS registration statements, and the prospectus forming part of that registration statement.

37 A free writing prospectus is, except as otherwise specifically provided or required by the circumstances, a written communication, including electronic communication, that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement and does not fall under any other defined form of prospectus or specifically exempted form of communication.

If at the time a registration statement becomes effective it contains an untrue statement of a material fact or omits to state a material fact required to be included in the registration statement or necessary to make the statements in the registration statement not misleading, any person acquiring a security under that registration statement has a right of action for damages against the persons who signed the registration statement (which at a minimum includes the issuer,[38] its principal executive and financial officers, and at least a majority of the members of the board of directors), every person who is a director (or who has been named and is about to become a director), any selling securityholder, the underwriters and every accountant, engineer, appraiser or other professional person who has, with his or her consent, been named as having prepared or certified any part of the registration statement.

Although issuers are strictly liable for any material misstatements or omissions, other persons subject to liability (including the underwriters, officers, directors and any selling securityholders) will have the benefit of a "due diligence" defence under the Section 11(b) of the Securities Act. While none of the U.S. Congress, the SEC or the U.S. courts has prescribed the precise practices that would establish conclusively whether a party has conducted a due diligence investigation sufficient to defend against a claim under the U.S. federal securities laws,[39] there are various procedures that underwriters have traditionally employed as a means to demonstrate the reasonableness of their investigation. In addition to discussions with senior management of the issuer, document review and the receipt of a "comfort letter" from the issuer's independent public accountants, oftentimes (and almost always in a U.S. public offering) underwriters request that the issuer's counsel and underwriters' counsel, as a condition to closing the securities offering, deliver a letter indicating that nothing has come to the attention of such counsel that has caused it to believe that the offering document contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading. Portions of the registration statement that are based upon an expert's authority (such as the audited financial statements or reports covering mineral and oil and gas reserves and resources) or copies or extracts from reports or valuations made by any experts will not attract liability if, at the time the registration statement became effective, the person had no reasonable grounds to believe (i) that the statements were untrue, (ii) that there was an omission to state a material fact that was required to be stated or necessary to make the statements not misleading, or (iii) that such portion of the registration statement did not fairly represent the expert's statement or was not a fair copy or extract from the report or valuation of the expert. Regarding other portions of the registration statement, such as the general description of the issuer and its business, after reasonable investigation, the person against whom liability is sought must have had reasonable grounds to believe and does believe that, at the time the registration statement became effective, such statements were true and that there was no omission to state a material fact required to be stated or necessary to make the statements not misleading.

Persons covered by Section 11 cannot avoid liability by simply relying on the fact that another party prepared the registration statement or a part of it. The process employed in most U.S. public offerings is to have the "outside"[40] directors read the registration statement prior to the initial filing with the SEC, and again just prior to the time it is declared effective by the SEC. These directors are invited to ask questions of the responsible persons or submit comments on the proposed text of the registration statement. Most officers and "inside"[41] directors are traditionally more involved in the preparation of the registration statement and therefore have ample opportunity to ask questions and provide comments throughout the process.

38 In order to ensure that the registration statement is accurate and complete, the issuer will usually send a questionnaire to its officers and directors and will require that they provide information that may have to be disclosed in the registration statement.

39 Section 11(c) states that the standard of reasonableness of the due diligence defense is that of a prudent person in the management of their own property.

40 "Outside" directors are typically directors who have no affiliation with the issuer other than through their position as director.

41 "Inside" directors include those who have additional roles as officers of the issuer or who are affiliated with the issuer other than solely as a result of their position as director.

It is important to note that although a due diligence defence is available to selling securityholders under Section 11 of the Securities Act, under Canadian securities law no due diligence defence is available to selling securityholders.

Section 12(a)(2) of the Securities Act: Section 12(a)(2) imposes liability on any person who offers or sells a security by means of a prospectus or oral communication which contains an untrue statement of a material fact or omits to state a material fact that is necessary to make the statements made, in the light of the circumstances under which they were made, not misleading. The Securities Act provides that the person liable under this section is only liable to those purchasing the securities from them. In certain instances, however, courts have interpreted this section of the Securities Act to impose liability even where there was no strict privity between the parties. There is a defence for claims brought under this section that is available to any person who can prove that he or she did not know, and could not reasonably have known, about the untrue statement or omission.[42]

Rule 10b-5 Exchange Act Liability: Section 10(b) of the Exchange Act provides that it is unlawful to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of rules made under the Exchange Act. The related Rule 10b-5 provides that it is unlawful, in connection with the purchase or sale of any security:

- to employ any device, scheme or artifice to defraud;
- to make any untrue statement of a material fact or to omit to state a material fact necessary to make a statement, in the light of the circumstances under which it was made, not misleading; or
- to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

U.S. case law interpreting Rule 10b-5 has held that this rule creates a private right of action that can result in civil liability. Liability for contraventions of this rule can arise from statements contained in registration statements filed with the SEC (including MJDS registration statements), annual or interim reports filed with or furnished to the SEC, or other publicly released statements of the company, including press releases and other public information. The U.S. Supreme Court has held that information is "material" under Rule 10b-5 if it "would be viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[43] Recent U.S. Supreme Court decisions have, however, raised significant questions about the extent of the scope of potential liability under Rule 10b-5.[44]

Section 18 of the Exchange Act: Additionally, by filing a registration statement in the United States, an issuer will generally become subject to periodic reporting obligations under Section 15(d) of the Exchange Act. The contents of reports filed by an issuer with the SEC pursuant to those periodic reporting obligations (such as, in the case of Canadian MJDS issuers, annual reports on Form 40-F) will be subject to statutory liability under Section 18 of the Exchange Act if the reports contain statements that were, at the time and in the circumstances in which they were made, false or misleading with respect to any material facts. Any person who, in reliance on the misleading statement, has purchased or sold a security at a price that was affected by that false or misleading statement, can bring an action under Section 18 for damages caused by that reliance unless the person sued proves that the person acted in good faith and had no knowledge that the statement was false or misleading.

42 See "Time of Sale Information and Free Writing Prospectus" for a discussion of when liability under Section 12(a)(2) arises.

43 *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

44 See, for example, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011) (limiting Rule 10b-5 liability to the party that has ultimate authority for the making of the misleading statements); *Morrison v. National Australia Bank Ltd., U.S., No. 08-1191* (2010) (applying Rule 10b-5 only to transactions in securities that take place in the United States or transactions in securities listed on a U.S. securities exchange); and *Stonebridge Investment Partners LLC v. Scientific Atlantic, Inc.*, 552 U.S. 148 (2008) (secondary actors not subject to 10b-5 liability where plaintiffs cannot prove reliance upon such actors' allegedly deceptive statements.)

Indemnification: It is common for corporations to indemnify directors and officers for liabilities that may arise out of their service to the corporation. These indemnification arrangements may be contained in the corporation's by-laws, including awards for damages, penalties or fines, attorneys' fees and related expenses, or may be in the form of contractual provisions in employment agreements or stand-alone indemnity agreements. Typically, corporations will also procure officers' and directors' liability insurance.

Any indemnification arrangements for officers and directors must be disclosed in a registration statement, including MJDS registration statement forms,[45] under the Securities Act. However, the SEC has expressed its opinion that indemnification by an issuer of directors, officers and controlling persons from Securities Act liabilities is against public policy and thus unenforceable.[46]

Earnings Statement: It is common for the underwriters to require the issuer to agree contractually to make generally available to its securityholders, on a one-time basis, an earnings statement covering a period of at least 12 months after the effective date of such issuer's registration statement.

The reason for securing an agreement to make such an earnings statement generally available is that the Securities Act provides that a person who acquires securities issued in a public offering may sue, among others, the issuer, its directors and the underwriters for false or misleading statements in the prospectus; however, after the earnings statement referred to above has been made generally available to the issuer's securityholders, such a claimant will have a right of recovery in the case of a materially false or misleading registration statement only if the claimant can prove that it acquired the securities in reliance on an untrue or misleading statement in the registration statement. The earnings statement requirement may be satisfied by simply providing a copy of the next following annual report to all holders of the security that was publicly offered (assuming it covers the appropriate 12-month period) or, in the alternative, by publishing a newspaper notice of its availability and furnishing a copy to securityholders upon request. As a practical matter, Canadian issuers are generally subject to a statutory requirement to make annual financial statements available to shareholders under applicable corporate laws.

It should be noted that U.S. investors may have available to them rights of action under Canadian securities laws against both the issuer and underwriters signing a Canadian prospectus for misrepresentations in the Canadian prospectus. Canadian securities laws do not provide similar relief from their own deemed reliance provisions following the availability of the earnings statement, so investors may be able to bring an action under Canadian securities laws until the applicable statutory limitation period expires.

2005 SECURITIES OFFERING REFORMS

In an effort to modernize the rules relating to public offerings of securities in the United States, the SEC adopted significant amendments to a number of its existing rules under the Securities Act which became effective on December 1, 2005 (the "Securities Offering Reforms").[47] The following reforms are among the most notable:

Automatically Effective Shelf Registration for WKSIs: The Securities Act Reforms introduced the concept of a category of issuer called a "well-known seasoned issuer", or "WKSI". A WKSI is entitled to file a shelf registration statement with the SEC that becomes effective automatically upon filing and is not subject to SEC review. Companies that qualify for WKSI status are therefore able to access the U.S. capital markets to conduct registered securities offerings with the speed and facility comparable to a take-down off of a shelf registration statement, even if no shelf has previously been filed.

45 Other than Form F-7.

46 Globus v. Law Research Service, Inc. 418 F.2d 1276 (2nd Cir. 1969).

47 See SEC Release No. 33-8591 (July 19, 2005).

Ordinarily, a company is eligible for status as a WKSI if, as of a date within 60 days of the relevant eligibility determination date, it has a worldwide public market value of its outstanding voting and non-voting common equity of US$700 million or more. Alternatively, an issuer can also qualify as a WKSI for the limited purpose of offering only debt securities, if in the last three years, it has issued at least US$1 billion aggregate principal amount of non-convertible debt securities in primary offerings for cash (rather than exchange offers) registered under the Securities Act. Despite meeting these eligibility requirements, an issuer will be disqualified from WKSI status if it is not current in satisfying its Exchange Act reporting obligations or if it meets other "bad-boy" disqualifying criteria.

The SEC staff has taken the position that Canadian foreign private issuers that file annual reports with the SEC on Form 40-F under MJDS are not eligible to be WKSIs, even if they meet all of the other stated eligibility requirements. Although there are clearly significant advantages associated with WKSI status for large U.S. domestic issuers and non-Canadian foreign issuers, the incremental advantages for Canadian foreign private issuers using MJDS would not be as significant as they may first appear to be because of the following considerations:

- MJDS eligible issuers are already entitled to file a registration statement with the SEC that becomes automatically effective, without SEC review, using the MJDS registration forms;
- in order to make registered offerings of any securities in the United States, Canadian issuers based in provinces such as Alberta and British Columbia will require a concurrent Canadian prospectus, even if they are eligible under U.S. law to make a U.S.-only offering as a WKSI because of the position taken by the staff of the securities commissions in those provinces that provincial securities laws apply to distributions of securities outside those provinces;
- a Canadian issuer will always require a concurrent Canadian prospectus in order to make a cross-border offering of securities in which a portion of the offering is registered under the Securities Act and a portion is qualified by prospectus under Canadian securities law;
- the review period for a Canadian short-form prospectus is only three business days, absent unusual circumstances, and for a seasoned issuer there are usually no comments that result in a delay of the timetable for an offering; and
- a Canadian issuer that does not wish to be subject even to the short three-day Canadian review and comment process could file a shelf prospectus in Canada, and use MJDS to concurrently file the Canadian shelf prospectus under a shelf registration statement in the United States, in advance of an actual offering and then conduct shelf take-downs without review in either jurisdiction.

Some large Canadian issuers have considered the merits of abandoning the use of Form 40-F as their annual reporting form and instead voluntarily filing their annual reports on Form 20-F or Form 10-K solely to become eligible for WKSI status. This course of action may not, however, be well advised. In addition to the considerations listed above, which will often impose the need for a Canadian prospectus in addition to the U.S. registration statement (in which case the Canadian prospectus would be the gating item from a timing perspective), the costs and burdens of switching from Form 40-F to Form 20-F or Form 10-K annual reporting are not insignificant.

Becoming a Form 20-F filer involves drafting an annual report that responds to the specific information requirements of Form 20-F, which are notably different from the disclosure requirements for Canadian annual information forms. As Form 20-F is based on the disclosure requirements of the International Organization of Securities Commissions, it is also different from the disclosure requirements ordinarily applicable to U.S. domestic companies.

Choosing to become a Form 10-K filer involves not only submitting to the more stringent disclosure standards that apply to the annual reports of U.S. domestic companies, but also to the requirement to file quarterly reports on Form 10-Q and current reports on Form 8-K, with most Form 8-K reports due within four business days of the triggering event. Filing annual reports on Form 10-K therefore creates significant additional compliance costs for periodic and current reporting throughout the entire year, in addition to the extra work necessary to produce the annual report form itself.

Time of Sale Information and Free Writing Prospectuses: Under the Securities Offering Reforms, the SEC clarified that issuers and underwriters in a registered offering are subject to liability under Section 12(a)(2) of the Securities Act if the information made available to investors at the time of their investment decision (the "Time of Sale Information") contains any untrue statement of a material fact or an omission of a material fact. Under Rule 159, any information conveyed to the purchasers after the time of sale will not be taken into account for Section 12(a)(2) liability purposes. Time of Sale Information typically includes the preliminary prospectus used to market the offering, as well as any additional information communicated to investors, whether orally or in writing, prior to the time that they make their investment decision. To provide a mechanism for allowing Time of Sale Information to be updated and fully complete, without the requirement to reprint and re-circulate an amended preliminary prospectus in a U.S. registered offering, the Securities Offering Reforms allow the delivery to investors of a free writing prospectus, and the contents of any free writing prospectus will form part of the Time of Sale Information.

The necessity of introducing these new rules under the Securities Act is best understood when considered in contrast to Canadian securities laws. In Canada, investors receive a preliminary prospectus upon which they base their initial decision to place an order to purchase securities. After the final prospectus has been filed and a receipt is issued for it, the underwriters will confirm the sale. The purchaser, however, is not legally required to proceed with the purchase and has the right to withdraw from the contract to purchase the security for two business days following receipt of the final prospectus. This withdrawal right gives the investor the opportunity to reconfirm or reconsider the investment decision in light of the information contained in the final prospectus. Accordingly, under Canadian securities laws, investors make their ultimate investment decision on the basis of the contents of the final prospectus.

In contrast, there is no withdrawal right following receipt (or deemed receipt) of a final prospectus under the Securities Act. Generally, investors make their investment decision based on the contents of the preliminary prospectus, as supplemented with any additional Time of Sale Information, and have no opportunity to reconsider or revoke that decision following receipt of the final prospectus. If any material changes are required to the contents of the preliminary prospectus, they must be communicated to prospective investors before the trade is confirmed through a free writing prospectus forming part of the Time of Sale Information, or else the information will not be available to investors to factor into their investment decision.

These differences create a number of important procedural tensions between the Canadian and U.S. sides of a cross-border offering, including offerings under MJDS. Canadian lawyers are accustomed to making changes from the preliminary to the final prospectus to take into account desirable changes, updates or corrections that come to light after the preliminary prospectus has been filed; however, a change of this sort usually falls short of being a "material adverse change" that would trigger the requirement for an amended preliminary prospectus to be reprinted and re-circulated under Canadian securities laws. By contrast, in the context of a concurrent U.S. offering, making these kinds of changes to the Canadian final prospectus could, depending upon the circumstances and the nature of the change, create a liability risk in the United States based on a potential deficiency in the Time of Sale Information, unless a free writing prospectus identifying any relevant change is circulated to prospective investors in the United States before their purchases are confirmed. From the U.S. perspective, U.S. underwriters who wish to take advantage of the flexibility of the free writing prospectus concept to communicate additional information to prospective investors must bear in mind that Canadian securities laws remain much more restrictive in terms of the kind of information (other than the preliminary prospectus or an amended preliminary prospectus) that can be delivered to prospective investors in Canada. A free writing prospectus cannot be used in Canada for marketing purposes. However, Canadian liability concerns that may arise as a result of not communicating to Canadian investors information contained in the free writing prospectus through delivery of the free writing prospectus itself could be addressed by adding that same information to the Canadian (and also the U.S.) final prospectus.

Because liability for Section 12(a)(2) purposes will apply based on the contents of the Time of Sale Information, including the preliminary prospectus, it has become common practice for U.S. underwriters to request that auditor "comfort letters" and counsel's negative assurance letters (or "10b-5 letters") regarding disclosure address the contents of the preliminary prospectus and other Time of Sale Information in addition to the contents of the final prospectus.

Electronic Roadshows: Under the Securities Offering Reforms, electronic roadshows are permitted (and encouraged) to be made available to all prospective investors, including retail purchasers. Although an electronic roadshow may constitute a free writing prospectus, the contents of the roadshow are generally not required to be filed with the SEC. The one exception to this general rule is for initial public offerings in the United States. For this purpose, an initial public offering is an offering by an issuer who, prior to the offering, was not subject to ongoing reporting obligations under the Exchange Act. A transcript of the electronic roadshow for an IPO and copies of the slides must either be filed with the SEC or a bona fide version of the roadshow must be made available without restriction to all prospective investors, including retail investors.

Under Canadian securities laws, however, an electronic roadshow may not be made generally available to retail investors. It may be made available to institutional investors, but only on a password-protected basis.

For transactions that do not constitute an IPO in the United States, the electronic roadshow may be restricted only to institutional investors. If it is password protected (and the password is only given to institutional, but not retail, Canadian investors) or other precautions are taken to ensure that the electronic roadshow is not accessed by Canadian retail investors, then it will be possible to comply with both Canadian and U.S. law without conflict.

In transactions that are considered to constitute a U.S. IPO for this purpose, there will be a conflict that may preclude the use of an electronic roadshow entirely. The SEC staff has taken the position that in order to be "available without restriction", the electronic roadshow must not be subject to any restrictions on access by Canadian retail investors. However, in order to comply with Canadian securities law, such a restriction on access must be imposed. Therefore, it will not be possible to comply with the requirement to make a bona fide version of the roadshow available without restriction while also complying with applicable Canadian securities laws. The only remaining option under the U.S. rules is to file the roadshow transcript and slides with the SEC if any electronic roadshow is used in a U.S. IPO transaction. U.S. underwriters and their counsel, however, will be very reluctant to file the contents of an electronic roadshow with the SEC because of the incremental litigation risks created by having a public record of the contents of the roadshow permanently available to the public (generally, electronic roadshows are subject to restrictions on downloading and printing, so that their contents cannot be recorded and preserved by viewers).

In a Canada/U.S. cross-border IPO, it has become customary to obtain an exemption order from the Canadian securities regulators to allow the electronic roadshow to be made publicly available to retail investors in Canada. However, it is a condition of those exemption orders that the issuer and the Canadian underwriters contractually agree to assume the same liability to investors for any misrepresentation in the contents of the roadshow as if all of the same information were contained in the Canadian prospectus. The Canadian securities regulators have proposed amendments to the Canadian prospectus marketing rules which, if adopted, may impose additional requirements for the use of roadshows in Canada and could result in an unwillingness to continue to provide exemption orders on the same basis as had become customary.

Access Equals Delivery: The Securities Offering Reforms also provided that the requirement to deliver a final prospectus to investors in the United States is deemed to be satisfied once the final prospectus has been filed on the SEC's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR")[48] and is publicly available on the Internet. Investors' ability to have electronic access to the final prospectus is deemed equivalent to delivery to them. However, no corresponding change has yet been made to Canadian securities laws. In Canada, the final prospectus must either be delivered physically or, subject to compliance with Canadian electronic delivery rules, by e-mail or other electronic means, but accessibility on the System for Electronic Document Analysis and Retrieval ("SEDAR")[49] does not by itself satisfy that requirement. In light of the fact that the two business day withdrawal period does not commence (and therefore cannot expire) until the final prospectus is delivered to Canadian investors, it is important to ensure that Canadian underwriter participants in a cross-border securities offering continue to comply with the Canadian prospectus delivery requirements.

JUMPSTART OUR BUSINESS STARTUPS ACT OF 2012

In April 2012, the JOBS Act introduced significant changes to existing U.S. federal securities laws intended to make it easier for small and emerging companies to conduct public and private securities offerings in the United States. For Canadian companies accessing the U.S. public markets through MJDS, the elements of the JOBS Act that will be the most relevant relate to status as an emerging growth company and the liberalization of pre-offering communications with U.S. institutional investors.

Emerging Growth Companies: The JOBS Act created the concept of an "emerging growth company" ("EGC"), which is a company that first sells common equity securities after December 8, 2011 pursuant to an effective IPO registration statement under the Securities Act and that has total annual gross revenues of less than US$1 billion[50]. EGCs are either exempt from or eligible for simplified compliance with a number of securities laws requirements, including being permitted to:

- provide only two years (rather than three years) of audited financial statements in its IPO registration statement; as well, management's discussion and analysis of financial condition and results of operation disclosure (MD&A) will only need to cover those two years;
- omit selected financial data from any other registration statement and periodic report for any period prior to the earliest audited period presented in connection with its IPO (instead of providing selected financial data for the preceding five fiscal years);
- be exempt from "say-on-pay" voting and certain significant executive compensation-related disclosure requirements;

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48 See Rule 172 under the Securities Act. Under SEC rules, final prospectuses and other documents filed with or furnished to the SEC by foreign private issuers, including Canadian issuers, must be filed electronically using EDGAR. EDGAR filings are accessible on a current basis at the SEC's website: www.sec.gov.

49 Information that must be filed with any securities regulator in Canada need only be submitted in electronic format using SEDAR. SEDAR filings are accessible on the Internet at www.sedar.com.

50 More specifically, an "emerging growth company" is defined as an issuer that had total annual gross revenues of less than US$1 billion (as such amount is indexed for inflation every five years by the SEC to reflect the change in the Consumer Price Index for All Urban Consumers published by the U.S. Bureau of Statistics, setting the threshold to the nearest $1 million) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year will continue to be deemed to be an emerging growth company until the earliest of:

(a) the last day of the fiscal year during which it had total annual gross revenues of US$1 billion (as such amount is indexed for inflation every five years by the by the SEC to reflect the change in the Consumer Price Index for All Urban Consumers published by the U.S. Bureau of Statistics, setting the threshold to the nearest $1 million) or more;

(b) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act;

(c) the date on which such issuer has, during the previous three-year period, issued more than US$1 billion in non-convertible debt; or

(d) the date on which such issuer is deemed to be a "large accelerated filer" as defined in Rule 12b-2 under the. Exchange Act.

- be exempt from any new or revised financial accounting standards until such standards are broadly applicable to private companies; be exempt from the requirement to obtain an independent auditor's attestation report on the company's internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act ("SOX 404 Report");
- submit to the SEC a draft of its IPO registration statement for confidential non-public review by SEC staff prior to public filing (so long as the public filing of the confidential submission and all amendments occurs at least 15 days before any roadshow); and
- be exempt from any future rules of the Public Company Accounting Oversight Board requiring mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the issuer's financial statements.

These rule changes will primarily be of interest to Canadian issuers that qualify as EGCs and that intend to file an IPO registration statement with the SEC but are not eligible to use MJDS because they do not meet the Canadian reporting history or public float requirements. MJDS issuers, for example, already benefit from the requirement to only provide financial statements for the years required under applicable Canadian securities laws (which cover just a two-year period for short-form eligible issuers) and are not required to follow the SEC's rules regarding "say-on-pay" and executive compensation-related disclosure requirements. The exemption from the SOX 404 Report requirement for up to five years will benefit all Canadian issuers that qualify as EGCs and that intend to conduct a U.S. IPO, whether or not they are MJDS-eligible.

Ability to "Test the Waters" Before Filing a Registration Statement: The JOBS Act also allows an EGC or any person authorized to act on its behalf to engage in oral or written communications with potential investors that are qualified institutional buyers (as defined in Rule 144A under the Securities Act) or institutions that are accredited investors (as defined in Regulation D under the Securities Act) prior to the filing of a registration statement with the SEC in order to determine whether those investors would have any interest in purchasing the EGC issuer's securities in a public offering. This ability to "test the waters" allows Canadian EGCs and their investment bankers to talk to institutional U.S. accounts about potential registered offerings before the registration statement (including an MJDS registration statement in a "bought deal") is filed with the SEC.

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Exchange Act Registration and Stock Exchange Listings

EXCHANGE ACT REGISTRATION

A Canadian issuer using MJDS to register an offering of securities under the Securities Act will also have to register that class of securities under Section 12(b) of the Exchange Act in connection with a new listing of its securities on the NYSE, NYSE MKT or NASDAQ. Registration under Section 12(b) of the Exchange Act of a class of securities at the time of an MJDS registered offering requires the filing of a Form 8-A Exchange Act registration statement, which is generally not reviewed by the SEC.

It is also possible that a Canadian issuer may wish to list its outstanding securities on the NYSE, NYSE MKT or NASDAQ without concurrently making a new offering. Eligible Canadian issuers will be able to make the necessary Section 12(b) registration under MJDS by filing a Form 40-F registration statement, containing as exhibits all material information the issuer was required to make public in Canada, file on a Canadian stock exchange, or distribute to its securityholders since the beginning of its last fiscal year, supplemented with certain additional disclosure required by the Sarbanes-Oxley Act. Form 40-F should be available to most Canadian issuers with at least a 12-month Canadian reporting history and a public float of outstanding equity shares of US$75 million or more for use as an Exchange Act registration statement and absent unusual circumstances, would not be subject to SEC review.

All U.S. stock exchanges require issuers of listed securities to be able to issue uncertificated shares through a “direct registration program” or “direct registration system”, which is generally operated by a clearing agency registered under Section 17A of the Exchange Act, such as The Depository Trust Corporation (“DTC”). The direct registration permits an investor’s ownership to be recorded and maintained on the books of the issuer or the transfer agent without the issuance of a physical stock certificate. The U.S. stock exchanges do not require issuers to participate in direct registration of their listed securities or to eliminate physical stock certificates. However, issuers with listed securities on U.S. stock exchanges are required to make their securities eligible for such a program. To be eligible, an issuer is required to use a transfer agent that meets DTC’s requirements for direct registered securities. Further, the transfer agent must instruct DTC to designate the company’s securities as “direct registered eligible securities”. Lastly, Canadian companies may need to amend their corporate organizational documents (i.e., articles of association, by-laws) in order to permit the issuance of uncertificated shares, which may require shareholder approval, before the listing of securities can take place.

LISTING ON THE NYSE

Canadian issuers will generally seek a listing on the basis of the listing standards for U.S. domestic companies given that the minimum distribution requirements under the U.S. standards are based on North American holders and North American trading volume.[51] Like U.S. issuers, Canadian issuers listing equity shares on NYSE must meet the following distribution criteria:

For an initial public offering in the United States:

- 400 holders of at least 100 shares and 1,100,000 publicly-held shares; and[52]
- A price per share of at least US$4 at time of listing.

For a transfer of quotation:

- 1,100,000 publicly-held shares and either:
  - 400 holders of at least 100 shares;
  - 2,200 total shareholders and an average monthly trading volume of 100,000 shares for the most recent six months; or
  - 500 total shareholders and an average monthly trading volume of 1,000,000 shares for the most recent 12 months.

In addition, an issuer must have:

- US$40 million market value of publicly-held shares at the time of an initial public offering or spin-out and US$100 million market value of publicly-held shares for all other listings.

Furthermore, an issuer must also satisfy one of the following financial standards:

Earnings Test

- At least an (x) aggregate of US$10 million in pre-tax earnings from continuing operations (as adjusted for minority interest, amortization and other items) for the last three fiscal years (a minimum of US$2 million in each of the two most recent fiscal years and positive amounts in all three years) or (y) US$12 million in pre-tax earnings from continuing operations (as adjusted for minority interest, amortization and other items) for the last three fiscal years together with a minimum of US$5 million in the most recent fiscal year and US$2 million in the next most recent fiscal year.

Modified Earnings Test for EGCs

- Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for specified items[53], must total at least US$10 million in the aggregate for the last two fiscal years together with a minimum of US$2 million in both years.

Valuation/Revenue with Cash Flow Test

- At least US$500 million in global market capitalization, at least US$100 million in revenues during the most recent 12 month period, and at least US$100 million aggregate cash flows for the last three fiscal years with positive amounts in all three years, where each of the two most recent years is reported at a minimum of $25 million (subject to specified adjustments).

51 Canadian issuers may also elect to qualify for listing under the Alternate Listing Standards for foreign private issuers. See Item 103.01 of the NYSE Listing Rules for Non-U.S. Companies Equity Listings.

52 Excludes shares held by directors, officers, or their immediate families and other concentrated holdings of 10% or more.

53 See Section 102.01C (3)(a) through (3)(j) of the NYSE Listed Company Manual.

Modified Valuation/Revenue with Cash Flow Test for EGCs

- At least US$500 million in global market capitalization, at least US$100 million in revenues during the most recent 12 month period and at least US$100 million aggregate cash flows for the last two fiscal years with positive amounts in both years, with a minimum of $25 million in each year, as adjusted.[54]

Pure Valuation/Revenue Test

- At least US$750 million global market capitalization and at least US$75 million in revenues for the most recent fiscal year.

Affiliated Company Test

- At least US$500 million in global market capitalization, at least 12 months of operating history, the entity's parent or affiliated company is a listed company in good standing, and the entity's parent or affiliated company retains control of the entity or is under common control with the entity.

Global Market Capitalization Test

- At least US$200 million in global market capitalization (subject to specified adjustments).

Companies that list their securities on the NYSE are also subject to continued listing standards.

LISTING ON THE NYSE MKT

Every company that lists equity shares on the NYSE MKT has to comply with one of three options: (i) a minimum of 800 public shareholders with minimum public distribution of 500,000 shares; or (ii) a minimum of 400 public shareholders with minimum public distribution of 1,000,000 shares; or (iii) a minimum of 400 public shareholders with minimum public distribution of 500,000 shares and a daily trading volume of 2,000 shares during the six months prior to listing. In addition, in order to list, companies need to fulfill the requirements of one of four standards.

Standard 1

- Pre-tax income from continuing operations of at least $750,000 in the latest fiscal year, or two of the three most recent fiscal years;
- Market value of public float of at least US$3 million;
- US$3 minimum share price; and
- Shareholders' equity of at least US$4 million.

Standard 2

- Market value of public float of at least US$15 million.
- US$3 minimum share price;
- Two-year operating history; and
- Shareholders' equity of at least US$4 million.

Standard 3

- Market capitalization of at least US$50 million;
- Market value of public float of at least US$15 million;
- US$2 minimum share price; and
- Shareholders' equity of at least US$4 million.

54 See Section 102.01C (I)(3)(a) and (b) of the NYSE Listed Company Manual.

Standard 4

- Market capitalization of at least US$75 million; or at least US$75 million in total assets and US$75 million in revenues in its last fiscal year or in two of its last three fiscal years;
- Market value of public float of at least US$20 million; and
- US$3 minimum share price.

Companies that list their securities on the NYSE MKT are also subject to continued listing standards.

LISTING ON NASDAQ

NASDAQ has three tiers of listing requirements, namely the Global Select Market℠, Global Market℠ and Capital Market®. Securities listed on NASDAQ must be registered under Section 12(b) of the Exchange Act, just as is the case for securities listed on the NYSE or NYSE MKT.

NASDAQ GLOBAL SELECT MARKET℠

Issuers are eligible for listing equity shares on the Global Select Market℠ provided they satisfy one of the following requirements:

Standard 1

- Pre-tax earnings from continuing operations that is greater than or equal to US$11 million in aggregate for the prior three fiscal years;
- Each of the two most recent fiscal years pre-tax income is greater than or equal to US$2.2 million;
- Each of the prior three fiscal years pre-tax income is greater than or equal to US$0;
- At least three or four registered and active market makers for the shares;[55] and
- Minimum bid price of at least US$4 per share.

Standard 2

- Aggregate cash flows in the prior three fiscal years is greater than or equal to US$27.5 million and each of the prior three fiscal years is greater than or equal to US$0;
- Market capitalization that averages US$550 million or greater over the prior 12 months;
- Revenue in the previous fiscal year is greater than or equal to US$110 million;
- At least three or four registered and active market makers for the shares,[55] and
- Minimum bid price of at least US$4 per share.

Standard 3

- Market capitalization that averages US$850 million or greater over the prior 12 months;
- Revenue in the previous fiscal year is greater than or equal to US$90 million;
- At least three or four registered and active market makers for the shares;[55] and
- Minimum bid price of at least US$4 per share.

Standard 4

- Market capitalization of at least US$160 million;
- Total assets of at least US$80 million;
- Stockholders' equity of at least US$55 million;

55 A company that also satisfies the Income Standard or Equity Standard for an initial listing on the Global Market is required to have three market makers. Otherwise, the company is required to have four market makers.

- At least three or four registered and active market makers for the shares; and
- Minimum bid price of at least US$4 per share.

Issuers involved in an initial public offering in the United States or spin-off must also meet the following liquidity requirements:

- At least 450 shareholders of at least 100 shares or at least 2,200 total shareholders;
- At least 1,250,000 publicly held shares;[56] and
- market value of publicly-held shares or market value of publicly held shares and stockholders equity of at least US$45 million.

NASDAQ GLOBAL MARKET℠

An issuer must have at least 1,100,000 publicly-held shares, at least 400 holders of 100 or more shares and a minimum bid price of at least US$4 per share. In addition, an issuer must also satisfy at least one of the following requirements:

Income Standard

- Market value of publicly-held shares of at least US$8 million;
- Stockholders' equity of at least US$15 million;
- Pre-tax income from continuing operations of at least US$1 million in its most recent fiscal year (or two of three of its most recent fiscal years); and
- At least three registered and active market makers for the shares.

Equity Standard

- Market value of publicly-held shares of at least US$18 million;
- Stockholders' equity of at least US$30 million;
- At least a two-year operating history; and
- At least three registered and active market makers for the shares.

Market Value Standard

- Market value of publicly-held shares of at least US$20 million;
- Market value of listed securities of at least US$75 million (current publicly-traded companies must meet this requirement and the $4 bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value Standard); and
- At least four registered and active market makers for the shares.
- Total Assets/Total Revenue Standard
- Total assets and total revenue of at least US$75 million, respectively (in latest fiscal year or in two of last three fiscal years);
- Market value of publicly held shares of at least US$20 million; and
- At least four registered and active market makers for the shares.

NASDAQ CAPITAL MARKET®

Issuers that have a minimum bid price of US$4 per share, at least 1 million publicly-held shares, at least 300 shareholders of at least 100 shares and at least three registered and active market makers for the shares may be eligible for listing on the Capital Market provided they also satisfy one of the following standards:

56 Excludes shares held directly or indirectly by officers, directors or any person who is beneficial owner of more than 10% of total shares outstanding.

Equity Standard

- At least US$5 million of stockholders' equity;
- Market value of publicly-held shares of at least US$15 million; and
- At least a two year operating history.

Market Value Standard

- At least US$4 million stockholders' equity;
- Market value of publicly-held shares of at least US$15 million; and
- Market value of listed securities of at least US$50 million (current publicly-traded companies must meet this requirement and the $4 bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value Standard).

Net Income Standard

- At least US$4 million of stockholders' equity;
- Market value of publicly-held shares of at least US$5 million; and
- Net income from continuing operations of at least US$750,000 (in the latest fiscal year or in two of the last three fiscal years).

Companies that list their securities on one of the NASDAQ markets are also subject to continued listing standards.

4

Corporate Governance Requirements of the NYSE, NYSE MKT and NASDAQ

Each of the NYSE, NYSE MKT and NASDAQ have adopted rules regarding the corporate governance standards for listed issuers in response to the requirements of the Sarbanes-Oxley Act and the Dodd-Frank Act. The rules provide certain accommodations for foreign private issuers that allow them to generally follow home-country corporate governance practices.[57]

NYSE Corporate Governance Requirements: As a general rule, the NYSE has granted substantial flexibility to listed foreign issuers by allowing them to follow their home country corporate governance practices instead of the NYSE corporate governance standards required of listed U.S. companies, subject to the listed foreign issuer making disclosure of the difference in such practices. All listed foreign issuers, however, at a minimum, are required to comply with the following requirements:

- **Audit Committee:** Listed foreign issuers must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act, including the requirement that each member of the audit committee be "independent" as defined in the SEC rule.[58]
- **Corporate Governance Practices:** Listed foreign private issuers relying on home country corporate governance practices must disclose any significant ways in which their corporate governance

57 As discussed on page 12, companies must monitor their status as a foreign private issuer. Loss of foreign private issuer status will have implications regarding an issuer's compliance with applicable stock exchange rules. For example, representatives of the NYSE have informed us that a company ceasing to be a foreign private issuer must comply with the NYSE's Section 312.03 shareholder approval requirements from the date of determination of the company's change of status ("Determination Date"); provided, however, that it need not comply with the requirements of Section 312.03 in connection with any transactions that are the subject of definitive agreements entered into prior to the Determination Date. Within six months of the Determination Date, the company must also satisfy the rules relating to: (i) majority of independent members of board of directors (Section 303A.01); (ii) website posting of certain information (Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10); (iii) fully independent nominating and compensation committees, authority to retain compensation advisers and independence of compensation advisers (Sections 303A.04 and 303A.05); (iv) audit committee members' compliance with independence requirements (Section 303A.02); and (iv) three-person audit committee (Section 303A.07(a)). Finally, any company ceasing to be a foreign private issuer will be granted various transition periods with regard to certain equity compensation plans that do not comply with Section 303A.08 and that were in place prior to the Determination Date.

In the case of the NYSE MKT, in the event that a company loses its status as a foreign private issuer, and to the extent that the foreign private issuer was exempt from the NYSE MKT's corporate governance and shareholder approval requirements in reliance on Section 110 of the NYSE MKT Company Guide, the NYSE MKT staff will review each company on a case-by-case basis to determine which corporate governance and shareholder approval requirements (i.e. Sections 711 – 713 and 800 – 809 of the NYSE MKT Company Guide) would take effect immediately as of the Determination Date, and which requirements would be afforded a transition period.

58 Please see the more detailed discussion set out below in "Part V: Corporate Governance Requirements under Federal Securities Laws".

practices differ from those followed by domestic companies under the NYSE listing standards. The NYSE has underscored that what is required is a brief, general summary of the significant differences, not a cumbersome and detailed comparison.[59]

- **Certification Requirement and Notification of Noncompliance:**[60] A listed foreign private issuer must submit an executed written affirmation to the NYSE annually within 30 days of the date it files its annual report with the SEC certifying as to the composition of its audit committee and the qualifications and biographical descriptions of its audit committee members, and certifying that it has provided disclosure of the significant corporate governance differences between its home country practices and those followed by domestic companies under the NYSE listing standards. Listed foreign private issuers must also submit an executed interim written affirmation to the NYSE each time that (i) an audit committee member who was deemed independent is no longer independent; (ii) a member has been added to the audit committee (iii) the company is no longer eligible to rely on a previously applicable exemption provided by Rule 10A-3 under the Exchange Act or (iv) the issuer determined that it no longer qualifies as a foreign private issuer. In addition, the CEO of a listed foreign issuer must promptly notify the NYSE in writing after any executive officer of the issuer becomes aware of noncompliance with applicable NYSE corporate governance standards.

There are no special corporate governance rules or exemptions particular to foreign private issuers that are incorporated or organized under the laws of Canada.

NYSE MKT Corporate Governance Requirements: The NYSE MKT recognizes the diversity of existing corporate governance regimes around the world and that every corporate entity must operate in accordance with the laws and customary practices of its country of origin or incorporation. Therefore, in evaluating the eligibility for listing of a foreign company, the NYSE MKT considers the laws, customs and practices of the applicant's country of domicile, to the extent not contrary to the U.S. federal securities laws, regarding such matters as: (i) the election and composition of the board of directors; (ii) the issuance of quarterly earnings statements; (iii) shareholder approval requirements; and (iv) quorum requirements for shareholder meetings. A company seeking relief under these provisions should provide a written certification from independent local counsel that the non-complying practice is not prohibited by the company's home country law.[61]

- **Audit Committee:** Listed foreign issuers must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act, including the requirement that each member of the audit committee be independent.
- **Corporate Governance Practices:** Each listed foreign issuer must provide English language disclosure of any significant ways in which its corporate governance practices differ from those followed by U.S. domestic companies under the NYSE MKT standards. This disclosure may be provided either on the company's website and/or in its annual report distributed to shareholders in the United States. If the disclosure is only available on the company's website, the annual report must so state and provide the web address at which the information may be obtained.
- **Notification of Certain Noncompliance:** A foreign private issuer must provide prompt notification to the NYSE MKT after an executive officer of the issuer becomes aware of any material non-compliance by the issuer with the corporate governance requirements of the NYSE MKT.

NASDAQ Corporate Governance Requirements: NASDAQ has also granted substantial flexibility to foreign private issuers with respect to corporate governance practices. Specifically, NASDAQ

59 NYSE Listed Company Manual Section 303A.11. Canadian listed issuers filing annual reports on Form 40-F may either include a statement of significant differences in their annual report or make the statement of significant differences available

60 The NYSE has prescribed forms of written affirmation and interim written affirmation that must be used by foreign private issuers to fulfill their certification obligations. See http://www.nyse.com/regulation/nyse/1101074752859.html.

61 Section 110 of NYSE MKT Company Guide.

Marketplace Rule 5615(a)(3) permits foreign private issuers to follow certain home country governance practices in lieu of the comparable NASDAQ requirements except for:

- **Audit Committee:** Foreign private issuers must have an audit committee that meets the requirements of Rule 10A-3 of the Exchange Act and, in particular, be comprised of at least three members, each whom must satisfy the criteria for independence set forth in Rule 10A-3(b)(1) under the Exchange Act.[62]
- **Corporate Governance Practices:** A foreign private issuer that follows its home country practice in lieu of following the corporate governance requirements of NASDAQ must disclose in its annual report filed with the SEC (or, in the case of the foreign private issuer's U.S. initial public offering, the registration statement) or (in the case of a Canadian issuer that files annual reports on Form 40-F) on its website each requirement of NASDAQ's corporate governance requirements that it does not follow and describe the home country practice followed by the issuer in lieu of such requirement. Disclosure by means of a press release or Form 6-K does not satisfy this requirement.[63]
- **Voting Rights Requirements:** Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance. Companies with existing dual class capital structures are generally permitted to issue additional shares of the existing super voting stock. NASDAQ will accept any action or issuance relating to the voting rights structure of a foreign private issuer that is not prohibited by the issuer's home country law.
- **Notification of Certain Noncompliance:** A foreign private issuer must provide NASDAQ with prompt notification after an executive officer of the issuer becomes aware of material noncompliance by the issuer with the corporate governance requirements of NASDAQ.

A foreign private issuer that elects to follow home country practice in lieu of the corporate governance requirements of NASDAQ must submit to NASDAQ a written statement from an independent counsel in such company's home country which certifies that the company's corporate governance practices are not prohibited by home country law. This letter is only required once, either at the time of initial listing or prior to the time the company first adopts a practice that does not conform to NASDAQ's corporate governance requirements that apply to U.S. domestic companies.

Enhanced Independence Rules for Compensation Committees: In January 2013, the SEC approved the NYSE and the NASDAQ listing standards relating to the independence of compensation committees, compensation consultants and other compensation advisers as required by Rule 10C-1 of the Exchange Act. Among other things, Rule 10C-1 required each U.S. stock exchange to develop its own definition of "independence" for serving as a member of a compensation committee after considering all relevant factors, including the source of a director's compensation, including any consulting, advisory or other compensatory fee paid by the issuer to such director, and whether a director is affiliated with the issuer, an issuer's subsidiary or an affiliate of an issuer's subsidiary.

Existing NYSE and NASDAQ director independence requirements, including the existing "bright line" prohibitions for director independence, continue to apply to the determination of the independence of

62 Please see the more detailed discussion set out below in "Part V: Corporate Governance Requirements under Federal Securities Laws."

63 Representatives of NASDAQ have informed us that a listed company ceasing to be a foreign private issuer will be required to meet all the corporate governance requirements applicable to a domestic U.S. registrant. The company will not receive exemptions from the corporate governance requirements, including the shareholder approval requirements for the issuance of securities in connection with (i) acquisition of stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) change of control; and (iv) private placements, set forth in Rule 5635 of the Marketplace Rules. Companies ceasing to be foreign private issuer must comply with all the listing rules in Rule 5600. There is no grace or transition period. However, with respect to board and committee composition, a company may choose to rely on the "exceptional and limited circumstances" exception according to Rule 5605(c)(2)(B) without obtaining NASDAQ's approval, in which case the company must make the disclosure required by Rule 5605(c)(2)(B) in its next proxy statement or its next annual report if it does not file a proxy statement with the SEC.

compensation committee members, although the board is also required to consider the additional independence factors under Rule 10C-1 in making such determination. Both the NYSE and NASDAQ requirements maintain their existing exemption for foreign private issuers. Accordingly, as with most other NASDAQ and NYSE governance listing standards, Canadian foreign private issuers will be allowed to follow their home country practice in lieu of the revised listing rules relating to the independence of compensation committee members. Canadian foreign private issuers relying on this exemption must disclose in their annual report filed with the SEC the ways in which their practices differ from the applicable exchange's requirements and the reasons why they do not have an independent compensation committee in accordance with NASDAQ and NYSE listing standards.

5

Corporate Governance Requirements under Federal Securities Laws

THE SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act was passed into law in July 2002, and a series of related rules were thereafter adopted by the SEC. The Sarbanes-Oxley Act and its related rules introduced a broad range of substantive and disclosure-related corporate governance reforms. These reforms apply to "issuers" within the meaning of the Sarbanes-Oxley Act, which term includes all companies subject to reporting obligations under the Exchange Act and all companies that have filed a registration statement under the Securities Act that has not become effective or been withdrawn. A Canadian issuer not yet subject to Exchange Act reporting obligations will become subject to those obligations and Sarbanes-Oxley Act requirements as result of filing a Securities Act registration statement with the SEC even if it is an MJDS registration statement (except for a Form F-7 registration statement relating to a rights offering or a Form F-8 or Form F-80 registration statement relating to a business combination or exchange offer, provided the issuer is exempt from Exchange Act Reporting pursuant to Rule 12g3-2(b)).[64] Virtually all requirements of the Sarbanes-Oxley Act apply to Canadian issuers as if they were U.S. domestic companies notwithstanding their status as foreign private issuers or their eligibility to report using MJDS forms. The following is a summary of the principal requirements of the Sarbanes-Oxley Act and its related rules and the extent to which they impose incremental obligations on issuers that are already subject to Canadian reporting issuer obligations and the Canadian corporate governance reforms that were modeled to some extent on the Sarbanes-Oxley Act.

Audit Committee: The Sarbanes-Oxley Act amended Section 10A of the Exchange Act to require public issuers to establish an audit committee composed of independent directors. The audit committee is responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attestation services for the issuer. The audit committee is also responsible for the resolution of any disagreements between management and the auditor

64 Canadian companies that have only sold securities in the U.S. capital markets in a private placement, such as an offering under Rule 144A or Regulation D, are not subject to the Sarbanes-Oxley Act unless the number of holders of their securities would trigger a registration requirement under the Exchange Act and no exemption from registration would be available. A foreign private issuer can automatically rely on the exemption from registration afforded by Rule 12g3-2(b) under the Exchange Act without taking any action to claim the exemption if it: (i) makes continuous disclosure filings on the System for Electronic Document Analysis and Retrieval (SEDAR) (in the case of a Canadian foreign private issuer); (ii) maintains a listing of the subject class of securities on one or more exchanges outside the United States that, either singly or together with the trading of the same class of the issuer's securities in another non-U.S. jurisdiction, represents at least 55% of the worldwide trading of the subject class of securities; and (iii) is not otherwise required to file or furnish reports under the Exchange Act.

regarding financial reporting. The issuer's auditors must report directly to the audit committee, not management of the issuer.

In order to be considered "independent" for audit committee eligibility purposes, an audit committee member may not, other than in such member's capacity as a member of the audit committee (i) accept any consulting, advisory, or other compensatory fee from the issuer or (ii) be an affiliated person of the issuer or any subsidiary of the issuer.

Section 10A also requires the audit committee to establish procedures for (i) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters and (ii) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters. Further, issuers are subject to potential civil and criminal liability if they take retaliatory action against whistleblowers.

These requirements are similar to the audit committee requirements of Multilateral Instrument 52-110 – Audit Committees, which was subsequently adopted in Canada, and an issuer that is in compliance with those Canadian requirements will generally also be in compliance with the Sarbanes-Oxley Act audit committee requirements.

The MJDS annual report on Form 40-F requires disclosure of whether an issuer has at least one audit committee financial expert serving on its audit committee and, if so, his or her name. If there is no audit committee financial expert designated, the reasons why not must be disclosed.

An "audit committee financial expert" is a person who has:

- an understanding of generally accepted accounting principles and financial statements (either in the U.S. or Canada);
- the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;
- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to those that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising one or more persons engaged in such activities;
- an understanding of internal control over financial reporting; and
- an understanding of audit committee functions.

The audit committee financial expert disclosure requirement is more stringent than the corresponding Canadian rules, which only require disclosure of the credentials and qualifications of each member of the audit committee but do not require identifying one individual as a financial expert. The SEC has stated that a person who is determined to be an "audit committee financial expert" will not be deemed an "expert" for any purpose (including for purposes of Section 11 of the Securities Act) as a result of such designation and that being an audit committee financial expert should not impose any duties, obligations or liabilities that are greater than those already imposed on members of the audit committee and board of directors.

Disclosure Controls and Procedures: Issuers must also maintain disclosure controls and procedures which ensure that the information required in reports filed under the Exchange Act is processed, summarized and reported on a timely basis. Management must also periodically evaluate the effectiveness of these controls and procedures. Issuers must disclose the conclusion of the issuer's principal executive officer and principal financial officer regarding the effectiveness of the company's disclosure controls and procedures as of the last date of the period covered by the periodic report.

The SEC has recommended that issuers form a "disclosure committee" to oversee responsibility for the issuer's compliance with its disclosure obligations. Members of this non-board committee are tasked with evaluating the materiality of information presented to the committee and making determinations regarding the issuer's disclosure obligations on a timely basis. Committee members generally include the issuer's principal accounting officer or controller, the general counsel or other another senior legal officer, an officer with responsibility for risk management for the issuer and an investment relations officer as well as senior officers of the issuer's principal business unit or segment. Canadian corporate governance best practices also contemplate the use of a disclosure committee for this purpose.

The chief executive officer and chief financial officer of a Canadian reporting issuer are required to provide annual and quarterly certifications addressing, among other things, the adequacy and effectiveness of the issuer's disclosure controls and procedures as defined under Canadian securities law. As a result, Canadian reporting issuers are effectively already subject to disclosure controls and procedures requirements comparable to those under the Sarbanes-Oxley Act.

Internal Control Over Financial Reporting: Issuers are required to establish and maintain a system of internal control over financial reporting designed to provide reasonable assurance regarding the reliability of their financial reporting and the preparation of their financial statements. Management must periodically evaluate the effectiveness of these internal controls and certain disclosure must be made regarding their conclusions, particularly with regard to identifying any weaknesses that have more than a remote likelihood of resulting in a material misstatement in the issuer's financial statements ("material weaknesses").

If a company identifies a material weakness, and such material weakness has not been remedied prior to the end of its fiscal year, it must conclude that its internal control over financial reporting is not effective. In such instances, the company should consider also including in its disclosure: (i) the nature of the material weakness, (ii) its impact on financial reporting and the control environment, and (iii) management's current plans, if any, for remedying the material weakness.

Section 404: Management and Auditor Review of Internal Control Over Financial Reporting: The most significant compliance costs arising under the Sarbanes-Oxley Act are those related to Section 404 and its related rules, which, as described above, require management to perform an annual review of the issuer's internal control over financial reporting and express a view on its effectiveness. The issuer's auditor is also required to perform an audit of the company's internal control over financial reporting, and to provide an attestation report in which it expresses an opinion on the effectiveness of the company's internal control over financial reporting. Like all other Exchange Act annual reporting forms, MJDS Form 40-F requires the inclusion of this management report and the auditor's attestation report. The management report must state the following: (i) the responsibilities of management for the establishment and maintenance of adequate internal control over the issuer's financial reporting, (ii) the conclusion made by management about the effectiveness of the issuer's internal control over financial reporting as of the end of the issuer's most recent fiscal year, (iii) a statement describing the framework used by management to assess the effectiveness of the issuer's internal financial reporting controls, (iv) any changes in the issuer's internal control over financial reporting that occurred during the issuer's most recent fiscal year, and (v) a statement that the issuer's auditor has issued the attestation report.

The design and assessment of an issuer's internal control over financial reporting requires the use of a recognized framework against which to measure them. The majority of U.S. and Canadian public companies have been using the framework developed by the Committee of the Sponsoring Organizations of the Treadway Commission (COSO) that was released in 1992 and updated in 2013.

The Dodd-Frank Act exempts issuers that are non-accelerated filers from the requirement to include an auditor's attestation report on internal control over financial reporting in their annual reports.[65] The SEC also grants a transition period for Section 404 compliance for newly-public companies and any acquired business in connection with a material purchase business[66]. This transitional relief applies to any issuer that has become public in the United States through an initial public offering or a U.S. registered exchange offer, or that otherwise becomes subject to the reporting requirements of the Exchange Act, including Canadian foreign private issuers that are listing on a U.S. stock exchange for the first time. These issuers will not be required to provide either a management's report on internal control over financial reporting or an auditor's attestation report in the first annual report that they are required to file with the SEC, giving those companies an extra year following their transition to status as U.S. reporting issuers in which to ensure compliance with Section 404 requirements. The JOBS Act extends this exemption from auditor attestation to all EGCs. EGCs are, however, still required to provide officer certifications of the company's internal control of financial reporting, unless the newly-public company exemption is available.

The Canadian Securities Administrators have adopted a version of Section 404 in Canada that require management's review of and report on the issuer's internal control over financial reporting. However, the Canadian Section 404 equivalent does not require an auditor attestation as to the effectiveness of the internal controls.

Auditor's Role and Independence: MJDS issuers are required to disclose in their annual reports on Form 40-F: (i) the amount of fees paid during the two most recent fiscal years to their independent auditors for audit services and (ii) the amount of fees paid during the two most recent fiscal years for, together with a description of, audit-related services, tax services and all other services.

In order for an auditor's independence to be preserved, a one-year "cooling-off period" must be maintained between (i) providing more than 10 hours of audit, review or attestation services or service as lead or concurring partner on a company's audit engagement team and (ii) the auditor's employment by such company in a "financial reporting oversight role" or where an "audit partner"[67] receives compensation for any services other than audit, review or attestation services. Relationships that were in existence prior to May 6, 2003 are exempt from the "cooling-off" period requirements. In the case of an emergency or other atypical circumstances (e.g., for foreign audit firms in jurisdictions where compliance with these requirements would be exceptionally difficult or costly), there is an exception available if the audit committee has decided that relying on this exception is in the best interests of shareholders.

65 The SEC does not define the term "non-accelerated filer". Instead, reference must be made to Rule 12b-2 under the Exchange Act which defines "accelerated filer" and "large accelerated filer". An "accelerated filer" is an issuer (i) with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of the issuer of US$75 million or more, but less than US$700 million, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) that has been subject to reporting requirements under Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) that has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) and is not eligible to use the annual and quarterly report forms applicable to small business issuers. A "large accelerated filer" is an issuer with an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates of US$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter and that satisfies (ii) – (iv) of the "accelerated filer" definition above.

66 See Question 3 under Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports- Frequently Asked Questions [October 6, 2004] http://www.sec.gov/info/accountants/controlfaq1004.htm

67 An "audit partner": (i) is a partner (or equivalent) member of the audit engagement team that is responsible for decision-making on key auditing, accounting and reporting matters or is in recurring contact with management and the audit committee; (ii) includes all those who provide audit services to the company at the company or parent level, other than specialty partners; and (iii) includes the lead partner on the audit team for subsidiaries of the company whose assets or revenues make up 20% or more of the consolidated assets or revenues of the company.

Auditors of a public company must not provide, under the SEC's rules,[68] the following non-audit services to clients to which they provide audit services:

- bookkeeping or other services related to the accounting records or financial statements of the audit client;
- financial information systems design and implementation;
- appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
- actuarial services;
- internal audit outsourcing services;
- management functions or human resources;
- broker or dealer, investment adviser, or investment banking services;
- legal services and expert services unrelated to the audit (does not prevent foreign accounting firms from providing services that a U.S. accounting firm may provide solely because local law requires the service to be provided by someone licensed to practice law) and expert services unrelated to the audit; or
- any other service that the PCAOB determines, by regulation, is impermissible.

Other non-audit services not specifically prohibited (such as tax services) may be provided only if they are pre-approved by the audit committee. Approval can be in the form of a one-time approval of a specific engagement or by way of general pre-approval policies and procedures for certain types or categories of services established by the audit committee. There is a *"de minimis"* exception for an inadvertent failure to pre-approve non-prohibited non-audit services, provided that they do not comprise in the aggregate more than 5% of the total amount of fees paid to the independent auditors for the year, were not recognized as non-audit services at the time of the engagement and are subsequently approved by the audit committee.

An issuer must discuss in its annual report (including an annual report on Form 40-F by a Canadian issuer) the audit committee's policies and procedures for pre-approvals of services from auditors. In addition, the issuer must disclose (i) the percentage of non-audit services that were approved by the audit committee under the "de minimis" test and (ii) the percentage of hours spent on the principal accountant's engagement to audit the issuer's financial statements for the most recent fiscal year performed by persons other than the principal accountant's full-time, permanent employees, if such percentage is greater than 50%. The PCAOB, on an *ad hoc* basis, can grant exemptions from these rules. In case of conflicts between foreign regulatory requirements and the SEC's rules, the SEC has indicated it would consider granting relief.

Rule 2-01 of Regulation S-X also requires the lead and concurring partner on an audit engagement team to rotate off each team with respect to a particular issuer after five years and thereafter subjects them to a five-year "time out" period before they can return to the team. Audit partners are also subject to similar requirements but must rotate after seven years and will be subject to a two-year "time out" period.

PCAOB Auditing Standard No. 5 provides professional standards and related performance guidance for independent auditors to attest to, and report on, management's assessment of the effectiveness of internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act. This standard (i) focuses the internal control audit on the most important matters; (ii) eliminates procedures that are unnecessary to achieve the intended benefits; (iii) provides guidance on scaling the audit to fit the size and complexity of the issuer; and (iv) sets a simplified standard.[69] The SEC has stated that an auditor's discussion with management of new accounting standards or the appropriate accounting treatment for unique or difficult transactions does not in itself violate the

68 See Rule 2-01 of Regulation S-X.

69 See www.sec.gov/news/press/2007/2007-144.htm and www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_5.pdf.

independence rules, nor does it fall into one of the nine prohibited categories of services. So long as management is responsible for the determination of the accounting that is to be used and is responsible for the design and implementation of the controls, an auditor's advice to management is itself not indicative of a deficiency. Auditors are encouraged by the PCAOB to use their professional judgment in providing accounting as well as technical guidance regarding the application of accounting principles to clients.

Section 302 and 906 Certifications: All issuers (including MJDS issuers filing their annual reports on Form 40-F) must file as exhibits the certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act.

Under Section 906 of the Sarbanes-Oxley Act, each of the issuer's principal executive officer and principal financial officer must certify that the information contained in the issuer's Form 40-F fairly presents, in all material respects, the financial condition and results of operations of the issuer, and that the report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act.

The certification required of each principal executive officer and principal financial officer for Section 302 purposes must state, among other things, that:

- they have reviewed the report;
- based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;
- based on the officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- the issuer's certifying officers are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) [and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f))][70] for the issuer and have:
  - designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information relating to the issuer, including its consolidated subsidiaries, is made known to them by others within those entities, particularly during the period in which the report is being prepared;
  - [designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;]
  - evaluated the effectiveness of the issuer's disclosure controls and procedures and presented in the report their conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by the report based on such evaluation; and
  - disclosed in the report any change in the issuer's internal control over financial reporting that occurred during the period covered by the report that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting; and
  - the issuer's certifying officers have disclosed, based on their most recent evaluation of internal control over financial reporting, to the issuer's auditors and to the audit committee of the board of directors (or persons performing the equivalent functions):

70 The bracketed language in this certification may continue to be omitted by newly-public companies covered by the transition relief discussed on page 45.

- all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the issuer's ability to record, process, summarize and report financial information; and
- any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting.

The SEC mandates that there can be no changes to the form of certification required by Section 302 of the Sarbanes-Oxley Act.

Canadian issuers that are subject to the CEO and CFO certifications of Section 302 of the Sarbanes-Oxley Act may file their Section 302 certifications with the Canadian Securities Administrators instead of the certifications mandated by Multilateral Instrument 52-109 – Certification of Disclosure in Issuers' Annual and Interim Filings. It should be noted, however, that the Canadian rules require certification of both annual and interim filings, whereas an MJDS issuer will only be required to provide a Section 302 certification to the SEC with respect to its annual report on Form 40-F. Canadian issuers, therefore, have to choose between either (i) voluntarily preparing Section 302 certifications for quarterly financial statements and filing them in Canada,[71] so that their interim certifications will be in the same form as their annual certifications or (ii) preparing and filing the Canadian form of certification for interim financial statements in Canada. As there are some differences between the contents of the Section 302 certification and the Canadian quarterly certification, and differences in guidance as to the procedures that should be followed to support making the certification, issuers may prefer to voluntarily prepare quarterly Section 302 certification for Canadian compliance purposes so as to ensure that their annual and quarterly certificate follow consistently only one set of rules. Whether in the form of a Section 302 certification or the Canadian interim certification, copies of the certificates filed in Canada will also have to be furnished to the SEC on Form 6-K current reports.

THE FOREIGN CORRUPT PRACTICES ACT

As discussed above, the Sarbanes-Oxley Act focused renewed attention on the concept of internal control over financial reporting and introduced certification, management reporting, and auditor attestation requirements relating to internal controls. However, the statutory requirement for U.S. public companies to maintain books and records that accurately reflect the company's financial position, and to design and maintain an adequate system of internal accounting controls, dates back to the Foreign Corrupt Practices Act of 1977.

Aside from its statutory codification of internal control requirements for public companies in the United States[72], the most significant ongoing implication of the Foreign Corrupt Practices Act is its prohibition against U.S. persons and businesses, SEC reporting companies, and persons and business using U.S. jurisdictional means directly or indirectly making certain payments to foreign officials that are considered improper. "Foreign officials" include officers, employees and other persons acting in an official capacity for a foreign government, or one of its departments or agencies, except those employees whose duties are essentially ministerial or clerical.

The Foreign Corrupt Practices Act prohibits an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value, to any foreign official, any foreign political party or official thereof or any candidate for foreign political office for purposes of:

71 Issuers who do so must ensure that all of the statements in the Section 302 certification are correct, including statements regarding the disclosure of the results of an assessment of disclosure controls and procedures, which would generally be included in the issuer's quarterly MD&A.

72 The internal control requirements are set forth in Section 13(b) of the Exchange Act.

- influencing any act or decision of that foreign official in his or her official capacity, or inducing that foreign official to do or omit to do any act in violation of the lawful duty of such official, or securing any improper advantage; or
- inducing the foreign official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality;

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

It is recognized, however, that some payments are often necessary to facilitate or expedite the performance of certain routine governmental actions, such as obtaining permits, processing governmental papers, providing police protection or other actions of a similar nature. A "facilitating payment" meeting the specified requirements will not constitute a contravention of the Foreign Corrupt Practices Act.

The consequences of contravening the Foreign Corrupt Practices Act can be quite severe, including fines that must be paid by the violator personally (and which many not be paid or reimbursed by his or her employer) or even imprisonment. Corporate violators may also be subject to enforcement proceedings by the SEC and U.S. Department of Justice.[73]

73 In November 2012, the SEC and U.S. Department of Justice published a resource guide to the Foreign Corrupt Practices Act, which can be found at www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

6

Using MJDS to Satisfy U.S. Periodic and Current Reporting Obligations

Eligible Canadian issuers may use MJDS to meet their periodic reporting requirements in the United States by using their Canadian annual information form, audited annual financial statements and management's discussion of financial condition and results of operations to file an annual report on Form 40-F and by furnishing current reports on Form 6-K that contain information they have made publicly available in Canada. Form 40-F and Form 6-K can be used by a Canadian foreign private issuer that has become obligated to meet U.S. periodic reporting requirements as a result of having used any of Form F-7, F-8, F-10 or F-80 to make a registered public offering in the United States.[74] In addition, any other Canadian issuer may meet its U.S. periodic reporting obligations by using Form 40-F and Form 6-K if, at the time of filing, it (i) is a foreign private issuer; (ii) has at least a 12-month reporting history in Canada and is in compliance with its reporting obligations; and (iii) satisfied the public float test of at least US$75 million or filed a Form F-9 with the SEC on or before December 30, 2012. Further, the SEC has confirmed that an issuer that filed a Form F-10 registration statement before December 31, 2015 using the "grandfathering" rules allowing it to do so on the basis that it would have been eligible to utilize Form F-9 as in effect on December 30, 2012 may also satisfy its annual reporting obligations arising as a result of such filing through the use of Form 40-F.

MJDS ANNUAL REPORTS ON FORM 40-F

General Principles of Form 40-F: MJDS filers can combine their Canadian annual information form, audited annual financial statements and management's discussion and analysis of financial condition and results of operations under the cover of Form 40-F in order to meet their annual reporting obligations under the Exchange Act. Form 40-F also requires additional disclosure relating to off-balance sheet arrangements, aggregate contractual obligations, principal accountant fees and services, codes of ethics and audit committee financial experts, as mandated by the Sarbanes-Oxley Act, and mine safety disclosure, as mandated by the Dodd-Frank Act. The Form 40-F must also include certifications of the chief executive officer and chief financial officer with respect to the financial disclosure made, and other matters, including the effectiveness of the issuer's disclosure controls and procedures and the issuer's internal control over financial reporting. If a material weakness in internal control over financial reporting exists, the issuer must then disclose the material weakness and any remedial action taken. Subject to the availability of applicable exemptions for non-accelerated filers, newly-public companies and EGCs, Form 40-F filers will also

74 A Canadian issuer will be exempt, however, from the duty to file reports under the Exchange Act solely as a result of registering securities on Form F-7, Form F-8 or Form F-80, provided the issuer is exempt from the registration obligation of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b).

be required to comply with all of the internal control requirements of Section 404 of the Sarbanes-Oxley Act, including the management assessment and auditor review requirements.[75]

As Form 40-F requires substantive disclosure beyond the prescribed contents of the Canadian annual information form, issuers will need to ensure compliance with their Canadian continuous disclosure obligations, which require all material information filed or furnished on EDGAR in the United States to also be filed on SEDAR in Canada. This requirement is frequently met by putting all mandated Form 40-F material disclosure into the body of the Canadian annual information form itself. If the additional Form 40-F required disclosure is addressed through supplemental pages to the annual information form, then the entire Form 40-F, including the supplemental pages, should be filed in Canada on SEDAR as an "other" document.

It is important to note that Canadian issuers that do not have a 12-month reporting history in Canada are generally not eligible to use Form 40-F. So, for example, a Canadian company conducting a concurrent initial public offering in both Canada and the United States (if not previously a reporting issuer in Canada) would, in addition to being ineligible to use an MJDS registration statement for the initial public offering itself, be required to file its first annual report under the Exchange Act with the SEC on Form 20-F. Following the date on which the one-year Canadian reporting history requirement is satisfied, the company could switch to Form 40-F to satisfy its annual reporting obligations for subsequent years instead of continuing to use Form 20-F.

International Financial Reporting Standards: Beginning in the first quarter of 2011, most Canadian reporting issuers were required to present their financial statements in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"). SEC rules permit foreign private issuers (including Canadian MJDS issuers) to include in their filings with the SEC financial statements prepared in accordance with IFRS as issued by the IASB without a reconciliation to U.S. GAAP.[76] Several Canadian companies that are U.S. public filers continue to use U.S. GAAP for their primary financial statements. Some of these companies are subsidiaries of U.S. companies, while others are SEC issuers that have elected to use U.S. GAAP instead of IFRS for various reasons. Those reasons include the fact that the companies may have significant operations in the United States and their main competitors in North America are companies operating in the United States.

Management's Discussion and Analysis of Financial Condition and Results of Operations: Form 40-F does not require Canadian issuers to comply with the SEC's specific disclosure requirements for management's discussion and analysis of financial condition and results of operations ("MD&A"). Rather, MJDS issuers may comply with Canadian MD&A requirements in connection with MJDS registration statements filed with the SEC under the Securities Act and in Form 40-F annual reports.

MJDS issuers should, however, familiarize themselves with the interpretive release (the "MD&A Interpretative Release") issued by the SEC about MD&A preparation in December 2003 and the SEC's guidance on presentation of liquidity and capital resources disclosures from September 2010.[77] Although the MD&A Interpretive Release does not impose legally binding requirements on Canadian issuers, it does provide issuers with insights from the SEC as to how to present a more informative and transparent MD&A. These insights may be helpful to issuers in connection with preparing their

75 See the discussion in "Part V: Corporate Governance Requirements Under Federal Securities Laws – The Sarbanes-Oxley Act of 2002".

76 See SEC Release No. 33-8879 (December 21, 2007). Form 40-F requires a U.S. GAAP reconciliation as required by Item 17 of Form 20-F (unless the Form 40-F is filed with respect to a reporting obligation that arose solely as a result of a filing made on Form F-7, F-8, F-9 or F-80), which in turn permits financial statements to be prepared according to IFRS as issued by the IASB without a U.S. GAAP reconciliation. If the financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

77 See SEC Release Nos. 33-8040 (December 12, 2001), 33-8056 (January 22, 2002), 33-8098 (May 10, 2002), 33-8176 (January 22, 2003), 33-8182 (January 27, 2003), 33-8350 (December 19, 2003) and 33-9144 (September 28, 2010).

MD&A under Canadian securities law requirements. Also, to the extent that the MD&A Interpretative Release sets a benchmark for U.S. disclosure standards, compliance with the MD&A Interpretative Release will help reduce the risk of successful civil liability claims under U.S. federal and state securities laws based on alleged deficiencies in a Canadian issuer's MD&A.

Regulation G Public Disclosure Requirements: Regulation G requires issuers that publicly disclose or release material information containing a non-GAAP financial measure to include in that disclosure or release a presentation of the most directly comparable GAAP financial measure and a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure. In the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. GAAP, the term "GAAP" refers to the generally accepted accounting principles under which those financial statements are prepared. If, however, a non-GAAP financial measure is derived from a measure calculated in accordance with U.S. GAAP, GAAP refers to U.S. GAAP. Regulation G applies to all Canadian issuers subject to Exchange Act reporting requirements. There is an exemption from Regulation G available to Canadian and other foreign private issuers in the limited circumstances where:

- the securities of the foreign private issuer are listed or quoted on a securities exchange or inter dealer quotation system outside the United States;
- the non-GAAP financial measure is not derived from or based on a measurement calculated and presented in accordance with U.S. GAAP; and
- the disclosure is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States.

Regulation G specifically confirms that this limited exemption is still available where (i) a written communication is released in the United States as well as outside the United States so long as it is not otherwise targeted at persons located in the United States; (ii) journalists or other third parties have access to the information; (iii) the information appears on one or more websites maintained by the issuer so long as the web sites are not available exclusively to, or targeted at, persons located in the United States; or (iv) following the disclosure or release of the information outside the United States, the information is included in a submission by the issuer to the SEC on Form 6-K. This permits foreign private issuers to furnish to the SEC reports on Form 6-K containing non-GAAP financial measures to the extent such reports comply with the limited exemption and are not incorporated by reference in a filed document. Annual reports on Form 40-F are subject to the requirements of Regulation G.

Item 10(e) Requirements for Certain Filings with the SEC: Although foreign private issuers are also subject to the stricter non-GAAP financial measure requirements of Item 10(e) of Regulation S-K, which apply to any non-GAAP financial measure contained in a document filed with the SEC, Canadian issuers filing annual reports on Form 40-F or MJDS registration statements, are not subject to these stricter requirements.[78]

78 Regulation S-K does not apply to annual reports on Form 40-F or MJDS registration statements. If applicable, Item 10(e) of Regulation S-K would require a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure and would also necessitate a presentation with "equal or greater prominence" of the most directly comparable GAAP financial measure. A narrative description of the use and purpose of the non-GAAP financial measure would also be required, including (i) disclosure of the reasons why management believes that the non-GAAP financial measure provides useful information to investors regarding the issuer's financial condition and results of operations; and (ii) disclosure of any additional purposes for which management uses the non-GAAP financial measure, to the extent material. In addition, the use of a number of categories of potentially misleading non-GAAP financial measures are completely prohibited, subject to certain limited exceptions for foreign private issuers.

Off-Balance Sheet Arrangements: Like other annual reporting forms, MJDS Form 40-F requires issuers to discuss, under a separately-captioned section, the company's "off-balance sheet arrangements" that have or are reasonably likely to have a current or future effect on, among other things, the company's financial condition, results of operations or liquidity that is material to investors. Issuers are also obligated to disclose a number of items about their "off-balance sheet arrangements" including, among other things, the nature and business purpose of the arrangements, the importance to the company of such arrangements, the amount of revenues, expenses and cash flows of the company arising from such arrangements and any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination or a material reduction in benefits arising from such arrangements. In defining the term "off-balance sheet arrangement", the SEC sought to capture the means by which companies typically structure off-balance sheet transactions or otherwise incur risks of loss that are not fully transparent to investors. An "off-balance sheet arrangement" means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the company is a party and under which the company has:

- any obligation under a guarantee contract having certain specified characteristics indentified in FASB ASC paragraph 460-10-15-4[79];
- a retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to the unconsolidated entity for such assets;
- any obligation under a derivative instrument that is both indexed to the company's own stock and classified in stockholders' equity, or not reflected in, the company's statement of financial position; or
- any obligation, including a contingent obligation, arising out of a variable interest in an unconsolidated entity that is held by, and material to, the company, where the unconsolidated entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the company.

Form 40-F also requires issuers to disclose all known contractual obligations, such as long-term debt, capital lease obligations, operating leases, purchase obligations, other long-term obligations reflected on the company's balance sheet and total contractual obligations, including the amounts of payments due under such obligations. The disclosure, which must be presented as a table, must contain information as of the latest fiscal year end balance sheet date and should be accompanied by footnotes describing the material terms and other material information to the extent necessary to an understanding of the timing and amount of the contractual obligations included in the table.

Code of Ethics: Form 40-F requires an MJDS issuer to disclose whether it has adopted a written code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and if it has not adopted one, why it has not done so. The issuer must (i) file the code of ethics as an exhibit to the Form 40-F; (ii) post the code of ethics on its web site and disclose that it has done so, and its website address, in the Form 40-F; or (iii) undertake in the Form 40-F to provide any person with a copy of the code of ethics without charge, upon request.

The issuer must also describe the nature of any amendment to the code of ethics made during the issuer's most recently completed fiscal year and any waiver of the code of ethics granted to an officer within one of the categories required to be covered by the code of ethics and file the amendment as an exhibit to the Form 40-F. Although not required, the SEC strongly encourages foreign private issuers to also disclose this amendment and waiver information on a Form 6-K or on the issuer's website.

79 To constitute an off-balance sheet arrangement, those characteristics identified in FASB ASC paragraph 460-10-15-4 may not be excluded from the initial recognition and measurement provisions of FASB ASC paragraphs 460-10-15-7, 460-10-25-1, and 460-10-30-1.

XBRL: As discussed above under "XBRL Requirements", an XBRL version of financial statements prepared in accordance with IFRS as adopted by the IASB and which are included in annual reports on Form 40-F will be required once the applicable XBRL taxonomy for IFRS has been completed and adopted by the SEC. Annual reports on Form 40-F that include financial statements prepared in accordance with U.S. GAAP are currently required to have an XBRL version of those financial statements.

INTERIM REPORTS ON FORM 6-K

Form 6-K: MJDS filers (and any other foreign private issuers) may satisfy all of their periodic reporting obligations other than their annual reports under the Exchange Act by furnishing to the SEC a report on Form 6-K upon the occurrence of certain events throughout the year. Unless previously included in its annual report filed with the SEC, a Canadian MJDS or other foreign private issuer must furnish a Form 6-K to the SEC promptly upon disclosure of material information that the issuer:

- makes or is required to make public in Canada;
- files or is required to file with any securities exchange on which its securities are traded and which was made public by that exchange; or
- distributes or is required to distribute to its securityholders.

These requirements typically involve furnishing on Form 6-K all of the Canadian issuer's continuous disclosure documents that the issuer files with the Canadian securities regulatory authorities on SEDAR. As a "furnished" document, the Form 6-K is not considered "filed" for purposes of liability under Section 18 of the Exchange Act and need not be incorporated by reference in Securities Act registration statements that require incorporation by reference of documents filed with the SEC, unless it is determined that incorporation by reference would be necessary to help ensure that the registration statement contains no material misstatements or omissions.

If the securities of the Canadian issuer are listed on a U.S. securities exchange, the Form 6-K must be filed with the exchange as well as the SEC, although this filing obligation is deemed to be satisfied when the Form 6-K is submitted to the SEC via EDGAR.

DISCLOSURE OBLIGATIONS REQUIRED BY THE DODD-FRANK ACT

While it primarily focused on wide-ranging reforms to the U.S. financial regulatory environment, the Dodd-Frank Act also introduced new compliance and disclosure obligations that apply to Canadian issuers subject to the Exchange Act relating to mine safety, use of "conflicts minerals" and payments to governments by "resource extraction issuers".

Mine Safety Disclosure: Section 1503(a) of the Dodd-Frank Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the SEC information regarding specified (i) health and safety violations, (ii) orders and citations, (iii) related assessments and legal actions, and (iv) mining-related fatalities. Section 1503(b) of the Dodd-Frank Act requires the filing of a current report on Form 8-K disclosing the receipt of certain shutdown orders and notices of patterns or potential patterns of violations from the Mine Safety and Health Administration ("MHSA"). Related SEC rules clarify that the disclosure requirements only apply to mines in the United States and that only U.S. issuers need to comply with the Form 8-K reporting requirement. Canadian MJDS issuers will need to disclose in their annual report on Form 40-F mine safety violations involving any mining operations that they have in the United States on a mine-by-mine basis. Canadian MJDS issuers that have matters to report must include brief disclosure in their annual report on Form 40-F noting that they have mine safety violations or other regulatory matters to report and that the required information is included as an exhibit to the Form 40-F. The exhibit must contain detailed disclosure about the specific violations and regulatory matters for the year covered by the Form 40-F.

Use of Conflict Minerals: Section 1502 of the Dodd-Frank Act and Rule 13p-1 of the Exchange Act create reporting obligations relating to the use by SEC reporting companies of conflict minerals originating from the Democratic Republic of Congo and adjoining countries ("Covered Countries"). Issuers for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that issuer are required to file a report on Form SD on or before May 31 of each year. "Conflict minerals" consist of columbite-tantalite (commonly used in electric components), wolframite (used to produce tungsten, which is commonly used in metal wires), cassiterite (tin) and gold. If the issuer does not manufacture or contract to manufacture any products, or if no conflict minerals are necessary to the functionality or production of the issuer's products, then the issuer is not required to take any further action, make any disclosures or file any Form SD report with the SEC relating to conflict minerals. While the phrases "contract to manufacture", "necessary to the functionality" of a product, and "necessary to the production" of a product are not defined, the SEC has provided guidance for issuers to consider when assessing whether those phrases apply to them.[80] For example, the SEC indicated that an issuer will not be considered to "contract to manufacture" a product if it does no more than take the following actions:

- The issuer specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product (unless it specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product);
- The issuer affixes its brand, marks, logo or label to a generic product manufactured by a third party; or
- The issuer services, maintains, or repairs a product manufactured by a third party.

In addition, the SEC has indicated that an issuer that engages only in activities customarily associated with mining, including transporting the mined ore to a processing facility, crushing and milling the ore and mixing crushed/milled ore is not considered to be "manufacturing" those minerals.

In determining whether a conflict mineral is deemed "necessary to the functionality" or "necessary to the production" of a product, an issuer should consider:

- whether the conflict mineral is intentionally added to the product or any component of the product and is not a naturally-occurring by-product;
- whether the conflict mineral is necessary to the product's generally expected function, use, or purpose;
- if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration; and
- whether the conflict mineral is intentionally included in the product's production process, other than if it is included in a tool, machine, or equipment used to produce the product (such as computers or power lines);

For a conflict mineral to be considered "necessary to the production" of a product, the mineral must be both contained in the product and necessary to the product's production. Also, the SEC confirmed in the adopting release for Rule 13p-1 that an issuer that mines or contracts to mine conflict minerals will not be considered to be manufacturing or contracting to manufacture those materials unless the issuer also engages in manufacturing, whether directly or indirectly, in addition to mining. The SEC's final rule also exempts from any disclosure requirements any conflict minerals that are "outside the supply chain" prior to January 31, 2013. Under the final rule, conflict minerals are "outside the supply chain" if they have been smelted or fully refined or, if they have not been smelted or fully refined, they are outside the Covered Countries.

80 The SEC's final rule Release No. 34-67716 can be found at https://www.sec.gov/rules/final/2012/34-67716.pdf and the SEC"s Frequently Asked Questions on Conflict Minerals can be found at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

If an issuer uses conflict minerals, then it must determine if they originated in Covered Countries by undertaking a reasonable country of origin inquiry. To satisfy the reasonable country of origin inquiry requirement, an issuer must conduct an inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries or are from recycled or scrap sources, and must perform the inquiry in good faith.

If as a result of its inquiry the issuer determines that any conflict minerals it uses ("Necessary Conflict Minerals")

- did not originate in a Covered Country; or
- come from recycled or scrap sources

or if as a result of its inquiry the issuer

- has no reason to believe its Necessary Conflict Minerals may have originated in a Covered Country or
- reasonably believes its Necessary Conflict Minerals come from recycled or scrap sources,

then the issuer must disclose in Form SD under a heading "Conflict Minerals Disclosure" its determination and briefly describe the reasonable country of origin inquiry it used in reaching its determination and the results of the inquiry. The issuer must also disclose this information on its website and under its "Conflict Minerals Disclosure" heading on its Form SD, provide a link to its website.

If, as a result of its reasonable country of origin inquiry, an issuer

- knows it has Necessary Conflict Minerals which originated in the Covered Countries and are not from recycled or scrap sources, or
- has reason to believe that its Necessary Conflict Minerals may have originated in the Covered Countries and has reason to believe they may not have come from recycled or scrap sources, then the issuer must exercise due diligence on the source and chain of custody of its conflict minerals. Its due diligence must conform to a nationally or internationally recognized due diligence framework, if such a framework is available for that particular conflict mineral.

If as a result of its due diligence an issuer determines that its conflict minerals

- did not originate in a Covered Country or
- did come from recycled or scrap sources,

then the issuer must disclose on its Form SD under the heading "Conflict Minerals Disclosure" its determination and briefly describe the reasonable country of origin inquiry and the due diligence efforts it undertook in making its determination and the results of the inquiry and due diligence efforts it performed. The issuer must also disclose this information on its website and under its "Conflict Minerals Disclosure" heading on its Form SD, provide a link to its website.

In all other circumstances an issuer will be required to prepare a report (a "Conflict Minerals Report") regarding its use of the conflict minerals. The issuer must provide its Conflict Minerals Report on its website and disclose on its Form SD that it has filed its Conflict Minerals Report with the SEC and provide a link to its website.

The Conflict Minerals Report must include:

- a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals,
- a description of its products that are not "DRC conflict free" (which the rules define to mean a product which does not contain conflict minerals that directly or indirectly finance or benefit armed groups in Covered Countries),

- the country of origin of those conflict minerals, and the facilities used to process those minerals,
- a description of the efforts and procedures taken to determine the mine or location of origin of the minerals with the greatest possible specificity,
- a certification by the issuer that it obtained an independent private sector audit of its Conflict Minerals Report, and
- the audit report and the identity of the auditor.

In April 2014, the U.S. Court of Appeals for the District of Columbia Circuit largely upheld the conflict minerals rule against a legal challenge. However, in its ruling, the Court of Appeals held that the conflict minerals rule violates the First Amendment to the U.S. Constitution, to the extent it requires companies to report to the SEC and state on their websites that any of their products have "not been found to be 'DRC conflict free.'" In response to the April 2014 holding, SEC guidance and a formal order indicate that the SEC expects companies to comply with the rule's substantive requirements, with certain modifications. The SEC's guidance:

- instructs companies to report in accordance with Rule 13p-1's filing deadlines and to address the portions of Rule 13p-1 and Form SD that were upheld by the Court of Appeals;
- provides that companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook;
- states that no company is required to describe its products as "DRC conflict free", having "not been found to be 'DRC conflict free'" or "DRC conflict undeterminable";
- indicates that, pending further SEC guidance, an independent private sector audit of a company's conflict minerals report is not required unless a company voluntarily elects to describe its products as "DRC conflict free" in its conflict minerals report.

On May 2, 2014, consistent with the SEC's guidance, the SEC issued a formal order staying the portions of the conflict minerals rule that the Court of Appeal held violate the First Amendment to the U.S. Constitution.

In August 2015, the Court of Appeals reaffirmed its holding. In March 2016, the SEC confirmed that it does not plan to appeal to the U.S. Supreme Court. The SEC's guidance and stay from 2014 currently remains in effect.

Payments to Governments by Resource Extraction Issuers: On June 27, 2016, the SEC adopted a final rule that requires SEC-reporting resource extraction issuers to disclose payments to the U.S. federal government and foreign governments relating to the commercial development of oil, natural gas or minerals. These annual disclosure requirements are substantially similar to those under Canada's Extractive Sector Transparency Measures Act ("ESTMA") which apply to all issuers listed on a Canadian stock exchange and certain other issuers with connections to Canada.

Rule 13q-1, as adopted under the Exchange Act, applies to all resource extraction issuers that file annual reports with the SEC, including Canadian issuers reporting on Form 40-F under the Multijurisdictional Disclosure System. The purpose of Rule 13q-1 is to promote greater transparency to help combat corruption related to resource development and to help citizens of resource-rich developing countries hold their governments accountable for the wealth generated by those resources. Rule 13q-1 was initially adopted by the SEC in August 2012 to implement section 1504 of the Dodd-Frank Act, but the 2012 rule was vacated by the U.S. District Court for the District of Columbia in July 2013 on the basis that the SEC misread the Dodd-Frank Act when compelling public disclosure of issuers' reports. The Court further held that the SEC's explanation for not granting an exemption when disclosure is prohibited by foreign governments was arbitrary and capricious. The SEC re-proposed the rule on December 11, 2015 in a form substantially similar to the 2012 rule, except that the SEC included certain concepts from Canada's ESTMA, which came into force on June 1, 2015, and the EU Accounting Directive and EU Transparency Directive ("EU Directives"), which came into effect in October 2013. The SEC's re-proposed rule also addressed the issues identified in the U.S. court decision vacating the 2012 rule.

Under Rule 13q-1 as adopted, the term "resource extraction issuer" includes all U.S. and foreign companies that engage in the commercial development of oil, natural gas or minerals and are required to file an annual report with the SEC on Forms 10-K, 20-F or 40-F.

The term "commercial development" means exploration, extraction, processing and export, or the acquisition of a licence to do so and is not intended to capture activities that are ancillary or preparatory to commercial development (such as operators providing hydraulic fracturing or drilling services), downstream activities (refining and smelting) or export services provided by issuers with no ownership interest in the resource.

Rule 13q-1 requires resource extraction issuers to provide project-level disclosure of payments that are "not *de minimis*" and that they have made to a foreign government (including a foreign national, state, provincial, county, district, municipal or territorial government, or a company that is majority-owned by such governments) or the U.S. federal government to further the commercial development of oil, natural gas or minerals. A payment that is not *de minimis* includes any payment, whether a single payment or a series of related payments, of US$100,000 or more during the most recent fiscal year. In contrast, the threshold for required reporting under ESTMA is CDN$100,000. In addition to payments it makes directly, a resource extraction issuer will be required to disclose payments made by its subsidiaries or other entities under its control (as determined by applicable U.S. GAAP or IFRS accounting principles).

The types of payments that must be disclosed include taxes (other than consumption-based taxes, such as sales taxes), royalties, fees (including licence fees), production entitlements, bonuses, dividends (other than those paid under the same terms as other shareholders) and payments for infrastructure improvements. Resource extraction issuers must also disclose community and social responsibility ("CSR") payments that are required by law or contract.

Rule 13q-1 largely mirrors the guidance and technical reporting specifications under ESTMA, issued on March 1, 2016, and the EU Directives in defining a "project" as operational activities that are governed by a single contract, licence, lease, concession or similar legal agreement, which form the basis for payment liabilities with a government. Agreements that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project. However, unlike the definition under ESTMA and the EU Directives, Rule 13q-1 does not require the agreements to have "substantially similar terms" to be treated as a single project.

The following items must be publicly disclosed under Rule 13q-1, unless one of the two exemptions discussed below applies:

- the type and total amount of payments for all projects made to each government
- the total amounts of the payments, by category
- the currency used to make the payments
- the fiscal year in which the payments were made
- the business segment of the resource extraction issuer that made the payments
- the government that received the payments and the country in which the government is located
- the project of the resource extraction issuer to which the payments relate
- the particular resource that is the subject of commercial development
- the subnational geographic location of the project

Rule 13q-1 includes two exemptions to the reporting obligations:

- A resource extraction issuer that has acquired a company not previously subject to the final rule will not be required to report payment information for the acquired company until the filing of a Form SD for the first fiscal year following the acquisition.
- Issuers can delay reporting payments related to exploratory activities in Form SD until the fiscal year following the fiscal year in which the payments were made. Payments are considered to be related to exploratory activities if they are made as part of the process of identifying areas that may warrant examination, examining specific areas that are considered to have prospects of containing oil and gas reserves, or as part of a mineral exploration program. However, exploratory activities are limited to activities conducted prior to the development or extraction of the oil and gas or minerals that are the subject of the exploratory activities. Furthermore, this targeted exemption is not permitted for payments related to exploratory activities on the property or any adjacent property once the issuer has commenced development or extraction activities anywhere on the property, on any adjacent property, or on any property that is part of the same project.

In addition to the two prescribed exemptions, issuers may apply for exemptive relief that the SEC will consider based on a case-by-case assessment of whether the requesting issuer would suffer substantial commercial or financial harm if the exemptive relief were not granted. In the adopting release for Rule 13q-1, the SEC indicated that it would also consider granting exemptive relief in situations where disclosure would conflict with the terms of a material pre-existing contract, reveal commercially sensitive information not otherwise available to the public, or have a substantial likelihood of jeopardizing the safety of an issuer's personnel, although it noted that this is not an exhaustive list.

A resource extraction issuer relying on the alternative reporting accommodation must file its foreign report as an exhibit to Form SD with XBRL tags and provide an English translation if the report was prepared in a foreign language. An issuer filing a report prepared pursuant to a foreign reporting regime is permitted to follow the reporting deadline in the foreign jurisdiction, but it must submit a notice on Form SD-N on or before the due date of its Form SD indicating its intent to submit the foreign report using the foreign jurisdiction's deadline. If an issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the foreign report within two business days of the alternative jurisdiction's deadline, it will become ineligible for the alternative reporting accommodation for the following fiscal year and must follow the requirements of the SEC's final rule.

Resource extraction issuers are required to comply with Rule 13q-1 beginning with their fiscal year ending on or after September 30, 2018 and must file the Form SD annually thereafter no later than 150 days after the end of their fiscal year. For example, a resource extraction issuer with a December 31 fiscal year end will be required to file its first resource extraction payment report no later than 150 days after December 31, 2018, which is May 30, 2019. The Form SD will be "filed" for U.S. Exchange Act purposes, meaning that resource extraction issuers will be subject to liability under the U.S. Exchange Act for the accuracy of the required payments information.

While Rule 13q-1 applies to all Canadian resource extraction issuers that file annual reports with the SEC, Canadian issuers subject to ESTMA will be able to satisfy all of the requirements of Rule 13q-1 by filing a Form SD with an English version of the Canadian ESTMA report attached as an exhibit, with the required XBRL tagging added. It is not clear from the adopting release for Rule 13q-1 whether Canadian resource extraction issuers will be permitted to exclude CSR payments, as permitted under ESTMA, or whether they will be required to calculate their CSR payments in order to add them to the XBRL aggregate payment field.

IRAN THREAT REDUCTION AND SYRIA HUMAN RIGHTS ACT OF 2012

In August 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "ITR Act") was enacted and significantly expands U.S. sanctions against Iran by, among other things, imposing a disclosure requirement relating to knowing engagement in sanctionable activities by domestic and foreign private issuers (including Canadian companies using MJDS) required to file annual and quarterly reports with the SEC.

The IRT Act added Section 13(r) of the Exchange Act, which requires an issuer that files annual or quarterly reports with the SEC to make specific disclosures in such reports if, during the period covered by the report, the issuer or any of its affiliates (including the issuer's significant shareholders, and potentially including other parties that the issuer does not control) engaged in any of the following activities:

- knowingly engaged in an activity covered by Section 5(a) or 5(b) of the Iran Sanctions Act of 1996, as amended;
- knowingly engaged in an activity or transaction described in sections 104(c)(2), 104(d)(1) or 105A(b)(2) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, as amended; or
- knowingly conducted any transaction or dealing with the following persons or entities:
    - any person or entity that has property blocked pursuant to Executive Order No. 132246, which relates to any person or entity that is designated on the Specially Designated National and Blocked Persons List (the "SDN List") as global terrorists by the Office of Foreign Asset Control;
    - Any person or entity that has property blocked pursuant to Executive Order No. 133828, which relates to any person or entity that is designated on the SDN List as a supporter and proliferator of weapons of mass destruction; or
    - any person or entity defined in Section 560.304 of the U.S. Code of Federal Regulations, which covers the Government of Iran, any political subdivision, agency or instrumentality of the Government of Iran, any entity owned or controlled directly or indirectly by any of the foregoing, or any person acting or purporting to act, or for whom there is reasonable cause to believe that such person is acting or purporting to act, directly or indirectly on behalf of any of the foregoing. Under this requirement, any transactions conducted without the specific authorization of a U.S. government department or agency must be reported.

If an issuer discloses that it, or one of its affiliates, has engaged in any of these activities during the relevant reporting period, the issuer is also required to provide a detailed description of such activity. Absent further guidance from the SEC, this disclosure must be made without regard to materiality of the amount or the scope or breadth of the activities involved. The disclosure must include:

- the nature and extent of the activity;
- the gross revenues and net profits, if any, attributable to the activity; and
- a statement whether or not the issuer or its affiliate intends to continue the activity.

The ITR Act also requires a reporting issuer to provide the same information to the SEC in a separate notice filed concurrently with the applicable annual or quarterly report. Upon receipt of this notice, the SEC is required to provide the relevant report to each of: (i) the President of the United States, (ii) the Committee on Foreign Affairs and the Committee on Financial Services of the House of Representatives, and (iii) the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate, and to post the notice publicly on the SEC's website. Following receipt of such notice, the ITR Act requires the President to initiate an investigation to determine whether sanctions should be imposed pursuant to a variety of laws or by Executive Order and to make that determination not later than 180 days after the commencement of the investigation.

SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS

In the United States, the Private Securities Litigation Reform Act of 1995 provides a "safe harbor" that substantially increases the ability of an issuer to make "forward-looking statements" without being subject to liability if the statements are based on reasonable assumptions but the ultimate actual results do not conform with the issuer's belief or expectation when the statements were made. Forward-looking statements include projections of revenues, income, earnings, capital expenditures, dividends or other financial items; statements of plans and objectives of management for future operations; and statements of expected future economic performance, including those made in the MD&A section of the disclosure document. In order to be entitled to the protections of this safe harbor, the issuer must identify the forward-looking statements as such, and also set forth meaningful cautionary statements describing the major circumstances or events that could cause actual results to differ materially from the issuer's current belief. There is divided opinion among U.S. courts as to how detailed the "meaningful cautionary language" must be in order for the safe harbor to be available. This safe harbor is available for forward-looking statements contained in registration statements under the Securities Act and periodic and current reports under the Exchange Act, except that it is not available for an issuer that is making a U.S. initial public offering. Nevertheless, it is common practice to include a cautionary statement regarding the use of forward-looking statements in a U.S. initial public offering registration statement on the basis that it is disclosure that would be helpful in establishing a defence if a claim is made based on the forward-looking statements, even though the statutory safe harbor would not itself be available.

In Canada, there is a corresponding safe harbor for forward-looking statements in the context of provincial legislation creating statutory liability for misrepresentations in public documents or statements that are, or are deemed to be, relied upon in connection with secondary market trading. The Canadian safe harbor does not apply to liability for forward-looking statements to purchasers who buy securities in a prospectus offering, although it would apply to an action based on the contents of the prospectus in connection with subsequent secondary market trading activity. An important difference between the safe harbor under the Canadian legislation and the U.S. safe harbor is that the Canadian rules require that, in addition to a statement of the circumstances and events creating the risk that actual results could differ, the issuer must also include a statement of the principal assumptions relied upon in order to arrive at the views expressed in the forward-looking statements. Under Canadian rules, the benefit of the safe harbor will not be available unless both elements are present. Accordingly, it is important for Canadian issuers to ensure that their cautionary statements are reviewed by Canadian counsel with expertise in the Canadian secondary market civil liability provisions, as compliance with only the U.S. requirements will not be sufficient to ensure the availability of the safe harbor in Canada.

7

Other Considerations for U.S. Reporting Issuers and Their Shareholders

PROXY RULES, INSIDER REPORTING AND SHORT-SWING PROFIT RULES

A Canadian company that is an SEC registrant but qualifies as a "foreign private issuer",[81] along with its insiders, will not be subject to:

- the requirements of Section 14 of the Exchange Act, which prescribe the contents for a proxy statement for meetings of shareholders and require the proxy statement to be filed with, and in some cases reviewed by, the SEC;
- the requirements of Section 16(a) of the Exchange Act to file insider reports with the SEC, in most cases within two business days of a trade; or
- the liability provisions of Section 16(b) of the Exchange Act, which can expose an insider to liability for "short swing profits" arising through certain purchase and sale transactions undertaken within the same six-month period.

DISCLOSURE REQUIREMENTS FOR SIGNIFICANT SHAREHOLDERS – SCHEDULES 13D AND 13G

Any person who is or becomes the beneficial owner of more than 5% of a class of voting equity securities registered under Section 12 of the Exchange Act is required to file a disclosure statement with the SEC pursuant to Section 13(d) of the Exchange Act and related rules. This disclosure is intended to serve the same purpose as the early warning requirements under Canadian securities law to ensure that the investing public is aware of concentrations of control of the company, changes in the ownership levels and interests of significant shareholders, and changes in the intentions of those shareholders with respect to their ownership position.

Unlike the insider reporting obligations of Section 16(a) of the Exchange Act, shareholders of a foreign private issuer (including MJDS filers) with Exchange Act-registered equity securities are not exempt from the Section 13(d) reporting requirements, which apply fully to the same extent as for shareholders of U.S. domestic companies.

There are two ways in which reporting obligations under Section 13(d) and its related rules may be satisfied. The first is by filing a Schedule 13D, which contains detailed information regarding the

81 Please see the discussion of foreign private issuers on page 10.

shareholder's ownership of securities and intentions regarding those securities. To those familiar with Canadian early warning reports, a Schedule 13D will appear to be a lengthy, detailed and onerous reporting form. Persons who have filed a Schedule 13D must also remain diligently attuned to the implications of changes in their circumstances or intentions because those changes (as well as changes in actual ownership levels) could trigger requirements to file amendments to the Schedule 13D. Unlike the Canadian early warning reports, changes that are not material changes under Canadian standards could trigger an amendment filing obligation for Schedule 13D purposes. As a result, there may be circumstances where amendments to a Schedule 13D filing will be required where no amendment to a corresponding Canadian early warning report need be filed.

Reporting on Schedule 13G, if an available option, is the second method through which these ownership reporting requirements can be satisfied. Schedule 13G is a simplified reporting form that requires considerably less disclosure than Schedule 13D. Subject to meeting the necessary eligibility requirements, Schedule 13G is generally available to:

- institutional investors who have purchased the securities in the ordinary course of their business, and not for the purpose or with the effect of changing or influencing control of the issuer;
- passive investors who have acquired the securities with neither the purpose nor with the effect of changing or influencing control of the issuer, and who own 20% or less of the class of securities; and
- any person who is directly or indirectly the beneficial owner of more than 5% of the subject security, but who is not otherwise required to file a beneficial ownership report on Schedule 13D, including any person who held such securities prior to their registration in the United States.

The simplified reporting in Schedule 13G will generally only require disclosure of the following information:

- the name and address of the issuer;
- the name, address and citizenship (or place of organization if not a natural person) of the person who beneficially owns the securities;
- the number of securities beneficially owned by the reporting person and the percentage of the total number of outstanding shares of the class that the beneficially owned securities represent; and
- the number of securities that the reporting person has sole or shared power to vote or to direct the voting thereof, and the number of securities that the reporting person has sole or shared power to dispose of or to direct the disposition thereof.

A Schedule 13D is generally required in all other circumstances. Among other things, the more onerous Schedule 13D report also requires, in addition to the information required by Schedule 13G:

- the source and amount of the funds or other consideration that were or will be used to make the purchases of the securities (and in particular, disclosure regarding any funds borrowed in order to acquire the securities);
- the purpose for acquiring the securities, including any plans or proposals to acquire additional securities, to effect an extraordinary corporate transaction such as a merger, reorganization or liquidation of the issuer, to sell or transfer a material amount of assets, to change the board or management of the issuer, to change the issuer's business in a material way or to delist the securities of the issuer from a national securities exchange; and
- details of any contracts, arrangements, or understandings entered into with respect to the issuer's securities, including voting arrangements.

There are several noteworthy differences between the U.S. and the Canadian reporting requirements for significant shareholders that should be considered:

- **Subject Classes:** In Canada, the early warning requirements apply with respect to ownership of any class of voting or equity securities of a Canadian reporting issuer. In the United States, the reporting requirements only apply with respect to the ownership of a class of voting equity securities registered under Section 12 of the Exchange Act (which includes, but is not limited to, securities trading on a U.S. national stock exchange). However, whether a particular class of security is "voting" or "non-voting" will have to be analyzed very carefully. Because Canadian corporate law may extend voting rights to holders of purportedly non-voting securities with respect to certain fundamental transactions, securities that are called "non-voting" may in fact be considered voting equity securities for the purposes of Section 13(d) reporting requirements.
- **Ownership Threshold:** In Canada, the relevant threshold requiring ownership reporting is currently 10% of a subject class. Under Section 13(d) of the Exchange Act the relevant threshold is 5%. As a result, holders of more than 5% but less than 10% of a subject class will be subject to reporting requirements in the United States, even though they will not be subject to any corresponding reporting requirement in Canada unless and until the proposed amendments have been adopted.
- **Reporting Trigger:** In Canada, an early warning reporting requirement is triggered by the acquisition of a voting or equity security which, together with that person's existing holdings, results in the person holding more than 10% of the class of security. No reporting requirement is triggered unless there is an acquisition of a security. For example, if a founding shareholder undertakes an initial public offering of a company in Canada, the founding shareholder will not be subject to any early warning reporting requirements in Canada in respect of such shareholder's remaining interest unless and until he or she acquires (subject to compliance with Canadian take-over bid requirements) at least one additional share.
- **Deemed Beneficial Ownership:** In both Canada and the United States, a person is deemed to be the beneficial owner of any securities that he or she has the right to acquire within the next 60 days. So, for example, a person will be deemed to be the beneficial owner of any shares issuable upon the exercise of a currently exercisable warrant even if the warrant is not in-the-money. In order to calculate the percentage of the class held by the reporting person, only the number of shares the reporting person is deemed to own as a result of his or her own acquisition rights is added to the actual number of shares outstanding. A difference between Canada and the United States with respect to the calculation of deemed beneficial ownership is that the Canadian rules also require the inclusion of securities that the reporting person has the obligation (rather than only the right) to acquire within the next 60 days. So, for example, if a person writes a currently-exercisable put option, under the Canadian rules that person will be deemed to be the beneficial owner of the shares covered by the put.

INSIDER TRADING RESTRICTIONS

Although Canadian MJDS and other foreign private issuers and their shareholders are exempt from the insider reporting requirements of Section 16(a) of the Exchange Act, they are subject to insider trading restrictions under U.S. federal securities laws.

Section 10(b) and Rule 10b-5 under the Exchange Act and the extensive case law considering those provisions prohibit an "insider" from trading in securities of the issuer while in possession of material information that has not been disclosed to the public. Rule 10b5-1 provides, as a general matter, that a person owing a duty of trust or confidence to an issuer or its shareholders will be deemed to have traded on the basis of material, non-public information if such person was aware of the material, non-public information at the time of the trade. The Rule also contains two affirmative defenses. One defense permits the purchase or sale of securities even when a person is in possession of material, non-public information if the trades are made pursuant to previously established binding contracts, instructions or written plans.[82] This affirmative defense would only be available to the insider if the contract, instruction or plan was entered into in good faith and not as part of a scheme to evade the prohibitions of Rule 10b5-1.

An additional affirmative defense is available only to trading parties that are not natural persons. Under this provision, an entity will not be liable under insider trading prohibitions if it demonstrates that the individual making the investment decision on behalf of the entity was not aware of material, non-public information, and that the entity had implemented reasonable policies and procedures, taking into consideration the nature of the entity's business, to prevent insider trading.

As a practical matter, the restrictions on insider trading and prohibitions against tipping under Canadian securities laws are equivalent to, if not even more extensive than, those arising under U.S. federal securities laws. Compliance with Canadian insider trading and tipping restrictions should, generally speaking, concurrently ensure compliance with the corresponding U.S. restrictions.

SELECTIVE DISCLOSURE AND REGULATION FD

Regulation FD (Fair Disclosure) sets out certain requirements intended to ensure that any material information made available to analysts or other selected individuals is also broadly and promptly disseminated to the public. Technically, the requirements of Regulation FD do not apply to Canadian MJDS and other foreign private issuers. However, the requirements of Regulation FD should be instructive to Canadian issuers since they reflect the principles of fair disclosure practices that will assist in complying with both Canadian and U.S. insider trading and tipping prohibitions.

OIL AND GAS AND MINING DISCLOSURE REQUIREMENTS

At the end of 2008, the SEC adopted extensive revisions to its oil and gas reporting disclosure requirements, which are in Subpart 1200 of Regulation S-K.[83] The revisions were designed to modernize and update the oil and gas disclosure requirements to align them with current practices and technology. Although the U.S. and Canadian disclosure requirements are now more harmonized, differences do exist that may, in certain circumstances, be material. The primary differences between the U.S. requirements and the Canadian NI 51–101 requirements are that (1) the U.S. standards require disclosure only of proved reserves, whereas NI 51–101 requires disclosure of proved and probable reserves, (2) the SEC does not allow proved and probable reserves to be aggregated where as NI 51-101 requires aggregate disclosure, (3) the U.S. standards require that the reserves and related future net revenue be estimated using a historic constant price, the average of the first-day of the month price for the 12 months prior to the end of the reporting period, while NI 51–101 requires disclosure of reserves and related future net revenue using forecast prices, (4) under U.S. disclosure standards, reserves and production information is disclosed on a net basis (after the deduction of royalties and similar payments), where as in Canada such information is disclosed on a gross basis, (5) the SEC prohibits disclosure of oil and gas resources, where as Canadian issuers may disclose

82 To rely on this affirmative defense, the insider would need to establish that:

(a) Before becoming aware of material, non-public information, the insider had (1) entered into a binding contract to purchase or sell the issuer's securities, (2) provided instructions to another person to execute the trade on behalf of the insider, or (3) adopted a written plan for trading the issuer's securities;

(b) With respect to the purchase or sale, the contract, instruction or plan either: (1) expressly specified the amount, price and date; (2) provided a written formula or algorithm, or computer program, for determining amounts, prices and dates; or (3) did not permit the insider to exercise any subsequent influence over how, when or whether to effect purchases or sales; provided, in addition, that any other person (such as a third party broker-dealer) who did exercise such influence was not aware of the material, non-public information when doing so; and

(c) The purchase or sale that occurred was pursuant to the prior contract, instruction or plan. A purchase or sale is not pursuant to a contract, instruction or plan if, among other things, the insider altered or deviated from the contract, instruction or plan or entered into or altered a corresponding or hedging transaction or position with respect to the securities.

83 See SEC Release 33-8995 (December 31, 2008).

certain resources, and (6) the SEC permits disclosure of internally-generated reserves data, where as Canadian issuers are required to disclose independently-generated reserves data.

Subpart 1200 disclosure requirements do not apply to MJDS issuers that file annual reports on Form 40-F and use MJDS registration statements and comply with National Instrument 51-101 in Canada.

The SEC's Industry Guide 7 contains disclosure guidance for public companies with significant mining operations. As discussed further below, in June 2016, the SEC released a proposal to modernize the SEC's disclosure requirements and policies for mining properties. If implemented, the proposal rules will replace Guide 7 with a new Subpart 1300 of Regulation S-K. While many of the terms and concepts used by Guide 7 are similar to those used in Canada's NI 43-101, these regimes are not harmonized and contain a number of substantive differences. Guide 7 is generally more conservative than NI 43-101 in what is permitted to be disclosed in a company's annual reports, registration statements and other public documents. For example, under Guide 7 mineralization is not permitted to be classified as "proven" or "probable" reserves until a "final" or "bankable" feasibility study has been conducted in order to demonstrate that a deposit can be economically extracted, and all necessary permits, including environmental permits, are in hand (or their issuance is imminent) in order to demonstrate that a deposit can be legally extracted. In contrast, under NI 43-101, mineral reserves are the economically mineable part of a measured or indicated mineral resource demonstrated by at least a preliminary feasibility study and there must be at least a reasonable expectation that governmental approvals will be provided. Guide 7 requires the use of commodity prices based on the average of the last three years subject to a reasonableness test or in certain circumstances based on a contract price if the commodity is sold under contract. In contrast, NI 43-101 allows the use of the issuer's forward-looking prices.

NI 43-101 also provides for the disclosure of "measured," "indicated" and "inferred" mineral resources. In general terms, measured and indicated mineral resources are categories of mineralization that have reasonable prospects for economic extraction but have not been demonstrated to be economically mineable as is required to constitute a mineral reserve under NI 43-101 or reserves under Guide 7. Inferred mineral resources have less certainty as to quantity and grade than measured and indicated mineral resources. Disclosure of mineral resources is generally prohibited by U.S. rules except where an issuer is required to do so by foreign or state law, though in limited circumstances Guide 7, as applied by the SEC, does allow the disclosure of "mineralized material," which generally includes any mineralization of existing or potential economic significance that does not qualify as a proven or probable reserve. Further, Guide 7 does not recognize the qualified person concept in NI 43-101, although it does require disclosure of the name of persons making the estimates and their relationship to the issuer.

In June 2016, the SEC introduced proposed rules that would modernize the SEC's disclosure requirements and policies for mining properties by aligning them with current industry and global regulatory practices and standards. The SEC is proposing to replace Guide 7, which has not been updated in 35 years, with a new Subpart 1300 of Regulation S-K. The new rules would align more closely with mining disclosure standards based on the Committee for Mineral Reserves International Reporting Standards ("CRIRSCO"). For example, the new rules would permit and in fact require a company to disclose mineral resources and material exploration results in addition to mineral reserves; would adopt the CRIRSCO-based classification of inferred, indicated and measured mineral resources; and would mandate that commodity prices used in reserve and resource estimations cannot be higher than the prior 24-month average closing price.

The SEC's Industry Guide 7 disclosure requirements and its proposed Subpart 1300 of Regulation S-K relating to an SEC reporting company's significant mining operations do not apply to MJDS issuers, which instead must comply with the NI 43-101 disclosure requirements in Canada relating to mining operations.

While none of Subpart 1200 and proposed Subpart 1300 of Regulation S-K nor SEC Industry Guide 7 disclosure requirements apply to Canadian issuers filing registration statements or period reports with the SEC on MJDS forms[84], Canadian MJDS issuers typically alert investors that the disclosure in their filings regarding reserve and resource estimates is being made in accordance with the Canadian requirements, and not the SEC's requirements, to avoid any claims under the antifraud provisions of the U.S. federal securities laws alleging confusion about which standard governed the disclosure.

For mining companies, to date, this disclosure, typically phrased as a "Note to U.S. Investors Regarding the Presentation of Mineral Reserves and Mineral Resources," essentially:

- outlines that the mineral reserve and mineral resource estimates disclosed in the offering materials were prepared in accordance with NI 43-101, which differs from Guide 7;
- explains the main differences between NI 43-101 and Guide 7; and
- provides certain warnings associated with the uncertainty around "measured," "indicated" and "inferred" mineral resources, given that Guide 7 generally prohibits disclosure of estimates that are not reserves as defined in Guide 7.

For oil and gas companies, this disclosure is typically phrased as a "Note to U.S. Investors Regarding the Presentation of Oil and Gas Reserves and Resources," essentially:

- outlines that the oil and gas reserve and resource estimates disclosed were prepared in accordance with NI 51-101, which differs from the SEC's standards;
- explains the main differences between NI 51-101 and the SEC's standards; and
- provides certain warnings associated with the uncertainty around "contingent" resources, given that the SEC's standards generally prohibit disclosure of estimates that are not reserves as defined in the SEC's standards.[85]

In addition to the "Note to U.S. Investors," Canadian mining and oil and gas companies may wish to include disclosure in the "Risk Factor" sections of their filings regarding the material differences between NI 43-101 and Guide 7 or NI 51-101 and Subpart 1200, respectively.

84 Some Canadian MJDS issuers in the mining industry have chosen to report their mineral reserve and mineral resource estimates in accordance with both NI 43-101 and Guide 7 to the extent possible. Similarly, some Canadian oil and gas companies using MJDS have sought exemptions from NI 51-101 and instead disclose oil and gas reserves pursuant to the SEC's standards or supplement their NI 51-101 disclosure with reserves and other oil and gas information in accordance with the SEC's standards. In each case, the main reason for doing so is usually to provide disclosure comparable to that provided by U.S. and other international issuers.

85 This advisory should become less extensive if the SEC's proposed Subpart 1300 of Regulation S-K is implemented, as Subpart 1300 would more closely align with NI 43-101 than Industry Guide 7.

Appendix

A

Summary Description of MJDS Registration Statement Forms

FORM F-10

USED FOR

Any security (including securities to be issued in a business combination). Form F-10 cannot be used, however, to register derivative securities except for: (1) warrants, options and rights, provided that these securities and the underlying securities are issued by the registrant, its parent or an affiliate of either and (2) convertible securities, provided that the securities are convertible only into shares of the registrant, its parent or an affiliate of either. For this purpose, "affiliate" has a special definition that includes only upstream entities.

ELIGIBILITY CRITERIA

Registrant:

1. Is incorporated or organized under Canadian federal or provincial law;
2. Is a foreign private issuer;
3. Has been subject to the continuous disclosure requirements of any Canadian securities regulatory authority for at least 12 calendar months immediately preceding filing of Form F-10, and is currently in compliance with those obligations[86];

86 In the case of an exchange offer, statutory amalgamation, merger, arrangement or other reorganization requiring a shareholder vote (a "business combination") the participating companies (other than the successor registrant) must meet the 12-month reporting requirement. Notwithstanding this test, if one or more of the participating companies accounts for at least 80% of the total assets and gross revenues of the continuing operations of the successor registrant, and such company or companies meet the 12-month reporting requirement, the reporting criterion will be deemed satisfied.
If the registrant is a successor registrant after a business combination, the registrant will be deemed to meet the 12-month reporting requirement if: (1) the time that the successor registrant has been subject to Canadian continuous disclosure requirements, when added separately to the time that each predecessor company that had been subject to Canadian disclosure requirements before the business combination, in each case equals or exceeds 12 months; and (2) the successor registrant has been subject to Canadian continuous disclosure obligations since the business combination, and is currently in compliance with those obligations. The test in (1) is deemed satisfied if, when the time that the successor registrant has been subject to Canadian continuous disclosure requirements is added to the time that one or more of the predecessor companies accounting for at least 80% of the total assets and gross revenues of the continuing operations of the successor registrant had been subject to Canadian disclosure requirements, the sum in each case equals or exceeds 12 months.
Note that while Instruction I.I. in Form F-10 states that the reporting requirement is 36 months, SEC Release No. 33 7025, amending Form F-10 (November 3, 1993), clearly indicates that the SEC has amended this requirement to 12 months.

4. Has an aggregate market value of the public float of its outstanding equity shares of US$75 million or more[87]; and
5. Is not an investment company registered or required to be registered under the Investment Company Act of 1940.

Form F-10 cannot be used if no takeover bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) or prospectus (in all other cases) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

ADDITIONAL NOTES

The market value of outstanding equity securities is to be computed by using the price at which the shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for the shares as of a date within 60 days prior to the date of filing. If there is no market for the securities, the book value of the securities computed as of the latest practicable date prior to the filing of the Form F-10 is to be used for purposes of calculating the market value.

"Public float" means only securities held by persons other than affiliates of the issuer. For this purpose, an "affiliate" is anyone that beneficially owned more than 10% of the issuer's outstanding equity shares as of the end of the issuer's most recently completed fiscal year.

In the case of an exchange offer, the issuer of the securities to be exchanged for the securities of the registrant must also be incorporated or organized under Canadian law and be a foreign private issuer.

In the case of a business combination, each participating company must be incorporated or organized under Canadian law and be a foreign private issuer.

In the case of an exchange offer or a business combination, the securities registered on Form F-10 must be offered to U.S. holders on terms and conditions not less favorable to those offered to any other holder of the same class of subject securities (in an exchange offer) or the same class of such securities of the participating company (in a business combination).

If the offering registered on Form F-10 is not being made contemporaneously in Canada, the registration statement on Form F-10 and any amendments thereto must be prepared and filed as though the offering were being made contemporaneously in Canada.

For debt securities or preferred securities, if the registrant is a majority-owned subsidiary, it will be deemed to meet the 12-month reporting and US$75 million public float requirements if the parent of the registrant subsidiary meets the eligibility requirements and fully and unconditionally guarantees the securities being registered as to principal and interest (if debt securities) or as to liquidation preference, redemption price and dividends (if preferred securities); provided, however, that the securities of the subsidiary are only convertible or exchangeable, if at all, for the securities of the parent.

87 In the case of a business combination, the aggregate market value of the public float of the outstanding equity shares of each participating company (other than the successor registrant) must be US$75 million or more. Notwithstanding this test, if one or more of the participating companies accounts for at least 80% of the total assets and gross revenues of the continuing operations of the successor registrant, and such company or companies meet the public float requirement, the public float criterion will be deemed satisfied. A participating company will also be deemed to satisfy the public float requirement if its equity securities were the subject of certain registered exchange offers or tender offers within the preceding 12 month period.

FORM F-7

USED FOR

Securities offered for cash upon the exercise of rights to purchase or subscribe for such securities that are granted to the registrant's existing security holders in proportion to the number of securities held by them as of the record date for the rights offer.

ELIGIBILITY CRITERIA

Registrant:

1. Is incorporated or organized under Canadian federal or provincial law;
2. Is a foreign private issuer;
3. Has had a class of its securities listed on the Toronto Stock Exchange (the "TSX") for the 12 calendar months immediately preceding the filing of the Form F-7, has been subject to the continuous disclosure requirements of a Canadian securities regulatory authority for a period of at least 36 calendar months immediately preceding the filing of the Form F-7, and is currently in compliance with obligations arising from such listing and reporting[88]; and
4. Is not an investment company registered or required to be registered under the Investment Company Act of 1940.

ADDITIONAL NOTES

The rights granted to U.S. holders must be granted on terms and conditions not less favorable than those extended to any other holder of the same class of securities. The securities offered or sold upon exercise of the rights granted to U.S. holders may not be registered on Form F-7 if the rights are transferable other than in accordance with Regulation S under the Securities Act.

The registrant will be exempt from reporting obligations under Section 15(d) of the Exchange Act if the reporting obligations would have arisen solely from the registration of securities on Form F-7.

88 In the case of successor registrants after a business combination, the method of calculating compliance with the 36-month reporting requirement and the 12-month listing requirement is substantially similar to the method of calculating compliance with the reporting history requirement for a successor registrant described in note 86.

FORM F-8 / F-80

USED FOR

Securities to be issued in an exchange offer or in connection with a business combination. Securities can be registered on Form F-8/F-80 whether they constitute the sole consideration in the exchange offer or business combination, or are offered in conjunction with cash. Form F-8/F-80 cannot be used to register derivative securities except for: (1) warrants, options and rights, provided that these securities and the underlying securities are issued by the registrant, its parent or an affiliate of either and (2) convertible securities, provided that the securities are convertible only into shares of the registrant, its parent or an affiliate of either.

ELIGIBILITY CRITERIA

For exchange offers:

Registrant:

1. Is incorporated or organized under Canadian federal or provincial law;
2. Is a foreign private issuer;
3. Has had a class of its securities listed on the TSX for the 12 calendar months immediately preceding the filing of the Form F-8/F-80, has been subject to the continuous disclosure requirements of a Canadian securities regulatory authority for a period of at least 36 calendar months immediately preceding the filing of the Form F-8/F-80, and is currently in compliance with obligations arising from such listing and reporting[89];
4. Has an aggregate market value of the public float of its outstanding equity shares of CDN$75 million or more, provided, however, that the public float requirement does not need to be satisfied if the issuer of the securities to be exchanged is also the registrant on the Form F-8/F-80; and
5. Is not an investment company registered or required to be registered under the Investment Company Act of 1940.

For business combinations:

1. Each company participating in the business combination, including the successor registrant, is incorporated or organized under Canadian federal or provincial law and is a foreign private issuer;
2. Each participating company, other than the successor registrant, has had a class of its securities listed on the TSX for the 12 calendar months immediately preceding the filing of the Form F-8/F-80, has been subject to the continuous disclosure requirements of a Canadian securities regulatory authority for a period of at least 36 calendar months immediately preceding the filing of the Form F-8/F-80, and is currently in compliance with obligations arising from such listing and reporting.[90]
3. The aggregate market value of the public float of the outstanding equity shares of each company participating in the business combination other than the successor registrant is CDN$75 million or more.[91]

89 In the case of a successor registrant after a business combination, the method of calculating compliance with the 36-month reporting requirement and the 12-month listing requirement is substantially similar to the method of calculating compliance with the reporting history requirements for successor registrants described in note 86.

90 In the case of a successor registrant after a business combination, the method of calculating compliance with the 36-month reporting requirement and the 12-month listing requirement is substantially similar to the method of calculating compliance with the reporting history requirements for successor registrants described in note 86.

91 See note 70 for a description of the method for calculating compliance with the public float requirement.

ADDITIONAL NOTES

Form F-8/F-80 cannot be used if no takeover bid circular or issuer bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

In the case of an exchange offer or business combination, the securities registered on Form F-8/F-80 must be offered to U.S. holders on terms and conditions not less favorable than those offered to any other holder of the same class of the subject securities (in an exchange offer) or of the same class of such securities of the participating company (in the case of a business combination).

In the case of an exchange offer on Form F-8/F-80, less than 25% (in the case of Form F-8) or 40% (in the case of Form F-80) of the subject class of securities outstanding are held by U.S. holders.[92] In the case of a business combination on Form F-8/F-80, less than 25% or 40%, respectively, of the class of securities to be offered by the successor registrant shall be held by U.S. holders, as if measured immediately after completion of the business combination.[93] The market value of outstanding equity securities is to be computed by using the price at which the shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for the securities as of a date within 60 days prior to the date of filing. If there is no market for the securities, the book value of the securities computed as of the latest practicable date prior to the filing of the Form F-8/F-80 is to be used for purposes of calculating the market value.

The registrant will be exempt from reporting obligations under Section 15(d) of the Exchange Act if the reporting obligations would have arisen solely from the registration of securities on Form F-8/F-80.

92 The calculation of U.S. holders is to be made as of the end of the subject issuer's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of such issuer's preceding quarter.

93 The calculation of U.S. holders is to be made by a participant as of the end of such participant's quarter, or, if such quarter terminated within 60 days of the filing date, as of the end of such participant's preceding quarter.

If you would like to discuss any of these topics further or request our assistance with a specific matter, please feel free to contact one of the below Osler lawyers:

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About this Publication

This publication is written for Canadian companies considering accessing the U.S. public capital markets through the Multi-jurisdictional Disclosure System ("MJDS") and for those Canadian companies that are already subject to U.S. public periodic reporting requirements and are eligible to satisfy those requirements through MJDS. Under MJDS, Canadian companies may comply with the disclosure requirements prescribed in Canada (subject to complying with certain incremental disclosure requirements prescribed by the Sarbanes-Oxley Act of 2002, as amended (the "Sarbanes-Oxley Act") and The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), to also satisfy their disclosure obligations in the United States. The disclosure documents filed by these companies will generally only be subject to review by the applicable Canadian securities regulators and will not be reviewed by the United States Securities and Exchange Commission (the "SEC").

This publication does not contain a full analysis of the law nor does it constitute an opinion of Osler, Hoskin & Harcourt LLP or any member of the firm on the matters discussed and is not intended to replace a full legal analysis with respect to specific facts and issues.

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Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative "one firm" approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It's law that works.

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