MULTIJURISDICTIONAL DISCLOSURE SYSTEM

OFFERING SECURITIES AND REPORTING IN THE UNITED STATES USING MJDS

DAVIES

Multijurisdictional Disclosure System

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ABOUT THIS GUIDE

This guide is intended to provide the reader with a general insight into offering securities and reporting in the United States using the multijurisdictional disclosure system. The information in this guide should not be relied upon as legal advice. The information in this guide is current as of September 2015.

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Contents

Introduction

Introduction

The multijurisdictional disclosure system (MJDS) was adopted in 1991 by the United States Securities and Exchange Commission (SEC) and the Canadian provincial securities regulators in an effort to reduce the barriers to cross-border financings between Canada and the United States. The MJDS permits eligible Canadian issuers to publicly offer securities in the United States by using a prospectus that is prepared principally in accordance with Canadian disclosure requirements.[1] Typically, a Canadian version of this prospectus is filed in Canada and reviewed by a provincial securities regulator. This Canadian prospectus may be prepared to permit a concurrent public offering of the securities in Canada or it may limit the offering to the United States. Although a U.S. version of this prospectus is also filed with the SEC as part of an MJDS registration statement, absent special circumstances, the SEC does not review the filing. Further, the MJDS permits eligible Canadian issuers that become subject to U.S. periodic reporting obligations to substantially satisfy those obligations by using their Canadian continuous disclosure documents under the cover of the applicable form.

Benefits of MJDS

The MJDS offers eligible Canadian issuers[2] the following principal benefits over other alternatives for U.S. public offerings and reporting:

- The costs and other burdens of complying with two prospectus regimes are minimized because prospectus disclosure is governed principally by Canadian requirements and Canadian regulators are generally responsible for the prospectus review.
- In most cases, an MJDS registration statement can be effective in as few as three to four business days because it is not reviewed by the SEC, absent special circumstances.
- U.S. continuous reporting obligations may be satisfied principally by using the generally less-burdensome Canadian continuous disclosure documents.

Eligible Canadian Issuers

A Canadian issuer is eligible to use the MJDS in order to effect a public offering of securities in the United States and to satisfy its U.S. annual reporting obligations if it meets the following conditions:

1 This is sometimes referred to as "Southbound MJDS". There is also a reciprocal "Northbound MJDS" regime, which permits eligible U.S. issuers to offer securities into Canada without Canadian regulatory review. However, it is less frequently used. In this guide, references to the MJDS are to Southbound MJDS.

2 A Canadian issuer that meets the MJDS-eligibility requirements is likely also to qualify to file under the "short form prospectus" procedures in Canada. For this reason, this guide assumes that a Canadian issuer will file a short form prospectus in Canada when using the MJDS to offer its securities in the United States.

- It is a "foreign private issuer" incorporated or organized under Canadian law.
- It has been subject to the continuous disclosure requirements of any provincial securities regulator in Canada for at least 12 calendar months immediately preceding the applicable filing[3] and is in compliance with those reporting obligations.
- The aggregate market value of the equity securities held by non-affiliates of the issuer (referred to as "public float") is at least US$75 million.[4]

Under Rule 405 of the U.S. *Securities Act of 1933*, as amended (the U.S. Securities Act), a "foreign private issuer" is any foreign issuer other than a foreign government, except that if more than 50% of the outstanding voting securities of the issuer are held by residents of the United States, the issuer will not qualify as a foreign private issuer if any one of the following is true:

- the majority of its executive officers or directors are U.S. citizens or residents;
- more than 50% of the assets of the issuer are located in the United States; or
- the business of the issuer is administered principally in the United States.

The first time that the issuer files a registration statement under the U.S. Securities Act or the U.S. *Securities Exchange Act of 1934*, as amended (U.S. Exchange Act), the determination whether the issuer is a foreign private issuer is made as of a date within 30 days before filing the initial registration statement. Following registration, a foreign company must determine its status as a foreign private issuer on an annual basis, as of the end of its second fiscal quarter.

3 This is true of the MJDS Form F-10, the form most frequently used for registering securities offerings. However, for registration statements on Forms F-7, F-8 and F-80, a reporting history of 36 calendar months is required. Form F-7 is used to register rights offerings. Forms F-8 and F-80 are used to register certain exchange offers and business combinations. Rights offerings, exchange offers and business combinations, including the unique requirements of Forms F-7, F-8 and F-80, are not discussed in detail in this guide.

4 Despite the conditions listed here, a Canadian issuer is not eligible to use the MJDS if it is an investment company registered or required to be registered under the U.S. *Investment Company Act of 1940*.

01

Preparation and Filing of Offering Documents

01
Preparation and Filing of Offering Documents

Canadian Prospectus for Concurrent Offering

An eligible Canadian issuer wishing to conduct concurrent public offerings in the United States and Canada under the MJDS prepares a preliminary prospectus for filing with the securities regulators in each province and territory where the securities will be offered. The disclosure in this Canadian prospectus is governed by applicable Canadian disclosure requirements that permit qualified issuers to file a short form prospectus that incorporates by reference much of the issuer's current continuous disclosure record.

U.S. Registration Statement and Prospectus

The issuer also prepares and files with the SEC an MJDS registration statement under the appropriate MJDS form (discussed in greater detail below), which consists of the Canadian prospectus, revised and supplemented as described below, and certain other information and exhibits filed with the SEC but not delivered to offerees or purchasers. Except as noted under "Additional Disclosure" below, the prospectus included in the MJDS registration statement is substantially the same as the Canadian prospectus but must include certain legends and other information prescribed by the U.S. rules and may omit certain disclosure applicable solely to Canadian offerees or purchasers that would not be material to offerees or purchasers in the U.S.[5]

The primary form for securities offerings under the MJDS, Form F-10, also requires that financial statements included in (or incorporated by reference into) the U.S. version of the prospectus be reconciled to U.S. GAAP. However, SEC rules provide that no reconciliation is required for financial statements filed with the SEC if those financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board. [6] This exception effectively eliminates the U.S. GAAP reconciliation requirement for Canadian public companies, which

5 This omitted disclosure typically includes the certificate pages and the disclosure in respect of statutory rights of withdrawal and rescission and eligibility for investment. In addition, as discussed under "Dodd-Frank" below, many registrants remove ratings from their registrations statements because rating agencies are reluctant to give the consents required under the U.S. securities laws.

6 In order to avail itself of this exemption from the U.S. GAAP reconciliation requirement, an issuer must state, unreservedly and explicitly in an appropriate note to the financial statements, that its financial statements comply with IFRS as issued by the International Accounting Standards Board. The issuer's independent auditor must also opine as to this compliance in the auditor's report. The SEC has indicated that financial statements prepared in accordance with a jurisdictional variation of IFRS will not be sufficient.

have been required to prepare their financial statements in accordance with IFRS since January 1, 2011. Alternatively, Canadian public companies with reporting obligations in both Canada and the United States may prepare their financial statements in accordance with U.S. GAAP. In addition to these GAAP requirements, certain of the SEC's rules and guidance in respect of audits, including those in respect of an auditor's independence, apply to audits of financial statements included in registration statements on the MJDS forms.

Southbound-Only Offering

In the case of an offering to be made solely in the United States under the MJDS (a Southbound-only offering), the type of offering document filed in Canada will depend on the location of the issuer. [7]

If the issuer is located in British Columbia, Alberta or Québec, it typically files with that province's securities regulator a Canadian preliminary prospectus because applicable securities regulation considers the Southbound-only offering by such an issuer to be a distribution *in* the applicable province requiring its qualification via a prospectus. As in a Canadian prospectus for a concurrent public offering in the United States and Canada, the disclosure in this Canadian prospectus is also governed by applicable Canadian disclosure requirements. However, issuers in British Columbia and Alberta may exclude the Canadian underwriters' certificate page.

An issuer located outside British Columbia, Alberta or Québec would instead file with the applicable provincial securities regulator the same MJDS registration statement that it files with the SEC. The Canadian disclosure requirements apply to the prospectus contained in this registration statement as if a Canadian prospectus were being prepared for the offering. However, like the U.S. version of a prospectus for a concurrent offering, this prospectus must include certain legends and other information prescribed by the U.S. rules and will exclude disclosure applicable solely to Canadian offerees or purchasers that would not be material to offerees or purchasers in the United States.

Additional Disclosure

Notwithstanding the specific Canadian or MJDS form disclosure requirements, including specified informational legends, issuers often add disclosure in prospectuses used in MJDS offerings. Some additional disclosure may be

7 Whether a Southbound-only offering is feasible under Canadian securities laws will depend on the nature of the issuer and the securities to be offered. In some circumstances it may be impractical to implement appropriate measures to ensure that the U.S. offering is not an indirect distribution in Canada.

included on the advice of U.S. underwriters to facilitate the marketing of the offering in the United States. The degree to which additional marketing disclosure is included depends on the extent to which the issuer is known in the U.S. capital markets. In addition, although the U.S. version of the prospectus need not comply with particular U.S. disclosure requirements, the MJDS offering will be subject to the general civil liability and antifraud provisions of U.S. securities laws.[8] Accordingly, additional disclosure may be advisable in order to address U.S. liability concerns. This additional disclosure may result in a much longer prospectus (a so-called long form short form prospectus), but has generally not resulted in longer review periods by Canadian securities regulators.

Additional disclosure in a prospectus for an MJDS offering may contain a summary of the strengths and strategies of the business, a detailed description of the business and management and selected financial and operating data for up to five years. Much of this information will have already been incorporated by reference from the issuer's public reports, albeit in a different format. Again, although not strictly required, U.S. underwriters may advise that certain of the issuer's incorporated reports be expressly included in or appended to the prospectus (e.g., management's discussion and analysis [MD&A] and annual and quarterly financial statements).

8 Although U.S. securities laws contemplate a liability standard for prospectuses similar to that contained in the equivalent Canadian securities laws, they do diverge in the prescribed disclosures for prospectuses and reports. Generally speaking, prospectuses and reports used in the United States tend to contain more disclosure than is included in the equivalent document in Canada. In addition, in contrast to financings in Canada and many other jurisdictions, in a U.S. financing the underwriters will ordinarily request written confirmation from counsel in the form of a 10b-5 letter saying that they are not aware of any material misrepresentations or omissions in the prospectus in order to help establish the underwriters' due diligence defense to any liability to which they might be exposed under these provisions.

02

Review and Clearance of Offering Documents

02
Review and Clearance of Offering Documents

Following the filing of the preliminary Canadian prospectus and the corresponding MJDS registration statement, the issuer responds to and settles any comments of the applicable provincial securities regulator with the goal of clearing a final prospectus in Canada and having the registration statement declared effective by the SEC.

Canadian Review

The principal provincial securities regulator and, if applicable, the Ontario Securities Commission (OSC)[9] review and comment on the Canadian preliminary prospectus for a concurrent offering under the "passport" regime. Absent unusual circumstances, the determinations of the principal regulator will bind all other provincial securities regulators in jurisdictions in which the prospectus is filed. This principal regulator is to use its best efforts to review and provide a first comment letter in respect of the prospectus within three business days of its receipt of the preliminary short form Canadian prospectus.[10] In most cases, these comments can be settled promptly without further comment from the principal regulator, allowing an issuer to be cleared to file a final prospectus with the Canadian regulators in as few as three to four business days after the preliminary Canadian prospectus filing.[11] The principal regulator issues a receipt for that final prospectus following its filing.

The Canadian review process for a Southbound-only offering can vary. If an issuer files a preliminary Canadian prospectus for that offering, that prospectus will be subject to review and comment by the applicable provincial securities regulator. Timing for the regulator's review and clearance of this prospectus is generally the same as it would be for a concurrent offering. When an MJDS registration statement is filed in Canada in lieu of a Canadian prospectus, guidance issued by the applicable provincial securities regulators in the form of a Companion Policy states that the regulators will monitor the filing but will review and comment on that registration statement only in unusual cases. In our experience, however, the regulator will review the filing and conform to the timing applicable to a concurrent offering. Instead of a receipt, the provincial

9 If the OSC is not the principal regulator and the prospectus is also filed in Ontario, there is a dual review whereby both the principal regulator and the OSC will review the prospectus. However, in these circumstances, the OSC typically coordinates its comments directly with the principal regulator and is required to use its best efforts to advise the principal regulator of any significant concerns it has within two business days of its receipt of the prospectus. The OSC reserves the right to opt out of this dual review process before the final prospectus is cleared. If the concerns that caused the OSC to opt out cannot be resolved by the principal regulator, the issuer would need to separately seek clearance from the OSC for use of the prospectus in Ontario. If the OSC is the principal regulator, dual review is not required.

10 However, if a prospectus involves a novel and substantive issue or is otherwise too complex for review in this period, the review may be delayed and the principal regulator may decide to apply a longer period for review. The risk of this delay in the formal review process may be mitigated through a pre-filing of the prospectus.

11 This timing is typical of cases in which the issuer is a seasoned issuer in Canada.

securities regulator will issue a notification of clearance in respect of any such registration statement unless the regulator has reason to believe there may be a problem with the offering or the related disclosure or other special circumstances exist.

Post-Receipt Pricing

Under Canadian securities laws, an MJDS-eligible issuer can file a prospectus with the applicable Canadian securities regulator using the post-receipt pricing (PREP) procedures. The PREP procedures allow the issuer to file a final prospectus that omits pricing and related information and to receive a final receipt or certificate of clearance from the Canadian securities regulator. Once pricing is determined, a supplemented PREP prospectus that contains all of the omitted information is filed with the applicable Canadian securities regulator, without any further regulatory action required; orders can then immediately be confirmed. Under the PREP procedures, an offering can be upsized by up to 20% in a supplemented PREP prospectus, without the need to file an amendment to the final prospectus.[12] The PREP procedures can be used under the MJDS for cross-border offerings as well as Southbound-only offerings. These procedures align the pricing mechanics of the offering with the practices followed in the United States.

U.S. Process

Regardless of the extent of the review, if any, performed by Canadian regulators in respect of the associated Canadian filing, the SEC does not ordinarily review an MJDS registration statement unless it has reason to believe that there is a problem with the filing.

For a concurrent offering, the MJDS registration statement will become effective upon filing with the SEC an amendment to the MJDS registration statement containing, among other things, the related final prospectus.

In the case of a Southbound-only offering, the amended MJDS registration statement will be declared effective when the SEC receives a copy of the receipt for the related final prospectus (or the notification of clearance in respect of that registration statement, as applicable) issued by the relevant provincial securities regulator.

12 Under U.S. securities laws, a pre-effective amendment to the F-10 may be required if the maximum aggregate offering price increases prior to the effectiveness of the registration statement, although an issuer may choose to initially register an increased offering size and pay the additional filing fee in advance of an upsizing.

03

Types of Offerings and Applicable Forms

03
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Debt and Equity Securities

An eligible Canadian issuer with a public float of equity shares of at least US$75 million may offer most types of debt and equity securities to the public in the United States by registering the offering on Form F-10.[13] This form may not be used for registration of derivative securities except for the following:

- warrants, options and rights, where the underlying securities to which they relate are issued by the issuer, its parent or an affiliate of either; and
- convertible securities that are convertible into securities of the issuer, its parent or an affiliate of either.

Rights Offerings

Form F-7 is used in connection with rights offerings for the registration of securities offered for cash upon the exercise of rights to purchase or subscribe for such securities that are granted proportionately to existing securityholders.

Exchange Offers and Business Combinations

Forms F-8 and F-80 may be used by certain Canadian issuers to register securities in exchange offers and business combinations when the target is also a Canadian company and the U.S. holders own less than 25% or 40% (for Forms F-8 and F-80, respectively) of the exchanged securities (or the securities of the newly formed entity, in the case of a business combination). To be eligible to use these forms, a Canadian issuer must have a three-year reporting history in Canada and a one-year listing history on a Canadian exchange; be in compliance with obligations arising from that reporting and listing; and have a public float of C$75 million.

13 In a 2011 release, the SEC announced that it was rescinding Form F-9, the MJDS form used to register investment-grade debt and preferred securities, effective December 31, 2012. In this release, the SEC adopted a three-year "grandfathering" period to address issues relating to the fact that Form F-9 did not have a public float requirement. During the grandfathering period, any issuer that would have been eligible to use Form F-9 as of December 31, 2012, is permitted to file a final prospectus for an offering on Form F-10 even if that issuer does not satisfy the public float or parent guarantee requirements of Form F-10. An issuer taking advantage of this grandfathering provision must disclose in the applicable registration statement that it has a reasonable belief that it would have been F-9 eligible as of December 31, 2012, and must also disclose the rationale for that belief. The final prospectus for any offering being made in reliance on this temporary grandfathering provision must be filed on or before December 31, 2015.

Offerings Using a Shelf

Large, seasoned issuers typically offer their securities in the United States by way of a shelf prospectus. Canadian issuers using the MJDS may register shelf offerings in the United States on Form F-10. Canadian issuers that report using the MJDS forms are not eligible to file an automatic shelf registration statement because the U.S. rules do not consider them "well-known seasoned issuers". However, the efficiency of the MJDS process puts Canadian issuers on almost equal footing with their U.S. counterparts when registering a shelf offering in the United States.

Trust Indenture and Trustee

If an issuer is registering debt securities on an MJDS form, the related trust indenture is exempt from virtually all of the substantive requirements of the U.S. *Trust Indenture Act of 1939* (U.S. Trust Indenture Act), provided that the trust indenture is subject to the *Canada Business Corporations Act*, the *Bank Act* (Canada) or the *Business Corporations Act* (Ontario). In addition, a Canadian trust company may act as the sole trustee for the registered debt securities, provided that it is subject to the *Trust Companies Act* (Canada) (now the *Trust and Loan Companies Act* (Canada)) or the *Canada Deposit Insurance Corporation Act* and has the capability to discharge the duties of a trustee in the United States.

However, in practice, Canadian issuers often do not take advantage of the exemption from the substantive requirements of the U.S. Trust Indenture Act and/or may appoint a U.S. trustee. This is because investors in the U.S. capital markets often expect that if the securities are to be sold principally in the United States, U.S. standards will apply. In these instances, the issuer might seek (and routinely obtain) relief under applicable Canadian trust indenture legislation from its substantive requirements and/or the requirement to have a Canadian trustee on the basis that the protections under the U.S. Trust Indenture Act are substantially equivalent.

Guaranteed Debt Securities

SUBSIDIARY GUARANTEES

In contrast with applicable Canadian securities laws, a guarantee of an offered security is treated under the U.S. Securities Act as a separate security that must also be registered. This poses a technical issue for guarantees from

non-public, Canadian subsidiaries of MJDS-eligible issuers: due to their lack of a reporting history and, if applicable, public float, these subsidiaries are not themselves eligible to use an MJDS registration statement to register securities. Certain issuers have resolved this ineligibility by having an MJDS-eligible parent company (whether it be the parent of the issuer or even the issuer itself) guarantee the subsidiary guarantees. This solution permits the guarantee by the Canadian subsidiary to be eligible for registration under the applicable MJDS forms.

PARENT GUARANTEES

As noted under Subsidiary Guarantees, above, a Canadian majority-owned subsidiary of an MJDS-eligible parent is eligible to use an MJDS registration statement, despite not meeting all of the eligibility tests, so long as the parent company fully and unconditionally guarantees the debt securities[14] to be offered by that subsidiary. However, a non-Canadian subsidiary of an MJDS-eligible parent company cannot use the MJDS to offer debt securities in the United States even if the securities are fully and unconditionally guaranteed by the parent. In such a case, a hybrid filing may be the solution. In a hybrid filing, the MJDS-eligible Canadian parent company registers its parent guarantee on an MJDS form and the offered debt securities of the non-Canadian subsidiary are registered on an SEC foreign issuer or domestic registration form.[15]

ADDITIONAL SUBSIDIARY DISCLOSURE

Parent and subsidiary guarantors, among others, are referred to as "credit supporters" under the Canadian rules governing prospectus disclosure. Under Canadian rules, absent an exemption, prospectus-level disclosure in respect of the issuer and each credit supporter is required to be included in (or incorporated by reference into) the prospectus. A parent company does not typically have available the stand-alone financial statements and other disclosures regarding its subsidiaries that are necessary to meet this disclosure requirement. A company could therefore incur significant time and expense preparing these additional disclosures. However, an exemption from providing prospectus-level disclosure in respect of a subsidiary (whether it is the issuer[16] or a credit supporter) is available if, among other things, consolidating summary

14 These debt securities may also be convertible into equity securities of the parent providing the guarantee. The parent guarantee, the debt securities and, if applicable, the underlying securities of the parent would all be registered on the appropriate MJDS form.

15 For example, the combined registration statement on Forms F-9 and F-3 of Barrick Gold Corporation and its U.S. financing subsidiaries, Barrick North America Finance LLC and Barrick Gold Financeco LLC, filed May 30, 2008.

16 When the issuer is a subsidiary of a parent guarantor, it must be wholly owned by the parent and the parent must meet the applicable eligibility requirements and provide full and unconditional credit support.

financial information is provided.[17] Canadian rules typically require that this disclosure be included in the prospectus and that it be updated and filed quarterly for as long as the guaranteed securities are issued and outstanding. An exemption from providing prospectus-level disclosure regarding a subsidiary may also be available if the issuer is merely a "finance subsidiary" or has limited independent operations and there is only a minor impact of non-guaranteeing subsidiaries on the consolidated financial statements of the parent company (whether a guarantor or the issuer).

As noted above, if both the issuer and the guarantor are Canadian companies, their respective securities may be registered on an MJDS form. In this case, inclusion of the Canadian-mandated subsidiary disclosure in the MJDS prospectus and the MJDS reports of the issuer or its parent, as applicable, should be sufficient for compliance with applicable U.S. rules. However, in a hybrid filing, the issuer will be subject to the more detailed U.S. guarantor financial statement requirements of Rule 3-10 of Regulation S-X. An exemption from providing this more detailed financial information may be available if the issuer is merely a finance subsidiary or the parent is merely a holding company and any non-guaranteeing subsidiaries are minor. In these circumstances, the consolidated financial statements of the parent company (whether a guarantor or the issuer), together with minor additional disclosure, will usually be sufficient. This is often the case in hybrid filings.

Potential Cross-Border Tensions

Depending on the way in which a particular offering is marketed, priced and settled, there can be tensions between the applicable Canadian and U.S. rules and practice. If these tensions are not identified and addressed by the issuer, its underwriters and their respective legal advisers at the inception of the transaction, they can jeopardize the success of the transaction and may even result in inadvertent violations of the applicable securities laws. For example, in a cross-border "bought deal", the U.S. prohibition on "gun jumping" can delay the inception of marketing, and the U.S. "trading rules" may require that the underwriters on both sides of the border curtail or otherwise modify their typical stabilizing arrangements. Other tensions may arise from the difference in U.S. and Canadian securities laws as to the time when an issuer may be liable for misrepresentations and omissions in a prospectus.

17 The consolidating summary financial information must show a separate column for each of any parent guarantor (as applicable), the issuer, any other credit supporter(s) and any other subsidiaries of the issuer (or the parent guarantor), together with the necessary consolidating adjustments. This information is to be presented in respect of each period for which financial statements of the issuer or its parent, as applicable, are included in (or incorporated by reference into) the prospectus. The required disclosure is more summarized than that required by the equivalent U.S. provision under Rule 3-10 of Regulation S-X.

03
Types of Offerings and Applicable Forms

Conflicting rules governing marketing activities in U.S. offerings are another potential source of tension. Information permitted in marketing materials under Canadian rules is not broad enough to cover certain information that, under applicable U.S. rules, may be included in road shows and other "free writing prospectuses" but excluded from the U.S. registration statement.[18] Canadian requirements also mandate a public filing of road show materials whereas U.S. rules generally do not.[19] To address this potential conflict, Canadian rules provide an exception from this filing requirement for certain U.S. cross-border offerings, permitting the materials to instead be delivered to the Canadian securities commissions on a confidential basis.[20] However, the scope of this exception is limited both geographically (applicable only to cross-border offerings that the underwriters expect to sell primarily in the United States) and in subject matter (exempting only the filing of materials related to the road show).

18 Under applicable Canadian rules, except for certain comparables, all information in these marketing materials must be derived from the prospectus. Under applicable U.S. rules, a free writing prospectus may contain information that is additional to the registration statement in respect of the securities offering; it simply must not conflict with the information in that registration statement or the issuer's continuous disclosure record.

19 Generally speaking, these materials need not be filed (and, in practice, are not filed) under applicable U.S. rules; however, road shows that are considered free writing prospectuses and that are also used in initial public offerings must be filed with the SEC unless at least one bona fide version of the road show is readily available to an unrestricted audience electronically.

20 When road show materials are not filed in Canada under this cross-border exception, the issuer and its Canadian underwriters will nonetheless be required to assume liability for any misrepresentation in those materials (to the extent not corrected in the final prospectus) through a contractual right of action. This right is to be given to each Canadian investor to whom those road show materials were provided.

04

Other U.S. Regulation of MJDS Offerings

04
Other U.S. Regulation of MJDS Offerings

State Securities Laws

MJDS offerings of securities by Canadian issuers in the United States may also be subject to state securities – or "blue sky" – laws in the states where offers and sales are made. These laws provide for, among other things, registration of securities with state securities regulators and review of the offering by such regulators.

Exemption from state registration is available in certain circumstances. The most common exemption is for sales of securities of issuers that belong to a class that is listed (or will be listed upon completion of the offering) on a U.S. stock exchange or are senior to such a listed class of securities. Unlike other exemptions, this exemption applies uniformly across all the states. For this reason, it is generally impractical for an issuer to conduct a broad public retail offering of its securities in the United States without a prior or concurrent U.S. listing of its shares.

FINRA Review

Many MJDS offerings are exempt from review by the Financial Industry Regulatory Authority (FINRA), which regulates the activities of the investment bankers that underwrite securities offerings and reviews the fairness of underwriting terms and arrangements. Public offerings exempt from FINRA review include the following:

- offerings of securities of a Canadian issuer registered on Form F-10 and offered under Canadian shelf prospectus offering procedures, provided that the issuer has an aggregate market value of its outstanding equity shares of at least C$360 million;
- offerings of non-convertible debt or non-convertible preferred securities, in each case rated investment grade;
- offerings of any securities by a corporation, foreign government or foreign government agency issuer consisting of unsecured non-convertible debt with a term of issue of at least four years or unsecured non-convertible preferred securities, rated investment grade, except for initial public offerings of equity; and
- exchange offers of securities if the company issuing the securities qualifies to register securities with the SEC on Forms S-3, F-3 or F-10.

05

U.S. Reporting and Associated Obligations

05
U.S. Reporting and Associated Obligations

General Reporting Obligations

As with any other public offering of securities in the U.S. capital markets, filing an MJDS registration statement will subject the issuer to ongoing annual and periodic reporting obligations in the United States. A Canadian issuer that is eligible to use the MJDS for a public offering or whose continuous reporting obligations arise solely as a result of a public offering in the United States registered on an MJDS form may satisfy its U.S. reporting obligations by using the MJDS reporting forms. This involves annually filing certain of the issuer's Canadian disclosure documents under cover of Form 40-F, the MJDS form for annual reports, and furnishing other material information made public in Canada under the cover of Form 6-K, the prescribed form for submitting this information to the SEC.

Sarbanes-Oxley

Despite its status as a foreign private issuer or its eligibility to report using the MJDS forms, a Canadian issuer required to report in the United States will nonetheless be subject to many of the disclosure and other requirements mandated by the U.S. *Sarbanes-Oxley Act of 2002* (Sarbanes-Oxley) and the rules and regulations adopted to effect these requirements.

Among other things, these rules and regulations require annual certifications by each of the issuer's CEO and CFO regarding the contents of its annual report and the design and effectiveness of the issuer's disclosure controls and procedures. They also require a report regarding management's assessment of, and an attestation report from the issuer's auditor on, the issuer's internal control over financial reporting.[21]

Although these officer certifications and management assessments are substantially similar to what is already required of a Canadian reporting issuer under the equivalent Canadian securities laws, and may supersede the issuer's Canadian certification obligation,[22] an auditor's attestation report regarding an issuer's internal controls is not required under Canadian securities laws. This auditor's attestation report is a significant undertaking.

These rules and regulations also require additional disclosure in an issuer's annual report on Form 40-F; however, this additional disclosure is generally

21 New reporting issuers in the United States are not required to provide in their initial annual report any certification as to, or management's report in respect of, internal control over financial reporting or the auditor's attestation report regarding the same.

22 A Canadian reporting issuer is not required to provide the Canadian-mandated certifications if it is in compliance with the corresponding requirements of, and files with the Canadian securities regulators, the U.S. certifications mandated under Sarbanes-Oxley.

similar to disclosure that Canadian reporting issuers are already required to make under applicable Canadian securities law requirements. Any incremental disclosure required in an issuer's annual report on Form 40-F is typically included in the corresponding Canadian disclosure document to ensure that the issuer's reports in Canada and the United States have equivalent information.

Sarbanes-Oxley and its related rules and regulations also impose a number of substantive corporate governance requirements on issuers subject to U.S. reporting obligations. As a general matter, these overlap with the corporate governance obligations prescribed by Canadian securities and corporate laws to which Canadian reporting issuers are already subject.

Dodd-Frank

Foreign private issuers are exempt from most provisions of the U.S. *Dodd-Frank Wall Street Reform and Consumer Act* (Dodd-Frank); however, Dodd-Frank contains disclosure requirements that apply to all SEC reporting companies. In particular, Dodd-Frank requires heightened disclosure relating to the independence of a reporting company's compensation committee and its compensation consultants. MJDS companies are exempt from having an independent compensation committee as long as they disclose in their annual reports to shareholders the reason why they do not have an independent compensation committee.

Dodd-Frank also repealed Rule 436(g) of the U.S. Securities Act and required registrants to obtain and file consents from the applicable credit rating agency when including a rating in a registration statement. Credit rating agencies are reluctant to give such consents. Therefore, many registrants have removed the ratings disclosure that is included in the corresponding Canadian prospectuses from their MJDS registration statements.

In addition, Dodd-Frank requires annual disclosure of (i) whether any "conflict minerals" necessary to the functionality or production of their manufactured products originated in the Democratic Republic of Congo or an adjoining country, and (ii) certain safety violations, orders and regulatory actions in coal or other mines, which are particularly relevant to many Canadian companies.

Annual Filings

A Canadian issuer eligible to use the MJDS reporting forms may satisfy its annual U.S. reporting obligations by filing its Canadian annual information form and audited annual financial statements and accompanying MD&A with the SEC under Form 40-F on the same day that they are due to be filed with the

provincial securities regulators in Canada. Nonetheless, the issuer should file the annual report on Form 40-F with the SEC at the same time as the reports contained therein are filed in Canada even if the reports are not yet due.

Periodic Filings

A Canadian issuer that is eligible to use the MJDS reporting forms to meet its periodic reporting obligations in the United States is required to promptly furnish to the SEC under Form 6-K all information material to an investment decision that it (i) makes public under the law of its home jurisdiction; (ii) files with any stock exchange on which its securities are traded; or (iii) distributes to its securityholders.

To satisfy this periodic reporting obligation, an MJDS-eligible issuer would typically furnish on Form 6-K all of its Canadian continuous disclosure documents filed in Canada, excluding the documents included in its Form 40-F. This would include the issuer's quarterly reports, information circulars and material change reports. The issuer would also furnish on Form 6-K all press releases that contain material information not included in one of those documents.

Foreign Private Issuer Status

As noted in the introduction, an issuer must maintain its foreign private issuer status to ensure its continued eligibility to use the MJDS. Following registration, foreign private issuer status is determined only once annually – on the last business day of the issuer's second fiscal quarter. However, it is good practice for all foreign private issuers to carefully monitor their status throughout the fiscal year.

The benefits of foreign private issuer status are significant, and Canadian issuers reporting in the United States under the MJDS should be mindful of actions that may trigger losing this status (such as the migration of share ownership to the United States or a change in board composition) and the related loss of the accommodations made to MJDS filers. The advantages of foreign private issuer status and the availability of the MJDS include the following:

- **Registration forms**. MJDS-eligible issuers may register securities on the MJDS forms, which principally consist of the disclosure required by Canadian regulators. In the absence of the MJDS accommodations, a Canadian issuer would be obligated to register securities on the U.S. domestic forms (e.g., S-1, S-3 and S-4). Whereas under the MJDS regime, the SEC staff relies on Canadian regulatory review, in the case of a registered

offering of securities in the United States and Canada, Canadian and U.S. registration statements would be subject to review in each respective home country and timing would need to be coordinated.

- **Reporting forms**. Under the MJDS, Canadian issuers can generally satisfy their continuous reporting obligations by filing their Canadian continuous disclosure documents with the SEC. As discussed above, Form 40-F, instead of a Form 10-K, may be used for all annual information and filed 90 days after year end (instead of 60 days for a Form 10-K).

  An MJDS-eligible issuer may file its Canadian quarterly financial statements and MD&A in the United States on Form 6-K within 45 days of the end of a quarter and is exempt from the U.S. domestic filers' requirement to file quarterly reports on Form 10-Q (including unaudited financial statements) as soon as 40 days after the end of each quarter. An issuer reporting under the MJDS is currently obligated to disclose a material change to its affairs and file a Material Change Report within 10 days, which is then filed in the United States on Form 6-K. Domestic U.S. filers must file a Form 8-K within four business days of the occurrence of specified material corporate events. Form 8-K is generally more prescriptive with respect to the reporting of corporate events than the Canadian requirements to report material changes.

- **U.S. proxy rules**. Foreign private issuers are exempt from the U.S. proxy rules, including, in particular, extensive disclosure relating to material factors and policies affecting compensation of an issuer's employees and directors (CD&A) and the CEO pay-ratio disclosure rules, as well as regarding board and committee composition and related controls and procedures. Similar (but less detailed) requirements apply under Canadian rules. Foreign private issuers also need not comply with the requirement that preliminary drafts of certain proxy circulars be submitted to the SEC for review.

- **GAAP reporting**. A foreign private issuer may prepare its financial statements in accordance with either IFRS or U.S. GAAP.

- **Regulation FD**. Foreign private issuers are exempt from the disclosure requirements of Regulation FD, which prohibits selective disclosure of material non-public information, although Canadian issuers are subject to a similar Canadian regulatory framework.

- **Section 16 liability and reporting**. Foreign private issuers are exempt from Section 16 of the U.S. Exchange Act, which applies to domestic issuers' directors, officers and greater than 10% beneficial owners of equity securities (statutory insiders). Statutory insiders of U.S. domestic issuers must file Form 3, which is an initial report of beneficial ownership, and then Form 4 within

two business days of a subsequent acquisition or disposition of any interest in an issuer's securities. Additionally, statutory insiders of U.S. domestic issuers are subject to Section 16's short-swing profit rules, which require an insider to disgorge profits from purchases and offsetting sales of a company's securities made within a six-month period.

- **National securities exchange requirements.** Under U.S. national securities exchange rules, a foreign private issuer may follow specified home country governance practices, provided that it discloses each exchange requirement that it does not satisfy and certifies to the exchange instances where the practice differs. Applicable exchange rules may differ from home country practice with respect to audit and compensation committee independence, as well as a U.S. exchange requirement to receive shareholder approval of all equity compensation plans and any material revisions to such plans.

  Domestic U.S. issuers must also receive shareholder approval prior to the issuance of common stock in excess of 20% of the voting power outstanding at the time of issuance or of the total number of shares outstanding. A comparable Toronto Stock Exchange rule requires shareholder approval for dilutive acquisitions resulting in the issuance of 25% or more of the shares outstanding.

- **SEC regulation of certain public acquisitions.** In order to register securities offered as consideration in an acquisition or merger transaction in which a portion of the target's shareholders reside in the United States, an MJDS filer may rely on the MJDS Forms F-8 and F-80. U.S. domestic filers must use Form S-4, which is subject to SEC review and could delay an acquisition.

- **Regulation BTR.** Regulation BTR makes it unlawful for an issuer's directors and executive officers to trade in its equity securities during pension fund blackout periods if the securities were acquired in connection with the director or executive officer's service or employment as a director or executive officer. Although Regulation BTR applies to directors and executive officers of both domestic issuers and foreign private issuers, in the latter case no blackout period will be deemed to have occurred unless the general requirements established in Regulation BTR are met, as well as other conditions relating to the U.S. residence of participants and beneficiaries.

- **Section 162(m) of the Internal Revenue Code.** Under Section 162(m) of the Internal Revenue Code of 1986 (the Code), a publicly traded corporation (or an affiliate, e.g., a U.S. subsidiary, of such corporation) generally cannot deduct more than US$1 million per year of compensation payments made to its chief executive officer and any other employee whose compensation

must be reported to shareholders on account of being paid to one of the four highest compensated officers for the taxable year.

In order to be covered by this rule, an officer's compensation must be reported on the summary compensation table required by Regulation S-K, which governs the non-financial portions of submissions to the SEC under the U.S. Securities Act and the U.S. Exchange Act. In the case of a foreign private issuer, however, the Internal Revenue Service has held that an officer cannot be subject to Section 162(m) as a result of the foreign private issuer's being required to report that officer's compensation to its shareholders under the securities laws of its home country because the foreign private issuer is technically not required to report under the relevant provision of Regulation S-K.

If you are interested in receiving more information, please contact us or visit our website at www.dwpv.com.

The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.

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