



**Raising Capital in the
United States Under the
Multijurisdictional Disclosure
System**

A Business Law Guide

Torys LLP

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TORYS
LLP

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Raising Capital in the United States Under the Multijurisdictional Disclosure System

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Introduction

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Canadian companies have a long and successful record of raising capital in the United States by offering a wide range of equity, debt and hybrid securities to U.S. investors. The depth and liquidity of the U.S. capital markets are very attractive to Canadian companies, and public offerings in the United States are often an integral part of Canadian companies' financing activities.

One reason why U.S. public offerings are so appealing to Canadian companies is the Canada-U.S. Multijurisdictional Disclosure System (MJDS). The MJDS is a system of mutual recognition between securities regulators in Canada and the United States that was established in 1991 out of a desire to streamline cross-border regulation and encourage cross-border capital raising. The MJDS permits eligible Canadian and U.S. issuers to raise capital in cross-border public financings, conduct various cross-border M&A transactions and make continuous disclosure filings while complying primarily with their home country securities regulations, including disclosure and procedural rules. The MJDS allows issuers to avoid dual regulation and oversight by two sets of securities regulators.

The rationale underlying the MJDS is that because the two countries' capital markets are so interrelated and their securities regulations are so similar, it makes sense to afford deference to issuers' home country rules by treating those rules as sufficient for the protection of investors in the other jurisdiction. By reducing the costs, timing issues and other complications associated with dual regulation, the MJDS provides significant opportunities for eligible Canadian and U.S. issuers to access each other's capital markets.

This guide is meant to provide Canadian issuers and their investment bankers with an overview of the financing opportunities presented by the MJDS in the U.S. capital markets. It also describes the ongoing reporting and corporate governance obligations that apply to Canadian issuers that access the U.S. capital markets under the MJDS. Since this guide is an overview of the MJDS, we recommend that readers seek advice regarding particular facts and legal issues. If you have any questions about the MJDS or would like to discuss any aspect of this guide in greater detail, please contact us.



Issuers and Transactions Eligible for the Multijurisdictional Disclosure System

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Capital Market Activities Under the Multijurisdictional Disclosure System

The Multijurisdictional Disclosure System (MJDS) permits eligible Canadian issuers to engage in cross-border public offerings, rights offerings, takeover bids and business combinations by complying primarily with Canadian laws and procedural requirements rather than the rules of the U.S. Securities and Exchange Commission (SEC). Moreover, issuers eligible for the MJDS may satisfy their ongoing U.S. reporting obligations primarily by filing their Canadian annual and quarterly reports and other continuous disclosure documents with the SEC.

Most prospectuses and other disclosure documents filed with the SEC under the MJDS are not subject to regulatory review by the SEC. Consequently, public offerings and other capital markets activities in the United States under the MJDS are relatively cost-effective and efficient because they avoid some of the transaction costs, ongoing compliance costs and timing concerns associated with SEC regulation.

Eligible Issuers

Canadian issuers must satisfy certain general eligibility requirements as well as certain transaction-specific eligibility tests that apply to the type of financing or other capital markets activity they plan to engage in under the MJDS. Generally, the MJDS is available to a Canadian issuer (whether federally or provincially incorporated or organized) that

- is a foreign private issuer (discussed on page 4);
- has been a reporting issuer in Canada for at least 12 months and is not in default under its reporting obligations; and
- has an aggregate market value of the public float of its outstanding equity shares of US\$75 million or more.

The public float refers to equity securities (excluding preferred shares) held by non-affiliates (affiliates are holders owning more than 10% of the issuer's securities). As discussed later in this guide, the public float requirement is waived for issuers offering non-convertible, investment-grade debt or preferred securities.

Successor Issuers

Issuers that are successor issuers following a recent amalgamation, arrangement or other business combination may be able to rely on the reporting history of their predecessor(s) to meet the 12-month reporting history requirement.

Government Issuers

The MJDS is generally not available to Canadian federal, provincial or municipal governments but is available to Crown corporations issuing investment-grade debt or preferred shares.

Investment Companies

The MJDS is not available to investment companies registered or required to be registered under the *U.S. Investment Company Act of 1940*. Under U.S. law, the term “investment company” is defined broadly and generally includes mutual funds, closed-end investment companies and any company engaged primarily in the business of investing, reinvesting or trading in securities. Nonetheless, many Canadian companies engaged in these types of businesses are still eligible for the MJDS because of an exemption that excludes Canadian banks, trust companies, loan companies and insurance companies from the definition.

Subsidiaries

A Canadian subsidiary issuer that is not MJDS-eligible may still use the MJDS to offer debt and preferred securities by relying on the MJDS eligibility of its parent company if

- the parent is the majority owner and meets the applicable MJDS eligibility requirements;
- the parent fully and unconditionally guarantees the subsidiary’s securities as to principal and interest (if debt securities) or as to liquidation preference, redemption price and dividends (if preferred securities); and
- the securities are convertible or exchangeable only for securities of the parent, if at all.

Meaning of “Foreign Private Issuer”

Only Canadian issuers that are “foreign private issuers” under U.S. securities law are eligible for the MJDS. The term “foreign private issuer” is defined by SEC rules as any issuer organized outside the United States unless more than 50% of the issuer’s outstanding voting securities are directly or indirectly owned by U.S. residents *and* any one of the following:

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

Eligible Securities Under the MJDS

The MJDS may be used to offer any kind of securities except certain derivatives. But the following are exceptions to this general prohibition on using the MJDS to offer derivatives:

- Warrants and options may be offered, provided that they and the underlying securities are issued by the issuer, its parent or one of their affiliates.
- Convertible securities may be offered, provided that they are convertible only into securities of the issuer, its parent or one of their affiliates.

Canadian issuers may also extend rights offerings to their U.S. shareholders under the MJDS. The rights themselves will not be freely tradable in the United States, but the securities issued to holders on the exercise of the rights will be freely tradable.

Alternatives to MJDS Offerings

Non-MJDS Public Offerings

A Canadian issuer that is not eligible to use the MJDS may still offer securities to the public in the United States. Instead of the MJDS rules, the applicable rules would be those that apply generally to public offerings by non-U.S. issuers. The disclosure, procedural and timing requirements are less favourable than under the MJDS, since MJDS offerings are essentially governed by Canadian regulations with very few additional U.S. rules. Moreover, the disclosure documents in non-MJDS offerings are subject to review and comment by the SEC, which means that non-MJDS transactions tend to be more time-consuming than comparable transactions under the MJDS.

Private Placements

Private placements are another means by which Canadian issuers may raise capital in the U.S. market. Canadian issuers routinely supplement their Canadian public offerings with sales to U.S. institutional investors under a private placement exemption from SEC registration. Furthermore, the speed and predictability of U.S. private placements may be significant advantages when markets are volatile. For more detail on conducting private placements in the U.S. capital markets, please see our Business Law Guide *Private Placements in the United States*.



Publicity, Disclosure and Liability

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Overview

Prospectuses used in MJDS offerings must comply with Canadian disclosure requirements. The U.S. and Canadian versions of an MJDS prospectus will be substantially the same, with certain differences noted below. Apart from the legal requirements for MJDS prospectuses, their overall “look and feel” tends to reflect the circumstances of different kinds of offerings. The prospectus for an MJDS offering that is being sold to both U.S. and Canadian investors will be drafted with a view to marketing the securities in both jurisdictions. By contrast, an MJDS offering that is being marketed and sold by U.S. underwriters solely or predominantly in the United States will reflect U.S. marketing and disclosure practices. Even if an issuer is well-established in Canada and eligible for the short form prospectus system, the prospectus for its initial public offering in the United States may, for the benefit of U.S. investors and in conformity with U.S. long form requirements, include a very detailed description of the issuer’s business as well as three years of audited financial statements and five years of selected financial information.

Publicity

Both U.S. and Canadian securities laws regulate the kinds of marketing and publicity that issuers and underwriters may engage in during the course of a public offering. In December 2005, the SEC implemented various changes to its rules that were meant to remove what it saw as outdated restrictions on pre-offering communications and to facilitate speedier access to capital. However, when making a public offering in both jurisdictions, Canadian issuers may not be able to take advantage of the SEC’s communication rules because the Canadian rules relating to publicity are more restrictive and issuers must generally ensure that their disclosure is materially the same on both sides of the border. For example, an issuer will generally have to obey the Canadian rules for quiet periods and will not be able to use “free-writing prospectuses” (documents promoting the offering other than the actual prospectus) to the extent now permitted under the SEC’s publicity rules.

The U.S. MJDS Filing Materials

A series of registration statement forms are available for MJDS public offerings. Form F-7 is used for rights offerings. Form F-9 is used to register eligible investment-grade debt and investment-grade preferred shares. Form F-10 is a default form that may be used to register securities that are not eligible for any other form. The main difference between the forms is that Form F-10 always requires the issuer's financial statements to be reconciled to U.S. generally accepted accounting principles (GAAP) (unless the financial statements are already prepared in accordance with U.S. GAAP or International Financial Reporting Standards [IFRS]).

Each form consists of several pages of legal information wrapped around the Canadian prospectus. The Canadian prospectus plus the wraparound document together make up the U.S. registration statement that is filed with the SEC. A registration statement may exclude any disclosure that is applicable solely to Canadian investors and that would not be material to U.S. investors, including

- any discussion of Canadian tax considerations not material to U.S. investors;
- the names of any Canadian underwriters not acting as underwriters in the United States, or any description of the Canadian plan of distribution (except to the extent necessary to describe the material facts of the U.S. plan of distribution);
- any description of investors' statutory rights under Canadian securities law (except to the extent that the issuer is making such rights available to U.S. purchasers); and
- the certificates of the issuer and underwriters that are required under Canadian securities law to be included in the prospectus.

Various informational legends for the benefit of U.S. investors and prescribed in the relevant form must also be included. These legends notify U.S. investors that the prospectus has been prepared in accordance with Canadian disclosure requirements; that the financial statements contained in the prospectus may not be comparable to the financial statements of U.S. companies; that the investment may have tax consequences for U.S. investors that are not fully described in the prospectus; and that it may be more difficult for U.S. investors to pursue civil remedies for any securities law violations in connection with the offering because some or all of the relevant potential defendants and their assets are located in Canada.

The MJDS registration statement must be signed by the issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, at least a majority of the board of directors or persons performing similar functions, and its authorized representative in the United States.

U.S. GAAP Reconciliation Requirements

The financial statements included in an MJDS prospectus may be prepared in accordance with U.S. GAAP or IFRS. Alternatively, they may be prepared in accordance with Canadian GAAP, which may require a reconciliation to U.S. GAAP, depending on the type of securities being offered. No U.S. GAAP reconciliation is required for

- rights offerings by an issuer that has a 36-month reporting history and that has been listed on a Canadian stock exchange for 12 months;
- offerings of non-convertible investment-grade debt or preferred securities; or
- offerings of convertible investment-grade debt or preferred securities so long as
 - the securities are convertible only after a period of one year has elapsed from the date of issuance and only into another class of securities of the issuer (or, in the case of a subsidiary that is relying upon the MJDS eligibility of its parent, the securities are convertible only into securities of the parent); and
 - the issuer has a minimum aggregate market value of the public float of its outstanding equity shares of US\$75 million (calculated on a date within 60 days before filing the MJDS documents with the SEC and excluding all securities held by persons who own or control more than 10% of the outstanding equity shares).

Under the MJDS, “investment-grade” securities are those rated in one of the four highest rating categories by at least one U.S.-recognized rating agency or a rating agency specifically recognized for this purpose by the Canadian Securities Administrators.¹

Where a U.S. GAAP reconciliation is required, it must be prepared in accordance with the requirements of item 18 of Form 20-F (the SEC form setting forth the disclosure requirements for annual reports and prospectuses of non-MJDS foreign private issuers). A reconciliation under item 18 requires the issuer to provide

- a discussion of material variations from U.S. GAAP and Regulation S-X (the SEC’s accounting regulation) in the accounting principles, practices and methods used;
- a quantification of each material variation with respect to the income statement, presented either in tabular format in the statement itself or in a note to the statement;
- a quantification of each material variation with respect to each line item of the balance sheet, presented in parentheses, in columns, as a reconciliation of the equity section, as a restated balance sheet or in some other manner; and
- the inclusion of all other information required by U.S. GAAP and Regulation S-X, including segment information and supplementary information for issuers in specified businesses.

If the earnings per share computed according to U.S. GAAP are materially different from the earnings per share calculated according to Canadian GAAP, this information must be presented separately.

¹ The SEC has proposed replacing the U.S. – but not the Canadian – investment-grade rating requirement with a requirement that the issuer have issued at least US\$1 billion worth of debt or preferred securities for cash during the past three years. This revision would not affect a Canadian issuer’s ability to use the MJDS to offer debt or preferred securities that are rated investment grade by a rating organization approved by the Canadian Securities Administrators for this purpose.

Liability Under U.S. Securities Laws

The MJDS does not exempt Canadian companies or other participants in a public offering from liability under U.S. securities laws. In raising capital or engaging in any other transaction under the MJDS and in filing the associated documents with the SEC, Canadian companies and their officers and directors, as well as the underwriters, accountants and others, are subject to substantially the same risks of liability for misleading disclosure as those who access the U.S. capital markets without using the MJDS. SEC rules specify that prospectuses and other SEC filings must include, in addition to the information expressly required by the rules and forms, any information that may be necessary to prevent the disclosure from being misleading in the circumstances. The *Securities Act of 1933* and the *Securities Exchange Act of 1934* (Exchange Act) contain anti-fraud and civil liability provisions that permit the SEC as well as private investors to sue offering participants for fraud in connection with an offering or for material misstatements or omissions in disclosure documents filed with the SEC. Underwriters conducting a due diligence investigation will ask U.S. and Canadian counsel to provide a “Rule 10b-5 letter” confirming the absence of any material misstatements or omissions in the prospectus.



Mechanics of MJDS Public Offerings

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Planning the Timetable for the Offering

Disclosure Document Preparation

When planning the timing for an MJDS offering, the issuer and its advisers should account for the time required to prepare a Canadian prospectus (either short form or long form, depending on the issuer's eligibility); additional time does not need to be built in for SEC review.

Obtaining Ratings

If the issuer proposes to offer investment-grade debt or preferred shares, time may need to be allowed for obtaining a rating from an approved rating agency.

Filing and Regulatory Review

Offerings Being Sold in Both Jurisdictions

The preliminary prospectus is filed with Canadian regulators and is subject to review and clearance in accordance with usual procedures. In the United States, a registration statement including the preliminary prospectus is filed but is not reviewed by the SEC except in unusual cases where there is a problem with the transaction. After the Canadian review process is complete, the issuer files its final materials, and sales of securities may then be completed in both jurisdictions.

U.S.-only Offerings

If securities in an MJDS offering are being sold only to U.S. investors, the issuer will file the prospectus with the SEC and just one provincial securities regulator, typically in its home jurisdiction. Depending on the applicable regulator, the prospectus will often not be reviewed except in unusual cases where there is a problem with the transaction. If the prospectus is selected for review, the issuer must be notified within three business days of filing. The period from filing the preliminary prospectus to filing the final prospectus and becoming clear to complete sales of securities could be as short as a few days or even less. The timetable for a U.S.-only offering under the MJDS may, therefore, be much shorter than the timetable for an offering being sold in both jurisdictions involving Canadian securities regulatory review.

Although U.S.-only offerings under the MJDS may be appealing because of their potential timing advantages, they are not always feasible under Canadian securities laws. If a widely held issuer has common shares interlisted on U.S. and Canadian stock exchanges, for example, it may be extremely difficult for the issuer to implement measures that will effectively safeguard against the flow-back into

Canada after the shares are sold in the United States. In that case, securities laws would require the issuer to file a prospectus to qualify sales of securities across Canada, and the offering would be structured as a U.S.-Canada offering, with the disclosure documents being subject to review by Canadian regulators. If, on the other hand, an interlisted issuer is offering debt securities that are not actively traded in Canada, the adoption of reasonable measures to prevent flow-back may be sufficient. In general, any flow-back prevention measures should be tailored to the circumstances of the issuer; the nature of the securities being offered; and the nature of, and volume of trading in, the principal trading markets for such securities.

Availability of the Shelf Prospectus System

Under Canadian rules, issuers eligible to participate in the short form prospectus system are permitted to clear a shelf prospectus that omits certain variable terms of the securities offered (such as the price, the amount of securities to be sold and the plan of distribution). For a period of 25 months from the date of the final receipt, the issuer can, from time to time, price and offer securities off the shelf simply by filing and delivering a prospectus supplement, which is generally not subject to prior regulatory review. The shelf prospectus system may also be used for continuous distributions and at-the-market distributions.

Under the MJDS, Canadian issuers can make shelf prospectus offerings in both Canada and the United States using the Canadian shelf procedures, alternating jurisdictions for various tranches depending on their financing needs and market conditions. Prospectus supplements must be filed with the SEC within one business day of being filed with Canadian authorities.

Availability of Post-Receipt Pricing Procedures

For most types of distributions, Canadian issuers may obtain a receipt for a final prospectus that omits the price of the securities and other price-related information. An issuer that uses this method can price the offering at any time within 20 days after clearing the final prospectus, without further advance filing or clearance obligations. This post-receipt pricing procedure allows the underwriters to begin confirming sales immediately after pricing.

A supplemented prospectus containing the pricing information must be filed with Canadian securities regulators by the second business day following the pricing date.

MJDS offerings of equity securities that are being sold in both jurisdictions typically take advantage of the post-receipt pricing procedure since this corresponds to typical practice for underwriters in U.S. public offerings. A prospectus supplement containing the pricing information must be filed with the SEC within one business day of being filed with Canadian securities regulators.

Amount of Securities Registered and Filing Fees

All MJDS offerings require the payment of a filing fee, in U.S. dollars, of a specified percentage of the aggregate offering price of the securities being registered. The number of securities registered with the SEC will be the portion to be offered in the United States, plus an extra amount to cover securities that, depending on the circumstances of the offering, may flow back from Canada into the United States in secondary trading.

Requirements Under State Securities Laws

State securities laws apply to MJDS offerings in the states where offers and sales are made. Registration and review by state authorities will be necessary unless an exemption is available. In many cases, MJDS offerings are eligible for the broad exemption from state regulation for securities of an issuer that are listed or authorized for listing on a U.S. stock exchange or that have equal or greater seniority to the issuer's listed securities.

Broker-Dealer Regulation and FINRA Review

Public offerings of securities in the United States, including MJDS offerings, are subject to review by the Financial Industry Regulatory Authority (FINRA), the regulatory body that oversees U.S. broker-dealers. A filing must be made with the corporate finance department of FINRA and must include the U.S. registration statement, draft underwriting agreement and a filing fee. FINRA reviews the terms and fairness of the underwriting arrangements. The SEC will not declare a registration statement effective until FINRA has advised that it has no objections.

Certain kinds of offerings are exempt from review by FINRA, including offerings of

- investment-grade, non-convertible debt or preferred shares;
- securities by issuers that already have outstanding unsecured, non-convertible investment-grade debt with a term of issue of at least four years or unsecured, non-convertible investment-grade preferred securities (in both cases, other than in connection with initial public offerings); and
- securities offered under Canadian shelf prospectus offering procedures that are registered on Form F-10.

Securities offerings in the United States must be conducted by U.S.-registered broker-dealers. Therefore, Canadian dealers may only offer and sell securities in the United States through their affiliates that are U.S.-registered broker-dealers.



Mergers and Acquisitions Under the MJDS

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Overview

In addition to providing favourable opportunities for capital raising, the MJDS also provides favourable treatment to certain cross-border merger and acquisition activities. The MJDS may be used to register securities that are being offered to U.S. shareholders as consideration in acquisitions structured as takeover bids or amalgamations if the parties to the transaction are both Canadian foreign private issuers and the other relevant MJDS criteria are satisfied. (There is an exemption from registration when securities are offered as consideration in acquisitions structured as plans of arrangement.) For takeover bids, the MJDS provides exemptions from many of the SEC's tender offer rules relating to procedure, timing and other mechanics, thereby minimizing conflicting dual regulation and enabling the parties to execute their transactions on a more efficient and streamlined basis. For transactions structured as plans of arrangement or amalgamations, the SEC's proxy solicitation rules in relation to meetings of shareholders will not apply (which is the case for all foreign private issuers, not just MJDS issuers).

Regardless of whether the MJDS is available, certain rules pertaining to the fairness of the transaction will continue to apply. For example, the deal documents must be sent to all shareholders, and all shareholders must be treated substantially equally (although not necessarily offered exactly the same form of consideration). In addition, the parties will be liable for misleading disclosure, insider trading or other fraudulent activities in connection with the transaction.

Torys' Guide to Takeover Bids in Canada and Tender Offers in the United States

For more detailed information about the legal requirements, structuring considerations and execution of cross-border M&A transactions involving Canadian and U.S. companies, please refer to our Business Law Guide *Takeover Bids in Canada and Tender Offers in the United States*.



U.S. Reporting and Corporate Governance Requirements Under the MJDS

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Canadian issuers that access the U.S. capital markets by offering securities to the public, whether under the MJDS or otherwise, become subject to ongoing reporting and corporate governance obligations imposed by the SEC (and U.S. stock exchanges, if the issuer becomes listed in the United States). The U.S. reporting and governance obligations are similar, but not identical, to Canadian requirements. Furthermore, all foreign private issuers, including Canadian MJDS issuers, enjoy the benefit of certain exemptions from the SEC's rules that apply to U.S. domestic issuers. Specifically, foreign private issuers are exempt from the U.S. proxy solicitation rules under section 14 of the Exchange Act and from the insider reporting requirements and short-swing profit liability provisions of section 16 of that Act; foreign private issuers file their annual reports under different form requirements, and with a more lenient deadline, than U.S. domestic issuers, and their quarterly and current reporting obligations are driven by home country rules rather than SEC rules; the financial statements of foreign private issuers may be prepared in accordance with IFRS, without having to be reconciled to U.S. GAAP, or they may be prepared in accordance with their home country GAAP with a U.S. GAAP reconciliation; and foreign private issuers may often follow home country corporate governance practices in lieu of complying with U.S. stock exchange requirements, subject to a requirement to disclose the differences.

Annual Reports

Under the Exchange Act, MJDS issuers file annual reports with the SEC on Form 40-F. Before S-Ox was passed in 2002, and in accordance with the MJDS principle of relying on home country regulation, the disclosure requirements of Form 40-F were limited to an issuer's Canadian annual information form (AIF), annual management's discussion and analysis (MD&A) and audited financial statements (reconciled to U.S. GAAP, discussed below). As part of the SEC's rulemaking under S-Ox, Form 40-F was enhanced to require certain additional disclosures that went beyond what was required in Canadian annual materials – for example, disclosure about off-balance sheet arrangements and contractual obligations, the presence of a financial expert on the audit committee, and the auditor's attestation of the issuer's internal control over financial reporting. Rulemaking by Canadian securities regulators over the past several years has, however, substantially increased Canadian continuous disclosure requirements, making them very similar to the U.S. rules and resulting in the “extra” Form 40-F items being largely duplicative of corresponding Canadian requirements (with the exception of the auditor attestation requirement, discussed below).

Form 40-F must be filed with the SEC on the same day that the annual materials are due to be filed with Canadian regulators.

U.S. GAAP Reconciliation

An MJDS issuer's annual financial statements must be reconciled to U.S. GAAP (unless they are already prepared in accordance with U.S. GAAP or IFRS). There is an exception for MJDS issuers that have offered only investment-grade debt or preferred securities using Form F-9.

The disclosure may be limited to a narrative description of the material variations from U.S. GAAP, plus a reconciliation of major line items in tabular form, as required by item 17 of Form 20-F. Alternatively, to facilitate future equity capital raising, an issuer may provide a comprehensive reconciliation pursuant to item 18 of Form 20-F, as discussed in part 3, above.

CEO and CFO Certifications

Annual reports filed with the SEC must contain two different certifications of the CEO and CFO: the securities law certifications required by section 302 of S-Ox and the criminal law certifications required by section 906 of S-Ox. Both sets of certifications are filed as exhibits to the report in question. They are very similar in content to the certifications required from CEOs and CFOs under National Instrument 52-109.

Internal Control Requirements

All SEC-reporting issuers are also required to include an internal control report in each annual report filed with the SEC. "Internal control over financial reporting" is defined, similarly to the corresponding definition under Canadian rules, as processes designed to provide reasonable assurance of the reliability of financial reporting and the preparation of financial statements in accordance with GAAP. The issuer's internal control report must contain

- a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting;
- a statement identifying the framework that management used to evaluate the issuer's internal controls;
- management's assessment of the effectiveness of the internal controls as of the end of the fiscal year; and
- disclosure of any material weaknesses in internal controls.

The most significant difference between the U.S. and Canadian certifications and related disclosure about internal controls is that an auditor's attestation is required under U.S., but not Canadian, rules.

Interim Reports on Form 6-K

All foreign private issuers, including MJDS filers, must use Form 6-K to file with the SEC any material information (other than the annual materials discussed above) that is made public under Canadian law or sent to shareholders in Canada throughout the fiscal year. Canadian issuers generally file their material press releases as well as the following additional disclosure documents on Form 6-K:

- quarterly financial statements and MD&A;
- glossy annual reports to shareholders;
- material change reports;
- management proxy/information circulars;
- business acquisition reports; and
- earnings releases.

Because Form 6-K requires disclosure in the United States of all material information that is made public in Canada, and because there is a corresponding Canadian rule requiring all disclosure material filed with the SEC to be filed with Canadian regulators, a Canadian issuer's disclosure record should be virtually identical in both Canada and the United States.

Form 6-K must be furnished to the SEC promptly after the information is made public in Canada, filed with a Canadian regulator or distributed to securityholders in Canada.

SEC Review

Historically, periodic filings under the MJDS, such as annual reports and financial statements, were not subject to SEC review. However, in contrast to the way MJDS prospectuses are treated, the SEC is required under S-Ox to review the periodic filings of all listed public companies on a regular and systematic basis at least once every three years. Canadian MJDS issuers should therefore expect an SEC review, which will likely focus on MD&A disclosure, risk factors and financial information. Any SEC comment letters, as well as the issuer's responses, will be made public approximately 45 days after the review is completed.

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