Denver Journal of International Law & Policy

Volume 20
Number 3 *Spring*

Article 8

January 1992

The Multijurisdictional Disclosure System and Other Cross-Border Offerings

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Keywords
Tender Offers, Regulation, Securities Law, Defenses

INTERNATIONAL CAPITAL MARKETS SECTION

The Multijurisdictional Disclosure System and Other Cross-Border Offerings*

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§ 1.01 Introduction

[1] *The MJDS*

The Securities and Exchange Commission has made "achieving a truly global market system" a top priority.[1] The Commission's focus on international securities markets led it to undertake several significant initiatives, including the adoption in April of 1990 of Regulation S,[2] relating to offshore distributions, and Rule 144A,[3] designed to improve the efficiency of private placement markets in the United States for all securities, but particularly foreign securities. The Commission also took the first steps toward a multijurisdictional disclosure system ("MJDS") that initially involves a reciprocal arrangement between the United States and Canada under which each country is to accept for certain issuers the disclosure document prepared and reviewed under the laws and procedures of the home country.[4] Concurrently with the Commission's action, the Ca-

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* This article is based on materials by the authors that appeared in EMERGING TRENDS IN SECURITIES LAW (1991 ed. Clark, Boardman, Callaghan) and is reprinted with the permission of Clark, Boardman, Callaghan.

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1. *See* press release relating to SEC, "Policy Statement on Regulation of International Securities Markets" (November 14, 1988 Press Release).

2. Sec. Act Rel. No. 6863, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,524 (April 24, 1990).

3. Sec. Act Rel. No. 6862, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,523 (April 23, 1990).

4. Sec. Act Rel. No. 6902, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,812 (June 21, 1991) [hereinafter the "MJDS Release"]. The MJDS was initially proposed in Sec.

nadian Securities Administrators adopted a counterpart disclosure system for U.S. issuers offering securities in Canada.[5]

The MJDS, although limited in scope by eligibility requirements, is as broad as the disclosure system cutting across registration under the Securities Acts, reporting under the Exchange Act, and tender offers. The MJDS introduces Securities Act Registration Forms F-7, F-8, F-9, and F-10 available to qualified Canadian foreign private issuers for, respectively, rights offerings, exchange offers and business combinations, investment grade senior securities, and for the offering of any security other than certain specified derivative securities.[6] To be eligible to use these forms the Canadian foreign private issuer generally has to meet specified Canadian reporting requirements and, in some instances, substantiality criteria. Form F-10, the only form not restricted by the type of offering, requires that the issuer have a three year reporting history with a Canadian regulatory authority and a market capitalization in its outstanding equity securities of not less than (CN) $360 million with a public float in such securities of not less than (CN) $75 million.[7] MJDS also provides for a Form 40-F that permits qualified foreign private issuers to satisfy Exchange Act reporting requirements by wrapping around the reports filed with Canadian regulatory authorities.[8] In tender offers for Canadian foreign private issuers, tenders can, under certain circumstances, be solicited from U.S. holders by complying with applicable Canadian Law and filing the Canadian materials with the SEC on a Schedule 14D-1F, 14D-9F, or 13E-4F, as appropriate.[9]

[2] *The Cross Border Proposals*

The Commission has also proposed other initiatives that are applicable to all foreign issuers, not merely Canadian issuers, in the limited area of cross-border rights offerings,[10] exchange offers, business combinations and tender offers.[11] The problem the Commission sought to address in these proposals is the tendency of foreign market participants to exclude U.S. security holders from predominantly foreign transactions due to the

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Act Rel. No. 6841, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,432 (July 24, 1989) [hereinafter the "Proposing Release"] and reproposed Securities Act Release No. 6879, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,701 (Nov. 2, 1990) [hereinafter the "Reproposing Release"].

5. *See infra* §1.16.

6. *See infra* §1.04[1].

7. Form F-10, General Instructions I.C(4)-(5), [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶7042 (July 1, 1991) [hereinafter Form F-10].

8. *See infra* §1.10[3].

9. *See infra* §1.12[1].

10. Cross-Border Rights Offers; Amendments to Form F-3, Sec. Act Rel. No. 6896, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,802 (June 5, 1991) [hereinafter Rel. 6896].

11. International Tender and Exchange Offers, Securities Act Release No. 6897, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803 (June 5, 1991) [hereinafter Rel. 6897].

burdens of complying with the U.S. securities laws.[12] Rather than risk "violating the 1933 Act," according to institutional investors, "issuers have often systematically excluded U.S. persons from such [rights] offerings."[13] Bidders similarly have excluded U.S. holders from tender offers for foreign issuers when faced with the disclosure and substantive requirements of the Williams Act.[14] The Commission's 1991 proposals are designed to address these practices.[15]

The cross border provisions in some respects go beyond the U.S.-Canadian MJDS, including exemptions from registration under the Securities Act for rights offerings, exchange offerings, and business combinations, involving foreign private issuers where the amount offered in the United States does not exceed $5 million.[16] The Commission also proposed a new registration form, Form F-11,to allow the registration of equity securities offered in rights offerings without regard to the size of the offering in the United States or elsewhere[17] and a new registration form, Form F-12, which would be available for securities issued in qualifying exchange offers and business combinations.[18] Allowing qualified foreign private issuers to effect such offerings to U.S. shareholders using disclosure documents prepared in accordance with home country requirements. The financial statements, if any, included in the disclosure documents would not be required to comply with U.S. generally accepted accounting principles or auditing standards.[19] A registration statement on Forms F-11 and F-12 would become effective upon filing.[20] The Commission proposed related exemptions from the continuous reporting provisions of the Securities Exchange Act of 1934 (the "Exchange Act").[21] The Commission also proposed to amend its rules under the Williams Act to exempt from the disclosure and substantive provisions thereof tender offers for securities of foreign private issuers if ten percent or less of the outstanding class of securities subject to the tender offer is held by U.S. holders.[22] The exemption provided by Rule 14d-1(c) will be available to both foreign and U.S. bidders if the target company is a foreign private issuer and the other conditions of the Rule are met.[23] Finally, the Commission proposed

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12. Rel. 6896, *supra* note 10, at 81,717.
13. *Id.*
14. Rel. 6897, *supra* note 11, at 81,743.
15. Rel. 6896, *supra* note 10, at 81,717; Rel. 6897, *supra* note 11, at 81,744.
16. Proposed Rule 801 under the Securities Act, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,802, at 81,730 [hereinafter Rule 801]; Proposed Rule 802 under the Securities Act, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803, at 81,767 [hereinafter Rule 802].
17. Proposed Form F-11, Rel. 6896, *supra* note 10 at 81,736 [hereinafter Form F-11].
18. Proposed Form F-12, Rel. 6896, *supra* note 10, at 81,780 [hereinafter Form F-12].
19. Rel. 6896, *supra* note 10, at 81,725; *See infra* §1.06[2].
20. *Id.* at 81,724.
21. *See infra* §1.10[1].
22. Proposed Rule 14d-1(c), [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803, at 81,775 [hereinafter Rule 14d-1(c)]; *See infra* §1.12[2].
23. Rel. 6897, *supra* note 11, at 81,747; *See infra* §1.12[2].

an exemptive order to address a number of issues arising in takeover bids for U.K. companies with U.S. shareholders.[24] The exemptive order would permit third-party exchange and cash tender offers for U.K. target companies that are subject to the City Code on Takeovers and Mergers to proceed without compliance with certain of the provisions of the Williams Act.[25]

The Commission has adopted a rule that exempts all foreign private issuers from the requirements of Section 14 of the Exchange Act and the proxy and other rules adopted thereunder and the reporting, short swing profit and other provisions of Section 16 of the Exchange Act.[26] These provisions are significant in that registration of a class of securities under Section 12 of the Exchange Act ordinarily subjects the registrant to the proxy rules and the provisions of Section 16. Foreign private issuers that register a class of securities under the Exchange Act are not subject to such provisions.[27]

MJDS and the cross-border proposals although two separate packages are, with some important nuances, the beginning of a unitary system bound together by the acceptance, under limited circumstances, of foreign disclosure to satisfy U.S. requirements. Securities Act registration under the cross border proposals is limited to rights offerings, exchange offers and business combination. MJDS, on the other hand, also is applicable to Securities Act registration of investment grade senior securities and to all offerings of certain substantial Canadian issuers. MJDS is in place and is limited to Canadian private issuers (and in some instances crown corporations). The cross-border proposals, if adopted, will be applicable to all foreign private issuers, including Canadian foreign private issuers. The approach in this Article is to combine and compare MJDS and the cross-border proposal to the extent practicable. The reader can facilitate this comparison by reference to Appendices one through five which present tabular comparisons of eligibility criteria and other relevant information pertaining to the applicable forms. Such comparisons reveal differences in eligibility criteria and otherwise between the MJDS and the cross-border proposals, and among the various forms, that in some instances defy rationalization. Hopefully, the cross border proposals when adopted will eliminate unwarranted differences.

§1.02 Some Common Definitions

Several of the MJDS forms share a number of common definitions and several of these definitions also are applicable to the cross-border offering forms and exemptions (indicated below by inclusion of an asterisk).

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24. *Id.* at 81,761; *See infra* §1.12[3].

25. *Id.*

26. Rule 3a-12-3 under the Securities Act, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶21,193 [hereinafter Rule 3a-12-3].

27. *See infra* §1.03 for the definition of a foreign private issuer.

The important common definitions include the following:

An "affiliate" is "any person who beneficially owns, directly or indirectly, or exercises control or direction over, more than ten percent of the outstanding equity shares of such person . . . as of the end of such person's most recently completed fiscal year."[28]

A "business combination" is "a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies. . . ." [29]

A "crown corporation" is "a corporation all whose common shares or comparable equity is owned . . . by the government of Canada or a province or territory of Canada."[30]

"Equity Shares" under Forms F-8 and F-10 and proposed Form F-12 means "common shares, non-voting equity shares and subordinate or restricted voting equity shares, but" not preferred shares.[31] In the case of MJDS Form F-7 relating to rights offerings and which is not limited to an offering of equity securities, the term equity shares or equity securities is not defined. Proposed Form F-11, which is limited to a rights offering of equity securities incorporates the Rule 405 definition of "equity security" which includes "any stock or similar security," but, unlike Rule 405, excludes securities convertible into equity securities and certain warrants or rights to purchase or sell an equity security.

"Market value" for purposes of determining the market capitalization of the registrant's outstanding equity shares and for the purpose of determining the market value of the public float of the registrant's outstanding equity shares is "computed by use of the price at which such shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for such shares as of a date within sixty days prior to the date of filing. If there is no market for any such securities, the book value of such securities computed as of the latest practicable date prior to the filing . . . shall be used . . . unless the issuer of such securities is in bankruptcy or receivership or has an accumulated deficit, in which case one-third of the principal amount, par value or state value of such securities shall be used."[32]

A "participating company" is a party to a business combination. A

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28. Form F-8, General Instructions I.C, [1989 Transfer Binder] Fed Sec. L. Rep. (CCH) ¶7022 (July 1, 1991)[hereinafter Form F-8]. The citations relating to definitions are representative rather than for each of the forms or applicable rule. To the extent any of the forms or applicable rule uses such defined terms, the definition is uniform.

29. *Id.*, General Instructions I.A; Rule 802(a)(6), *supra* note 16; Form F-12, *supra* note 18, General Instructions I.A.

30. Form F-9, General Instructions I.B, Instruction 2, [1989 Transfer Binder] Fed.Sec. L. Rep. (CCH) ¶7032 (July 1, 1991) [hereinafter Form F-9].

31. Form F-10, *supra* note 7, General Instructions I.C, Instruction 3; Form F-12, *supra* note 18, Instructions for Form F-12, No. 3.

32. Form F-10, *supra* note 7, General Instructions I.C, Instruction 4; Form F-12, *supra* note 18, Instructions for Form F-12, No. 5.

"small non-conforming participating company," is a company participating in a business combination that is not required to meet the substantiality and continuous reporting requirements of the relevant form because "other participating companies, whose assets and gross revenues, respectively, would contribute at least eighty percent of the total assets and gross revenues from continuing operations of the successor Registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years immediately prior to the business combination, each meet" such requirements.[33] Neither of these terms are a specifically defined term in the Forms, but are used as a convenient means of exposition in this Chapter.

"Public float" for purposes of the MJDS means only the "securities held by persons other than affiliates of the issuer."[34] Public float for purposes of the cross border proposals means "only such securities held by persons other than U.S. holders of more than ten percent of the issuer."[35]

A "U.S. holder" means "any person whose address appears on the records of the issuer of subject securities [on the records of a participating company, in the case of a business combination] any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of the issuer of the subject securities [on behalf of a participating company, in the case of a business combination] as being located in the United States."[36] The determination of the percentage of shares held by U.S. holders in connection with a business combination is determined as of the end of each participant's last fiscal quarter unless the quarter ended within sixty days (180 days in the case of Form F-12) of the filing date in which event it is determined as of the preceding quarter.[37]

§1.03 Foreign Private Issuer

The concept of a "foreign private issuer" is critical to MJDS as well as the cross-border proposals. The MJDS is limited to an issuer incorporated or organized under the laws of Canada or any Canadian province or territory that is a foreign private issuer or, in the case of Form F-9, a crown corporation.[38] The cross-border proposals for the most part are ap-

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33. Form F-10, *supra* note 7, General Instructions I.C(3)-(5); Form F-12, *supra* note 18, General Instructions 1-B(3).

34. Form F-10, *supra* note 7, General Instructions I-G, Instruction 1 and 2.

35. Form F-12, Instructions for Form F-12, No. 5. In fact, the two definitions reach the same results as the MJDS defines an affiliate in effect as one holding more than 10% of the issuer.

36. Form F-8, *supra* note 28, General Instructions II.D, Instruction 1; Form F-12, *supra* note 18, Instructions for Form F-12, No. 6.

37. Form F-8, *supra* note 28, General Instructions III.B, Instruction 2; Form F-12, *supra* note 18, Instructions for Form F-12, No. 9.

38. All of the MJDS forms have substantially identical general instructions relating to the basic Canadian orientation of the issuer. Thus Form F-10, General Instruction I.C(1)(2) includes as eligibility requirements that the issuer be incorporated or organized under the

plicable to foreign private issuers, but are not limited to Canadian foreign private issuers. A corporation organized outside the United States is not a foreign private issuer if[39] (i) more than fifty percent of the outstanding voting securities of such issuer is held of record, either directly or through voting trust certificates or depositary receipts, by persons for whom an U.S. address appears on the records of the issuer, its transfer agent, voting trustee or depositary; *and* (ii) *any* of the following factors are present: (A) the majority of the executive officers or directors of the issuer are U.S. citizens or residents; (B) more than fifty percent of the assets of the issuer are located in the United States; *or* (C) the business of the issuer is administered principally in the United States.

§1.04 The Basic MJDS and Cross Border Registration Forms and Eligibility Requirements

[1] *The MJDS Forms*

The MJDS Forms for registration of securities under the Securities Act, and related eligibility requirements, are as follows:

Form F-10 is available for any type of security (except for certain derivative securities) and any type of offering by a Canadian private issuer, provided the issuer satisfies the eligibility requirements.[40] The issuer must have been subject to the continuous disclosure requirements of any Canadian securities commission or equivalent regulatory authority in Canada for 36 consecutive months and be currently in compliance with such reporting requirements.[41] The market capitalization of its outstanding equity securities must be (CN) $360 million or more *and* the market capitalization of the public float of its equity shares must be (CN) $75 million or more.[42] All of the participating companies in a business combination must be Canadian foreign private issuers and all participating companies, except for small non-conforming participating companies,[43] must meet the market value, float, and reporting requirements for Form F-10 eligibility.[44] Form F-10 may be used for an offering of derivative securities consisting of warrants, options, rights (collectively "warrants"), and convertible securities provided the warrants and securities underlying the warrants or the convertible security and the security into which converti-

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laws of Canada or any Canadian province or territory and that it be a foreign private issuer. Instruction 1 to General Instruction I defines a foreign private issuer by reference to Rule 405. Form F-9, General Instructions I.B also includes a crown corporation and instruction 2 defines a crown corporation.

39. Rule 405, Under Securities Act Regulations, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5803 [hereinafter Rule 405]; Rule 3b-4, Under the Securities Act [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶21,255 [hereinafter Rule 3b-4].

40. *See* Form F-10, *supra* note 7, General Instruction I.C(1)-(2).

41. *Id.*, General Instruction I.C(3).

42. *Id.*, General Instruction I.C(4)-(5).

43. *See* supra note 33.

44. Form F-10, *supra* note 7, General Instruction I.C(3).

ble are issued by the Registrant, its parent or an affiliate of either. Form F-10 cannot otherwise be used to register derivative securities.[45]

Form F-9 is limited to investment grade debt securities or preferred stock offered for cash or in connection with an exchange offer by a Canadian private issuer or crown corporation that has been subject to the continuous disclosure requirements of any Canadian securities commission or equivalent regulatory authority for thirty six consecutive months (twelve months, in the case of a crown corporation) and is currently in compliance with such reporting requirements.[46] The investment grade refers to the four highest grades accorded by at least one nationally recognized statistical rating organization.[47] Form F-9 can be used for investment grade convertible securities only if they cannot be converted for a period of at least one year from the date of issuance and only if convertible into a security of another class of the issuer or[48], in the case of convertible securities offered by a subsidiary into securities of the parent.[49] In the limited circumstances under which Form F-9 can be used to offer convertible securities, the issuer also must satisfy a substantiality requirement measured by a market capitalization of (CN) $180 million and a public float of (CN) $75 million.[50] There are special requirements to the use of Form F-9 in connection with an exchange offer. See 1.07[1].

Form F-7 is available for any rights offering to security holders for cash by a Canadian private issuer that has a class of securities that have been listed on the Montreal or Toronto Stock Exchanges or the Senior Board of the Vancouver Stock exchange for at least twelve months preceding the offering *and* has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for at least the immediately preceding thirty six months and is currently in compliance with applicable listing and reporting requirements.[51] The rights issued to U.S. holders must be granted on terms and conditions not less favorable than those afforded to other holders of the same class of securities.[52] The rights (but not the underlying securities) must be restricted so that they may not be transferred except in an offshore transaction in compliance with Regulation S.[53]

Form F-8 is available for an exchange offer being made by a Canadian private foreign issuer that has a class of securities that have been listed on the Montreal or Toronto Stock Exchanges or the Senior Board

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45. *Id.*, General Instruction I.B.
46. Form F-9, *supra* note 30, General Instruction I.A-I.B.
47. *Id.*, General Instruction I.A.
48. *Id.*
49. *Id.*, General Instruction I.E.
50. *Id.*, I.B(4)-(5).
51. Form F-7, General Instruction I.A and I.B., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶7012 (July 1, 1991)[hereinafter Form F-7].
52. *Id.*, General Instruction I.D.
53. *Id.*

of the Vancouver Stock exchange for at least twelve months preceding the offering *and* has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for at least the immediately preceding thirty six months and is currently in compliance with applicable listing and reporting requirements. If the registrant is other than the issuer of the securities being offered, the registration must have a public float of outstanding equity shares with a market value of (CN) $75 million or more. The offer must be made to the shareholders of another Canadian issuer for a class of securities as to which U.S. holders hold of record less than twenty five percent of the class. Form F-8 can be used for an offering of derivative securities only if such securities consist of warrants, options, rights (collectively "warrants"), or convertible securities and provided the warrants and securities underlying the warrants or the convertible security and the security into which convertible are issued by the Registrant, its parent or an affiliate of either.

Form F-8 is also available for a statutory business combination requiring the vote of participating companies if all the participating companies are Canadian issuers and less than twenty five percent of the shares of the surviving entity will be held of record by U.S. holders immediately after the completion of the business combination. Each participating company, other than small non-conforming companies as defined above,[54] must meet the listing/reporting requirements applicable to the use of Form F-8 in connection with an exchange offering. Each participating company, other than a small non-conforming company as defined above, must have a public float of equity shares with a market value of (CN) $75 million except under certain specific circumstances involving a participant that was the subject of an exchange or tender offer during the preceding twelve months.

Form F-80 is identical in very respect to Form F-8, except it can be used provided U.S. holders hold less than forty percent of the outstanding class as distinguished from twenty five percent as under Form F-8 of the securities of the target company in the case of an exchange offer or of the resulting company in the case of a business combination. The Commission, having determined that a less than a forty percent U.S. interest is a sufficient threshold at which it is willing to accept Canadian disclosure, provided for duplicative forms with the one difference in eligibility requirements to accommodate those state blue sky commissioners that regard twenty five percent U. S. holdings as a more appropriate threshold. A reference hereafter to Form-8 should also be deemed a reference to Form F-80 unless specifically stated to the contrary.

The MJDS forms in all instances are available only if the registrant is subject to relevant Canadian disclosure and filing requirements. None of the forms are available to a company registered or required to register

54. *See supra* note 33.

under the Investment Company Act, although it is available to investment companies not required to register under the Investment Company Act.[55] None of the forms are available to issuers, which, although organized under the laws of Canada, are not foreign issuers for purposes of the Exchange Act.[56]

[2] *Forms F-11 and F-12*

Form F-11, if adopted, will be available for the registration of equity securities to be sold for cash upon the exercise of rights granted by qualified foreign private issuers.[57] The issuer would be allowed to register securities on Form F-11 if it met the Common Eligibility Requirements and the other conditions of the Form. In general, the issuer must be a foreign private issuer that is a "reporting issuer"[58] or exempt from reporting pursuant to Rule 12g3-2(b).[59] In the latter case, the issuer must have a security listed or quoted on a designated offshore securities market (DOSM)[60] *and* have been listed or quoted the immediately preceding thirty six months *or* have a public float of $75 million.[61] The issuer must grant the rights to U.S. holders in proportion to the securities they hold and upon terms and conditions no less favorable than those extended to other holders.[62] The rights themselves may not be transferable except in accordance with Regulation S under the Securities Act.[63] Rights, transferability of Form F-11 generally is not available if the issuer is an investment company registered or required to be registered under the Investment Company Act.[64] The Form is available irrespective of the aggregate offering price, the amount offered in the United States, the percentage of U.S. shareholders to whom the rights are issued or the number of shares outstanding attributable to the offering. The fact that an unlimited amount of securities may be registered on Form F-11 will make the Form extremely useful to foreign private issuers, especially in light of the facts that: (i) U.S. accounting, auditing and auditor independence principles

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55. Form F-7, *supra* note 51, General Instruction I.E; Form F-8, *supra* note 28, General Instruction I.B; Form F-9, *supra* note 30, General Instruction I-G; Form F-10, *supra* note 7, General Instruction I-C.

56. *See infra* §1.03.

57. Form F-11, *supra* note 17, General Instructions I.A. Cf. Form F-12, which is available for the registration of equity or debt securities.

58. A reporting issuer for this purpose is a company required to file reports pursuant to Section 15(d) or Section 13(a) of the Exchange Act that has filed all reports due during the immediately preceding 12 months (or such shorter period as the issuer was required to file reports). Form F-11, General Instructions I.B.

59. Form F-11, *supra* note 17, General Instruction I.B.

60. DOSMs include most of the major offshore exchanges and were initially designated in accordance with Rule 902(a) of Regulation S.

61. Form F-11, *supra* note 17, General Instruction I.B(2).

62. *Id.*, General Instruction I.A., I.D.

63. *Id.*, General Instruction I.D.

64. *Id.*, General Instruction I.B., Instruction 2.

will be inapplicable;[65] (ii) offerings of securities registered on Form F-11 will not give rise to continuous reporting obligations[66] or be subject to Rules 10b-6, 10b-7 and 10b-8, if certain conditions are met;[67] and (iii) rights offerings are common methods of financing abroad.[68]

The Commission also proposed a new Form F-12 may be used for the registration by foreign private issuers for equity or debt securities.[69] In connection with exchange offers and business combinations that are primarily foreign in character. In exchange offers, not more than five percent of the class of securities that is the subject of the exchange offer can be held by U.S. holders, other than U.S. holders of more than ten percent of the subject class.[70] In business combinations, not more than five percent of the class of securities being offered in the exchange offer by the registrant can be held by U.S. holders, excluding U.S. holders of more than ten percent, as measured upon completion of the business combination.[71] The registrant must be a foreign private issuer, have a class of securities registered under Section 12 of the Exchange Act or be reporting pursuant to Section 15(d), and have filed all required materials for at least one year preceding the commencement of the offering (or such shorter period as the registrant was required to file such materials).[72] As an alternative to the reporting requirement the registrant may establish eligibility for Form F-12 by filing for an exemption from Exchange Act registration pursuant to the Rule 12g3-2(b).[73] In the case of an exchange offer, the registrant must have a class of equity securities that has been listed on a DOSM for the three years immediately preceding filing of the Form F-12, and be in compliance with its obligations arising from such listing, *or*, if (in addition to the other requirements) the issuer must have an equity security listed on a DOSM, a thirty six month operating history and a public float of at least $75 million, and be currently in compliance with its obligations arising from its DOSM listing.[74] U.S. holders must participate

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65. Rel. 6896, *supra* note 10, at 81,716-81,717.

66. Proposed Rule 12h-5, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803, at 81,736.

67. *See* Rel. No. 6986, *supra* note 10, at 81,728. Those conditions include a public float of $150 million, appropriate legend disclosure (*see infra* §1.13), disclosure in the United States of actual bids or purchases if disclosure is made of such information in a foreign jurisdiction, no bids or purchases effected in the U.S., and all bids and purchases effected on a DOSM.

68. *See* Rel. 6896, *supra* note 10, at 81,717-81,718. "Unlike their U.S. counterparts, foreign issuers frequently engage in rights offerings. . . ." Id. Rights offers are particularly common in the United Kingdom and Europe, where many countries have some form of preemptive right statutes . . . Rights offers are also common in British Commonwealth counties such as Australia and South Africa." *Id.*

69. Rel. 6897, *supra* note 11, at 81,753.

70. Form F-12, *supra* note 18, General Instruction I.B.1.(c).

71. *Id.*, General Instruction I.C.1.(c).

72. *Id.*, General Instruction 1.B.1., 1.C.1.

73. Rule 12g3-2(b) under the Exchange Act, 17 C.F.R. §240.12g3-2(b). *See infra* §1.10[2].

74. Form F-12, *supra* note 18, General Instruction 1.B.1.(d).

in the offer on terms no less favorable than those offered other holders of the same class,[75] except in the case of an offer prohibited by state law after good faith effort on the part of the registrant to register in such state.[76]

Form F-12 is available for business combinations where each company participating in the combination is a foreign private issuer[77] and meet other eligibility requirements. The registrant must be a reporting issuer or have filed the necessary documents pursuant to Rule 12g3-2(b) exemption from Exchange Act registration[78] on or before filing the Form F-12. In most instances, the registrant will be a successor corporation organized for purposes of the business combination, which will necessitate that it take affirmative steps to meet this requirement. The Form is not available if more than five percent of the class being offered is held by U.S. holders (other than U.S. holders of more than ten percent),[79] as of the completion date of the business combination.[80] Each participating company in the business combination, other than the successor registrant and other than a non-conforming small company participant,[81] must have had a class of equity securities listed on a DOSM for thirty six months immediately preceding the filing of the Form F-12, and must be in compliance with its obligations arising therefrom. If a participating company does not meet the thirty six month listing requirement, Form F-12 would still be available if such company has a class of equity securities currently listed on a DOSM, has a three year operating history and a public float of $75 million or more, and is currently in compliance with its obligations arising from the listing.[82] As in the case of exchange offers, business combinations must be structured so that U.S. holders participate on terms no less favorable than those of other holders with an exception for holders in any state which prohibits an offer after a good faith effort by the issuer to register securities in such state.[83]

Form F-12 is less liberal than the counterpart Form F-8 relating to MJDS business combinations and exchange offers in terms of the allowable U.S. interest (five percent in the case of F-12 and twenty five percent

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75. Form F-2, General Instructions B.2, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶6962 (December 4, 1982) [hereinafter Form F-2].

76. *Id.* The issuer in such event may offer shareholders in that state a cash alternative, but only if such cash alternative is offered to shareholders in all other states in which it was unable to register the securities.

77. A reporting issuer for this purpose is a company required to file reports pursuant to Section 15(d) or Section 13(a) of the Exchange Act that has filed all reports due during the immediately preceding 12 months (or such shorter period as the issuer was required to file reports). Form F-12, Instructions for Form F-12, No. 2.

78. *See infra* §1.10[2] for a discussion of the Section 12g3-2(b) exemption.

79. Form F-12, *supra* note 18, General Instruction C.1.(c).

80. *Id.*

81. *Id.*; *See supra* note 33 for the criteria relevant to allowable non-conforming companies.

82. Form F-12, *supra* note 18, General Instruction C.1.(c).

83. *Id.*, General Instruction C.2.

in the case of F-8), but unlike Form F-8 in determining the allowable U.S. interest U.S. holders that are affiliates (have a ten percent or greater interest) are excluded in determining the extent of the U.S. interest. Any foreign private issuer could make an exchange offer under proposed Rule 802 up to $5 million without regard to amount of shares of the target held by U.S. holders provided the conditions of that exemption are complied with. For example, see the discussion in §1.11[2].

[3] *Proposed Amendments to Form F-3*

Form F-3 is the counterpart for foreign issuers to Form S-3, which allows qualified registrants to use a prospectus that consists primarily of a description of the offering and the distribution terms and incorporates by reference the balance of the prospectus from filings made pursuant to Exchange Act reporting requirements.[84] Any foreign private issuer which meets the Registrant Requirements[85] of Form F-3 may use the Form for the registration of securities to be offered in any transaction which meets the Transaction Requirements[86] of that Form. Form F-3 is presently limited to certain so-called "world-class" issuers that satisfy a 3 year reporting requirement[87] and have a float of $300 million.[88] In conjunction with the cross border proposals, the Commission proposed to amend Form F-3 to eliminate the three-year reporting and $300 million float requirements in connection with certain transactions.[89] Under the proposals, a registrant that is a reporting issuer can offer securities issuable in connection with rights offerings, dividend or interest reinvestment plans, and conversions or warrants without regard to a three year reporting history and a $300 million float.[90] Under the proposals registration statements on Form F-3 relating solely to securities offered in the foregoing transactions would become effective automatically upon filing.[91] Thus, a foreign private issuer that is a reporting issuer could use Form F-3 for a rights offer-

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84. *See* 3 H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW [hereinafter "SFCL"] §15.13[2][a].

85. Form F-3, General Instruction I.A, [1989 Transfer Binder] Fed. Sec. L. rep. (CCH) ¶6972 (December 4, 1982) [hereinafter Form F-3].

86. *Id.*, General Instruction I.B.

87. Form F-3, *supra* note 85, General Instruction I.A.2. The issuer, however, would have to be a reporting company and have filed at least one annual report (presumably on Form 20-F). Form F-3, *supra* note 85, General Instruction 1.A.1. Although the instruction literally requires that the issuer have filed "annual reports", which suggests more than one such report; presumably, this is an oversight that failed to correct the previous instruction which assumed that the registrant would be subject to a three year reporting history.

88. Form F-3, *supra* note 85, General Instruction I.A.4. Under current law the aggregate market value worldwide of the voting stock held by non-affiliates of the registrant must be the equivalent of $300 million or more.

89. Proposed Amendments to Form F-3, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,802, at 81,734.

90. Rel. 6896, *supra* note 10, at 81,726.

91. Proposed Amendment to Rule 468 under the Securities Act, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,802, at 81,730.

ings (or the other specified offerings), assuming it meets the other relevant conditions to the use of the Form which require that it have not failed to pay any of its debt or long term lease obligations, dividend or sinking fund payments relating to preferred stock which, failure(s), in the aggregate, are material.[92] A foreign issuer meeting the eligibility requirements for both Forms F-11 and F-3 (as amended) could register securities on either Form.[93]

§ 1.05 The Reporting and Substantiality Requirements

[1] *Under MJDS*

[a] Three-Year History of Continuous Reporting

The MJDS requires that the issuer have at least a three year (thirty six calendar months immediately preceding the filing) history of continuous reporting, and to be in compliance with all reporting requirements at the time of filing. In the case of a Form F-10 or F-9 registration statement, the three year reporting history can be pursuant to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada.[94] In the case of a Form F-7 (rights offering) or Form F-8 (exchange offering or business combination), in addition to the three year reporting requirement, the issuer (participating issuers in the case of a business combination) must have had a class of securities listed on the Montreal Toronto, or Vancouver (Senior Board only) Stock Exchanges during the twelve calendar months immediately preceding the filing of the registration statement.[95]

[b] Substantiality Requirements

Besides satisfying the continuous reporting or listing requirements, as is appropriate, the issuer in many instances must meet a substantiality criterion. As the Commission explains:

> The purpose of the 'substantial' designation is to single out issuers whose size is such that there is a large market following for them and the marketplace can be expected to have set a price for their securities based on all publicly available information.[96] 28[ ] The Commission has distinguished for this purpose between investment grade securi-

92. Form F-3, *supra* note 85, General Instruction I.A.3.

93. Rel. 6896, *supra* note 10, at 81,727.

94. Form F-10, *supra* note 7, General Instruction I-C(3); Form F-9, *supra* note 31, General Instruction I-A and B.

95. Form F-7, *supra* note 51, General Instruction I-A and B; Form F-8, *supra* note 28, General Instruction II-A(3) and III-A(2).

96. "Compare Securities Act Release No. 6331 (August 6, 1981) (adopting Form S-3) ("Because these registrants are widely followed, the disclosure set forth in the prospectus may appropriately be limited, without the loss of investor protection, to information concerning the offering and material facts which have not been disclosed previously.")."

ties and other securities and has provided separate registration forms for each.[97]

Substantiality is reflected by the capitalization at market value of the issuer's outstanding equity shares,[98] or the public float in its outstanding equity shares, and, in some instances, of both. Market capitalization is determined by multiplying the number of outstanding equity shares by their market value and public float is similarly determined by multiplying the number of public float equity shares by market value at the appropriate selected date.[99] For a Form F-10 registration, which can be for any kind or quality of security, the market capitalization has to be at least (CN) $360 million and the public float (CN) $75 million.[100] For Form F-9, which is available only for investment grade debt and preferred stock, there are no substantiality requirements if the securities are not convertible. If they are convertible (and can be only under the limited circumstance that the conversion right is not exercisable for a year), the market capitalization and float minimums are at least (CN) $180 million market capitalization and (CN) $75 million public float.[101] To be able to use Form F-8 (for an exchange offer or business combination), the substantiality criterion is met by having (CN) $75 million in public float.[102] In the case of a business combination, the float requirement must be met by each participating company other than small non-conforming companies.[103] Only a rights offering on Form F-7, a non-convertible debt and equity offering on Form F-9, and an exchange offering on Form F-8 by an issuer to its own securities holders[104] do not have to meet a substantiality criterion.

In an offering on Form F-10 of non-convertible debt or preferred stock, the continuous reporting requirement and the market tests of substantiality can be satisfied for a majority owned subsidiary by its parent, provided the parent has fully and unconditionally guaranteed the registered securities as to principal and interest (if debt securities) or as to liquidation preference, redemption price and dividends (if preferred se-

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97. MJDS Release, *supra* note 4, at 81,866-81,867.

98. Equity shares includes common shares, non-voting equity shares, and subordinated or restricted equity shares, but not preferred shares. *See* Form F-10, *supra* note 7, General Instruction I-B, Instruction 5; F-8, *supra* note 28, at 6132, General Instruction II-A, Instruction 3.

99. *See supra* §1.02 for the definition of market capitalization and public float.

100. Form F-10, *supra* note 7, General Instruction I-C(4).

101. Form F-9, *supra* note 30, General Instruction I-B(4)-(5).

102. Form F-8, *supra* note 28, General Instruction II-A(4), III-A(3).

103. *Id.*, General Instruction III-A(2). *See supra* note 34 for the definition of a small non-conforming company.

104. An exchange offer by an issuer made exclusively to its own security holders is exempt under Section 3(a)(9) of the Securities Act if no commission or other remuneration is paid for soliciting the exchange. Accordingly, registration and Form F-8 would be used only if the exemption were not available.

curities).[105] In an offering on Form F-9 of investment grade debt securities or preferred stock (including convertible securities if convertible only into securities of the parent), the continuous reporting requirement can be similarly met by the parent of a majority owned subsidiary that guarantees the registered security.[106] For the remaining MJDS eligibility requirements see Section 1.04[1].

[2] *Under the Cross Border Proposal*

The cross-border proposals have a counterpart exemption (Rule 801) to registration on Form F-11 for rights offerings and a counterpart exemption (Rule 802) to registration on Form F-12 for exchange offers and business combinations. The eligibility requirements for the Rule 801 exemption correspond to the eligibility requirements relating to registration on Form F-11 for rights offerings; the difference being that the offering under the Rule 801 exemption is limited in amount.[107] The discussion in this subsection relating to Form F-11 is applicable, therefore, to the Rule 801 exemption. The exemption under Rule 802, although relating to the same type of offerings as Form F-12, has different and less stringent eligibility requirements than Form F-12 and the discussion below relating to Form F-12 is not applicable to the Rule 802 exemption. For a discussion of Rule 802 see §1.11[2].

In the case of registration on Form F-11, if the registrant is a reporting issuer there is no further reporting or substantiality requirement.[108] A reporting issuer is one that is subject to the reporting requirements of the Exchange Act pursuant to Section 13(a) or Section 15(d) of the Exchange Act.[109] There is no requirement that it have been a reporting company for any specified time, but it must have filed all required reports during the immediately preceding twelve months or such shorter period that it was required to file reports.[110] If it is not a reporting issuer, it must be exempt from registration under the Exchange Act pursuant to Rule 12g3-2(b) AND its must have a class of securities listed or quoted on a DOSM.[111] In

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105. Form F-10, *supra* note 7, General Instruction I-H.

106. Form F-9, *supra* note 30, General Instruction I-E.

107. *See infra* §1.11 for a discussion of the exemptions.

108. Form F-11, *supra* note 17, General Instruction I-B(1).

109. Form F-11, *supra* note 17, General Instruction I-B, Instruction 2.

110. *Id.*

111. Form F-11, *supra* note 17, General Instruction I-B(2). A "designated offshore securities market" (DOSM) has the same meaning as in Rule 902(a) of Regulation S. Under Regulation S, a "designated off-shore securities market means (i) any foreign securities exchange or non-exchange market designated by the Commission; or (ii) the Eurobond market; the Amsterdam Stock Exchange; the Australian Stock Exchange; the Bourse de Bruxelles; the Frankfort Stock Exchange; the Stock Exchange of Hong Kong; the International Stock Exchange of the United Kingdom and the Republic of Ireland; the Johannesburg Stock Exchange; the Bourse de Luxembourg; the Borsa Valori Di Milan; the Montreal Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange. Rule 902 of Regulation S, 17 C.F.R. §230.902(a). Since the adoption of Regulation S,

addition, it must either have a public float[112] of $75 million or have maintained its listing on the DOSM for 36 consecutive months immediately preceding the commencement date of the offering.[113]

In the case of Form F-12, the registrant (each participating company other than a small non-conforming company in the case of a business combination)[114] must either be a reporting issuer or have prior to filing on Form F-12 made an initial submission of the information required by the Rule 12g3-2(b) exemption from registration under the Exchange Act.[115] In the case of Form F-12, being a reporting issuer is not sufficient, however, to satisfy the reporting requirements. The registrant must also have a class of securities listed on a DOSM and be in full compliance with its listing obligations.[116] The listing must have been for the thirty six months immediately proceeding the filing of the registration statement *or* it must have a thirty six month operating history *and* a public float of $75 million or more.[117]

Form F-11 and F-12 state the DOSM requirement differently. In the case of Form F-11, the class of equity securities can be listed or quoted on a DOSM.[118] In the case of a Form F-12 literally the security must be listed on the DOSM.[119] One might assume based on this distinction that Form F-12 requires admission to the official list as distinguished, for example, being admitted for dealings on the Unlisted Securities Market of the International Stock Exchange in London. It is not entirely clear whether the difference is a result of deliberate or sloppy drafting. The Release in describing the eligibility requirements for an "offeror" ignores this distinction and paraphrases this requirement as if it is identical under both forms (i.e. can be listed or quoted on a DOSM). This is confusing as in the case of a business combination the offeror is typically a successor registrant that is excluded from the requirement that it have a class of securities listed on a DOSM.[120] Rather it is the other participants

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the Commission has designated other offshore securities markets as qualifying under this provision. These include the Helsinki Stock Exchange and the Mexican Stock Exchange. Rel. 6896, *supra* note 10, at 81,720 n.47. The staff has also indicated that trades on the U.K.AEs SEAQ qualify as trades on a DOSM. *Id.*

112. *See supra* §1.02 for the definition of public float.

113. Form F-11, *supra* note 17, General Instruction I-B(2).

114. *See supra* note 34 for definition of participating companies and non-conforming small company.

115. Form F-12, *supra* note 18, General Instructions I-B(1)(b), I-C(1)(b).

116. Form F-12, *supra* note 18, General Instructions I-B(1)(d), I-C(1)(d).

117. *Id.*

118. Rel. 6897, supra note 11, at 81,754.

119. Form F-12, *supra* note 18, General Instructions 1-C(1)(d). The exclusion for a successor registrant assumes that the business combination will always result in the formation of a new corporation and that under foreign law it is not possible to have a business combination in which one of the participants is the surviving corporation and the registrant. Presumably, in such an event, the registrant would not be excluded from the listing and related requirements.

120. Rel. 6897, supra *note* 11 at 81,757. (emphasis added).

that must meet the DOSM requirement. Further, the Release in specifically discussing the Form F-12 requirements relating to participants in a business combination refers to "a security listed on a" DOSM. Further, the relevant thirty six month period is measured from the commencement of the offering in the case of Form F-11 and from the date of the filing in the case of Form F-12.

For the remaining Form F-11 and F-12 eligibility requirements see Section 1.04[2].

Permitting foreign issuers to satisfy reporting requirements under appropriate circumstances by making filings under the Rule 12g3-2(b) exemption is a significant concession on the part of the Commission. The Rule 12g3-2(b) exemption is available to a foreign private issuer that furnishes to the Commission specified information that during its last fiscal year it made public pursuant to law, and/or filed with a stock exchange on which its securities are listed or distributed to its security holders.[121] To maintain the exemption provided by Rule 12g3-2(b) the issuer must furnish to the Commission during each subsequent fiscal year any information in the above-mentioned categories it has made public as described above.[122] To claim Rule 801 or use Form F-11 a non-reporting issuer must be æaæ exempt from the requirements of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b). . . .AEAE[123] A foreign private issuer submitting information to the Commission under Rule 12g3-2(b) but not exempt under Section 12(g) because it has not satisfied all of the terms of Rule 12g3-2(b) would thus appear to be ineligible for Rule 801 and Form F-11.[124]

An issuer that has been submitting material under Rule 12g3-2(b) should not assume that it is exempt from Section 12(g) but rather should review its compliance with the terms of Rule 12g3-2(b) prior to relying

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121. Rule 12g3-2(b) under the Exchange Act, 17 C.F.R. §240.12g3-2(b) (1991).

122. *Id.* Information and documents an issuer submits pursuant to Rule 12g3-2(b) are not deemed to be æaæ filed AEAE with the Commission or otherwise subject to liability under Section 18 of the Exchange Act. For this and other reasons, information submitted pursuant to Rule 12g3-2(b) is sometimes considered to be less comprehensive and reliable than information filed pursuant to Sections 13, 14 and 15 of the Exchange Act.

123. Rule 801(b)(1)(i)(B)(2); Form F-11, General Instruction I.B.(2)., *supra* note 17.

124. Proposed Rule 801(b)(1)(i)(B)(2); Form F-11, General Instruction I.B.2. Technically in order to use Rule 801 or Form F-11 a non-reporting issuer would have to determine that it were exempt pursuant to Rule 12g3-2(b) and not merely filing pursuant to that Rule. Failure to comply with all of the conditions of Rule 12g3-2(b) would call into question the availability of Rule 801 and Form F-11. The Commission does publish a list of foreign private issuers who appear to satisfy the requirements for the exemption provided by Rule 12g3-2(b). See, e.g., List of Foreign Issuers Which Have Submitted Information Required by the Exemption Relating to Certain Foreign Securities, SEC Rel. 34-28,889, [Vol. 3] Fed. Sec. L. Rep. (CCH) ¶23,317, at 17,145 (Feb. 15, 1991). As the Commission put it, however, "[i]nclusion of an issuer on the following list is not an affirmation by the Commission that the issuer has complied or is complying with all of the conditions of the exemption provided by Rule 12g-3-2(b). The list does identify those issuers that have both claimed the exemption and have submitted relatively recent information to the Commission." Id.

upon Rule 801 or filing pursuant to Form F-11. An issuer that is not already submitting documents pursuant to Rule 12g3-2(b) may initiate a claim of such exemption at the time it commences an offering in the United States under Rule 801 or at the same time it files a registration statement on Form F-11.[125]

§1.06 Accounting Standards

[1] *Under MJDS*

Although the financial statements can be prepared according to Canadian auditing and general accounting standards, all the MJSD registration forms, other than Form F-7, require that the Commission's rules on auditor independence apply to the auditor's report for the most recent fiscal year for which financial statements are included. If the registrant has previously filed with the SEC audited reports for the prior fiscal periods to which the Commission's rules on auditor independence applied, then such rules are also applicable to the prior periods.[126] The financial statements, however, otherwise can be audited under Canadian generally accepted auditing standards and can be prepared in accordance in Canadian generally accepted accounting principles. For registration on Form F-10, and only F-10, there also must be included a reconciliation to U.S. generally accepted accounting principles as specified in Item 18 of Commission Form 20-F.[127] The item 18 reconciliation will no longer be required for registration statements filed after July 1, 1993. The reconciliation required by item 18 is the so called full reconciliation that has two components. First, material variations must be quantified between Canadian GAAP and U.S. GAAP both as to the income statement and as to the balance sheet. Second, supplemental information required by U.S. GAAP must be set forth, including segmental information, pension information, and supplemental financial disclosures for oil and gas producers.[128] The accountants should consider, with respect to the financial statements included in any MJDS Form other than Form F-7, any conflict between U.S. and Canadian guidelines relating to contingencies and going concern considerations.[129] If additional comments are appropriate under U.S. guidelines and are not included in the prospectus, reference to this fact should be included as part of the legend relating to the financial statements that must be included in the prospectus.[130]

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125. Rel. 6896, *supra* note 10, at 81,720.

126. Form F-9, *supra* note 30, General Instruction III.B; Form F-10, *supra* note 7, General Instruction III.B; Form F-8, *supra* note 28, at 6136, General Instruction V-B.

127. Form F-10, *supra* note 7, Part I, Item 2.

128. See SFCL, *supra* note 84, §15.12[6][c].

129. General Instruction III.C to Forms F-9 and F-10; General Instruction V-C to Forms F-8 and F-80, *supra* notes 30 and 7.

130. *Id. See* §1.08[3] for discussion of the legend requirements.

[2] *Forms F-11 and F-12*

In connection with Forms F-11 and F-12, the issuer will not be required to comply with U.S. accounting principles and auditing standards, including the Commission's rules on auditor independence,[131] with respect to the financial statements, if any, included within the prospectus.[132] The requirements as to the need for and contents of financial statements as well as the accounting and auditing procedures are determined by the requirements of the home country.[133] Similarly, there are no financial or accounting requirements in connection with disclosure documents delivered pursuant to the Rule 801 and 802 exemptions.[134]

§1.07 Special Aspects of Exchange Offerings and a Business Combinations Under MJDS

[1] *Exchange Offers*

Forms F-9 and F-10 are all available, assuming the eligibility requirements of the specific form are met, for an exchange offer, notwithstandng the fact Form F-8 and Form F-80 are specially tailored for an exchange offer.[135] Form F-8 may not be available for any of the following reasons:

a. The issuer had not had a class of securities listed on the Montreal, Toronto, or Vancouver (Senior Board) Stock Exchange for the required 12 month. period. It may, however, have been subject to the continuous reporting requirements of one or more of the securities commissions for three years in which event it satisfies the reporting requirements to use Form F-9 or F-10.

b. The U.S. holders hold 25% or more (forty percent or more, in the case of Form F-80) of the outstanding shares of the class of securities to whom the exchange offer is being directed. This is not a restriction on Form F-10 or F-9.

c. The issuer has a public float of outstanding equity shares of less than (CN) $75 million. This would also preclude the use of Form F-10, but it would not preclude the use of Form F-9 if the securities being offered are investment grade non-convertible debt or preferred stock.

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131. The SEC traditionally has applied its independence requirements equally to foreign and domestic accountants. E.g., Deloitte, Haskins & Sells, SEC No-Action Letter (February 14, 1983) ("non-U.S. auditor must be independent, in all substantial respects, under U.S. requirements"). The Commission's proposal to exempt foreign auditors from U.S auditor independence rules constitutes a significant reversal of longstanding Commission policy and is contrary to the approach taken in connection with Canadian financial reports for the purposes of the MJDS.

132. Form F-11, *supra* note 17, General Instruction III.B; Rel. 6896, supra note. 10, at 81,725; Form F-12, General Instructions III.B., *supra* note 18, at 6176.

133. *See infra* §1.06[2].

134. *See infra* §1.11.

135. An exchange offer is likely also to be subject to regulation under the Williams Act as a tender offer. The multijurisdictional approach to tender offers is discussed at §1.12[1].

The issuer, of course, may be eligible to use one or more of the forms or it may be ineligible to use any of them. Presumably, to the extent it has a choice, it would prefer not to use Form F-10 as that requires, until July 1, 1993, a full reconciliation of the financial statements to U.S. GAAP. For an exchange offer registered on Form F-8, F-9, or F-10, a condition to the availability of the MJDS is that the securities be offered to U.S. residents upon the same terms and conditions as offered to residents of Canada.[136] The issuer of the securities to be exchanged, in all instances, must be incorporated or organized under the laws of Canada and must be a foreign private issuer or crown corporation.[137]

[2] *Business Combination*

Securities can be offered on Form F-8 or F-10 in connection with a business combination if the issuer meets the requirements of the specific form. The form specifically tailored for business combinations is the Form F-8 and usually it would be the form used if the issuer met the eligibility requirements. The circumstances under which a Form F-10 might be available and not a Form F-8, include the following:

a. The participating companies cannot satisfy the requirement that each of them (other than small non-conforming companies) had securities listed on the Toronto, Montreal or Vancouver (Senior Board) stock exchange during the preceding twelve months, but can satisfy the Form F-10 requirement that it have been subject to the continuous reporting requirements of an appropriate Canadian regulatory authority for 36 months.

b. On completion of the business combination, U.S. holders will hold less than twenty five percent (less than forty percent in the case of Form F-80) of the class of securities being offered pursuant to the combination.[138] This is not a restriction on the use of Form F-10. In that event, however, the more stringent substantiality requirements of Form F-10 would be applicable. Form F-10 requires (CN) $360 million in market capitalization as well as (CN)$75 million in float for each participating company, except for small non-conforming companies,[139]

in contrast to the single requirement of (CN) $75 million in float for each such participating company (other than small non-conforming company) under Form F-8.

Form F-10 and Form F-8 both take into account that smaller corporations may be part of a business combination and unable to satisfy the continuous reporting and substantiality requirements. So long as the par-

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136. Form F-9, *supra* note 30, General Instructions I-C.

137. Form F-9, *supra* note 30, General Instructions I-D; Form F-10, *supra* note 7, General Instructions I-C; Form F-8, *supra* note 28, General Instructions II-D.

138. Form F-8, *supra* note 28, General Instructions III-B.

139. Form F-10, *supra* note 7, General Instructions 1-A-(4)-(5).

ticipating companies meeting the requirements are contributing in the aggregate eighty percent of the assets and gross revenues on a pro forma basis, additional participants that do not meet those requirements can be added to the combination although obviously at some point if additional small non-conforming participants are added the conforming companies would no longer be contributing eighty percent of the assets and gross revenues. If the non-conforming companies contributed in excess of twenty percent of the assets or gross revenues, neither form would be available for the business combination.[140] If the conforming participants meet the eighty percent criteria, the small non-conforming participants do not have to meet the substantiality requirements of total market value and public float in the case of Form F-10 and of public float in the case of Form F-8. Similarly, under those circumstances, a small non-conforming company does not have to satisfy the twelve month listing on the Toronto, Montreal or Vancouver (Senior Board) exchanges and thirty six months of continuous regulatory disclosure otherwise necessary to use Form F-8 or the 36 months of continuous regulatory disclosure requirements of Form F-10.[141]

[3] *The Successor Corporation of a Business Combination*

In Canada, business combinations often result in the creation of a new corporation which is the issuer that would have to register the securities under the U.S. securities laws and such company obviously cannot meet either the reporting/listing requirements or the substantiality requirements of Form F-10 or Form F-8 at the time of filing.[142] The reporting and substantiality requirements however are stated so as to exclude, in addition to the small non-conforming participant, the "successor registrant."[143] Accordingly, in a business combination if the registrant is the successor company resulting from the combination, it does not have to meet the substantiality requirements or the reporting/listing requirements provided all the participating companies other than the small non-conforming participants do meet such requirements.

Similarly, if the resulting corporation is a new corporation, it could

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140. *See supra* note 33.

141. Form F-10, *supra* note 7, General Instructions I-C, (3)-(5); Form F-8, *supra* note 28, General Instructions III-A, (2)-(3).

142. Under Rule 145, each solicitation of proxies relating to the shareholder vote is deemed a sale of a security that necessitating, absent an exemption, registration of the securities to be issued on consummation of the business combination, typically on Form S-4, prior to such solicitation. The Canadian authorities do not treat the solicitation of proxies as a sale of a security; hence, the applicable documentation used in Canada is pursuant to the relevant proxy solicitation rules of the appropriate agency and stock exchange. See Reproposing Release, supra note. 4, at 81,118. It is these documents rather than a Canadian prospectus that is filed as the Securities Act prospectus for the Form F-8 registration statement. Form F-8, Part I, Item 1, *supra* note 28, at 6136-6137.

143. Form F-8, *supra* note 28, General Instruction III-A (1)-2; Form F-10, *supra* note 7, General Instruction I-C (3)-(5).

not meet the continuous reporting/listing requirement for subsequent offerings until an appropriate period of time had elapsed. All the forms contain a special provision for determining whether the registrant meets the continuous reporting/listing requirement. In the case of Form F-7[144] or Form F-8,[145] the registrant must have met the listing requirement since the business combination and the time registrant has been subject to the listing/reporting requirements when added to the time each participating company to the business combination other than a small non-conforming company[146] satisfy the twelve month listing and thirty six month reporting requirements. For Form F-9[147] or F-10[148] offering being made by a successor resulting from a business combination, the registrant-successor must have been subject to appropriate reporting requirements continuously since the combination and must be in full compliance therewith, and each predecessor, other than a small non-conforming participating company, must have been subject to appropriate reporting requirements for thirty six months, tacking on for this purpose the time the registrant is subject to such requirement. Thus, if companies A and B amalgamated to form Company C and company A had been a reporting company for 5 years and company B for two years, the continuous reporting requirement would not be met until Company C has been subject to the continuous reporting requirements for at least a year. Presumably, any business combination effected under MJDS would meet these requirements provided the successor corporation was continuously listed with the appropriate exchange and/or continuously subject to regulatory reporting requirements, as appropriate for the particular form, since the business combination. These provisions ordinarily would come into play for the successor, resulting from a business combination that was not effected pursuant to the MJDS.

[4] *Other Aspects*

In an exchange offer to shareholders of another corporation (the subject corporation) or in a business combination on Form F-8, the U.S. holders in the subject corporation must hold less than twenty five percent (forty percent in the case of From F-80) of the shares of the subject corporation in an exchange offer and of the resulting corporation in a business combination. Form F-8 also requires that the issuer of the securities

144. Form F-7, *supra* note 51, General Instruction I-C.

145. Form F-8, *supra* note 28, II-C; With respect to an exchange offer. There is no comparable provision for an offering relating to a subsequent business combination. Although the listing/reporting requirements are not applicable to a successor corporation in the business combination, this does not aid the successor corporation participating in a subsequent business combination.

146. *See supra* note 33 for a definition of a small non-conforming company, it being the same in this context as in connection with determining the availability of Form F-8 or Form F-10 in connection with a business combination.

147. Form F-9, *supra* note 30, General Instruction I-F.

148. Form F-10, *supra* note 7, General Instruction I-I.

to be acquired in an exchange offer be a Canadian foreign issuer and a Canadian corporation may not be a foreign private issuer if persons with U.S. addresses hold of record fifty percent or more of the voting securities.[149] If an exchange offer on Form F-8 takes the form of a tender offer (whether hostile or friendly), there is a presumption that the issuer of the securities to be acquired is a foreign private corporation and that U.S. holders hold less than twenty five percent of the outstanding shares of such corporation unless (1) U.S. trading volume in the class of securities being tendered for exceeded Canadian trading volume over the twelve calendar months preceding the offer; or (2) the most recent annual report or annual information form filed with an appropriate Canadian securities regulators or with the SEC indicates that U.S. holders hold twenty five percent or more of the outstanding subject class of securities; or (3) the offeror has actual knowledge that such is the fact.[150]

For a second stage business combination following an exchange offer or tender offer, there could be difficulty in meeting the public float requirements for each participating corporation in a subsequent business combination to acquire the shares not tendered in the exchange offering since, presumably, a substantial percentage of the shares of the corporation to be acquired were acquired in the exchange offer by what is now an affiliate and, therefore, not included in the public float. Form F-8 and Form F-10 both provide that if such exchange offer terminated within the past twelve months. the corporation to be acquired will be deemed to meet the participant's public float requirement if it would have satisfied such market value requirement immediately before commencement of the exchange or tender offer.[151] If the prior offer was an exchange offer, this provision is applicable only if the exchange offer was registered or would have been eligible for registration on Form 8, 9, 10, or 80; if the prior offer was a tender offer, this provision is applicable only if a Schedule 13E-4 or 14D-1F was filed or could have been filed.[152]

§1.08 Prospectus

[1] *Under MJDS*

The MJDS is premised on the assumption that there are appropriate disclosure requirements required under Canadian law that can be used as the basis for the registration statement filed with the SEC. In the case of

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149. *See supra* §1.03

150. Form F-8, *supra* note 28, General Instructions II-D, Instruction 2. Trading volumes are measured on the basis of the aggregate trading volume during the relevant period of that class of securities on the national securities exchanges and NASDAQ in the United States compared to the aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network.

151. Form F-8, *supra* note 28, General Instructions III-A-3; Form F-10, *supra* note 7, General Instructions I-A-(5).

152. *Id.*

an offering other than an exchange offer or business combination, the appropriate document in Canada is ordinarily a prospectus. In the case of an exchange offer it is a takeover bid circular or issuer bid circular and, in the case of a business combination, an information circular.[153] The prospectus under the MJDS is based on the appropriate home jurisdiction documents. The home jurisdiction, however, depends on the nature of the offering. If the offering is a conventional offering of securities for cash, it will be processed in Canada under coordination procedures that designate one of the Commissions as the principal jurisdiction for review purposes. In that event, the prospectus will consist of the entire disclosure document(s) required to be delivered to purchasers pursuant to the laws of the principal Canadian jurisdiction. This will be true whether the offering is made on Form F-10 or F-9.[154] The principal jurisdiction concept, however, is not applicable to an exchange offer or a business combination or a rights offering. The prospectus in connection with an exchange offer is to consist of the entire disclosure document(s) used to offer securities in any Canadian jurisdiction.[155] In the case of a business combination, the prospectus consists of the disclosure documents used to solicit votes in any Canadian jurisdiction.[156] In connection with a business combination, Canadian disclosure generally is based on proxy solicitation rules rather than prospectus requirements, but the Canadian authorities changed such proxy solicitation rules to increase the disclosure required in anticipation of the adoptions of the MJDS.[157] For a rights offering, the prospectus is to consist of the entire disclosure document(s) used to offer the rights and underlying securities in any Canadian jurisdiction.[158] In all instances, the documents are to be prepared in accordance with the disclosure requirements as interpreted and applied by the home jurisdiction(s).[159]

Appropriate legend(s) must be set forth in the Prospectus, as discussed below,[160] or as required by any jurisdiction in which the offering is to be made. There also must be attached to the prospectus a list of the documents filed with the Commission as part of the registration statement.[161] The prospectus, however, does not have to include any documents incorporated by reference into home jurisdiction disclosure document(s) unless required to be delivered pursuant to the laws of the home jurisdiction.[162] If any information is incorporated by reference into the prospectus, the prospectus must set forth the name, address and telephone number of an officer of the issuer from whom copies of the incor-

153. *See* MJDS Release, *supra* note 4, at 81,870, 81,876.
154. Form F-10, *supra*, note 7, Part I, Item 1; Form F-9, *supra* note 30, Part I, Item 1.
155. Form F-10, *supra* note 7, Part I, Item 1; Form F-9, Part I, Item 1, *supra* note 30.
156. *Id.*
157. MJDS Release, *supra* note 4, at 81,870.
158. Form F-7, *supra* note 51, Part I, Item 1.
159. Part I, Item 1 of Forms F-7, F-8, F-9, F-10 and F-80.
160. *See infra* §1.08[3].
161. *See* Part I, Item 4 of Forms F-7, F-8, F-9 and F-80, +I, Item 5 of Form F-10.
162. Part I, item 1 of the appropriate form.

porated document may be obtained without charge.[163] In offerings made prior to July 1, 1993 on Form F-10, the prospectus also must include a reconciliation between U.S. GAAP and Canadian GAAP conforming to item 18 of Form 20-F.[164] This is true whether the offering is a conventional financing, a rights offering, exchange offering or business combination if registration is on Form F-10. Registration on any other form does not require such reconciliation. Presumably, the Commission expects that developments in Canadian GAAP prior to July 1, 1993 will eliminate the need for reconciliation. The Adopting Release notes that such reconciliation will not be required after that date "absent future action by the Commission to the contrary."[165]

[2] *Forms F-11 and F-12*

The disclosure requirements of Form F-11 are based almost completely upon foreign standards. The prospectus to be included within the registration statement will consist of the disclosure document or other information used to offer the securities in the issuer's home jurisdiction.[166] The "home jurisdiction" is the jurisdiction of the issuer's organization or incorporation, unless the primary market for the securities is in another country, in which event the country or the primary market is the "home jurisdiction."[167] The issuer will not be required to comply with U.S. accounting principles and auditing standards, including the Commission's rules on auditor independence, with respect to the financial statements, *if any*, included within the prospectus.[168] The prospectus would be prepared in accordance with home jurisdiction requirements, except that the issuer must include certain informational legends discussed at §1.10[3].

In an exchange offer on Form F-12, the prospectus consists of the documents required to be delivered to holders of the securities being acquired by the registrant pursuant to the laws of the home jurisdiction in which the foreign target company is organized.[169] The prospectus also must include information supplied to such holders pursuant to rules of any DOSM in any jurisdiction in which the registrant has a class of equity securities listed.[170] When securities are being registered in connection with a business combination, the prospectus includes the entire disclosure document required to be delivered to security holders pursuant to laws governing the solicitation, including rules of any DOSM upon which the

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163. Form 10, *supra* note 7, Part I, Item 4,; Part I, Item 3 of Forms F-7, F-8, F-80.

164. Form F-10, *supra* note 7, Part I, item 2. *See supra* §1.06[1] for a discussion of item 18.

165. MJDS Release, *supra* note 4, at 81,868.

166. Form F-11, *supra* note 17, Item 1.

167. Form F-11, *supra* note 17, General Instruction II.A., Instruction.

168. Form F-11, *supra* note 17, General Instruction III.B; Rel. 6896, *supra* note 10, at 81,725.

169. Form F-12, *supra* note 18, Part I, Item 1.

170. *Id.*

equity securities of the participating companies are listed.[171] In general, the disclosure document must be prepared in accordance with the requirements of the foreign target company's home jurisdiction (in the case of a business combination, in accordance with the requirements governing the solicitation) as interpreted and applied by the securities commission or other regulatory authorities in such jurisdiction.[172] A registrant that is incorporated in a country different from that of the target company's may use its home country disclosure document if so permitted by the target company's home jurisdiction.[173]

[3] *The Legends*

The MJDS Forms and the proposed cross-border registration forms require that the prospectus include certain legends which are substantially the same for comparable offerings. Although the Prospectus generally follows the Canadian format and requirements, it must contain the standard Rule 423 disclosure on the cover page that the securities have not been approved or disapproved by the SEC, etc., and when appropriate the Rule 430 statement relating to a preliminary prospectus.[174] In addition, the outside front cover page (or a sticker thereto) must contain in bold-face roman type a series of informational legends, to the extent applicable, designed to alert investors to the implications of the multijurisdictional disclosure system to the following effect:[175]

1. The offering is being made by a foreign issuer that is permitted to prepare the prospectus in accordance with the disclosure requirements of its home country. Such requirements are different from those in the United States. The financial statements were prepared in accordance with foreign generally accepted accounting principles, subject to foreign auditing and auditor independence standards, and may not be comparable to financial statements of U.S. companies.

2. There may be tax consequences both in the United States and Canada because of the acquisition of the securities and their application to a citizen of the United States may not be fully described in the prospectus.

3. Enforcement by investor of civil liabilities under the federal securities laws may be adversely affected because-

The issuer is incorporated or organized under the laws of a foreign country.

Some or all the officers and directors may be residents of a foreign country.

Some or all the underwriters and experts named in the registration

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171. *Id.*

172. *Id.*

173. Rel. 6897, *supra* note 11, at 81,753.

174. Part I, item 2 of the various forms other than Form F-10; Form 10, *supra* note 7, Item 3, Part I.

175. *Id.*

statement may be residents of a foreign country.

All or a substantial portion of the assets of the issuer and such persons may be located outside the United States.

4. Any legend or information required by the laws of any jurisdiction in which the securities are to be offered.

5. In the case of an exchange offer, a legend must be included to the effect that the registrant or its affiliates may bid for or make purchases of the securities under applicable Canadian law.

[4] *Exclusions from the Prospectus*

The prospectus need not include any document incorporated by reference into the Canadian disclosure document not required to be delivered to offerees or purchasers in Canada pursuant to Canadian law.[176] The U.S. prospectus can exclude any disclosure applicable solely to Canadian offerees that would not be material to offerees in the United States including, without limitation, the following:[177]

1. Any Canadian red herring legend.

2. Any discussion of Canadian tax consequences other than those material to U.S. purchasers.

3. The names of any Canadian underwriters not acting as underwriters in the United States.

4. A description of the Canadian plan of distribution (except to the extent necessary to describe material aspects of the plan of distribution in the United States).

5. A description of statutory rights under applicable Canadian securities legislation unless available to U.S. offerees or purchasers.

6. Certificates of the issuer or any underwriter.If any part of the document delivered to offerees or purchasers is not in English, it must be accompanied by an English translation.[178]

§1.09 The Registration Process

[1] *Mechanics of Registration*

The registration statement is filed under an appropriate facing page for the specific form that does not differ significantly from the typical facing page except it calls for the province or other jurisdiction of incorporation or organization, a translation of the issuer's name into English, if appropriate, the principal regulatory jurisdiction in Canada, proposed

176. Part I, Item 1 of the various forms.

177. *Id.*

178. Form F-10, General Instruction II-J; Form F-7, General Instruction II-G; Form F-8, General Instruction IV-I; Form F-80, General Instruction IV-I; Form F-9, General Instruction II-I; Form F-12, General Instructions II-I; Form F-11, General Instructions II-G.

commencement and effective dates which take into account special procedures applicable under the MJDS, including whether securities are being registered for the shelf pursuant to procedures of the home country. Five copies of the complete registration statement and any amendments thereto, including exhibits and all other papers and documents filed as a part of the registration statement, must be filed and three additional copies and amendments thereto without exhibits must be filed with the Commission.[179] The registration statement, however, is the document required under the rules and regulations applicable in the home jurisdiction, Part I being the prospectus as described above. Part II consists of a list of the exhibits and, under the MJDS Forms F-8, F-9, F-10, and F-80, a brief description of the indemnification provisions, if any, relating to directors, officers and controlling persons of the registrant against liability arising under the Securities Act and the Commission's standard statement that in its view such provisions are against pubic policy and unenforceable.[180] The registration statement also includes undertakings, to the extent specifically required by certain forms, and the signature page.

[2] *Exhibits*

The following exhibits must be included as part of the registration statement, appropriately lettered or numbered for convenient reference:[181]

1. In the case of an exchange offer, all reports or other information that must be made publicly available in accordance with the requirements of the jurisdiction in which the subject issuer (i.e., the company whose shareholders are the subject of the offer) is incorporated and organized and a copy of all agreements relating to the proposed acquisition.

2. In the case of a business combination, all reports or other information that must be made publicly available in accordance with the requirements of the jurisdictions in which the participant companies are incorporated and organized and a copy of all agreements relating to the proposed business combination.

3. All reports or other information that under the requirements of the home jurisdiction must be made publicly available concerning the offering. The home jurisdiction for this purpose is the jurisdiction that governs the content of the prospectus as discussed above.[182]

4. Copies of any documents incorporated by reference into the registration statement and publicly available documents filed with the principal jurisdiction or any other Canadian regulatory authority concurrently

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179. Form F-7, General Instruction II.C; Form F-8, General Instruction IV-C; Form F-9, General Instruction II.D; Form F-10, General Instruction II.D; Form F-11, General Instruction II.D; Form F-12, General Instruction II.C; Form F-80, General Instruction IV-C.

180. Part II of Forms F-8, F-9, and F-10.

181. Part II of the appropriate form.

182. *See supra* §1.08[1].

with the prospectus.

5. Manually signed written consents of any accountant, engineer, or appraiser, or any other expert who is named as having prepared or certified a report or valuation for use in the offering document.

6. Manually signed power of attorney of any person signing the registration statement or amendment pursuant to power of attorney, and, if relating to an officer signing on behalf of the registrant, a certified copy of a resolution of registrant's board of directors authorizing such signature.

7. A copy of any indenture relating to the registered securities.

[3] *Undertakings and Signature Page*

Part III of the MJDS Registration Statement includes an Undertaking and Consent to Service of Process. The registrant on all the MJDS registration forms other than Form F-7 undertakes to make available, in person or by telephone, representatives to respond to inquiries made by the staff and to furnish promptly upon request of the staff information relating to the securities registered or to transactions in such securities. Part III of the MJDS and Form F-12 registration forms requires the filing of a consent to service of process on Form F-X as is discussed below.

The signature page is completed in the same manner as other registration statements as to the persons required to sign, the formalities of manual signatures, powers of attorney and the like. The signature page, however, also includes, redundant in view of the Form F-X, a consent to service of process by the registrant.

[4] *Form F-X*

A manually signed Form F-X executed by the issuer, and, if applicable, the indenture trustee, must be filed separately with the Commission at the time the registration statement is filed in connection with registration on Forms F-8, F-9, F-10 and F-80, and proposed Form F-12.[183] In connection with Form F-7 relating to a rights offering, a Form F-X and consent to service of process must be filed only by a non-U.S. person acting as trustee with respect to the registered securities.[184] No Form F-X or other consent to service of process is required in connection with proposed Form F-11. The Form F-X must set forth the name of the issuer or person filing (the "Filer"), identify the filing in conjunction with which it is being filed, include the name of jurisdiction under the laws of which the Filer was organized, the full address and telephone number of the Filer, and designate and appoint a named U.S. person to serve as agent to accept service of any process, pleadings, subpoenas, or other papers relat-

183. Part III, Item 2 of the appropriate MJDS form; Form F-12, *supra* note 18, Part III, Item 1. Six copies of the form must be filed with the Commission. Form F-X, General Instruction II, [1991 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶7095 [hereinafter Form F-X].

184. Form F-7, *supra* note 51, Part III.

ing to applicable matters, with the full address and telephone number in the United States of the Agent. The Form F-X also must be signed by the Agent. Service relates to (a) any investigation or administrative proceeding conducted by the Commission; (b) any civil suit or action brought against the Filer or to which it has been joined as defendant or respondent in any appropriate court subject to the jurisdiction of a state or of the United States or of the District of Columbia or Puerto Rico arising out of or relating to, among other things, to the following: (i) An offering made by the Filer identified by the name of the form on which made and the date thereof and any purchase or sale of any security in connection therewith or (ii) as to a trustee indenture to the securities in relation to which the Filer acts as trustee. The Filer also must agree to appoint a successor agent for service of process and to file an amended Form F-X if for any reason the Agent is no longer serving in that capacity and undertakes to advise the Commission promptly in writing of any change to the Agent's name or address. The obligation to appoint a successor Agent continues until six years after the issuer ceases to report under the Exchange Act except in the case of a Form F-8 or F-80. In the case of a Form F-8 or F-80, the obligation continues for six years from the date of the latest amendment to the Form 8 or 80.[185] In the case of a signature pursuant to board resolution a certified copy of the resolution is to be filed with each copy of the Form F-X. If executed pursuant to a power of attorney, a manually signed copy of the power of attorney is to be filed with each copy of the Form F-X.

[5] *Filing and Effective Dates*

There is no specific time in relationship to the Canadian filing that the filing must be made with the SEC. It obviously behooves the issuer not to delay unduly the filing notwithstanding the fact that the filing ordinarily will be accorded a no review status since the registration statement cannot become effective until it is filed and no pre-effective selling effort can be undertaken until filed. A registration statement (and any amendment thereto) filed on any of the forms in connection with an offering being made contemporaneously in Canada and the United States becomes effective on filing with the SEC, unless, in the case of a Form F-9 or F-10 designates on the cover page that they are preliminary materials.[186] In the case of a filing on F-9 or F-10 of an offering being made in the United States only, the effective date will be any date named by the registrant that is more than seven days after the date of the filing.[187] If, in connection with such filing, Canadian authorities issue a receipt of notification or clearance prior to the end of such seven-day period, the registra-

185. Form F-X, *supra* note 183, General Instruction II.F.

186. Rule 467(a), [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5856, at 5393.

187. *Id.* The seven days is to afford Canadian authorities an opportunity to review the filing. The filing, of course, would have to be made with the Canadian authorities or the MJDS form would not be available.

tion statement can become effective as soon as practical after written notification to the Commission of such receipt or clearance.[188] The filed documents will be given a "no review" status except for the "unusual case" in which the staff perceives a problem.[189] A registration statement on Form F-12 would become effective upon filing except if it relates to an issue of debt securities in which case it would not become effective until the issuer has complied with the U.S. [Trust Indenture Act].[190] "Moreover, the registration statement generally would not be subject to prior review by the Commission Staff."[191]

[6] *Inapplicability of Regulation C*

Regulation C, which controls the nuts and bolts relating to the filing and format of registration statements generally, is not applicable to MJDS, although selected portions have found their way into instructions included in the applicable forms and certain rules included in Regulation C are explicitly incorporated into the appropriate forms. The informational legends required as described above[192] must be in bold-face type at least as high as ten-point modern type and at least two points leaded. Each copy of the registration statement must be bound, stapled or otherwise compiled with the binding on the side or stitching margin so as to leave the reading matter legible and without stiff covers.[193] Otherwise, such nut and bolts matters are generally determined in accordance with the Canadian requirements.

[7] *Civil Liability and Other Applicable Provisions*

The civil liability provisions, including Sections 11 and 12(2) and the Section 17(a) fraud provisions of the Securities Act are applicable with respect to securities registered under the MJDS and offered in the United States. Rule 408 which requires that the registration statement include such further material information, if any, necessary to make the required

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188. *Id.*

189. MJDS Release, *supra* note 4, at 81,877. Since in most instances the registration statement becomes effective on filing, the review would be a post-effective one. Although the Commission's stop-order authority under Section 8(d) of the Exchange Act extends to registration statements that become effective, to enter the stop-order after the offering has been distributed may have little effect other than to alert purchasers that they may have an action under Section 11 or 12(2) of the Securities Act. If entered during the period during which dealers must deliver a prospectus in trading transactions pursuant to Section 4(3)(B) of the Securities Act, and Rule 174 adopted thereunder, so long as the stop-order remains in effect the period will not run and dealers will be unable to trade in the security because of the unavailability of the prospectus except in unsolicited brokerage transactions. The practical effect will be to force U.S. holders to sell the securities in Canada. See SFCL §6.12[2].

190. Rule 469, under the Securities Act [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803.

191. Rel. 6897, *supra* note 11, at 81,756.

192. *See supra* §1.08[3].

193. Form F-10, *supra* note 7, General Instruction II-D and comparable instruction to other forms.

statements not misleading remains applicable.[194] The Rules imposing limitations on the underwriters and in some instances dealers while the issuer is in registration relating to market reports and recommendations continue in force,[195] as does Rule 174 relating to the delivery of a prospectus in the trading market. The safe-harbor rules relating to projections and oil and gas supplemental information apply to MJDS offerings if otherwise applicable.[196]

Some concern was expressed that to the extent that Canadian disclosure differs from U.S. standards that courts may use the failure to comply with U.S. standards as a basis for imposing liability. The Commission declined to adopt a rule dealing with this situation, but has attempted to alleviate these concerns, stating:[197]

By adopting the MJDS, the Commission in essence would adopt as its own requirements the disclosure requirements of Canadian forms. The effect would be the same as if the Commission had set forth each Canadian requirement within the MJDS forms.

§ 1.10 Exchange Act Registration and Reporting

[1] *Section 15(d) Reporting Companies*

Section 15(d) requires an issuer that has registered securities under the Securities Act to file annual and periodic reports specified by Section 13(a) of the Exchange Act. A Canadian foreign private issuer registering securities on a MJDS form and other foreign private issuers registering securities on the MJDS forms or F-11 or Form F-12, therefore, would ordinarily become subject to the reporting requirements of the Exchange Act.[198] An issuer registering securities on proposed Forms F-11[199] and F-12,[200] however, is exempted from the continuous reporting obligations of Section 15(d) of the Exchange Act.[201] The MJDS does not contain an outright exemption from Section 15(d) for MJDS registrants, but provides that If at the time of filing of a Form F-7, F-8 or F-80 registrant was relying on the Rule 12g3-2(b) exemption from registration under the Exchange Act, no reporting obligation will arise under Section 15(d).[202]

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194. General Instructions II-B of the relevant form.

195. Rule 138, [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5713A; Rule 139, [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5713B, at 5060.

196. Rule 175, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5736, at 5183-5185.

197. Reproposing Release, *supra* note 4, at 81,130.

198. *See generally* SFCL, *supra* note 84, § 3.11.

199. Proposed Rule 12h-5, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803, at 81,736.

200. Proposed Rule 12h-4, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,803, at 81,771.

201. *See supra* § 1.04[2].

202. Rule 12h-4. It is not unlikely that a similar qualification will be applicable to Form F-11 and F-12 registrants. Rule 12h-4 was proposed in connection with the Form F-12 proposal without such qualification and then adopted three days later as part of the MJDS

There is no Section 15(d) exemption for registrants on Forms F-9 or F-10. In the event Section 15(d) reporting requirements are triggered by the registration of securities on one of the MJDS forms, registrant can elect to satisfy the reporting requirements by filing an annual report on Form 40-F provided such reporting requirements arise solely by reason of such registration.[203] Form 40-F, which is a wrap around of the home jurisdiction report, is discussed at §1.10[3]. If the issuer's securities are listed or are to be listed on a U.S. stock exchange or are quoted or are to be quoted on NASDAQ, then the issuer will have to register the class of securities under Section 12 of the Exchange Act on Form 20-F (or, if eligible, Form 40-F) and will thereafter be subject to the reporting requirements of Section 13(a) of the Exchange Act which include, among other things, require the filing of an annual report on Form F-20 (or, if eligible, Form 40F).[204]

[2] *Exchange Act Registration*

Section 12(g) of the Exchange Act requires an issuer with total assets of in excess of $5 million to register any class of equity securities if there are 500 or more holders of record of that class of security.[205] A foreign private issuer with less than $5 million in total assets or with fewer than 300 U.S. residents as shareholders in a class of equity securities, is exempt from registration under the Exchange Act if its securities are not listed in the United States and not traded on NASDAQ.[206] There is also an exemption for foreign private issuers under Rule 12g3-2(b) for issuers conforming with the requirements of the exemption which generally requires the filing with the SEC of documents and releases material to shareholders that are required by the regulators (including stock exchanges) in the issuer's home country. The offering by a foreign private issuer in the United States on an MJDS form or the cross-border registration forms, other than on Form F-7 or proposed Form F-11, which necessarily are to existing shareholders, will increase the number of U.S. residents that are shareholders and, hence, the possibility that the issuer will have in excess of 300 U.S. residents as shareholders in a class of equity securities and can no longer rely on the Section 12g3-2(a) exemption from registration under the Exchange Act. The foreign private issuer under such circumstances can, if it chooses, rely on the Section 12g3-2(b) exemption by making the required filings with the SEC necessary to obtain such exemption. An issuer reporting on Form 40-F to satisfy their Section

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Release with this qualification as it applies to the relevant MJDS Forms. It may be that the qualification reflects some last minute fine tuning of the provision.

203. Form 40-F, General Instructions, A(1) [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,812 [hereinafter Form 40-F].

204. *See* SFCL, *supra* note 84, § 15.13 for discussion of Form 20-F registration and reporting.

205. *See* SFCL, *supra* note 84, § 3.03 for discussion of Exchange Act registration.

206. Rule 12g3-2(a), *supra* note 121.

15(d) reporting obligation can satisfy the 12g3-2(b) exemption requirements simultaneously by indicating on the cover page of the Forms 40-F and 6-K that the information is being filed for both purposes and including its filing number for the exemption.[207]

[3] *Form 40-F*

The MJDS introduces a new Form 40-F for registration and reporting by Canadian foreign private issuers which for eligible Canadian issuers permits them in several instances to register under the Exchange Act and/or to comply with the reporting requirements under the Exchange Act essentially by a wrap-around filing with the SEC of the documents they are required to file with the appropriate Canadian regulatory (including any stock exchange on which they may have securities listed) authorities. In the event Section 15(d) reporting requirements are triggered by the registration of securities on one of the MJDS forms,[208] registrant can elect to satisfy the reporting requirements by filing an annual report on Form 40-F provided such reporting requirements are solely by reason of such registration.[209] Form 40-F also can be used for reporting by Canadian issuers pursuant to Section 13(a) or Section 15(d) of the Exchange Act that have not previously registered securities under one of the MJDS Securities Act registration forms or to register securities pursuant to Section 12(b) or 12(g) provided the issuer is a Canadian foreign issuer and meets the following requirements:[210]

1. The issuer has been subject to Canadian reporting requirements for at least 36 months (12 months in the case of a crown corporation) and is currently in compliance.

2. If the filing relates to convertible securities of an issuer that would be eligible to use Form F-9 for the registration of such securities,[211] the market value of the outstanding equity shares of the registrant must be (CN) $180 million or more and the market value of the public float of such equity shares must be (CN) $75 million.

3. If the filing relates to non-convertible securities of an issuer that would be eligible to use Form F-9 for the registration of such securities, there are no threshold that must be met as to the market value of the outstanding equity shares or public float.[212]

4. In all other cases, the market value of the outstanding equity shares of the registrant must be (CN) $360 million and the market value of the public float in such securities must be (CN) $75 million.

Form 40-F, in the case of registration, requires the filing of all infor-

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207. Facing Page of Form 40-F, *supra* note 203.
208. *See supra* § 1.10[1].
209. Form 40-F, *supra* note 203, General Instructions, A(1).
210. *Id.*, General Instructions A(2).
211. *See supra* § 1.04[1].
212. *Id.*

mation material to an investment decision that the Registrant, since the beginning of its last full fiscal year, (i) made or was required to make public pursuant to the law of any Canadian jurisdiction; (ii) filed or was required to file with a stock exchange on which its securities are traded and which was made public by such exchange; or (iii) distributed or was required to distribute to its security holders.[213] The registration statement on Form 40-F must also include that portion of the issuer's home jurisdiction reports, forms or listing application that describes the securities to be registered.[214] A list of the documents constituting the registration statement is to be filed as an Exhibit to the registration statement.

If the Form 40-F is being filed as an annual report, registrant must file the annual information form required under Canadian law, its audited annual financial statements and accompanying management's discussion and analysis.[215]

In any Form 40-F filed prior to July 1, 1993, with limited exceptions noted below, the financial statements, other than interim statements, must include a reconciliation to U.S. GAAP as required by Item 17 of Form 20-F.[216] Such reconciliations are not required in the case of securities that would be eligible for registration on Form F-9[217] or if the form is being filed solely because of reporting obligations arising under Section 15(d) because of the prior registration of securities on Form F-7, F-8, F-9 or F-80. In all instances, the Commission's rules on auditor independence are applicable except as to certain prior fiscal years.[218] Registration statements and annual reports filed on Form 40-F have to be in the English language.[219] A consent to service of process on Form F-X must be filed as part of the Form 40-F and an undertaking to cooperate with the SEC.[220]

Registrants filing annual reports on Form 40-F, must file periodically on Form 6-K all other information (i.e., not included in its annual report on Form 40-F) material to an investment decision that registrant i) makes public pursuant to the law of the jurisdiction of its domicile, (ii) filed or was required to file with a stock exchange on which its securities are traded, or (iii) distributed or was required to distribute to its security holders.[221]

Documents filed on Form 40-F to satisfy reporting obligations must be filed with the Commission the same day they are filed with the Cana-

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213. Form 40-F, *supra* note 203, General Instructions B-(1).

214. *Id.* General Instructions B-(2).

215. *Id.* General Instructions B-(3).

216. *Id.*, General Instructions, C-(2). On the difference between Item 17 reconciliation and Item 18, *see* SFCL, *supra* note 84, §15.13[1][c].

217. *See supra* §1.04[1].

218. Form 40-F, *supra* note 203, General Instructions, C-(1). The requirements are comparable in this respect to those relating to the filing on the MJDS Securities Act registration forms. *See* § 1.06[1].

219. *Id.*, General Instructions B-(4).

220. *See supra* § 1.09[4] for discussion of Form F-X.

221. Form 40-F, General Instructions B-(3), *supra* note 203.

dian securities regulatory authority.[222] Documents required to be filed on by Form 6-K must be furnished to the Commission promptly after they are made public, filed or distributed.[223]

The issuer reporting annually on Form 40-F, like other foreign issuers reporting on Form 20-F, need only comply with Form 6-K for interim reporting.[224]

§1.11 Exemption from Registration For Cross Border Rights, Exchange Offerings and Business Combinations

[1] *Rule 801*

Section 3(b) of the Securities Act authorizes the Commission to exempt securities from the registration requirements if the aggregate amount of the offering does not exceed $5 million.[225] The Commission has proposed Rule 801 under Section 3(b) to exempt securities issuable upon the exercise of rights granted by qualified foreign private issuers. The Rule provides a limited alternative to registration on Form F-11.[226] The aggregate offering price of securities offered to U.S. security holders can not exceed $5 million.[227] The non-U.S. portion of the offering and offerings pursuant to other exemptions or to registration need not be included in the $5 million amount.[228] The rights themselves may not be transferable except in accordance with Regulation S[229] under the Securities Act.[230] Rule 801 does not impose any specific disclosure requirements but requires the issuer to provide U.S. holders with the same information as that provided to offerees in the issuer's home jurisdiction.[231] The Rule

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222. MJDS Release, *supra* note 4, at 81,873.

223. *Id.*

224. Rule 13a-16 and 15d-16 as amended by Sec. Act Rel. No. 6902, *supra* note 4.

225. 11 U.S.C.A. § 77c(b) (1981).

226. *See supra* § 1.04[2].

227. The Rule provides that the "aggregate offering price of securities subject to outstanding offers made to offerees that are U.S. holders in connection with each rights offering made in reliance on this § 230.801 shall not exceed $5,000,000." Rule 801(b)(4), *supra* note 16 at 81,768. The "aggregate offering price" is the total gross sales price to be received by the issuer for issuance of its securities upon exercise of the related rights. Rule 801(c)(1). For purposes of the calculation it is assumed that all rights granted as part of the rights offering are exercised. Rel. 6896, *supra* note 10, at 81,722.

228. Rule 801, *supra* note 16, Preliminary note 8.

229. Regulation S, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶5921.

230. Rule 801(b)(3)(i)(C)(2), *supra* note 16, at 81,732.

231. *Id.*, Proposed Rule 801(b)(3)(ii). "Home jurisdiction" is the country of the issuer's organization or incorporation, unless the primary market (as defined) for the issuer's equity securities is in another country, Rule 801(c)(6), in which event the country of the primary market for the issuer's listed securities is the "home jurisdiction." *Id.* If information regarding the offering is published in the home jurisdiction instead of being delivered to offerees, the issuer may publish substantially equivalent information in English in a publication of general circulation in the United States. Rule 801(b)(3)(ii). Alternatively, the issuer may deliver a written copy of the home jurisdiction publication to offerees in the United States. *Id.*

generally is not available for rights offerings by investment companies registered or required to register under the Investment Company Act of 1940.[232] The exemption provided by Rule 801 would apply only to transactions that satisfy a number of requirements ("Common Eligibility Requirements") that also determine a registrant's eligibility to use Form F-11.[233] The Com-mon Eligibility Requirements provide generally that the issuer must be a foreign private issuer and either reporting under the Exchange Act or exempt from such reporting by reason of Rule 12g3-2(b).[234] If the issuer is not a reporting issuer, its securities must be listed or quoted on a DOSM AND either have maintained such listing or quotation for the immediately preceding 36 months OR have a public float of not less than $75 million.[235]

Rights offerings made pursuant to Rule 801 are subject to the antifraud, civil liability and other provisions of the federal securities laws.[236] The Commission indicated, however, that it will enter an order exempting such offerings from the antimanipulative provisions of Rule 10b-6, 10b-7 and 10b-8.[237]

[2] *Rule 802*

Rule 802 exempts any exchange offer for a class of securities of a foreign private issuer if it satisfies the conditions of the Rule,[238] irrespective of whether the offeror issuer is a foreign or U.S. issuer.[239] The exemptive rule would also apply to an exchange of securities for securities of a foreign private issuer in connection with a business combination whether or not the acquiring issuer is a foreign or U.S. issuer.[240] The aggregate dollar amount of securities being offered in the exchange offer or business combination in the United States may not exceed $5 million under the proposed rule.[241] The Rule is equally available for debt and equity securities.[242] The exchange offer (and securities issued in the business combina-

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232. Rule 801, *supra* note 16, Preliminary note 8. Foreign issuers able to make public offerings in the U.S. pursuant to Rule 6c-9 or an exemptive order under the Investment Company Act would be eligible to use Form F-3, *supra* note 10, at 81,721-81,722.

233. *See supra* §1.04[2].

234. 17 C.F.R. §240.12g3-2(b). Rule 12g3-2(b), known as the "information supplying exemption," exempts certain securities issued by foreign private issuers from the registration requirements of Section 12(g) of the Exchange Act. To qualify for the exemption provided by Rule 12g3-2(b), the issuer must periodically supply certain information to the Commission. *See* SFCL, *supra*, note 84, at § 15.13[3][a].

235. Rule 801(b)(1)(B)(2)(i)-(ii), *supra* note 16, at 81,731.

236. Rule 801, *supra* note 16, Preliminary Note 1.

237. Rel. 6896, *supra* note 10, at 81,728.

238. Rule 802(b), *supra* note 16, at 81,765.

239. Rel. 6897, *supra* note 11, at 81,752.

240. A "business combination" is a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of one or more of the participating companies. Rule 802(a)(6), *supra* note 16, at 81,768.

241. Rule 802(c)(1), *supra* note 16, at 81,768.

242. Rel. 6897, *supra* note 11, at 81,752.

tion) must be for a class of securities of a "foreign private issuer."[243]

The exemption does not apply to transactions by an investment company registered or required to be registered under the Investment Company Act,[244] except for companies that have the benefit of an exemptive order under such Act or that may rely on Rule 6c-9.[245] The exemption provided by Rule 802 as indicated is only available if the aggregate dollar amount of securities being offered in the United States in the exchange offer or business combination does not exceed $5 million.[246] Recognizing the limitations of this approach (the parameters of which were fixed by Section 3(b) of the Securities Act), the Commission requested comment as to whether the ceiling is "so low as to neutralize the exemption's usefulness by enough offerors to warrant the rule-making effort on both the federal and state levels?"[247] Offers and sales made outside the United States would not be included in calculating the $5 million threshold nor would registered domestic offerings or domestic offerings made pursuant to other exemptions be integrated even if made contemporaneously with the offering under Rule 802.[248]

The exemption does not apply to transactions by an investment company registered or required to be registered under the Investment Company Act,[249] except for companies that have the benefit of an exemptive order under such Act or that may rely on Rule 6c-9.[250] The exemption provided by Rule 802 as indicated is only available if the aggregate dollar amount of securities being offered in the United States in the exchange offer or business combination does not exceed $5 million.[251] Recognizing the limitations of this approach (the parameters of which were fixed by Section 3(b) of the Securities Act), the Commission requested comment as to whether the ceiling is "so low as to neutralize the exemption's usefulness by enough offerors to warrant the rule-making effort on both the federal and state levels?"[252] Offers and sales made outside the United States would not be included in calculating the $5 million threshold nor

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243. Rule 802(b), *supra* note 16, at 81,768.

244. Rule 802, Preliminary note 7, *supra* note 16, at 81,767.

245. Rel. 6897, *supra* note 11, at 81,751.

246. Rule 802(b), Rule 802(a)(7), *supra* note 16, at 81,767-81,768. This limitation applies to the total dollar amount the offeror proposes to issue upon exchange for securities of a single class held by U.S. security holders, assuming all of the subject securities held in the U.S. are exchanged. Rule 802(a)(7). The amount of the securities being offered is to be calculated based upon the market value of the securities held by U.S. holders. *Id.*

247. Release 6897, *supra* note 11, at 81,752.

248. Rule 802, *supra* note 16, Preliminary Note 8.

249. *Id.*, Preliminary Note 7.

250. Rel. 6897, *supra* note 11, at 81,751.

251. Rule 802(b), Rule 802(a)(7), *supra* note 16, at 81,767-81,768. This limitation applies to the total dollar amount the offeror proposes to issue upon exchange for securities of a single class held by U.S. security holders, assuming all of the subject securities held in the U.S. are exchanged. Rule 802(a)(7). The amount of the securities being offered is to be calculated based upon the market value of the securities held by U.S. holders. *Id.*

252. Release 6897, *supra* note 11, at 81,752.

would registered domestic offerings or domestic offerings made pursuant to other exemptions be integrated even if made contemporaneously with the offering under Rule 802.[253]

The exchange offer or business combination must permit all U.S. holders to participate on terms no less favorable than those offered to other holders.[254] If, however, the law of a particular state requires the registration or qualification of securities sold therein and the offeror does not register or qualify the offering in that state, the offeror must offer security holders in such state a cash alternative if cash has been offered in any other jurisdiction; if cash has not been so offered, the offeror is not be required to extend a cash alternative in that state.[255] In this event, the offeror may exclude the security holders in such state and still claim Rule 802 as to security holders elsewhere. Aside from this exception, the transaction must permit all U.S. holders to participate on terms no less favorable than those offered to other holders.[256]

The offeror must furnish U.S. holders the same information as that provided to offerees in the home jurisdiction simultaneously with or as soon as practicable after such information is made available in the home jurisdiction.[257] Rule 802 provides that with respect to an exchange offer of securities made in reliance upon Rule 802, "home jurisdiction" means the country of the foreign target company's organization, incorporation or chartering.[258] Thus the disclosure requirements are established by a reference to the foreign target company's home country.[259] The supervisory agencies of the target company's jurisdiction would establish the applicable disclosure standards and, as "a general rule, the Commission would not expect the document submitted or filed with the Commission to be reviewed by the staff; such review, if any, would be left to the foreign target company's jurisdiction."[260] Rule 802 is somewhat ambiguous as to which jurisdiction governs the disclosure standards in the case of business combinations. Rule 802(e) provides that U.S. holders must be provided with the same information as that provided to offerees in the home jurisdiction of the issuer, and Rule 802(a)(4) providing a definition of "home jurisdiction" only with respect to an exchange offer. The Release does not

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253. Rule 802, Preliminary Note 8, *supra* note 16, at 2683-3.

254. Rule 802(c)(2), *supra* note 16, at 2687-7.

255. *Id.*

256. *Id.*

257. Rule 802(e), *supra* note 16, at 2684. If information regarding the offering is published in a newspaper in the home jurisdiction the issuer may publish substantially equivalent information in a publication of general circulation in the United States or deliver copies of the home jurisdiction instead of being delivered, publication to offerees in the United States. The information delivered to U.S. holders must be in the English language. *Id.*

258. Rule 802(a)(4), *supra* note 16, at 2683-7. *Cf.* Rule 801 (c)(6), *supra* note 16, at 2683-7, defining "home jurisdiction" for purposes of the rights offering exemption generally as the country of the issuer's organization or incorporation.

259. Rel. 6897, supra note 11, at 81,752-81,753.

260. *Id.* at 81,745.

distinguish in this regard between exchange offers and business combinations, but states simply that disclosure provided to U.S. security holders would be governed by the requirements of the foreign target company's home country.[261] The disclosure documents must include legends, to the extent applicable, as specified in Rule 802(d). The legends are similar to those required in connection with registration on Form F-12.[262]

§1.12 Tender Offers and the MJDS

[1] *Under MJDS*

The MJDS is necessary with respect to third party tender offers directed to U.S. shareholders of a Canadian foreign private issuer to the extent there is subject matter jurisdiction under the Williams Act's tender offer provisions. Section 14(e) of the Exchange Act, the anti-fraud tender offer provision, is applicable to all tender offers. For the most part the filing requirements and substantive regulation relating to a third party tender offer is found in Regulation 14D and those relating to issuer tender offers in Rule 13e-4. There are, however, some provisions of Regulation 14E that, although taking the form of defining fraudulent practices, impose substantive regulation (e.g., the period a tender offer must remain open under Rule 14e-1) on all tender offers.

The acquisition of shares in Canadian companies through a takeover bid or exchange offer is regulated in Canada at both the federal and the provincial levels.[263] A bidder must comply with the securities acts of each province in which one or more target shareholders resides and with the federal or provincial corporate statute under which the target company is incorporated. Ontario and Quebec laws apply to most takeovers and exchange offers conducted in Canada since must Canadian corporations with a significant number of shareholders are likely to have shareholders in these provinces.

Canada's federal and provincial takeover laws impose on third-party bidders, target management, and issuers engaged in a self-tenders detailed disclosure requirements that closely resemble those prescribed by the Exchange Act.[264] There are counterparts to the Schedules 14D-1, 14D-9, and the 13E-4. In addition, in connection with an exchange offer, as in the United States, prospectus filing requirements and prospectus level disclosure relating to the securities being offered must be complied

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261. Rel. 6897, supra note 11, at 81,752-81,753.

262. *See supra* § 1.08[3].

263. The description of the regulation of takeover bids in Canada is based upon the Proposing Release. Securities. Act Release No. 6841, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) +84,432, at 80,294-80,296 (July 24, 1989) [hereinafter the "Proposing Release"]. The Proposing Release sets forth an extensive comparative analysis of takeover/tender offer regulation in Canada that provides much of the rationalization for the SEC's willingness to accept Canadian regulation absent a predominant U.S. shareholder interest.

264. On comparison of Canadian and U.S. tender offer regulation see Proposing Release, *Id.* at 80,294-296.

with. There are also Canadian substantive provisions regulating tender offers such as the period that the offer must remain open, making the offer to all shareholders, pro-rata taking in the case of partial offers, and withdrawal rights that are similar to those applicable in the United States. The Canadian requirements relating to the delivery of tender offer materials (takeover bid circulares) are similar to those under the Exchange Act.

The basic eligibility requirements for a third party or self tender offer under the MJDS in terms of the place of organization and Canadian character of the corporation is the same as under the MJDS for Securities Act registration-the target (or the issuer in the case of a self-tender) must be a foreign private issuer organized under the laws of Canada or a Canadian province or territory that is not a company registered or required to register under the Investment Company Act.[265] Relevant definitions such as foreign private issuer and U.S. holder are the same as those applicable to Securities Act registration.[266] The MJDS is applicable to tender offers only if U.S. holders hold of record less than forty percent of the class of securities that is the subject of the tender offer[267] and that the offer be extended to U.S. holders upon terms and conditions not less favorable than those extended to any other security holder.[268] The less than 40% U.S. holder requirement is determined at the end of the issuer's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of the issuer's preceding quarter.[269] If the bid consists of an exchange offer, and if the securities offered are registered on any MJDS Form other than Form F-80, the U.S. holders in the target company must be less than 25%.[270] Accordingly, in an exchange offer, the securities must be registered on Form F-80 or a non-MJDS form, or limited to a target with less than twenty five percent U.S. holders notwithstanding the less than forty percent threshold of Schedules 13E-4F or 14D-1F.

An issuer or third-party bidder competing with an initial offer launched under the MJDS might be unable to use the MJDS for its bid if as a result of arbitrage activities the record ownership of U.S. holders increased above the forty percent threshold since commencement of the initial bid. The MJDS rules take this into account by providing that the

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265. General Instructions I.A , I.C of Schedule 13E-4F, General Instructions I.A. and I.C., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶23,708 [hereinafter *Schedule 13E-4F*]; Schedule 14D-1F, General Instructions I.A. and I.C., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶24,284G [hereinafter *Schedule 14D-1F*].

266. *Id.* General Instruction 1-A and Instructions 1 and 2. *See supra* § 1.02 for the definition of U.S. holder and §1.03 for the definition of foreign private issuer.

267. General Instructions I.A of Schedules 13E-4F, 14D-1F, *supra* note 265.

268. *Id.* at 17,304 and 17,752. Although not an eligibility requirement, in the case of a third party bid, the target necessarily is registered under the Exchange Act as otherwise there would be no subject matter jurisdiction and no need to comply with any SEC filing requirements.

269. General Instructions I.A of Schedules 13E-4F, 14D-1F, *supra* note 265.

270. *See supra* § 1.04[1].

date of the first bid made under the MJDS is also the date for determining the U.S. holders for all subsequent, competing bids.[271]

The MJDS creates a safe harbor that affords third-party bidders the benefit of a presumption that U.S. holders hold less than forty percent of the subject class of securities and that the issuer is a foreign private issuer, unless aggregate trading volume in the prior twelve months in the United States exceeded that in Canada, or unless information to the contrary appears in the most recent annual report or information statement filed by the issuer with Canadian (Ontario, Quebec, British Columbia, Quebec, or, if the issuer is not a reporting company in any of them, any other Canadian securities regulator) or U.S. securities regulators, or the bidder has actual knowledge that US. holders own forty percent or more of such securities.[272]

The MJDS includes counterpart forms to the relevant tender offer forms; to wit, Schedules 13E-4F, 14D-1F, and 14D-9F. In each instance in which the filing of a Schedule is required under the Exchange Act, the counterpart MJDS Schedule is to be filed. The MJDS Schedules are basically a wrap around of the documents required to be filed with the appropriate Canadian authorities, specified undertakings, a signature page and a Form F-X consent to service of process.[273] The home jurisdiction documents filed with the SEC and delivered to U.S. residents must be supplemented by specified informational legends on the outside front cover page in bold type designed to make the U.S. resident aware that (1) that the tender offer is being made in compliance with the disclosure requirements of the target's home country (Canada); (2) that those requirements are different from those of the United States; (3) financial statements may not be comparable to those prepared by U.S. companies; (4) enforcement of civil liabilities under the federal securities laws may be adversely affected; (5) the bidder may bid for the issuer's securities while the tender offer is in progress as permitted by Canadian law.[274]

Under the MJDS, not only is Canadian disclosure and review accepted, but substantially all of the Canadian substantive regulation (including such matters as dissemination of the tender offer materials, the period during which the offer must remain open, withdrawal rights, etc.) rather than U.S. regulation is applicable.[275] There must, however, be compliance with the Canadian regulation since the MJDS schedules are avail-

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271. Schedule 14D-1F, General Instructions I.A, Instruction 4, Schedule 13E-4F, General Instructions I.A, Instruction 4, *supra* note 265.

272. General Instructions I.A, Instruction 3 of Schedules 13E-4F, 14D-1F, *supra* note 265. Trading volume in the U.S. is based on the aggregate trading on national securities exchanges and NASDAQ and that in Canada on Canadian securities exchanges and the Canadian Dealing Network. *Id.*

273. *See id.* Parts I-IV of the appropriate schedules.

274. *See* Part II, Item 2 of Schedules 13E-4F, 14D-1F, 14D-9F, *supra* note 265.

275. General Instructions III.A of Schedules 13E-4F, 14D-1F. Rules 13e-4(g), Rule 14d-1(b).

able and such substantive regulation is waived only if "the tender offer is subject to, and the bidder complies with the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer. . . ."[276] Assuming compliance with the applicable Canadian law and the appropriate MJDS forms and regulations relating, for example, to a third party tender offer, such compliance is deemed to satisfy the requirements imposed by Sections 14(d)(1) through (d)(7) of the Exchange Act, Regulation 14D and Schedules 14D-1 and 14D-9 thereunder, and Rule 14e-1 (which provides for the period of time a tender offer must remain open).[277] Rule 14e-2(c) provides that filing a Schedule 14D-9F that includes the appropriate Canadian documents satisfies the requirement of the Rule that the target or any of its officers or directors file a Schedule 14D-9.

Section 14(e) (the general tender offer anti-fraud provision), Rule 14e-3 (relating to insider trading based on knowledge of a prospective bid), Section 10(b) and the rules adopted thereunder,[278] and Section 18 of the Exchange Act, however, continue to apply to the tender offer.[279] Schedule 13D, which must be filed with the Commission and sent to the issuer and any exchange on which the security is listed if one makes an acquisition of shares part of a class of equity securities registered under the Exchange Act that will bring the acquire (including for this purpose a group acting together) to a 5%, or more beneficial ownership threshold in that class of security,[280] is not affected in any way by the MJDS.

[2] *Cross Border Tender Offers and the Williams Act*

In numerous cases involving tender offers for predominantly foreign companies, the question arises as to the appropriate treatment of the U.S. shareholders of the foreign target company. Foreign bidders have frequently excluded U.S. holders from tender offers for foreign companies on grounds that the costs of complying with the Williams Act outweighed the advantages of including the U.S. holders in the offer.[281] The Commission has proposed amendments to its rules under the Williams Act designed to facilitate the inclusion of U.S. shareholders in predominantly

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276. *Id.* Rule 13e-4(g), Rule 14d-1(b).

277. Rule 14d-1(b), *supra* note 275.

278. The Commission, however, adopted a number of exemptions to Rules 10b-6 and 10b-13 to accommodate Canadian practice. *See* Order of Exemption from Provisions of Rule 10b-6 and 10b-13 under the Securities Exchange Act of 1934 for Canadian Multijurisdictional Disclosure Systems, Exchange Act Release No. 29355, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,813 (June 21, 1991).

279. General Instructions I.B and I.C of Schedules 13E-4F, 14D-1F, *supra* note 265.

280. *See* SFCL *supra* note 84 at § 13.21.

281. The Commission has observed that the Williams Act and rules thereunder do not require foreign bidders to extend offers to target shareholders residing in the United States unless a foreign offeror uses the jurisdictional means of the United States, in which case the tender offer generally must be made to U.S. shareholders on the same terms as other target shareholders. Proposing Release, *supra* note 4, at 80,299, n. 151.

foreign tender offers. Under proposed amendments to Rule 14d-1, any tender offer for securities of a foreign private issuer would be exempt from the disclosure and substantive provisions of the Williams Act if ten percent or less of the outstanding class of securities that was the subject of the tender offer were held by U.S. holders other than 10% holders.[282] The exemption would be available to both foreign and U.S. bidders if the target company is a foreign private issuer and the other conditions of the Rule are met.[283] Specifically, the tender offer would be exempt from the requirements of Section 14(d)(1) through 14(d)(7) of the Williams Act, Regulation 14D thereunder and Rule 14e-1.[284] To qualify for the exemption, U.S. holders must be afforded the opportunity to participate on terms no less favorable than those offered to other holders of the same class, with certain exceptions.[285] If the subject securities are registered under Section 12 of the Exchange Act, the disclosure document required to be furnished to holders must be submitted to the Commission on Form 14D1C and disseminated to U.S. holders in accordance with the target company's home jurisdiction's laws.[286] Disclosure required to be furnished to U.S. holders generally is governed by the jurisdiction of the foreign target company.[287] The exemption provided by Rule 14d-1(c) would not be available to investment companies registered or required to be registered under the Investment Company Act.

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282. Rule 14d-(1)c, *supra* note 265, at 17,739. The Commission has proposed revisions to Regulation S-K, Form 20-F, and Rule 12g3-2(b) to require foreign private issuers to disclose U.S. ownership of their equity securities. Proposed Amendments to Regulation S-K, Proposed Form 40-F, and Rule 12g3-2; Proposed New Forms for Furnishing Materials Pursuant to Rule 12g3-2(b), [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) +84,805 (June 6, 1991). These revisions will facilitate determination of the 10% threshold. In addition, a bidder may conclusively presume that U.S. ownership is below the 10% threshold if the company is not a reporting company or submitting documents pursuant to Rule 12g3-2(b) unless the bidder has knowledge to the contrary. Release 6897, *supra* note 11, at 81,748. *Cf.* Rule 14d-1(b), which exempts qualifying tender offers for a class of securities of Canadian issuers made under MJDS in accordance with Canadian law where U.S. holders hold less than 40% of the subject securities.

283. Rel. 6897, *supra* note 11, at 81,747. This position leads to the somewhat anomalous result of allowing U.S. bidders to make tender offers to U.S. investors in accordance with foreign regulations. *Id.* The basis of this position is the "potential regulatory inequality that could result if U.S. companies were required to comply with multiple regulatory schemes. . ." *Id.*

284. Rule 14d-1(c), *supra* note 265, 17,739. The tender offer would also be exempt from Schedule 14D-1 and 14D-9. The Rule 14e-3 tender offer provisions would continue to apply. Rel. 6897, *supra* note 11, at 81,747.

285. *Id.* at Rule 14d-1(c)(1). The exceptions relate to impediments to extending an offer in a particular state due to state securities law requirements. Also, a bidder is not required to extend to U.S. holders alternative non-cash consideration the purpose of which in the home jurisdiction is income tax deferral. Rule 14d-1(c)(1)(iii).

286. *Id.* at Rule 14d-1(c)(2). The materials furnished to the Commission would not be deemed to be "filed" with the Commission and the offeror would not be subject to liability under Section 18 of the Exchange Act.

287. Rel. 6897, *supra* note 11, at 81,749.

The Commission also proposed comparable changes to Rule 13e-4[288] to exempt from the requirements thereof any issuer tender offer, including an exchange offer, by a foreign private issuer if ten percent or less of the outstanding class of securities is held by U.S. holders, other than U.S. holders of more than ten percent of the class. The exemption is conditioned on eligibility requirements substantially similar to those set forth in the proposed amendments to Rule 14d-1.

[3] *Tender Offers for U. K. Companies*

The Commission also proposed entering an exemptive order to address takeover bids for U.K. companies that involve U.S. jurisdiction. Takeover bids in the U.K. are subject to the City Code on Take-Overs and Mergers (the "City Code"), which is administered by the Panel on Takeovers and Mergers.[289] Cross-border takeover bids for U.K. companies with U.S. shareholders have presented a number of issues under the Williams Act, many of which were seen as impediments to the orderly progress of such offers. The SEC proposes to codify various accommodations it has previously made in this area.[290] These accommodations involve withdrawal rights, the all-holders rule, public announcements of the offer, guaranteed deliveries, disclosure documents, and Rule 10b-13.[291] As proposed, the exemptive order would extend to tender offers for U.K. companies that are "foreign private issuers."[292] The order would grant certain limited exemptions from the requirements of the Williams Act.[293]

§1.13 Rule 10b-6 and 10b-13

Rules 10b-6 under the Exchange Act precludes a bidder in an exchange offer from purchasing its own securities and Rule 10b-13 under the Exchange Act generally precludes a bidder from purchasing securities subject to the tender offer outside of the tender offer.[294] Bidders in Canada may make purchases under limited circumstances during a tender offer.[295] The Commission concurrently with the adoption of MJDS entered an order of exemption from provisions of Rules 10b-6 and 10b-13 that permit the offeror to purchase securities of the target company (and in the case of an exchange offer, the offered securities) outside of the tender offer if the appropriate disclosure document discloses the intent to make (or the possibility of) such purchases and discloses in the United States the same information the bidder is required to disclose or other-

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288. Rule 13e-4, 17 C.F.R. §240.13e-4.

289. *See generally* International Capital Markets and Securities Regulation [hereinafter "ICMSR"] §1.08[6][b].

290. Rel. 6897, *supra* note 11, at 81,761.

291. *Id.* at 81-761-81,765.

292. *Id.* at 81,761.

293. *Id.*

294. *See* SFCL, *supra* note 84, at § 13.28[1][f].

295. *See* MJDS Release, *supra* note 4, at 81,876.

wise discloses concerning the actual purchases under Canadian law.[296] Canadian law permits purchases from the third day following the date of the bid until its termination provided (1) such purchases do not exceed five percent of the shares outstanding on the date of the bid, (2) the intention to make such purchases is disclosed in the bid circular, and (3) a press release is made and filed with the relevant exchange or regulatory authority reporting such pertinent information relating to such purchases at the close of each day on which securities have been purchased.[297]

§1.14 Coordination of State Registration with the MJDS

[1] *Introduction*

Chairman Breeden and members of the Commission's staff have expressed concern that blue sky laws may prove an impediment to the implementation of a multijurisdictional disclosure system.[298] Such views of alarm were expressed notwithstanding the adoption of a resolution by members of NASAA supporting multi-jurisdictional disclosure and the adoption by the Board of Directors of NASAA of model rules for state implementation of the Multi-Jurisdictional Disclosure System ("MJDS").[299]

This concern, however, may be somewhat exaggerated. If one assumes a firmly underwritten offering to be made by a Canadian issuer registering an offering on one of the MJDS forms through dealers licensed in the states of the United States in which the offering is to be made, the general registration pattern under the blue sky laws is as follows:

There are no registration or filing requirements in the District of Columbia or Hawaii. The District of Columbia does not register securities and Hawaii exempts from securities registration securities registered with the SEC.[300]

There are no registration or significant filing requirements in New York provided the securities are not real estate syndication securities. New York registers only intrastate offerings[301] and offerings of real estate securities.[302] A licensed New York dealer will have to file a Further State Notice, a routine and minimum filing, with the Secretary of State in connection with the offering.[303]

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296. "Order of Exemption from Provisions of Rule 10b-6 and 10b-13 under the Securities Exchange Act of 1934 for Canadian Multijurisdictional Disclosure Systems," Exchange Act Release No. 29355, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,813 (June 21, 1991).

297. *See* MJDS Release, *supra* note 4, at 81,876, *citing* OSA §93(3) and Reg. §169, QSA §142.

298. *See* 22 Sec. Reg. & Law Rep. (BNA) 1315 (Sept. 14, 1990).

299. *See infra* §1.14[3].

300. Haw. §485-5(15), Blue Sky L. Rep. (CCH) ¶20,105.

301. N.Y. Gen. Bus. Law ch. 20, art. 23-A , §359-ff, Blue Sky L. Rep. (CCH) ¶42,131.

302. N.Y. Gen. Bus. Law ch. 20, art 23-A, §352-e, Blue Sky L. Rep. (CCH) ¶42,106.

303. N.Y. Gen. Bus. Corp. Law ch. 20, art. 23-A, §359-e(1.)(b), Blue Sky L. Rep.

Georgia exempts (Coordination Exemption) an offering which is registered under the Securities Act or qualified under Regulation A. In order to obtain the Coordination Exemption, however, a Notice of Intention to sell must be filed accompanied by the documents filed with the SEC, a consent to service of process, and payment of a filing fee.[304] Louisiana has a coordination exemption that is substantially identical to that of Georgia. A Notice of Intention to Sell must be filed on Form U-1.[305] Florida has a similar procedure available for securities registered with the SEC, but in Florida, rather than being an exemption, it constitutes registration by notification.[306] In Florida, the procedure is not available for securities offered at $5 or less per share unless the securities are listed on a national securities exchange, or are quoted or authorized for quotation on NASDAQ.[307] Pennsylvania has an exemption for securities registered with the SEC: however, it is available to companies that are reporting companies under the Exchange Act.[308]

In the states of Arizona, North Dakota, Oregon, Vermont, and, if offered for less than $5 a share, Florida, there are no provisions for registration by coordination and ordinarily the securities have to be registered by qualification. Oregon does have registration by filing which is a registration by coordination procedure limited to seasoned issuers.[309] The procedure is available only for securities of issuers meeting a number of criteria, including a three year reporting history with the SEC. Surprisingly, the states that do not have registration by coordination have taken the lead in attempting to accommodate MJDS. See discussion at §1.14[3].

The remaining jurisdictions have a version of the Uniform Act's registration by coordination provisions.

[2] *Registration by Coordination*

The registration by coordination provisions accommodate concurrent state and federal securities registration by (1) simplifying the registration process in the state, and (2) providing a procedure that, if complied with, permits the registration statement to become effective in all of the states upon giving notice to the state administrator that the registration statement filed with the SEC has become effective. Although the statutory waiting period prior to effectiveness under the Securities Act is twenty days from the date the registration statement is filed, under MJDS registration is effective on filing with the SEC unless the registrant requests that the effective date be deferred. The Uniform Act procedure relating

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(CCH) ¶42,128).

304. Ga., §10-5-9(5), Blue Sky L. Rep. (CCH) ¶18,109.

305. La., §51:709(5), Blue Sky L. Rep. (CCH) ¶28,139.

306. Florida, §517.082, Blue Sky L. Rep. (CCH) ¶17,108A.

307. Florida, §517.802(3), Blue Sky L. Rep. (CCH) ¶17,108A.

308. Pa., §203(i), Blue Sky L. Rep. (CCH) ¶48,113.

309. Oregon, §59.065, Blue Sky L. Rep. (CCH) ¶47,107. *See* SFCL §14.02[2] for a description of the blue-chip exemption.

to concurrent effectiveness requires the following:[310]

(1) That the appropriate documents be on file with the State Administrator for at least ten calendar days prior to the effective date. In practice, unfortunately, many states take a longer period to review a filing and by one means or another keep the registration statement from becoming effective if the review has not been completed at the time the SEC registration statement is expected to become effective.

(2) That all amendments to the SEC registration statement be filed with the State Administrator no later than the first business day after the day they are forwarded to or filed with the SEC (whichever first occurs). The Form U-1 undertaking relating to amendments to the SEC registration statement tracks this provision except it provides for a filing no later than the second business day.

(3) That the maximum and proposed minimum offering price and the maximum underwriting discounts (or commissions) be on file for at least two days before the effective date.

(4) That the State Administrator be promptly notified by telephone or telegram of the date and time the SEC registration statement became effective and the content of the price amendment.

(5) That the price amendment, if not previously filed, be promptly filed thereafter as a post-effective amendment.

A number of states have provided different periods from the above as to the initial filing date, requiring in some instances a shorter period and in other instances a longer period. The shorter period, of course, is more convenient from the applicant's standpoint and the longer periods could adversely affect the efficiency with which the offering can be completed. States with a shorter period are Alabama (five days), Colorado (five days, registration by filing), Connecticut (fifteen days), Tennessee (five days), and Virginia (three days after the filing of the registration statement and all amendments other than the price amendment). States with a longer period are Iowa (twenty days), Michigan (twenty days), Minnesota (twenty days), Missouri (fifteen days), New Hampshire (twenty days), Ohio (fifteen days), South Dakota (twenty days). Michigan also requires that all amendments to the SEC registration statement other than the price amendment be on file for ten days before the effective date.

Several states in addition to requiring a minimum period of time during which the registration statement be on file require that it be filed within a certain number of days of the filing with the SEC. States in this category include California (five business days), Maine (ten days), Nevada (five days), New Jersey (ten days), New Mexico (five days), Ohio (five days), Rhode Island (ten days). The failure to comply with this requirement can increase significantly the period of time the registration statement must be on file prior to the effective date. In view of the fact

310. Uniform Securities Act §303(c).

that the MJDS registration statement becomes effective on filing with the SEC, it may be advisable to reverse the usual order and file with the states sufficiently in advance of the SEC filing to permit the registration statement to become effective with the states when it is filed with the SEC. Otherwise, it may be necessary to defer SEC effectiveness until sufficient time has elapsed for registration to become effective in the states in which the offering is to be made. Section 303(c) of the Uniform Act does provide that, if the SEC registration statement becomes effective before all of the state conditions are satisfied, the registration statement becomes effective automatically when all of such conditions are satisfied.

[3] *NASAA Model MJDS Rule*

The NASAA Model Rules[311] seeks to deal with the timing problem by providing that a registration filed with the SEC on an MJDS Form need be on file with the State Administrator for only seven days prior to the effective date rather than ten.[312] This is based on the understanding that seven days is the normal review period in Canada for offerings in this category.[313] Several states have taken action to accommodate MJDS. Surprisingly, the four states that do not have registration by coordination (Arizona, North Dakota, Vermont and Oregon) have made a special effort to accommodate MJDS. Arizona provides that an offering that has become effective with the SEC on Form F-7, F-8, F-9, F-10 is exempt from registration provided a disclosure document is filed with the Administrator at least seven days before the offering is made and that a non-refundable fee of one-tenth of one percent of the offering price of the securities offered in Arizona is paid with a minimum fee of $200 and a maximum of $2,000.[314] Oregon will permit an MJDS registration statement to become effective when the SEC registration statement becomes effective, provided it has been on file for at least seven days.[315] Vermont promises to expedite such filings and will attempt to register such offerings within seven days of filing, but does not guarantee that it will be able to do so.[316] North Dakota has announced that it believes it can expedite such registration and that no amendments to its regulations are necessary for this purpose.[317] Eleven states (Alaska,[318] California,[319] Idaho,[320] Kansas,[321]

311. Model Rules For State Implementation of the Multi-Jurisdictional Disclosure System (adopted Aug. 30, 1990) [hereinafter the MJDS Model Rules], NASAA Reports (CCH) ¶2371.

312. *Id.* at MJDS Model Rule No. 1.

313. *Id.* at Comment to MJDS Model Rule No. 1.

314. Az., Reg. R14-4-135, Blue Sky L. Rep. (CCH) ¶9541.

315. Ore., Rule 441-65-035, Blue Sky Rep. (CCH) ¶47,559A.

316. Vt., Policy Statement (9-12-91), Blue Sky Law Rep. (CCH) ¶58,417.

317. N. D., Letter (June, 1991), Blue Sky Law Rep. (CCH) ¶44,520.

318. Alaska, Policy Statement (2-26-92), Blue Sky L. Rep. (CCH) ¶8562.

319. Calif., Rel. No. 90-C, Blue Sky Law Rep. (CCH) ¶12,623.

320. Idaho, Policy Statement 89-5 (12-11-89), Blue Sky L. Rep. (CCH) ¶27,488.

321. Kansas, Order (7-25-91), Blue Sky Law Rep. (CCH) ¶26,514.

Kentucky,[322] Montana,[323] North Carolina,[324] Rhode Island,[325] South Carolina,[326] Texas,[327] and Washington[328]) have reduced the number of days prior to the effective date that the registration statement must be on file to seven days and Nebraska has promised to attempt to complete its review within seven days.[329] Massachusetts[330] will permit MJDS registration statements to become effective when declared effective by the SEC without regard to how long it has been on file with the state.

The assumption of the Model Rule was that by filing concurrently with the Canadian authorities, the SEC, and the states, effectiveness in Canada would trigger effectiveness with the SEC which would trigger effectiveness with the states in which a timely filing was made. But the Model Rule was adopted in several states while the MJDS was proposed and before finally adopted by the SEC. The MJDS as adopted contemplates that registration with the SEC will be effective on filing.[331] This suggests that the filing should be made with the states prior to the filing with the SEC and, in any event, concurrently with the Canadian filing. The comments to the Model Rule suggests that states may want to waive the ten-day period entirely, particularly in connection with exchange offers on Form F-8, to provide more flexibility and to permit effectiveness on filing. This appears particularly appropriate in view of the SEC's decision to not only grant "no review" status but to permit the registration statement to become effective on filing.

[4] *Financial Statements and the MJDS*

The MJDS registration forms permit the financial statements to be prepared in accordance with Canadian general accepted accounting principles.[332] For registration filed on Form F-10, if the filing is made prior to July 1, 1993 it also must include a reconciliation to U.S. generally accepted accounting principles as specified in Item 18 of Commission Form 20-F.[333] The reconciliation required by Item 18 is the so called full reconciliation that has two components. First, material variations must be quantified between Canadian GAAP and U.S. GAAP both as to the income statement and as to the balance sheet. Second, supplemental information required by U.S. GAAP must be set forth, including segmental information, pension information, and supplemental financial disclosures

322. Ky., Policy Statement (April 4, 1991), Blue Sky Law Rep. (CCH) ¶27,580.
323. Mont., Policy Statement (1-16-92), Blue Sky L. Rep. (CCH) ¶36,521.
324. N.C., Policy Statement (4-8-91), Blue Sky L. Rep. (CCH) ¶43,513.
325. R.I., Order (4-10-91), Blue Sky L. Rep. (CCH) ¶50,507.
326. So. Carolina, Statement of Policy (8-12-91), Blue Sky Law Rep. (CCH) ¶51,570.
327. Texas, Reg. §113.13, Blue Sky L. Rep. (CCH) ¶55,590C.
328. Wash, WAC 460-11A-010, Blue Sky Law Rep. (CCH) ¶61,535.
329. Neb., Interpretative Opinion No. 19 (7-1-91), Blue Sky Law Rep. (CCH) ¶37,471.
330. Mass., Reg. §13.302, Blue Sky L. Rep. (CCH) ¶31,462.
331. *See, supra* §1.09[5].
332. *See supra* §1.06[1].
333. Form F-10, *supra* note 7, Part I, Item 2.

for oil and gas producers.[334]

The Model Rules provide that with respect to registration statements filed on one of the MJDS forms that financial statements and financial information that have been prepared in accordance with Canadian generally accepted accounting principles may be included in the registration state.[335] Reconciliation to U.S. GAAP is not required. The Model Rule was drafted in a fashion that this would be true with respect to registration on Form F-10 if the Commission should decide not to require reconciliation with U.S. GAAP. The Model Rule was proposed before the SEC adopted the MJDS in final form and assumed that the Commission might be persuaded to not require such reconciliation. The Commission did modify the original proposal so as to no longer require reconciliation after July 1, 1993. Such reconciliation will be required, therefore, until July 1, 1993 in order to register the securities with the SEC and presumably will, therefore, be included in any document filed in connection with state registration.[336]

[5] *Rights Offerings and the MJDS*

Form F-7 relating to rights offerings is more significant on the federal level than the state level, since the Uniform Act states have an exemption for rights offerings that would generally be available provided no commissions other than a standby commission are paid and the rights are not exercisable for more than ninety days.[337] The Uniform Act includes a provision[338] under which, if one of the conditions of the exemption for rights offerings is not complied with, the issuer can file a notice with the Administrator setting forth the terms of the proposed rights offering and an exemption is available if the Administrator does not disallow it within five days after the filing. The MJDS Rules[339] provides that, in lieu of this filing, the Administrator shall accept a copy of the registration statement filed with the SEC on Form F-7.

[6] *Secondary Trading and the MJDS*

A real barrier to any foreign offering in the United States is the necessity for finding a secondary trading exemption for the resale of those securities. Several states have the Uniform Act provision under which the

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334. *See supra* §1.06[1].

335. MJDS Model Rules, *supra* note 311, Rule 2.

336. In an attempt to anticipate what the SEC might do with respect to reconciliation, the MJDS Model Rules seem to require that the securities offered pursuant to Form F-10 include a prospectus in which the SEC has not required a reconciliation to U.S. GAAP. The comments to Rule 2, however, make clear that this language was intended to accommodate the situation should the SEC decide, as it has not done, to eliminate reconciliation to U.S. GAAP.

337. *See* Uniform Act (1985), §402(b)(11).

338. Uniform Securities Act (1985), §402(b)(11)(B).

339. MJDS Model Rules, *supra* note 311, Rule No. 3.

registration statement covering the primary distribution registers effectively for one year all outstanding securities of the same class. The immediate secondary trading problem, therefore, is likely to arise in the jurisdictions in which the primary offering was not made. A number of states have secondary trading exemptions for securities as to which appropriate information is included in a recognized securities manual such as Moody's and Standard and Poor's. Since foreign issuers are less likely to be included in a recognized securities manual and Moody's Manual for international securities is not universally accepted by the states, this may pose a problem for several foreign issuers.[340] The Model MJDS Rules provide a secondary trading exemption (an exemption for non-issuer transactions) of securities previously registered on Form F-8, F-9, or F-10.[341] The comments to the Rule suggest that it is within the discretion of each jurisdiction as to whether to include a secondary trading exemption for securities registered on Form F-7. The implication of the comment is that, although holders of the Canadian securities should not be denied the benefit of the rights offering, if the securities were not previously entitled to a secondary trading exemption (which, presumably, means the securities were sold to residents of the state in violation of the state's securities act), the F-7 should not legitimize further trading in the security. In the latter event, residents of the state would have to look to a foreign (presumably Canadian) market for the resale of the security or a state in the United States in which there is an exemption for such resales.

The states that have adopted the Model Rule relating to registration of the primary distribution generally have not adopted a specific exemption for secondary trading. See §1.14[3]. Massachusetts has adopted a non-issuer transaction exemptions for offerings registered with the SEC on Forms F-8, F-9, and F-10.[342] In Arizona, all offerings registered with the SEC on Forms F-7, F-8, F-9, or F-10 are exempt from registration, presumably, including non-issuer transactions.[343]

[7] *Filing of Documents and Sales Literature*

The Uniform Act specifies the documents that are to be filed with the State, which, however, are free to modify them by Rule.[344] Although the statutory filing requirements for registration by coordination remain, for all practical purposes they have been superseded by the uniform form U-1.[345] In addition, most of the non-coordination states have either adopted or accept Form U-1. The qualification states also have detailed requirements as to the contents of a prospectus, but generally will accept the SEC prospectus in lieu thereof. The application and prospectus re-

340. *See* Blue Sky L. Rep. (CCH) ¶6301.
341. MJDS Model Rules, *supra* note 311, Rule No. 4.
342. Mass., Section 14.402(B)(13)(j), Blue Sky L. Rep. (CCH) ¶31,472.
343. *See supra* §1.14[3].
344. Uniform Securities Act (1985), §303.
345. *See* NASAA Reports (CCH) ¶5011.

quirements of the states in which registration by qualification is necessary and the coordination states is essentially the same. The principal difference is that the qualification non-coordination states do not have a procedure that assures that the registration will become effective concurrently with the SEC registration statement.

The Model MJDS Rules do not address the documents to be filed with the states. The Form U-1 requires the filing of a copy of the registration statement filed with the SEC and two copies of the prospectus.[346] The only additional Form U-1 document that has to be filed that is not an exhibit to the SEC registration statement is the specimen certificate and an appropriate consent to service of process. The SEC's MJDS forms primarily rely on filing as Exhibits the documents filed with the Canadian authorities;[347] hence, there is no assurance that the specific document called for by Form U-1 will be part of the SEC filing. Because of the basic nature of the SEC exhibits (underwriting agreements, articles, by-laws etc.) it is likely that if not part of the Canadian and SEC filings such documents will be readily available. For the most part, therefore, the documents required for the state filings will entail producing extra copies of such documents and including them as part of the state filing.

The Form U-1 also requires the filing with the state of all sales literature intended to be used in the state. A number of states require that sales literature be filed a specified number of days prior to use. There are generally exceptions for tombstone advertisements.

[8] *Form F-X and Consent to Service of Process*

The MJDS requires the filing of a Form F-X which includes a consent to service of process executed by the issuer, appointment of a U.S. person as agent for service of process, a consent to service of an administrative subpoena and an undertaking to assist the SEC with administrative investigations.[348] The consent to service of process relates, among other things, to any civil suit brought in any appropriate court in any place subject to the jurisdiction of any state or the United States arising out of an offering registered on one of the MJDS forms. This appears to be broad enough to cover actions based on state laws, but, nonetheless states will expect compliance with their requirements relating to the filing of a consent to service of process. A Form U-1, in the states that follow the Uniform Act, can be filed by the issuer or by a broker-dealer registered in the state.[349] Presumably, in most instances the registration statements relating to a MJDS offering will be filed in each state by a registered dealer who will file a consent to service of process with respect to claims arising under the state securities laws to the extent it has not al-

346. *Id.*
347. *See supra* §1.09[2].
348. *See supra* §1.09[4].
349. Uniform Securities Act (1985), §305(a).

ready done so. The Uniform Act requires the issuer to file a consent to service of process only if it is the applicant and/or if the offering is being made by the underwriter as its agent which typically would involve a best efforts underwriting. The Uniform Act also has a long arm provision to the effect that anyone engaging in activities in the state that violate the securities act or give rise to a claim thereunder shall be deemed to have appointed the Administrator as its agent for service.[350]

[9] *Merit Requirements and the MJDS*

The conditions to the availability of the MJDS registration forms under the Securities Act make it unlikely that most of the state blue sky merit provisions will be applicable, since, such provisions are applicable primarily to companies in the promotional or development stage. Some conditions to registration under state blue sky law, however, are of general application; e.g., restrictions on underwriting compensation and/or offering expenses; the issuance of warrants to underwriters; non-voting common stock, issuance of senior securities, and others.[351] It remains to be seen as to the extent to which states will insist on applying these conditions to registration to offerings made pursuant to the MJDS.

[10] *The Exemption Alternative*

There is an alternative route available for many foreign issuers and that is to be listed on the New York or American (or, in some states, other) Stock Exchange or to be quoted on NASDAQ/NMS. Such listing or approval for listing on notice of issuance or designation on NASDAQ/NMS will exempt an offering of securities from registration under the securities laws of all but a few of the jurisdictions that register securities.[352] In order to become listed on an Exchange or quoted on NASDAQ, however, an issuer must register a class of securities under the Exchange Act. The MJDS introduces a new Form 40-F, a multi-purpose form for registration and reporting by certain Canadian issuers under the Exchange Act. Form 40-F can be used by certain Canadian issuers to register securities under the Exchange Act and for such issuers provides a convenient means of obtaining access to trading on NASDAQ (or on a U.S. exchange).[353] Form 40-F requires for registration and for reporting pursuant to Section 13(a) of the Exchange Act the filing of documents the issuer is required to file with the appropriate Canadian regulatory authorities (including any stock exchange on which they may have securities listed) and the financial statements, in most instances, until July 1, 1993 will have to be reconciled to U.S. GAAP in accordance with the requirements of Item 17 of Form 20-F. Item 17 requires a quantitative reconciliation to U.S.

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350. *Id.* at §708(c).

351. For a list of NASAA Statements of Policy and adoptions by jurisdictions, *see* Blue Sky L. Rep. (CCH) ¶6211.

352. *See* Blue Sky L. Rep. (CCH) ¶6401.

353. *See supra* §1.10[3].

GAAP, but not the full reconciliation required by item 18 of Form 10-F.[354] Except for such financial statement requirements, Form 40-F registration and reporting essentially is no more burdensome than complying with the Section 12g3-2(b) exemption which permits trading in the United States but not on NASDAQ or on an exchange. Canadian issuers that are eligible to do so can use Form 40-F to "upgrade" to Exchange Act registration and move off the NASD Electronic Bulletin Board onto NASDAQ and designation on the National Market System (NMS), assuming they meet the NMS qualifications.[355] By listing on an exchange or being approved for NASDAQ/NMS quotation they will have also obtained an exemption from registration securities of the same class as those listed or designated for listing on notice of issuance, warrants to purchase such security, and securities senior or substantially equal to the listed or quoted class of security in a substantial number of states.[356]

Several states have a so-called blue-chip exemption. The blue-chip exemption is for securities senior to or on parity with a class of securities registered by the issuer under the Exchange Act for the three preceding years; the issuer has not defaulted on principal, interest, dividend, sinking fund installments, rentals under long-term leases; the issuer had consolidated net income after taxes and before extraordinary items of at least $1 million in each of four of its last five fiscal years, including its last fiscal year; its stock, assuming a stock offering, is owned by at least 1,200 persons, there are outstanding at least 750,000 shares with a market capitalization of $3.75 million; provisions relating to voting rights; and other provisions if the security offered is a debt security. An issuer not organized under the laws of the United States or a state of the United States must appoint an agent to accept service of process in the United States and set forth the name and address of such agent in the prospectus. In many instances, a security exempt under the blue-chip exemption, if quoted on NASDAQ as a designated NMS security, would be exempt under the NASDAQ/NMS exemption. If the issuer cannot meet the three year or other blue-chip prerequisites, the NASDAQ/NMS or listed security exemption may be an appropriate alternative.

§1.15 NASD Corporate Financing Rule and the MJDS

The NASD also regulates underwriting compensation and a number of aspects of underwriter warrants.[357] The NASD regulation could impede an offering to a greater extent than state regulation of commissions as several aspects of the NASD standards/guidelines are vague and often undeterminable. The NASD has requested comments from its members on a proposal that would exempt offerings of Canadian issuers filed on Form F-9 or F-10 from filing the registration statement for review for

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354. *Id.*
355. For the NMS qualifications, *see* NASD Manual (CCH) ¶¶1808-1813.
356. Blue Sky L. Rep. (CCH) ¶6401.
357. *See* NASD Manual (CCH) ¶2151.02.

fairness and reasonableness of underwriting compensation by its Corporate Financing Department.[358] Registration statements on Form F-8 or F7 would have to be filed if otherwise required to be filed.

§1.16 The Canadian Multijurisdictional Disclosure System

[1] *Introduction*

In June 1991, the Canadian Securities Administrators ("CSA") adopted a new regulatory system designed to serve as the counterpart to the multijurisdictional disclosure system concurrently adopted in the United States ("MJDS" or "U.S. MJDS").[359] The Canadian multijurisdictional disclosure system ("CMJDS") is similar to the U.S. MJDS with some variation to accommodate differences in U.S. and Canadian procedures and institutional arrangements. For a discussion of MJDS, see §§1.01-1.13.

The CMJDS also extends to tender offers and exchange offers for U.S. issuers where Canadian residents hold less than 40% of the class of securities that is the subject of the bid.[360] Finally, the system enables qualifying U.S. companies that otherwise would be subject to Canadian continuous disclosure, proxy, and insider reporting rules to observe, instead, corresponding U.S. requirements.[361] U.S. issuers and others using the CMJDS will remain subject to civil, criminal and administrative liability under Canadian law.

In 1990, the Canadian Securities Administrators, an organization of securities regulators from all but two of the Canadian provinces and territories, released Draft National Policy Statement No. 45.[362] CSA and the U.S. Securities and Exchange Commission ("SEC") adopted the two measures in tandem in June 1991.

The CMJDS allows a U.S. issuer to distribute the following types of securities in Canada primarily on the basis of U.S. disclosure documents: non-convertible debt and preferred securities with an "Approved Rat-

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358. NASD, Notice to Members No. 91-34 (June, 1991). The discussion of the proposal suggests that the exemption is applicable to any registration on Form F-10. The language of the proposal specifically exempts such registration only if the securities are registered for the shelf pursuant to Rule 415.

359. Multijurisdictional Disclosure System, National Policy Statement No. 45 [hereinafter, "Policy Statement"]. The Policy Statement has been published as Appendix C to the MJDS Release, *see supra* note 4. National Policy Statements are applicable to Alberta, British Columbia, Manitoba New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon Territory, and inapplicable to Newfoundland and the Northwest Territories. *See* National Policy Statement No. 1, [Vol. 3] Can. Sec. L. Rep. (CCH) ¶470-001, at 57,525.

360. Policy Statement, *supra* note 359, §4.2(7).

361. *Id.* at §1.

362. Draft National Policy Statement No. 45, [Vol. 1] Can. Sec. L. Rep. (CCH) ¶10-200, at 4186 (Nov. 1990) [hereinafter "Draft Policy Statement"]. *See also Canadian Regulators Issue Proposal for Cross-Border Offerings by U.S. Firms*, 22 Sec. Reg. L. Rep. (BNA) 1608 (Nov. 16, 1990).

ing"[363] (hereafter, "investment grade debt and preferred shares"); certain convertible investment grade debt and preferred shares; other securities, if the issuer meets a "substantiality" requirement, described below; and rights offerings by qualifying U.S. issuers to their Canadian shareholders.[364] Both the issuer and selling security holders may use the system.[365]

Generally, the U.S. disclosure requirements that would apply if the offering were being made in the United States govern the disclosure document to be used for the Canadian offering. The prospectus generally is not required to comply with the form or content provisions of Canadian law. For offerings in Quebec, however, the issuer is required to file both English and French versions of the prospectus.[366] The issuer may present its financial statements in accordance with U.S. requirements, except in offerings of certain non-investment grade securities in which case the issuer must reconcile its statements to Canadian accounting principles or International Accounting Standards.[367] In the case of concurrent U.S. and Canadian offerings, the registrant initially files the registration statement with the SEC which has primary responsibility for reviewing the disclosure document.[368] If the issuer uses CMJDS to offer securities solely in Canada, the disclosure document, which is still based on U.S. disclosure requirements, is filed with and reviewed by the jurisdiction in Canada which is supervising the offering.

[2] *Definitions and Key Terms*

The definitions under the CMJDS are similar and in some instances substantially identical with those used in the MJDS. The definitions set forth in CMJDS include (but are not limited to) the following:

An "affiliate" with respect to an issuer, is "a person or company who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the issuer."[369] This is the U.S. definition of an affiliate,[370] the Canadian authorities proposing to in-

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363. The Draft Policy Statement referred to this category of securities as "investment grade" securities. The Policy Statement as adopted changed the composition of this category and re-designated it as "Debt or Preferred Shares Having an Approved Rating". Policy Statement, *supra* note 359, §§3.2, 2(4). The terms "investment grade securities" and "securities having an Approved Rating" (the latter defined *infra* §1.16[2]) are used herein interchangeably.

364. Generally, MJDS is not available for offerings of derivative securities, such as stock index warrants, currency warrants and debt the interest on which is based on a stock index. The system is available for warrants, options, rights and convertible securities in cases where the issuer of the underlying security is eligible to distribute such securities pursuant to CMJDS. Draft Policy Statement, *supra* note 362, at § 3.1.

365. *Id.*

366. *Id.* at § 3.8.

367. *Id.* at § 3.10.

368. *Id.* at § 3.8(1).

369. Policy Statement, *supra* note 359, at § 2(1).

370. Rule 405, 17 C.F.R. § 230.405.

corporate it into the CMJDS just as the SEC has incorporated the Canadian definition of an affiliate into the U.S. MJDS.[371]

The "applicable Canadian securities legislation" is the securities legislation of each province and territory in which securities are offered, or a bid is made, under the Policy Statement.[372] Similarly, the "applicable securities regulatory authority" means the securities authority in each Canadian province and territory in which securities are offered or a bid is made under the Policy Statement.[373]

"Approved rating" when used in relation to debt or preferred shares, means securities that have received a provisional rating by the Canadian Bond Rating Service Inc., Dominion Bond Rating Service Limited, Moody's Investors Service, Inc. or Standard and Poor's Corporation in one of the generic categories set forth in Section 2(4) of the Policy Statement.[374] This definition is the same as that in CSA's shelf prospectus and delayed pricing system,[375] a recently adopted system that corresponds roughly to SEC Rules 415 and 430A.

"A business combination means a statutory merger or consolidation or similar plan or acquisition requiring the vote or consent of security holders of a company or person, in which securities of such company or person or another company or person held by such security holders will become or be exchanged for securities of another company or person."[376]

"Canadian GAAP" refers to the accounting principles generally accepted in Canada; where the Handbook of the Canadian Institute of Chartered Accountants recommends a principle, "Canadian GAAP" as used in the Policy Statement means such principle.[377]

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371. *See* Multijurisdictional Disclosure and Modification to the Current Registration and Reporting System for Canadian Issuers, Sec. Act. Rel. No. 6879, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,701, at 81,113 n. 9 (Nov. 2, 1990) [hereinafter "U.S. Re-Proposing Release"]. The U.S. MJDS employed the Canadian definition so that "Canadian registrants can identify their affiliates under the definition they are accustomed to applying." *Id.*

372. Policy Statement, *supra* note 359, at § 2(2).

373. *Id.* at § 2(3).

374. *Id.* at §2(4). The ratings are, with respect to debt securities, AAA, AA, A or BB, Standard & Poors Corporation; Aaa, Aa, A or Baa, Moody's Investors Service, Inc.; AAA, AA, A or BBB, Dominion Bond Rating Service Limited; A , A , A or B , C.B.R.S. Inc. The Policy Statement gives corresponding ratings for preferred shares. Draft National Policy Statement No. 45 only recognized the top three ratings as constituting investment grade. Subsequently, the Canadian regulatory authorities recognized the fourth highest rating category as signifying investment grade. Policy Statement, *supra* note 359, at §2(4). In response, the SEC changed the requirements of Form F-9-a registration form for offerings of investment grade debt and preferred stock by "substantial" Canadian issuers upon adoption generally to allow registration of securities having a rating in one of the four highest categories. U.S. MJDS Release, *supra* note 4, at 81,868.

375. National Policy Statement No. 44, [Vol. 3] Can. Sec. L. Rep. (CCH) at 57,725-2.

376. Policy Statement, *supra* note 359, at §2(8).

377. *Id.* at §2(9). In Staff Accounting Communique No. 1, the staff of the OSC noted that the regulations under the Act define generally accepted accounting principles as the principles set forth in the Handbook of the Canadian Institute of Chartered Accountants.

CMJDS, as proposed by CSA, generally is available to any "foreign issuer" organized under the laws of the United States or any state or territory of the United States or of the District of Columbia. "Foreign issuer" is defined in Section 2(17) of the Policy Statement to exclude nominally foreign issuers that, in reality, are principally owned by Canadians or located in Canada.[378]

"Independent underwriter" with respect to the application of the Policy Statement in a province or territory, means a dealer that is not the issuer and in respect of which "the issuer is not a related party or related issuer or connected party or connected issuer or, where the dealer is not a registrant in such province or territory, would not be a connected party or connected issuer if the dealer were a registrant."[379]

"International Accounting Standards" refers to the accounting principles issued by the International Accounting Standards Committee.[380]

"Market value" with respect to a class of securities, is the aggregate market value of the securities, calculated by using the price at which the securities were last sold in the principal market for the securities as of a

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[Vol. 3] Can. Sec. L. Rep. (CCH) ¶474-001, at 59,001. In referring to financial statements filed with the OSC, in Staff Accounting Communique No. 1, the staff also pointed out that it "would expect reporting issuers to comply with the CICA Accounting Guidelines and the consensus views of the CICA Emerging Issues Committee since these sources represent considered views of informed accountants on areas for which there are no specific standards." *Id.*

378. An issuer, even if organized under foreign law is disqualified if (a) voting securities carrying over 50% of the vote for the election of directors are held by persons whose last address as shown on the books of the issuers is in Canada, and (b) *either* (i) the majority of the senior officers or directors of the issuer are citizens or residents of Canada; (ii) more than 50% of the assets of the issuer are located in Canada; *or* (iii) the business of the issuer is administered principally in Canada. Policy Statement, *supra* note 359, at §2(17). The Policy Statement establishes presumptions in this regard in certain cases. *See id.* at §4.2. A bidder using the CMJDS to extend a tender offer to Canadian residents in accordance with U.S. requirements, as permitted by §4 of the Policy Statement, must ensure, *inter alia*, that the target company qualifies as a foreign issuer. *Id.* at §4.2(1), §2(47). As stated, an issuer does not qualify as a foreign issuer where more than 50% of the voting power of the corporation is held by Canadian residents if certain other conditions are met. *Id.* at §2(17)(a). Under §4.2, it is conclusively presumed that such disqualification does not exist in specified cases generally involving non-negotiable or hostile bids, unless the tests set forth in §4.2 are satisfied.

379. *Id.* at §2(18). Canadian underwriters are subject to conflict of interest provisions regulating distributions of "related" or "connected" issuers. *See* OSA Reg. §§194, *et. seq.*, Can. Sec. L. Rep. (CCH) ¶453-229, at 55,366-55,372. *See infra* §1.16[6] regarding the corresponding treatment under CMJDS.

380. Policy Statement, *supra* note 359, at §2(20). As of 1990, the International Accounting Standards Committee (IASC) had adopted 29 IASs. IASC's objectives are (i) to formulate and publish accounting standards to be observed in the presentation of financial statements and to promote their worldwide acceptance, and (ii) to work generally for the improvement and harmonization of regulations, accounting standards and procedures relating to the presentation of financial statements. IASC Constitution, No. 2, Objectives and Procedures, Appendix 2, §9000.58 (Jan. 1983), American Institute of Certified Public Accountants, Professional Standards (CCH), at 11,035.

date specified in the Policy Statement; or the average of the bid and asked prices of the securities in such market if there were no sales on the specified date.[381]

"Public float" means the aggregate market value of securities held by persons or companies not affiliates of the issuer.[382]

A "securities exchange bid" is a takeover bid or an issuer bid for which the consideration for the securities of the target company consists, in whole or in part, of securities of the offeror or of another issuer.[383] A "takeover bid," insofar as the application of the Policy Statement in a province is concerned, has the same meaning given the term in the securities legislation of the particular province.[384] The Policy Statement provides a corresponding definition for an "issuer bid."[385]

"U.S. issuer" is a foreign issuer (as defined) incorporated or organized under the laws of the United States or any state, territory or the District of Columbia.[386]

Although not a defined term, the concept of a "substantiality" test, based upon market value and public float of the issuer's securities,[387] plays a pivotal role in CMJDS. Any U.S. reporting issuer that has been such for thirty months and meets the substantiality requirement set forth in Section 3.3(2) (market value and public float of U.S. $300 million and $75 million, respectively) may use the CMJDS for the distribution of any security.[388] Although it only an approximation of market efficiency at best, for ease of reference this substantiality test is sometimes referred to hereinafter as the "efficient market substantiality test." There are lesser substantiality requirements associated with specific types of offerings under CMJDS as discussed below.[389]

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381. Policy Statement, *supra* note 359, §2(24). A different rule is provided if there is not market for the class of securities in question. *Id.* In such cases, "market value" means "book value" as determined on the date specified in the applicable provision of the Policy Statement. *Id.* If the issuer is in bankruptcy, receivership, or has an accumulated capital deficit, "market value" means one third of the principal amount, par value or stated value of the class of securities in question. It is not clear why "market value" in this context is based upon par or stated value since par or stated value generally do not bear any relationship to market value.

382. *Id.* at §2(37).

383. *Id.* at §2(44).

384. *Id.* at §2(46).

385. *Id.* at §2(22).

386. *Id.* at §2(47).

387. *Id.* at §3.3.

388. *Id.* at §3.3(2). The valuation must be made as of a date within 60 days prior to the filing of the preliminary prospectus with the principal jurisdiction.

389. Other applications of the substantiality test include market value and public float of U.S. $150 million and U.S. $75 million, respectively, for convertible investment grade securities, *see id.* at §3.2(6)(b), and certain guaranteed issues, *id.* at §3.6 (1)(b); and public float of U.S. $75 million for certain securities exchange bids, *id.* §4.4(4)(a), and business combinations, *id.* §5.2.

[3] *Common Requirements*

The Canadian MJDS is available for several different types of offerings by U.S. issuers including offerings of investment grade securities,[390] exchange bids,[391] business combinations,[392] rights offerings,[393] and, if the issuer meets the efficient market substantiality test, any other offering.[394] Each of these categories requires, at a minimum, that the issuer meet a set of common eligibility requirements set forth in Section 3.2(1)-(5) of the Policy Statement. The issuer must be a "foreign issuer," as defined, incorporated or organized under the laws of the United States or any state, territory thereof, or the District of Columbia.[395] Further, the issuer must be an SEC reporting issuer[396] and have filed all required material for the thirty six calendar months preceding the filing of the preliminary prospectus with the principal jurisdiction,[397] special provision being made for successor issuers.[398] Finally, the issuer must not be registered (or required to be registered) as an investment company under the U.S. Investment Company Act of 1940 and must not be a commodity pool issuer.[399]

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390. *Id.* at §3.2.

391. *Id.* at §4.4.

392. *Id.* at §5.

393. *Id.* at §3.4.

394. *Id.* at §3.3.

395. *Id.* at §3.2(1).

396. *Id.* at §3.2(2). Specifically, the issuer must have a class of securities registered under Section 12(b) or (g) of the Securities Exchange Act of 1934, or be required to file reports pursuant to Section 15(d) of such Act.

397. *Id.* at §3.2(3). Specifically, the issuer must have filed all the material required to be filed pursuant to Section 13, 14 or 15(d) of the Exchange Act for a period of at least 36 months immediately preceding the filing of the preliminary prospectus with the principal jurisdiction. *Id.* Although this condition requires the issuer to have filed all material required to be filed under the specified provisions prior to using MJDS, literally it does not require the information to have been timely filed. *Cf.* SEC Form S-3, General Instruction I.A.3.(b) ("has filed in a timely manner all reports required to be filed"). Section 3.2(3) of the Policy Statement, which contains the reporting requirement, corresponds to the U.S. MJDS which requires a Canadian issuer to have at least a three year history of reporting with a Canadian securities regulatory authority for any type of CMJDS offering. MJDS Release, *supra* note 4, at 81,865. In contrast, Proposed Form F-11-recently proposed U.S. registration form for certain rights offerings by any qualified foreign private issuer (Canadian or non-Canadian)-requires that the issuer either be a reporting issuer in the U.S. or exempt under Rule 12g3-2(b); Form F-11 does not require the issuer to have been subject to the reporting requirements for any particular length of time. Proposed Form F-11, General Instruction I.B. *Accord,* Proposed Form F-12, another recently proposed U.S. registration form for certain exchange offers and business combinations by any foreign private issuer. Form F-12, General Instruction 1. B., 1.C., Instruction 2. *See* §1.05[2].

398. Policy Statement, *supra* note 359, at §3.5.

399. *Id.* at §§3.2(4) and (5). A "commodity pool issuer" is an issuer formed and operated for the purpose of investing in commodity futures contracts, commodity futures and/or related products. *Id.* at §2(10). Under the U.S. MJDS, investment companies registered or required to be registered under the Investment Company Act of 1940 are ineligible for Forms F-7, F-8, F-9 or F-10. In contrast, Forms F-11 and F-12, although generally unavailable for investment companies registered or required to register under the Investment Company Act of 1940, are available to foreign issuers able to make public offerings in the U.S.

In sum, to qualify for the system, the issuer must be a "foreign issuer" organized under U.S. law, an SEC reporting company in compliance with its reporting obligations and not registered or required to register under the Investment Company Act. These requirements, set forth in Section 3.2(1)-(5) of the Policy Statement, are hereafter referred to as the "Common Requirements."

Another requirement, common to some but not all of the categories of transactions encompassed by CMJDS, is that the issuer "has had a class of its securities listed on the New York Stock Exchange or the American Stock Exchange or quoted on NASDAQ NMS for a period of at least twelve calendar months immediately preceding the filing of the preliminary prospectus with the principal jurisdiction and is in compliance with the obligations arising from such listing or quotation."[400] This requirement hereinafter is sometimes referred to as the "Listing Requirement."

[4] *Prospectus Offerings*

The categories of offerings included within CMJDS are (i) non-convertible investment grade debt and preferred shares;[401] (ii) investment grade debt and preferred shares that may not be converted for at least one year after issuance, if the issuer meets a substantiality requirement;[402] (iii) other securities, if the issuer satisfies a greater substantiality requirement;[403] (iv) certain rights offerings,[404] and business combinations and securities exchange bids.[405] Compliance with the Common Requirements is necessary for each category. Both the issuer and selling security holders may sell securities pursuant to the system.[406] CMJDS is available for offerings certain derivative securities, namely, warrants, options, rights and convertible securities if the issuer of the underlying securities is eligible under the Policy Statement.[407] The system is unavailable for offerings of other derivative securities such as stock index warrants, currency warrants and debt the interest of which is keyed to a stock index.[408]

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pursuant to Rule 6c-9 or individual exemptive orders under the Investment Company Act.

400. *See, e.g.*, Policy Statement, *supra* note 359, at §3.4(2)(b). Special provision is made for successor issuers. *See id.* The U.S. MJDS also has a listing requirement applicable to some but not all types of transactions. When applicable, such requirement is satisfied if the issuer has had a class of securities listed on the Montreal Exchange, the Toronto Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months prior to filing the registration statement. *See, e.g.*, Form F-7, General Instruction I.B.(3); Form F-8, General Instruction II.A.(3), III.A.(2).

401. Policy Statement, *supra* note 359, at §3.2(1) - (5).

402. *Id.* at §3.2(6).

403. *Id.* at §3.3.

404. *Id.* at §3.4.

405. *Id.* at §4.

406. *Id.* at §3.1.

407. *Id.*

408. *Id.*

A seller may distribute investment grade debt and investment grade preferred shares in Canada, or rights immediately exercisable therefor, pursuant to CMJDS provided the issuer and the securities satisfy the Common Requirements. This category includes securities having no less than the fourth highest rating by specified Canadian rating agencies.[409] Investment grade securities that are convertible are eligible for the system only if they are not convertible for at least one year and the issuer's equity shares have a market value and public float of not less than U.S. $150 million and $75 million, respectively.[410] Offerings of other securities, including, without limitation, common shares, also may be offered pursuant to the system, provided the issuer meets the Common Requirements and the issuer's equity shares have a market value and public float of not less than U.S. $300 million and U.S. $75 million, respectively.[411] Thus, large, reporting U.S. issuers are eligible to offer any securities (irrespective of investment quality) pursuant to CMJDS.[412]

A U.S. issuer may use CMJDS for rights offerings if it meets the Common Requirements and the Listing Requirement.[413] As stated, the Listing Requirement provides that the issuer must have had a class of securities listed on the New York Stock Exchange or the American Stock Exchange or quoted on NASDAQ NMS for at least twelve months preceding the filing of the preliminary prospectus with the principal jurisdiction.[414] The rights must be exercisable immediately upon issuance.[415]

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409. *Id.* at §§3.2, 2(4).

410. *Id.* at §3.2(6)(b). The valuation is to be made within 60 days prior to filing the preliminary prospectus with the principal jurisdiction.

411. *Id.* at §3.3(2). The valuation is to be determined as of a date within 60 days prior to filing the preliminary prospectus with the principal jurisdiction.

412. One of the premises of the Canadian MJDS appears to be the so-called "efficient market hypothesis." As stated, under the CMJDS, any securities of a U.S. issuer may be distributed under the system if the issuer meets a "substantiality" test based upon market value and public float of its securities. Policy Statement, *supra* note 359, at §3.3(2). According to the Canadian Securities Administrators, the purpose of this "substantiality" requirement is "to single out issuers whose size is such that (i) information about them is publicly disseminated and (ii) they have a significant market following." Policy Statement, *supra* note 359, at §3.1. "As a result," CSA continued, "the marketplace can be expected to set efficiently a price for the securities of these issuers based upon publicly available information." *Id.* This proposition bears a strong resemblance to the efficient market theory, regarding which, *see generally West, Efficiency of the Securities Markets, in* F. FABOZZI AND ZARB, HANDBOOK OF FINANCIAL MARKETS: SECURITIES, OPTIONS AND FUTURES 23-25 (1981); THE FINANCIAL ANALYST'S HANDBOOK 1227-1228 (Levine, S., ed., 2d. ed. 1988).

413. Policy Statement, *supra* note 359, at §3.4(2). The CMJDS provides that registration as a dealer is not required by an issuer with respect to a rights offering made under the CMJDS. A standby underwriter or dealer manager of a rights offering does not have to register as a dealer in Canada if it does not undertake soliciting activity in Canada or resell in Canada any securities acquired in the standby underwriting. *Id.* at §3.4(4).

414. *Id.* at §3.4(2)(b). The issuer must also be in compliance with its listing or quotation obligations.

415. *Id.* at §3.4(3)(a). The corresponding requirement in the U.S. MJDS, Form F-7, was dropped without explanation upon adoption of the system by the SEC. MJDS Release, *supra* note 4, at 81,871. The CMJDS proposal also indicated that rights must have an exer-

Rights issued to a resident of Canada may not be transferable to another resident of Canada with certain exceptions.[416] Subject to the foregoing, rights issued to residents of Canada must have the same terms and conditions as rights issued to residents of the United States.[417] The CMJDS proposal stated that CMJDS is "not intended to be used to effect an indirect financing in Canada."[418] Accordingly, CMJDS as proposed limited the increase in the number of outstanding securities of the class to be issued to no more than twenty five percent, assuming all rights issued as part of the same offering (or within the previous year as part of another offering) were exercised;[419] otherwise, the rights offering provision of CMJDS would not have been available. The CMJDS as adopted deleted this condition without explanation.[420] Before embarking on an CMJDS-registered rights offering, a U.S. issuer should consider the possibility of conducting the rights offering on an exempt basis in Canada. Prospectus exemptions include, among others (1) sales to a bank, trust company, insurance company and certain other institutions, purchasing as principal;[421] (2) private placements;[422] (3) rights offerings, as well as securities issued upon the exercise of rights;[423] (4) sales of certain securities issued

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cise period not exceeding 90 days. Draft National Policy Statement No. 45, at §3.4(3). This requirement was dropped upon adoption of CMJDS, and the corresponding provision in the U.S. MJDS was dropped without explanation upon adoption by the SEC. *See* MJDS Release, *supra* note 4, at 81,871.

416. Policy Statement, *supra* note 359, at §3.4(3)(c). Rights may be transferred to other Canadian residents who were granted rights of the same issue by the issuer. *Id.* In addition, the prohibition on transfer of rights does not affect transfer of securities issuable upon exercise of the rights, nor does it affect the transfer of rights on a securities exchange or inter-dealer quotation system outside of Canada. *Id.* The general restriction on transferability of rights appears to be based upon the proposition that CMJDS should not allow U.S. issuers to extend rights offerings to new investors in Canada. *Cf.* MJDS Release, *supra* note 4, at 81,872. Apparently, CSA intended such offerings to be made under CMJDS only if they independently qualify under another provision.

417. Policy Statement, *supra* note 359, at §3.4(3)(b).

418. *Id.* at §3.4(1).

419. Draft Policy Statement, *supra* note 362, at §3.4(3)(d). The same limitation would have applied, in the case of debt, to the increase in the aggregate principal amount of long-term debt to be outstanding after the rights offering. *Id.*

420. The SEC also deleted the 25% condition upon adoption of the U.S. MJDS. The SEC explained that, "[u]pon reconsideration, the limitation was judged unnecessary for, and in some cases inconsistent with, U.S. investors' interests." MJDS Release, *supra* note 4, at 81,871-81,872. Form F-11, which the Commission proposed in June 1991, also does not have a 25% limitation. Form F-11 is a registration form available for the registration in the U.S. of equity securities offered upon the exercise of rights granted by foreign private issuers. *See supra* §1.04[2].

421. ICMSR, *supra*, note 289, at §4.05[1]; OSA §71(1)(a)(c).

422. ICMSR §4.05[1]; OSA §71(d) (purchase as principal of specified amount). The seller must file a report with the OSC within ten days. OSA §71(1)(3). Private placements to institutions are common methods of financing in Canada. *See* ICMSR §4.01[5].

423. OSA §71(h). Subject to regulations of the OSC, the prospectus requirements of the Ontario Securities Act do not apply where, inter alia, "the trade is made by an issuer in a right, transferable or otherwise granted by the issuer to holders of its securities to purchase additional securities of its own issue and the issue of securities pursuant to the

in connection with a statutory amalgamation or arrangement;[424] (5) sales by an issuer of its own securities to employees;[425] (6) certain "limited offerings;"[426] and (7) placements of "Eligible Eurosecurities."[427] In Ontario, the exemption for rights offerings is not available, however, if the offering would result in an increase of more than twenty five percent in the number of securities of the subject class, or if the offering "is for the purpose

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exercise of the right." OSA §71(1)(h). This exemption requires the issuer to notify the Commission of the proposed offering, and is not available if the Commission objects within ten days of notice. *See generally* ICMSR §4.05[1]. *See also* Uniform Act Policy 2-05, [3] Can. Sec. L. Rep. (CCH) ¶470-205; Ontario Policy 6.2, [3] Can. Sec. L. Rep. (CCH) 471-602. Ontario Policy 6.2 sets forth certain grounds upon which the OSC will object to rights offerings proposed to be made under the exemption provided by §71(1)(h) of the Act. "The Commission has concluded that, generally speaking, a major financing by way of rights offering should be made pursuant to a prospectus. . . ." The Director accordingly will object to rights offerings proposed to be made under §71(1)(h) where the proposed offering, if completely subscribed, would result in an increase of more than 25% in the number of the securities of the class to be issued upon the exercise of rights (or in the case of debt, 25% of principal amount). Ontario Policy 6.2, III.3.(a). The Director will also object "where the offering is for the purpose of financing a major new undertaking." *Id.* at III.3.(c). The Policy Statement as initially proposed contained a provision corresponding to this 25% limitation. Draft Policy Statement No. 45, *supra* note 362, at 3.4(3)(d). Under Draft Policy Statement No. 45, CMJDS would have been available for rights offerings only if, generally, the number of outstanding securities of the class to be issued would not increase by more than 25%. *Id.* The CSA deleted this provision upon adoption.

424. Policy Statement, *supra* note 359, at §5.1; OSA §71(1)(i); ICMSR §4.05[1]. This exemption covers securities issued as consideration in the typical business combination. MJDS Release, *supra* note 4, at 81,870. The basis for the exemption is that disclosure is made in the information circular required under proxy rules so that prospectus disclosure is unnecessary. *Id.* At least some of the provinces have recently required prospectus-level disclosure in information circulares used in connection with business combinations. *Id.* Since the terms "amalgamation" and "arrangement" are not defined in the securities laws, it is necessary to rely upon companies laws to determine the scope of these exemptions. ICMSR §4.05[1]. Business combinations involving "significant asset transactions" under Canadian law may be subject to additional regulation in Canada. MJDS Release, *supra* note 4, at 81,881. Regarding mergers and other corporate combinations in Canada, see generally ICMSR §4.09.

425. ICMSR, *supra*, note 289, at §4.05[1]; OSA §71(1)(n).

426. ICMSR, *supra*, note 289, at §4.05[1]; OSA §71(1)¶.

427. *In the Matter of Eurosecurity Financing*, OSC Blanket Order (Nov. 22, 1984), Can. Sec. L. Rep. (CCH) ¶473-033, at 58,523. The Ontario Securities Act, §73(1), authorizes the Commission to rule that any transaction, security or person is not subject to, inter alia, the prospectus requirement of §52 of the Act if such ruling is not prejudicial to the public interest. Pursuant to this authority, the Ontario Securities Commission ruled on November 22, 1984, that during a "distribution period," as defined, except for trades otherwise made in conformity to the Act, the prospectus requirement does not apply to a trade of "Eligible Eurosecurities" where the purchaser is an "Eligible Eurosecurity Purchaser," as defined. The "Eligible Eurosecurity Purchaser" may sell Eurosecurities to a non-Canadian resident which is not a "Eligible European Purchaser" under certain circumstances. noteeither of these exemptions is applicable if the trade is a "distribution" within the meaning of the Act. The "Eurosecurity market" is the "international market that exists outside Canada for the initial distribution of securities . . . to persons whose ordinary business it is to buy and sell such securities . . . , and in respect of which an international secondary market may develop where settlement is in a Eurocurrency."

of financing a major new undertaking."[428]

The Policy Statement provides an alternative eligibility requirement for certain guaranteed securities.[429] To qualify for this requirement, the issuer must be a "foreign issuer" organized under U.S. law, and must not be an investment company (registered or required to register under the Investment Company Act) or commodity pool issuer.[430] The parent company of the issuer must guarantee the securities being offered.[431] The Policy Statement establishes with specificity which securities qualify for this alternative treatment.[432]

[5] *Business Combinations and Securities Exchange Bids*

CMJDS is available for the distribution of securities of a U.S. issuer as part of a business combination if less than forty percent of the securities being distributed would be held by Canadian residents.[433] Securities may be distributed pursuant to CMJDS to security holders in Canada "by a successor issuer subsisting after the business combination" if certain conditions are met,[434] with a common exception to such conditions for smaller participants in the transaction.[435] A U.S. issuer may issue securities pursuant to CMJDS in connection with a business combination on the basis of U.S. disclosure requirements, if, with the exception of certain smaller participants referred to immediately above: (i) each participant in the business combination meets the Common Requirements[436] (e.g., each is a U.S. issuer); (ii) the equity shares of each participant in the business combination have a public float of not less than U.S. $75 million;[437] (iii) each participant in the business combination meets the

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428. Ontario Securities Commission Policy 6.2, [Vol. 3] Can. Sec. L. Rep. (CCH) ¶471-602, at 58,105.

429. Policy Statement, *supra* note 359, at §3.6.

430. *Id.* at §3.6(2).

431. *Id.* at §3.6(3).

432. The securities being offered must fall into one of three categories: (a) non-convertible in-vestment grade securities of a majority-owned subsidiary whose parent meets the Common Requirements; (b) certain convertible investment grade securities of a majority owned subsidiary; or (c) certain other securities where the parent of the issuer meets a substantiality requirement, among other conditions. *Id.*

433. *Id.* at §5.1.

434. *Id.* at §5.2.

435. Certain of the eligibility requirements for business combinations, specified in §5.2, do not apply in respect of a participant in the transaction whose assets and gross revenues would contribute less than 20% of the total assets and gross revenues from continuing operations before income taxes, extraordinary items and cumulative effects of a change in accounting principles of the successor issuer, as measured based on a pro forma combination of the participating persons' and companies' most recently completed fiscal years. *Id.* at §5.2 (1).

436. The exception for smaller participants in the transaction does not apply to all of the Common Requirements, but rather, only those set forth in §3.2(2)-(3). Thus, the minor transaction participants are not required to be reporting companies.

437. Policy Statement, *supra*, note 359, at §5.2(2). The valuation is to be made as of a date within 60 days prior to the filing of the preliminary prospectus with the principal

Listing Requirement.[438] In addition, CMJDS is available in this context only if the terms of the transaction apply equally to Canadian and U.S. residents, and less than 40% of the class of securities to be distributed would be distributed to Canadian residents.[439] There is no exception from these latter two requirements.

A "securities exchange bid" is a takeover or issuer bid in which the consideration offered consists in whole or part of securities of an offeror or other issuer.[440] Section 4.4 of CMJDS allows, under certain circumstances, the bidder to comply with the requirements of U.S. law to satisfy Canadian prospectus requirements applicable to the exchange of securities. A U.S. issuer may rely on this provision if the tender offer itself meets the requirements of CMJDS;[441] the bidder (or the issuer of the securities being offered) meets the Common Requirements;[442] the bidder (or the issuer of the securities being offered), meets the Listing Requirement;[443] and at least one of the following conditions are satisfied: (i) the bidder (or issuer of the securities being offered) meets a specified substantiality requirement;[444] (ii) the securities being offered are non-convertible investment grade debt or preferred shares (i.e., shares having an "Approved Rating"); or (iii) the bid is an "issuer bid" made under CMJDS with securities of the issuer offered as consideration.[445] MJDS also permits eligible takeover bids and issuer bids to be made to Canadian residents on the basis of U.S. tender offer rules.[446] Generally, qualifying tender offers would be exempt from most provisions of provincial law governing the conduct of the bid.[447] The bidder would be required to

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jurisdiction.

438. *Id.* at §5.2. *See also id.* at §3.5. (successor issuers).

439. *Id.* at §§5.2(4) and (5). Technically, the 40% limitation applies to "persons or companies whose last address as shown on the books of the participating person or company is in Canada." *Id.* at §5.2(5). Section 5.2 of the Policy Statement establishes specific rules governing this calculation.

440. *Id.* at §2(44).

441. *Id.* at §4.4(1). Specifically, the offeree issuer (i.e., the target company) and the tender offer itself must meet the requirements of Section 4.2 of the Policy Statement. Section 4.2 sets forth the conditions pursuant to which a bidder may make a tender offer in reliance upon U.S. rather than Canadian tender offer rules. *See infra.* §1.16[7].

442. The relevant date for measuring the three-year reporting period in this context, see Policy Statement, *supra* note 359, at §3.2(3), is the filing of the registration statement with the SEC rather than the filing of the preliminary prospectus with the principal jurisdiction. *Id.* at §4.4(2). The bidder making a securities exchange bid must file the registration statement with each applicable securities regulatory authority in Canada. *Id.* §4.5(5).

443. The securities must have been listed (or quoted on NASDAQ NMS) for at least 12 calendar months immediately preceding filing of the registration statement with the SEC, and the issuer must be in compliance with its obligations arising from such listing (or quotation).

444. Policy Statement, *supra* note 359, at §4.4(4). Specifically, the bidder's equity shares (or those of another issuer if securities of another issuer are being offered) must have a public float of $75 million.

445. *Id.* at §4.4(4).

446. *Id.* at §4.

447. *Id.*

comply with the Williams Act in connection with takeover bids made under MJDS.[448]

[6] *Other Substantive and Disclosure Requirements*

A U.S. issuer registering securities for sale in Canada pursuant to CMJDS and in the United States would prepare the registration statement pursuant to SEC disclosure requirements.[449] Except where expressly required in the Policy Statement, the registration statement or other disclosure documents need not comply with Canadian law. If the issuer intends to sell securities in both the U.S. and Canada, it files a registration statement with both the SEC and the principal jurisdiction.[450] The Policy Statement specifies filing requirements which apply in respect of sales in non-principal jurisdictions.[451] If the issuer intends to sell securities solely in Canada, it prepares the preliminary prospectus, prospectus and each amendment as if it were also offering the securities in the United States.[452] In this case it is not required to prepare the cover page of the registration statement or other information not required in the prospectus.[453]

A U.S. issuer using CMJDS generally complies with the financial statement requirements that would apply if the securities were being registered for sale in the United States.[454] The U.S. issuer is not required to reconcile its financial statements to non-U.S. accounting principles, unless it is offering securities pursuant to Section 3.3 of the Policy Statement (i.e., non-investment grade securities) in which case it is required to provide a reconciliation to Canadian GAAP[455] or to International Accounting Standards[456] of the financial statements included or incorporated by reference in the preliminary prospectus or prospectus.[457] The is-

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448. *Id.*
449. *Id.* at §3.8(1).
450. *Id.* at §3.8.
451. *Id.*
452. *Id.*
453. *Id.* at §3.8(1).
454. *Id.* at §3.10.
455. *See* text at §1.16[6].
456. Draft Policy Statement No. 45 required the conciliation in the case of offerings pursuant to §3.3 to be made to Canadian GAAP. Draft Policy Statement, *supra*, note 359, at §3.10. Without discussion, the Policy Statement as adopted permits the issuer to reconcile to Canadian GAAP or to International Accounting Standards ("IASs"). This is a significant development for IASs which to date have not received wide recognition. The International Accounting Standards Committee ("IASC"), which promulgates IASs, was formed in 1973. As of 1989 IASC had a membership of about one hundred accountancy bodies from about eighty countries. The members of the Committee are accountancy bodies (such as the American Institute of Certified Public Accountants in the United States) rather than countries. noteeither the IASC nor the accountancy profession has the power to require compliance with international accounting standards. Preface to Statements of International Accounting Standards, No. 19, Objectives and Procedures, App. 4, §9000.60 (Jan. 1983), American Institute of Certified Public Accountants, Professional Standards (CCH), at 11,052-11,053.
457. Policy Statement, *supra* note 359, at §3.10.

suer should provide the reconciliation in the notes to the financial statements or as a supplement to be contained within or incorporated by reference in the preliminary prospectus and prospectus.[458] The reconciliation must "explain and *quantify* as a separate reconciling item any significant differences between the principles applied in the financial statements (including note disclosure) and Canadian GAAP or International Accounting Standards. . . ."[459] In the case of annual financial statements, the reconciliation must be covered by an auditor's report.[460]

The reconciliation requirement described above applies in the case of offerings pursuant to Section 3.3 of the Policy Statement.[461] Section 3.3 applies to offerings of securities not eligible for one of the other categories sanctioned by CMJDS (i.e., investment grade securities, rights offerings, securities exchange bids and business combinations). Section 3.3 is only available if the issuer meets the "efficient market substantiality test."[462] The reconciliation requirement significantly diminishes the utility of CMJDS for these offerings of securities, since a reconciliation to Canadian GAAP or IASs may not be significantly less burdensome than complying with the full requirements.[463] Although the issuer will be able to prepare most of the remainder of the disclosure document in accordance with U.S. rather than Canadian requirements, foreign accounting and auditing principles are usually considered to be the most difficult aspect of complying with a foreign disclosure system.

Another provision affecting the content of the prospectus is the language requirement of Section 3.8 applicable to filings made in Quebec.[464] CMJDS requires both English and French language versions of the preliminary prospectus, final prospectus, amendments, supplements and documents incorporated by reference to be filed if offers will be made in Quebec. The French language version of continuous disclosure documents need not be filed unless and until incorporated by reference into the pro-

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458. *Id.*

459. *Id.* (emphasis added).

460. *Id.* The Policy Statement is silent as to whether the audit and auditor must meet provincial auditing and auditor independence standards. *See, e.g.*, National Policy Statement No. 3, Unacceptable Auditors, [Vol. 3] Can. Sec. L. Rep. (CCH) ¶470-003, at 57,561 (auditor's report unacceptable under specified circumstances). The United States, of course, has strict audit requirements including stringent requirements concerning the independence of the auditor. *See* Codification of Financial Reporting Policies, §601.01, §602.02a, [Vol. 6] Fed. Sec. L. Rep. (CCH) ¶73,251 at 62,881, 62,885; Rule 2.01(b) of Reg. S-X, Fed. Sec. L. Rep. (CCH) ¶69,122, at 61,011.

461. Policy Statement, *supra* note 359, at §3.10.

462. *See supra* §1.16[3] (market value and public float of U.S. $300 million and $75 million, respectively).

463. "The reconciliation shall explain and quantify as a separate reconciling item any significant differences between the principles applied in the financial statements (including note disclosure) and Canadian GAAP or International Accounting Standards, as the case may be, and, in the case of the annual financial statements, shall be covered by an auditor's report." Policy Statement, *supra* note 359, at §3.10 (emphasis added).

464. Policy Statement, *supra* note 359, at §3.8.

spectus.[465] Information contained in a Form 10-K or 10-Q that is not required to be disclosed under Quebec requirements applicable to the offering need not be included in the French language version of such documents.[466] The French language requirement of the CMJDS will constitute an impediment to cross-border capital flows between the United States and Quebec and it remains to be seen whether the imposition of this requirement was a wise policy choice for Quebec which presumably instigated it. The CMJDS as adopted, in a change from the proposed version, does provide that a seller does not have to file French language versions of disclosure documents for certain rights offerings and tender offers made under the Policy Statement.[467]

Each preliminary and final prospectus used in Canada under CMJDS must include a certificate from the issuer to the effect that the prospectus (together with the documents incorporated by reference), "constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus. . . ."[468] The underwriter must give the identical certificate to the best of its "knowledge, information and belief."[469] The Policy Statement establishes special certificate requirements for Rule 415 and 430A offerings.[470] In addition to satisfying the certification requirement discussed above, underwriters of offerings in Canada pursuant to CMJDS must observe the conflict of interest requirements of provincial law.[471] These provisions regulate conflicts of interest arising in connection with the sale of securities of related parties of the underwriter. CMJDS specifies the extent to which the participation of an independent underwriter is required under the system when otherwise required by Canadian law.[472]

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465. *Id.*

466. *Id.* at §3.8(1).

467. *Id.* at §3.8(1). The seller is not required to file French language versions of the disclosure documents for rights offerings under §3.4, unless the issuer is a reporting issuer in Quebec (except if such reporting obligation arose solely as a result of rights offerings made under §3.4) or 20% or more of the class of securities underlying the rights is held by Canadian residents. *Id. Cf. id.* §4.5(1) (seller need not file French language versions of tender offer disclosure materials unless target is reporting in Quebec or 20% test is met).

468. Policy Statement, *supra* note 359, at §3.11 (1). A slightly different certificate is required if the offering is being made in Quebec. *Id.*

469. *Id.*

470. *Id.* at §3.11(2) & (3).

471. OSA Reg. §§ 194, *et seq.* Can. Sec. L. Rep. (CCH) ¶453-299, at 55,366-55,372. These regulations impose limitations on underwriters in the case of distributions of securities of a "related issuer" or "connected issuer" as defined.

472. Policy Statement, *supra* note 359, at §3.12. For offerings made under MJDS in Canada and the U.S., provisions of provincial law requiring the underwriting of part of the distribution by an independent underwriter shall be deemed to have been satisfied if the test set forth in §3.12(2)(a) is satisfied. This test involves the proportion of the offering that is underwritten by independent underwriters compared to the proportion underwritten by dealers related to the issuer. *Id.* For Canada-only offerings, see *id.* §3.12(2)((b). Draft Policy Statement No. 45 would have allowed underwriters to use an alternative test based upon NASD rules. Draft National Policy Statement, *supra* note 362, at §3.12(2)(a)(ii). CSA de-

Although generally is not necessary under CMJDS for the disclosure to conform to the content and form requirements of provincial law,[473] CMJDS does require certain additional legends to be included in preliminary and final prospectuses used in Canada pursuant to the system.[474] These legends relate to, among other things, a warning that the disclosure presented differs from that required under provincial law; difficulties in international service of process and enforcement of judgments; and the withdrawal and other rights provided by Canadian law.[475] Upon filing a final prospectus under CMJDS, an issuer is required to file a "Submission to Jurisdiction and Appointment of Agent for Services of Process."[476] This form requires the issuer irrevocably to submit to the jurisdiction of the courts and administrative tribunals of each of the provinces of Canada in which the securities were being distributed, any administrative proceeding in any such province, and any proceeding relating to the distribution of securities made pursuant to the CMJDS prospectus.[477] Issuers and other selling securities in Canada under CMJDS are also required to comply with provincial rules governing advertising and distribution of material to investors and the press.[478]

The CMJDS sets forth various procedural rules governing filing and review of the prospectus and conduct of the distribution of securities in Canada. In keeping with current practice, at the time of filing the preliminary prospectus in Canada the seller must select from among the provinces a "principal jurisdiction" to review the offering.[479] The jurisdiction selected by the issuer to serve as principal jurisdiction, however, may decline to serve as such.[480] If the seller is offering the securities in both the U.S. and Canada, it must file the registration statement with the principal jurisdiction as nearly as practicable contemporaneously with the filing of the registration statement with the SEC.[481] The seller should also file the preliminary and final prospectuses with the other "applicable securities regulatory authorities,"[482] i.e., the securities authorities in each Canadian province and territory in which securities are offered pursuant to CMJDS. Precise filing requirements are set forth in Section 3.8 of the Policy Statement.

In the case of concurrent offerings in Canada and the U.S., the dis-

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leted the alternative test upon adoption of CMJDS.

473. Policy Statement, *supra* note 359, at §3.8(1).

474. *Id.* at §3.9.

475. *Id.*

476. *Id.* at §3.14(4).

477. *Id.* at Appendix B.

478. *Id.* at §3.8.

479. *Id.* at §3.8(2).

480. *Id.* As of the date of adoption of the Policy Statement, New Brunswick, Prince Edward Island, Newfoundland, Yukon Territory and the Northwest Territories have stated they will not act as principal jurisdiction in MJDS offerings. *Id.* at §3.8(2).

481. *Id.* at §3.8(1).

482. *Id.*

closure documents are subject to SEC review, although Canadian regulatory authorities also will monitor the materials "in order to check compliance with the specific disclosure and filing requirements of [the] Policy Statement."[483] In the "unusual case" where the provincial authorities suspect a "problem with the transaction or the related disclosure" or in "special circumstances," the authorities will review the substance of the disclosure documents.[484] The implication is that in the ordinary case the Canadian regulatory authorities will not subject offering materials filed pursuant to CMJDS to substantive or merit review.[485] This result is consistent with the U.S. MJDS[486] but may work uneasily with some provincial statutes that would appear to prohibit the issuance of a final receipt under specified conditions.

As explained above, an offering may commence in Canada upon the issuance of a "receipt" for the final prospectus. In the typical case of concurrent offerings in the United States and Canada, each provincial regulatory authority will issue a receipt for the final prospectus-in effect permitting securities to be sold in the province-when the registration statement becomes effective with the SEC provided the principal jurisdiction has issued its receipt.[487] The principal jurisdiction will issue its receipt for a prospectus after the SEC has declared the related registration statement effective, unless it suspects a problem with the transaction or disclosure or special circumstances exist.[488] The securities regulatory authorities of other provinces also will not issue receipts if they suspect problems with the transaction or disclosure or special circumstances exist.[489] A registrant may also apply for a single "National Policy Statement No. 1 Receipt" that would permit securities to be distributed in all provinces in which the issuer has filed a preliminary prospectus (assuming the province has not opted out of the National Policy Statement No. 1 Receipt System).[490]

[7] *Tender Offers*

The CMJDS permits qualifying tender offers for U.S. target companies to be extended to Canadian residents on the basis of U.S. rather than

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483. *Id.* at §3.8(3).

484. *Id.*

485. *See id.*

486. The MJDS Release provides: "Review of the disclosure document will be undertaken by Canadian securities authorities and generally will be that customary in Canada. Thus, except in the unusual case where the Commission's staff has reason to believe there is a problem with the filing or the offering, the documents will be given a 'no review' status by the Commission. For the most part, since the MJDS Securities Act forms become effective upon filing, any Commission review would be undertaken after effectiveness." MJDS Release, *supra* note 4, at 81,877.

487. Policy Statement, *supra* note 359, at §3.8(4).

488. *Id.*

489. *Id.*

490. *Id.*

Canadian law. To qualify, the target company must be a U.S. issuer,[491] and Canadian residents must hold less than forty percent of the securities that are the subject of the offer.[492] The bid must be extended to all holders of the class of securities in Canada and the United States and must be made on the same terms and conditions to all security holders. Compliance with the requirements of the CMJDS exempts the bidder from the tender offer provisions of the Canadian securities laws except those relating to the filing with appropriate regulatory authorities and delivery to security holders of a bid circular and a director's recommendation. Such documents, however, may com-ply with the form and content requirements of U.S. rather than Canadian law provided they contain no false or misleading statement. The bidder must comply with the applicable provisions of Sections 14(d) and (e) (or Section 13(e) in the case of an issuer bid) of the Exchange Act and the regulations adopted thereunder and the officers and directors of the target must comply with the provisions under the Williams Act relating to recommendations by the board and company.[493]

[8] *Liability and Continuous Disclosure*

CMJDS does not affect any of the liability provisions of the provincial securities laws.[494] Thus, the issuer, directors, underwriters, consenting experts and possibly others could be subject to civil, criminal and administrative liability for any misrepresentations in the prospectus, as determined under Canadian law by Canadian courts.[495] CMJDS does not affect the authority of a Canadian regulatory authority to stop a distribution, prevent reliance on an exemption, halt trading or refuse to issue prospectus receipts.[496] The Canadian regulatory agencies will "continue to exercise their public interest jurisdiction in specific cases where they determine that it is necessary to do so in order to preserve the integrity of the Canadian capital markets."[497] Although a user of CMJDS who violates a U.S. securities law requirement incorporated, in effect, into CMJDS may be deemed to have violated a corresponding Canadian requirement, the

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491. "U.S. issuer" is a foreign issuer (as defined) incorporated or organized under the laws of the United States or any state, territory or the District of Columbia. An issuer, even if organized under foreign law is not a foreign issuer if (a) voting securities carrying over 50% of the vote for the election of directors are held by persons whose last address as shown on the books of the issuers is in Canada, and (b) either (i) the majority of the senior officers or directors of the issuer are citizens or residents of Canada; (ii) more than 50% of the assets of the issuer are located in Canada; or (iii) the business of the issuer is administered principally in Canada. Policy Statement, *supra* note 359, at §2(17). The Policy Statement establishes presumptions in this regard in certain cases. *See* Policy Statement, *supra* note 359, at §4.2.

492. Policy Statement, *supra* note 359, at §4.1.

493. *Id.* at §4.3.

494. *Id.* at §1.

495. *See* ICMSR, *supra* note 289, at §4.12; OSA, §126(1).

496. Policy Statement, *supra* note 359, at §1.

497. *Id.*

CMJDS user will not be disqualified from using the system with respect to a transaction or document.[498]

A U.S. issuer making a public offering in Canada ordinarily would be subject to Canadian continuous reporting, insider reporting and proxy requirements.[499] For example, an issuer that files a prospectus with the Ontario Securities Commission becomes a "reporting issuer" and, as such, must comply with the periodic reporting requirements.[500] Compliance by a U.S. reporting issuer with U.S. requirements relating to current reports, annual reports and proxy statements, however, will constitute compliance with Canadian laws relating to reports of material change, annual reports, and information and proxy circulares, if the issuer complies with the filing and dissemination requirements of Sec. 6 of the Policy Statement. Compliance by non-reporting issuers with U.S. proxy requirements in respect of a U.S. reporting issuer will satisfy Canadian requirements provided such person also complies with the filing and dissemination requirements of Section 6. The Policy Statement also provides for satisfaction of Canadian requirements relating to interim and annual financial statements, and press releases, if certain conditions are met.[501] If the issuer complies with the requirements of Rule 14a-3 under the Exchange Act relating to shareholder communications, it is not required to comply with National Policy Statement No. 41, but any Canadian Clearing agency and any Canadian intermediary holding of record shares of the issuer is required to comply with National Policy Statement No. 41 within the time limitations established by that Policy Statement for forward proxy-related materials and the like and is entitled to receive the fees and charges provided for in that Policy Statement.[502] The CMJDS also provides that any insider of a U.S. issuer required to file insider reports with respect to holdings of securities of the issuer with any Canadian securities regulatory authority shall not be required to file such reports so long as insider files the reports required under the Exchange Act with the SEC on a timely basis.

§1.17 Critique

The U.S. Multijurisdictional Disclosure System presently is limited to Canadian issuers and to issuers and offerings meeting substantiality, reporting, and/or other criteria. The extent to which it will encourage cross-border offerings between Canada and the United States cannot be immediately measured, although the convenience and increased efficiency for eligible issuers is apparent.

The Canadian multijurisdictional disclosure system will simplify the

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498. *Id.*
499. *Id.* at §6.
500. OSA, §1(1)(38).
501. Policy Statement, *supra* note 359, at §6.
502. *Id.*

process of financing in Canada by allowing U.S. issuers generally to follow home country requirements. However, the new system is not expected to open the floodgates to public offerings in Canada by U.S. companies. Although Ontario already makes accommodations for offerings by foreign issuers, and allows the use of home country reports to satisfy continuous reporting obligations, financing there by U.S. issuers has been modest to date. Nevertheless, CMJDS will undoubtedly facilitate multinational offerings, including the addition of a Canadian tranche in connection with otherwise routine domestic financing.

MJDS' and CMJDS' significance does not depend solely upon a statistical measure of resulting capital flows. The process demonstrates that disclosure schemes outside of the United States may have enough similarities to that of the U.S. that each country can accept the others, notwithstanding significant differences of detail. The ability to find common denominators not only reflects the increased sophistication of disclosure schemes outside the United States, but the technical competence of the staffs of the SEC and, in this instance, its Canadian counterparts, in sorting out the technical details and reaching agreement on reciprocal requirements and mechanics.

In connection with rights offerings, the issuer if relying amended Form F-3 would have to be a U.S. reporting company; if relying on Form F-11 or the Rule 801 exemption it would have to be a U.S. reporting company or have made filings pursuant to the Section 12g3-2(b) exemption, whereas a Canadian foreign issuer relying on Form F-7 would not have to be a reporting U.S. issuer. The F-7 registrant has to have it securities listed on one of the designated securities Canadian stock exchanges and have been subject to reporting requirements under applicable Canadian securities laws for three years. The F-11 registrant if not a reporting company but relying on the 12g3-2(b) exemption would also have to have a class of securities listed or quoted on a designated overseas securities market. Either such listing must have been in effect for the preceding thirty six consecutive months or the registrant must have a float of $75 million. The latter requirement is to assure that the registrant is not a start-up and, if a company that has gone public recently, that it has a significant float. The issuer, however, could be a start-up without a significant float if it were prepared to register a class of its securities under the Exchange Act and, thus, become a reporting company. The requirement that the issuer either be a reporting company or have made filings pursuant to the Section 12g3-2(b) exemption is to assure that there is public information relating to the company. But if it is required to be listed or quoted on a DOSM, the information that it includes in its prospectus presumably will be based on the requirements of the DOSM and, hence, is likely to be substantially the same information that it is required to file under Section 12g3-2(b) and will, unlike the 12g3-2(b) filings, will have to be translated into English if in a foreign language. Further, the issuer will be exempt from the Section 15(d) reporting requirements; hence, if it relied on its Section 12g3-2(b) exemption the only filings it will make are

those required by that exemption, which filings do not have to be translated.

The foreign issuer, assuming Form F-3 is amended as proposed, must be a reporting company and must have filed one annual report (presumably, in most instances, on Form 20-F). The prospectus will be the abbreviated Form F-3 prospectus incorporating by reference the last annual report and including information relating to distribution terms, use of offering proceeds and other offering specific information. Since a foreign issuer eligible to use Form F-3, if amended, will also be eligible to use Form F-11, the principal reason to elect to use Form F-3 would be the perception that it would afford better protection against Section 11 liability. Form F-3 also has the advantage that the rights will be freely transferable whereas under any of the other alternatives discussed they can be transferred only pursuant to Regulation S.

A Canadian foreign issuer eligible to use Form F-7 could use Form F-11 by becoming a U.S. reporting company (which presumably it wouldn't do, unless it already was one) or by filing for the Section 12g3-b(2) exemption. If it met the one year F-7 listing requirement, but had been listed for less than one year than it would also have to satisfy the $75 million float requirement in order to use F-11. There appears no advantage, however, to using Form F-11 rather than Form F-7. Accordingly, the Canadian issuers that use Form F-11 are likely to be those that cannot meet the Form F-7 eligibility requirements. Form F-11 to this extent adds another alternative for Canadian issuers with no corresponding alternative to U.S. issuers making a rights offering in Canada.