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Securities Law Internationalization of Securities Regulation - Multijurisdictional Disclosure System for Canada and the U.S.

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In an effort to facilitate cross-border securities transactions, the United States Securities and Exchange Commission (SEC) and the Canadian Securities Administrators (CSA) recently adopted a multijurisdictional disclosure system (MJDS) for use between the United States and each of the provinces and territories of Canada. The MJDS is intended to ease the difficulties confronted by those seeking to undertake cross-border financing and to encourage others to consider financing on a cross-border basis. This article discusses the ways in which the MJDS improves on the prior regulatory scheme and explores its potential impact.

II. BACKGROUND

Throughout the 1980s the financial community generated, and securities regulators witnessed, an increasing number of international or cross-border financings. This trend was apparent


The opinions expressed in this article are those of the author, and do not necessarily express the opinions of the staff of the Ontario Securities Commission.

2. The CSA is a group comprised of all of the securities regulatory authorities in Canada. For further discussion of the Canadian regulatory system, see infra note 32.


4. For discussions of this trend, see Securities Act Release No. 6568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743 at 87,319-20 (Feb. 28, 1985) [hereinafter Release No. 6568] ("In recent years, the Commission has recognized that the lines of demarcation between domestic and international capital markets are becoming more difficult to ascertain. Traditional notions of a world made up of separate and distinct domestic capital markets are being replaced by a global market for corporate securities.").
both in domestic purchases of foreign securities\(^5\) and foreign issuances of domestic issuer securities.\(^6\) Factors that are believed to have contributed to the increased internationalization of securities markets throughout the 1980s include "the abandonment of U.S. investment controls" and "relaxation of foreign exchange controls."\(^7\) Primarily, however, issuers began to look to foreign markets for financing because of their needs: to expand the geographic base of their investors, to fill financing needs which could not be met within their home countries, to create a presence abroad for strategic or marketing reasons, or to raise money for particular projects or in particular currencies.\(^8\) One analyst has suggested that "[t]he dramatic increase in international securities activity is occurring with very little help or hindrance from national securities regulators," and has concluded that "much more must be done [by regulators] if the world's capital markets are to operate at optimum efficiency."\(^9\)

The unique nature of international transactions had been addressed by the SEC in a 1964 release in which it had exempted from the Securities Act registration requirements foreign offerings which were "reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States." Securities Act Release No. 4708, 29 Fed. Reg. 9828 (1964) [hereinafter Release No. 4708].

5. Release No. 6568, supra note 4, at 87,320 ("transactions in foreign stocks traded in the United States increased from $2.03 billion in 1970 to approximately $30 billion in 1983"); see also Release No. 6902 supra note 3, at 81,862 n.8 ("In 1990, U.S. investors purchased $130.9 billion and $35.9 billion of foreign equity securities and foreign debt securities, respectively, compared to $24.8 billion and $85.2 billion in 1985.").

6. See Securities Act Release No. 6568, supra note 4, at 87,319-20 (citing study identifying approximately 236 issuers as having an "active international trading market"—defined as daily active trading outside the home market of the issuer—in their equity securities; 84 issuers were American, 13 British and 12 Canadian); see also Release No. 6902, supra note 3, at 81,862 n.8 ("Debt offerings outside the United States by U.S. issuers totalled $20.3 billion in 1990, $19.8 billion in 1989 and $19.8 billion in 1988. The value of international offerings of common and preferred stocks in 1989 was $15.7 billion, down from the record total in 1987 of $20.3 billion, but representing an increase over the total in 1983 of $200 million.").

7. See Release No. 6568, supra note 4, at 87,319 (other factors cited by SEC were: advent of floating exchange rates; efforts by corporations and investors to diversify funding and investment sources; then recent repeal of the withholding tax on interest paid to foreign holders of U.S. bonds; interest rate differentials, relatively long period of peace and prosperity for developed countries; and new technology in areas of transportation and communications).


Mr. Sommer noted that many foreign companies won't list on an American exchange or make an offering in the U.S. because of stringent disclosure requirements or fears of liability; foreign-based mutual funds are for all practical purposes barred from offering in this country; some broker-dealers un-
Against this background, securities regulators around the
globe have attempted to respond to the growing internationaliza-
tion of securities markets. Both the SEC and the CSA have
demonstrated their determination to remain leaders in interna-
tional securities regulation through a number of recent
initiatives.11

10. See INTERNATIONAL SECURITIES LAW AND PRACTICE, vii (J. Robinson ed.
1985). Mr. Robinson, writing in 1985, stated:
The original international securities market—the Euromarket for debt
instruments—launched the [internationalization] movement in the mid-
1960’s. . . . The Euromarkets moved from straight debt. . . . to floating
rate notes and commercial paper . . . . This market then moved into
similar instruments denominated in [all types of] international curren-
cies. . . . All this was done with relative ease, although over a long
period, due, in no small measure, to the absence of or very limited gov-
ernmental regulation and interference with the free market.

The development of internationalized equity markets is a more recent
phenomenon. However, the speed of this development has been as-
tounding and promises to become more so. Avoiding regulation, how-
ever, will be much more difficult in the case of equities. . . .

With the development of international debt and equity markets came
pressures for a loosening of the restrictions, usually nationalistic and
often bordering on chauvinistic, on admitting foreign player restric-
tions. . . . Many . . . jurisdictions are only now appreciating that with
the internationalization of the markets must come the internationaliza-
tion of the market makers.

For a critical discussion of the SEC response to the challenge of globaliza-
tion, see Karmel, SEC REGULATION OF MULTIJURISDICTIONAL OFFERINGS, 16 BROOKLYN J.
INT’L L. 3 (1990) (essentially concluding that SEC has responded too late with
too little). For discussion of the potential future response of regulators to
globalization of securities markets, see INTERNATIONAL ORGANIZATION OF SECURITIES
COMMISSIONS, REPORT ON INTERNATIONAL EQUITY OFFERS (Sept. 1989).

11. The SEC has recently implemented a number of policies dealing with
cross-border transactions. Release on International Tender and Exchange
Offers, Securities Act Release No. 6897 (June 5, 1991) (regulation intended to en-
courage foreign bids to U.S. holders on basis of foreign disclosure where
relatively small number of U.S. holders exist); Investment Company Act Release
(Aug. 17, 1990) (regulation intended to expand exemption from registration
under Investment Company Act of 1940 for offer and sale of certain securities of
foreign banks, insurance companies and “related entities”); Regulation S, 17
C.F.R. § 230.901 (1991); Rule 144A, 17 C.F.R. § 230.144A (1991); Cross-bor-
der Rights Offers, Amendments to Form F-3, Securities Act Release No. 6896
Fed. Sec. L. Rep. (CCH) ¶ 84,402 (June 5, 1991); Amendments to Rule and
Form Requirements Which Govern Age of Financial Statements of Foreign Pri-
In April of 1990, the SEC approved Rule 144A12 which is intended to provide a limited safe harbor from securities registration requirements for resales of restricted securities13 among qualifying institutional buyers (QIBs).14 Rule 144A creates a new market for the purchase and sale of securities by permitting the sale of securities, previously sold under the private placement exemption15 and not belonging to a class of securities which are

(6).


13. "Restricted securities" are securities originally purchased pursuant to an offering exempt from the registration requirements of § 5 of the Securities Act of 1933 (the "Securities Act"). See 15 U.S.C. § 77e (1988). Exemptions from the registration requirements of § 5 of the Securities Act are contained in § 3 (which exemptions generally relate to the type of security—i.e., securities issued or guaranteed by banks, commercial paper, etc.) or § 4 (which exemptions generally relate to the type of transaction—i.e., certain transactions by persons other than issuers, underwriters and dealers (secondary trades) and private placements, etc.). Where the exemption relates to the transaction, then further sales of the securities may raise potential problems. Where the original purchasers have bought the transaction-exempted securities with a view toward distribution they may be considered underwriters and further sales, if made without registration, would be in violation of the registration requirements. This is because a person who wishes to resell restricted securities may rely on the exemption under § 4 of the Securities Act for that trade only if the person falls within the terms of the section—not an issuer, underwriter or dealer. If the transaction is considered to be a "distribution" then such person may be considered to fall within the definition of an underwriter contained in § 2(11) of the Securities Act. Under the safe harbor established in 1972 as Rule 144, the SEC clarified some of the confusion surrounding these issues by setting forth criteria under which such a resale would be deemed not to be a distribution and therefore setting forth the circumstances under which a person conducting such a resale would not be considered an underwriter. Thus, purchasers of securities under a private offering may resell the restricted securities in reliance on the provisions of the rule. See 15 U.S.C. § 77d(2); Release No. 5223, supra note 12, at 5 (Rule 144 safe harbor); see also L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 366 (2d ed. 1988).

14. The eligibility tests for a qualified institutional buyer under 144A, are as follows: institutional investors must own, and invest in a discretionary manner, $100 million in securities of non-affiliated issuers in order to be considered "qualifying buyers" under Rule 144A. Under the original proposal smaller institutional investors would have been able to trade, with certain additional restrictions, under Rule 144A. See Release No. 6806, supra note 12, at 89,525-26.

15. Historically, securities sold under the "private placement exemption" of the Securities Act could not be publicly resold without registration except in accordance with Rule 144 after a two-year "hold period" or in reliance upon the so-called "4(1½) exemption" under which the restricted securities are on-sold.
publicly traded in the United States amongst other QIBs, without either a hold period or compliance with registration requirements. For foreign issuers, Rule 144A provides a means to access U.S. capital markets directly without complying with the costly and time consuming requirements associated with the public issuance of securities in the United States.

in further private sales to persons who would have qualified under the original private placement and in the same manner. The "4(1/2) exemption" was an invention of practice and is a hybrid of the exemption for persons who are not issuers, underwriters or dealers (4(1)) and the exemption for private placements (4(2)). For a general discussion of the "4(1/2)" and the private placement exemption see Note, The Capital Markets in Transition: A Response to New SEC Rule 144A, 66 IND. L.J. 233, 251-52 (1990) (describing section 4(1/2) transactions and collecting sources); see also L. Loss, supra note 13, at 366.


As noted above, Rule 144A provides a non-exclusive safe harbor for resales of restricted securities to QIBs (i.e. institutional investors meeting the $100 million eligibility test) where the QIB is buying for its own account or for the account of another QIB. Foreign and domestic banks or thrifts must in addition to the $100 million test, meet a $25 million net worth test in order to use Rule 144A. See 17 C.F.R. § 230.144A (1991); Release No. 6862, supra note 12, at 80,654.

Rule 144A is limited to securities which are "non-fungible" to the extent that when such securities are issued they are not part of the same class or deemed to be of the same class as securities listed on a U.S. national exchange or quoted on the National Association of Securities Dealers Automated Quotation system ("NASDAQ"). Release No. 6862, supra note 12 at 80,658.

Under Rule 144A a seller must reasonably believe that the prospective buyer is a QIB. 17 C.F.R. § 230.144A(d)(1) (1991). The SEC provides a list of disclosures upon which a seller may reasonably rely in formulating such a conclusion. Id. In the case of a foreign buyer, such disclosure must be less than 18 months old at the date of sale. Id. § 230.144A(d)(1)(i). In addition, the seller must have taken reasonable steps to ensure that the buyer knows that the seller may use Rule 144A. Id. § 230.144A(d)(2).

Rule 144A also imposes an information requirement such that where the issuer of the securities is not a reporting issuer under the Exchange Act or exempt from Exchange Act reporting pursuant to the information supplying exemption of Rule 12(g)(3)-2(b) (which means the issuer is supplying home-country disclosure to the SEC under cover of Form 20-F) the holder and prospective purchaser may request certain basic financial information. Id. § 230.144A(d)(4)(i).

17. In discussing the effect of the implementation of Rule 144A, one author noted:

investment bankers and securities lawyers with an eye on the SEC's new Rule 144A are anxious to know just when Japan and Asia's emerging standard bearers will tap into the U.S. private placement market via 144A transactions. . . . Even the most optimistic U.S. securities lawyers aren't expecting a flood of new 144A paper soon as Japanese interest in this new alternative to fund raising is tempered with caution, if not a good dose of confusion. . . . "There is going to be a period of time during which Japanese issuers acclimate themselves to the new environment, including such issues as the Rule 12g3-2(b) exemption to information requirements and the disclosure obligations associated with the private placement of securities into the United States. A third issue,
In the same month that Rule 144A was approved, the SEC took another step intended to facilitate cross-border financings: it adopted Regulation S. Regulation S provides guidance as to the extraterritorial reach of the Securities Act of 1933 (Securities Act) by providing that certain transactions are deemed beyond the scope of Securities Act registration requirements. The regulation particularly of interest to Japanese investment banks, has to do with the anti-manipulation provisions of Rule 10b-6 and Rule 10b-7 under the ... Exchange Act.

Japanese Are Taking Time to Acclimate to SEC's Rule 144A, INT'L SEC. REG. & REP., Aug. 13, 1990, at 5-6; see also Karol, supra note 16, at 132 ("In conjunction with newly issued Regulation S, Rule 144A will create a more attractive environment for foreign issuers to issue securities in the United States. Many foreign issuers have been reluctant to face the SEC registration process. Regulation S and Rule 144A give foreign issuers an alternative to the Euromarkets. As to resales, a seller could sell the securities abroad pursuant to Rule 904 of Regulation S, in addition to selling to a QIB [qualified institutional buyer] in the United States."); Karmel, New Rules for Trading Foreign Securities, N.Y.L.J., June 28, 1990, at 6, col. 4.

As originally conceived, Rule 144A would have imposed further resale restriction on securities of foreign private issuers both in the United States and abroad and would have precluded the "tacking" of hold periods by institutional investors toward compliance with the two year hold period; thereby precluding resales of such foreign securities into the retail market until such investors had held the securities for at least two years. In its adopting release, the SEC stated that it had been persuaded by commenters who had argued that the resale restrictions and tacking preclusion for foreign issuers were unnecessary since resales outside of the United States were unlikely to flow back to the U.S. retail market but would instead "flow back to the dominant off-shore market" for such securities. See Release No. 6862, supra note 12, at 80,647; see also Karmel, supra note 10, at 13 ("[T]he [Rule 144A] reproposals are based on discrimination between institutional and individual investors, and marks a shift in SEC policy concerning the extraterritorial application of the securities laws from a 'nationality' focus to a 'territorial' focus.").


Some of the procedures adopted in practice to attempt to ensure that an offering would be considered outside the scope of the Securities Act included covenants by the underwriters that they would not sell the securities in the United States or to U.S. persons, covenants by the underwriters to deliver "confirmations" imposing the sales restrictions on purchasing dealers, and a 90 day lock-up period with a global certificate issued upon distribution and exchangeable for the actual security only after the 90 day period. For a general discussion of the background of Regulation S, see Silverman & Braverman, Regulation S and Other New Measures Affecting the International Capital Markets, 23 REV. SEC. & COMMODITIES REG. 179, 179-80 (1990).

20. 17 C.F.R. § 230.901 (1991). For a discussion of the Regulation S general statement, see Silverman & Braverman, supra note 18, at 180 ("In view of the difficulties of applying a simple territorial principle to transactions that are by definition international in character, it is unlikely that the general statement will often serve as a basis for planning offerings outside of the United States."). For a discussion of the shortfalls of Regulation S, see Cole & Johnson, MTN Programmes and Regulation S, 9 INT’L FIN. L. REV. 32 (1990).

Aside from giving greater certainty to various practical aspects of securities offerings, the SEC’s new Regulation S, which provides a safe harbor for offshore offerings, will not have a major impact on either Euro or global medium term note programmes. Two factors will minimize the impact of Regulation S: the approach of the IRS to enforcing compliance with the requirements for exemption from relevant US tax laws in the case of international securities offerings and the continuing practical convenience of certain practices from the pre-Regulation S period.

Id. at 32.

21. 17 C.F.R. §§ 230.903(a), 904(a) (1991); see also Release No. 6863, supra note 18, at 80,663. For purposes of Regulation S, the SEC defines an “offshore transaction” as one in which

[no offers are] made to a person in the United States; and . . . either (A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or (B) for purposes of . . . [the issuer safe harbor], the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange . . . ; or [for purposes of the resale safe harbor], the transaction is executed . . . [through] the facilities of a designated offshore securities market . . . and neither the seller nor the buyer knows that the transaction has been pre-arranged with a buyer in the United States. 17 C.F.R. § 230.902(i)(1) (1991); see also Release No. 6863. supra note 18, at 80,666-68 (more detailed discussion of requirement of offshore transaction); Silverman & Braverman, supra note 18, at 181.

22. 17 C.F.R. §§ 230.903(b), 904(b) (1991); see also Release No. 6863, supra note 18, at 80,663 ("‘Directed selling efforts’ are activities undertaken for the purpose of, or that could reasonably be expected to result in, conditioning of the market in the United States for the securities being offered.’’); id. at 80,668-71 (more detailed discussion of directed selling efforts).

United States. Each category is subject to different procedural rules, but the different rules have one common purpose: to ensure that the securities offered under the regulation come to rest offshore.

In essence, each of these regulatory initiatives was an attempt to codify existing practice or existing remedies which could otherwise have been achieved on a case-by-case basis. The codification was intended to create greater standardization, greater certainty and, from the viewpoint of issuers involved in cross-border transactions, a more streamlined and cost-effective administrative process. The MJDS, to a large extent, represents a regulatory step beyond either Regulation S or Rule 144A in that it goes further than current practice.

A. Development of the MJDS

The MJDS concept was originally released for public comment in a 1985 SEC release entitled "Facilitation of Multinational Securities Offerings." The release introduced two conceptual

24. 17 C.F.R. § 230.903(c); see also Release No. 6863, supra note 18, at 80,663 (distinctions "based upon factors such as the nationality and reporting status of the issuer and the degree of U.S. market interest in the issuer's securities"). Briefly, the first category includes "securities offered in 'overseas directed offerings,' securities of foreign issuers in which there is no substantial U.S. market interest, securities [offered by] foreign governments, and securities issued pursuant to certain employee benefit plans." Id.; see also 17 C.F.R. § 230.903(c)(1). The second category includes "offerings of securities of U.S. reporting issuers and offerings of debt securities, asset-backed securities and specified preferred stock of foreign issuers with a substantial U.S. market interest." Release No. 6863, supra note 18, at 80,663; see also 17 C.F.R. § 230.903(c)(2) (1991). The third residual category, includes all securities not covered by the first two categories. Release No. 6863, supra note 18, at 80,679; see also 17 C.F.R. § 230.903(c)(3) (1991).

25. The requirements become more strict as one moves from the first category of securities to the third. A transaction involving securities in the first category falls within the issuer safe harbor simply by satisfying the "offshore" and "no directed selling efforts" general requirements. Release No. 6863, supra note 18, at 80,672. Transactions involving securities in the second category, in addition to satisfying the general requirements, must satisfy "transactional restrictions" and "offering restrictions." Transactions involving securities in the third category must satisfy the general requirements, the same offering restrictions as those in category two, and even stricter transactional restrictions. See id. at 80,679-80.

26. See id. at 80,663, 80,671.

27. In this respect, Rule 144A codifies what had been achieved through the use of the so-called "4 (1½) exemption," while Regulation S codifies the no-action letter process relating to Release No. 4708, supra note 18.

28. See supra notes 11-25 and accompanying text.

approaches for creating a system that would encourage multinational securities offerings: the reciprocal approach and the common prospectus approach.\textsuperscript{30} The reciprocal approach would require each participating country to recognize disclosure documents that were prepared according to another participating country's rules. Thus, an issuer would comply with home country disclosure document requirements and those documents would be recognized by a participating foreign country in satisfaction of the foreign country's disclosure requirements. The alternative approach, the common prospectus approach, would involve the harmonization of securities regulation and the development of a mutually acceptable disclosure standard, rather than mutual recognition of foreign disclosure. Both approaches were considered flawed if adopted in isolation.\textsuperscript{31}

\textsuperscript{30} Id. at 87,322. The SEC described these approaches in the following manner:

[The reciprocal approach] . . . would require the agreement by each of the three countries to adopt a reciprocal system providing that an offering document used by the issuer in its own country would be accepted for offerings in each of the other countries, assuming certain minimum standards are met. For example, the [SEC] . . . could promulgate the necessary rules to permit a foreign issuer to file a registration statement with the [SEC] . . . pursuant to the Securities Act consisting of a facing page, a copy of the offering documents used in its own country and a signature page. By doing so, of course, a foreign issuer would be subject to the same liability provisions of the United States' securities laws which apply to domestic issuers. . . . The second possible conceptual approach would be for all three countries to agree on disclosure standards for an offering document that could be used in two or more of the three countries . . . . [T]he [SEC] could adopt the necessary rules to allow the common prospectus to be used in registration statements filed with the [SEC] pursuant to the Securities Act [and] . . . like the reciprocal approach, the same liability provisions of the federal securities laws would apply to foreign issuers as apply to the domestic issuers.

\textsuperscript{31} Id. In addition, the SEC requested specific comment on any other possible approaches which could facilitate multinational offerings and on a number of other issues, including: the role of the SEC in encouraging multinational offerings, the cost savings to issuers if the proposed approaches were adopted, and the effect on purely domestic issuers if a multijurisdictional disclosure system were adopted. \textit{See id.} at 87,320-24.

For a discussion of the advantages and disadvantages of both conceptual approaches, see \textit{id.} at 87,323. The SEC has stated:

An advantage to [sic] reciprocal approach appears to be that it is simpler to implement than the common prospectus approach. While the common prospectus approach would require agreement between the participating countries on disclosure standards, the reciprocal approach would basically accept the offering document of each of the participating countries. On the other hand, adoption of the reciprocal approach could eliminate any incentive to harmonize the disclosure standards of the participating countries.

\textit{Id.}
On July 26, 1989, the SEC, the Ontario Securities Commission (OSC) and the Commission des valeurs mobilières du Québec (Quebec’s securities commission) released for comment a proposal for a multijurisdictional system between the CSA and the SEC.32 The SEC reported that it had received comments on the 1985 release which indicated that the reciprocal approach would be more workable than the common prospectus approach.33 Thus, the July 26th proposal was for a system which would be a hybrid of both approaches: “While it is based on the concept of mutual recognition, the participants will be those jurisdictions whose disclosure systems, while different in detail provide investors with information to make an informed investment decision and financial statements of relevance and reliability.”34 Under the proposed (as well as the final) system, the only participants were the United States and Canada.35

Over the comment period, the SEC and the CSA received


In Canada, securities regulation is carried out at the provincial level of government rather than at the federal level; therefore, policies which are to be effected throughout Canada are achieved through joint provincial initiatives. For an overview of Canadian securities regulation, see V. Alboini, Securities Law and Practice (1984). For a brief summary of the Canadian system, see Release No. 6841, supra. For a somewhat outdated, but excellent practical summary, see International Securities Law and Practice, supra note 10, at 47.


34. Id. at 80,289.

35. Initially, the project was conceived of as including the United States, Canada and the United Kingdom. See Release No. 6568, supra note 4, at 87,319. The reasons for inclusion of Canada and the United Kingdom were stated by the SEC as follows: “The United Kingdom and Canada were chosen for consideration because issuers from these countries use the United States’ capital markets frequently and their disclosure requirements are more similar to the United States’ requirements than those of other countries.” See id.

In its later release the SEC stated:

While the multijurisdictional disclosure effort is based on the concept of mutual recognition, Canada was chosen as the first partner for the United States in part because of the similarities between the U.S. and Canadian investor protection mandates and disclosure requirements. The existence of a well-developed, sophisticated and reliable system for administering Canadian disclosure requirements also was critical, given the Commission’s reliance on Canadian definitions, procedures, application of disclosure standards, and day-to-day administration of those standards.

thirty-five comment letters on the July 26th proposal which were considered in preparing the subsequent repropposal. In October of 1990, the SEC released a revised proposal of the MJDS and the CSA published, simultaneously, a proposal in Canada. The MJDS was adopted in final form in June of 1991 and became effective in the United States and throughout Canada on July 1, 1991. Although the MJDS, as implemented, retains the basic structure of the system proposed in 1989, its scope has been enlarged and it has been further refined.

The MJDS is comprised of two distinct but complementary systems. As implemented in the United States, the system relates to Canadian issuers. As implemented in Canada, the system relates to U.S. issuers. Together, both systems create a multijurisdictional disclosure system.

B. The MJDS for U.S. Issuers

The MJDS, as adopted in Canada, allows certain U.S. issuers to make offerings in Canada using the disclosure documents prepared in satisfaction of SEC requirements (with certain additional legends and certificates). The Canadian securities authorities will monitor these cross-border filings for compliance with the specific requirements of the MJDS, but will review the substance of the disclosure only when they are aware of a problem with a transaction or the related disclosure. The SEC will review the filings in the manner normally used for domestic filings.

Reconciliation to Canadian Generally Accepted Accounting

36. See Release No. 6879 supra note 35, at 81,112 n.3. Most commenters expressed general approval of the proposal. Id.
39. See supra notes 40-110 and accompanying text.
40. For a discussion of the manner in which regulation of securities is achieved in Canada, see supra note 31.
41. For example, a certificate of the issuer signed on its behalf by a senior officer, confirming that it satisfies the applicable eligibility criteria must be filed with each applicable securities regulatory authority at the time of filing the preliminary prospectus in Canada. See Policy Statement No. 45, supra note 3, at 2889. In addition, the Canadian securities regulatory authorities require that issuers file a form constituting a submission to jurisdiction and appointment of an agent for service of process. Id.
42. Id. at 2909.
43. Id.
Principles (Canadian GAAP) is not required for the financial statements used for filings under the MJDS of investment grade debt, preferred shares, certain rights offerings, business combinations, or take-over or issuer bids. However, in the case of “other offerings” under the MJDS, in which category are placed equity offerings of common stock or debt and preferred securities which do not have an approved rating, reconciliation is necessary.\(^{44}\) In an effort to promote greater harmonization of accounting standards and “in view of the underlying goal of the MJDS to facilitate global capital formation,”\(^{45}\) the CSA accepts reconciliation to International Accounting Standards as established by the International Accounting Standards Committee in lieu of Canadian GAAP. Because the financial statements of many U.S. issuers prepared in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP) already comply with International Accounting Standards, there will be no reconciliation required of such issuers.\(^{46}\)

U.S. issuers should note that the MJDS does not alter or eliminate the liability provisions of the securities laws of the Canadian provinces and territories. Further, the Canadian securities regulators continue to possess the discretionary authority conferred by their enabling statutes with respect to offerings made under the MJDS. Thus, Canadian securities regulators maintain the discretionary authority to: cease trade securities, halt a distribution, not issue a receipt for a prospectus or preliminary prospectus (i.e. necessary for “effectiveness” of the prospectus), or remove an otherwise granted exemption in respect of such offerings. Further, these regulators will exercise their “public interest” jurisdiction with regard to offerings made under the MJDS where, in specific cases, they determine that action is required to preserve the integrity of the Canadian capital markets.\(^{47}\)

Basically, to be eligible to use the MJDS, issuing companies must have been incorporated or organized under the laws of the United States, and have a thirty-six month reporting history with the SEC.\(^{48}\) In addition, such companies must intend to offer se-

\(^{44}\) Id. at 2915-16. For a discussion of the remarks of commenters in respect of reconciliation requirements put forth in the June 26 proposal, see Draft Policy Statement No. 45, supra note 37.


\(^{46}\) Id.

\(^{47}\) Policy Statement No. 45, supra note 3, at 2892.

\(^{48}\) Id. at 2900. The reporting requirements are as follows:
securities in compliance with certain transaction requirements prescribed under the MJDS. These latter requirements are based on the type of securities being offered.

The MJDS is available to U.S. issuers for: (1) nonconvertible investment grade debt and preferred shares;\(^49\) (2) investment grade debt and preferred shares which may not be converted for at least one year after issuance, if the issuer’s equity shares have a market value of $150 million (U.S.) and a public float of $75 million (U.S.); and (3) other types of securities, including common shares, if the issuer’s equity shares have a market value of $300 million (U.S.) and a public float of $75 million (U.S.).\(^50\)

In adopting the transaction eligibility criteria outlined above, the MJDS echoes the criteria adopted in the integrated disclosure provisions of both countries. These eligibility criteria focus on the concept of independent assessments of creditworthiness and “substantiality.” The introduction of greater or lesser “substantiality” tests is intended to reflect the policy that eligibility for use of integrated disclosure systems and for use of the MJDS should be focused on those issuers “whose size is such that (i) information about them is publicly disseminated and (ii) they have a significant market following.”\(^51\) Investment grade debt

the issuer (i) has a class of securities registered pursuant to section 12(b) or 12(g) of the [Securities Exchange Act of 1934]; or (ii) is required to file reports pursuant to section 15(d) of the [Securities Exchange Act of 1934]; the issuer has filed with the SEC all the material required to be filed pursuant to sections 13, 14 and 15(d) of the Securities Exchange Act of 1934 for period of at least 36 calendar months immediately preceding the filing of the preliminary prospectus with the principal jurisdiction.

\(^{49}\) Under the MJDS, the CSA have expanded the number of rating categories recognized as “investment grade” from three to four. \(\text{Id.}\) at 2893.

\(^{50}\) \(\text{Id.}\) at 2900-02.

\(^{51}\) \(\text{Id.}\) at 2899. The MJDS further provides that: “As a result [of satisfying the substantiality tests], the marketplace can be expected to set efficiently a price for the securities of these issuers based on publicly available information.” \(\text{Id.}\)

Under the MJDS, as in the case of registration of short form prospectuses under the integrated disclosure system, an issuer which does not meet the transaction eligibility criteria may still be able to use the system where its parent satisfies the eligibility criteria and guarantees the securities being offered. \(\text{Id.}\) at 2904.

In addition, the MJDS makes provision for successor issuers subsisting after a business combination such that such issuers are deemed to meet the eligibility requirements if, since the business combination, the successor issuer has satisfied the requirements provided that any requirement to be satisfied for a 36 month period (i.e. reporting requirements) shall be satisfied by separately adding the period during which the successor issuer satisfied the requirement to the immediately preceding period the predecessor satisfied the requirement, and further provided that the 36 month requirement need not be satisfied with
and preferred shares are granted eligibility without satisfaction of a "substantiality" test in recognition of the predominant importance of the yield and independent rating upon which such securities trade.52

For U.S. issuers that do not have a thirty-six month reporting history with the SEC but are majority-owned subsidiaries of a U.S. parent, alternative eligibility requirements have been included in the MJDS such that certain offerings53 will be able to be made under the MJDS if the securities are fully guaranteed by their parent and if their parent satisfies the general eligibility requirements discussed above.54 Similarly, the MJDS provides that successor issuers that exist after a business combination are deemed to meet the thirty-six month reporting requirement and the twelve month listing requirement (as applicable) provided that the successor issuer together with each predecessor entity satisfies the requirements. In order not to prevent use of the MJDS in situations where a predecessor entity cannot satisfy the requirements, but is a relatively insignificant part of a combined entity, the eligibility requirements will not be imposed with respect to a predecessor whose contribution to the successor accounts for less than 20% of the total assets and revenues of the successor.55

Further, the MJDS encourages U.S. issuers to extend rights offerings to their Canadian holders by reducing the cost of regu-

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52. Id. at 2899-900. The Policy Statement noted:
Non-convertible debt and preferred shares that are investment grade are particularly appropriate for the MJDS because these securities trade primarily on the basis of their yield and an assessment of creditworthiness by an independent rating organization. The lack of a substantiality requirement for offerings of these securities reflect this and allows the MJDS to be used by issuers of investment grade securities such as finance subsidiaries, that access the market frequently, but do not meet the market value and public float requirements.

53. The types of securities offerings which may be conducted in reliance upon the alternative eligibility criteria has been expanded from those set forth in the 1990 reproposal, to include offerings of debt or preferred securities of a subsidiary convertible, not solely into investment grade debt or preferred securities, but into any securities of a parent which meets the general eligibility criteria. Id. at 2904.

54. Id.; see also supra note 51 and accompanying text.

55. Policy Statement No. 45, supra note 3, at 2903-04; see also supra note 51 and accompanying text.
or which documentation is made.

Rights offerings are also limited to those which are exercisable immediately upon issuance and which are issued to Canadian holders on the same terms as they are issued to U.S. holders. Further, beneficial ownership of the rights offered under the MJDS is generally non-transferable within Canada to other Canadian residents. Registration as a dealer in Canada is not required by an issuer making a rights offering under the MJDS. Where the eligibility criteria for rights offerings have not been met, a rights offering may still be effected if the general eligibility criteria for prospectus offerings in the "other securities" category have been satisfied.

The mechanics of making an offering under the MJDS are relatively simple. An issuer which meets the MJDS eligibility re-

56. See supra note 48 (setting forth the reporting requirements).
57. There is no market value or public float test for issuers making rights offerings because "existing security holders can reasonably be expected to be familiar with the issuer and follow publicly available information concerning it." Policy Statement No. 45, supra note 3, at 2902.
58. Under the 1990 reproposal there were additional limitations on rights offerings such that "the rights must have been for the cash purchase of securities of the issuer, the rights must have had an exercise period of 90 days or less, and the exercise of the rights would not lead to an increase in the class of underlying securities or the amount of long term debt by more than 25%." Id. at 4601.
59. The MJDS states that "a standby underwriter or dealer manager for a rights offering made under the MJDS is not required to register as a dealer if it does not engage in soliciting activity in Canada or resell in Canada any securities acquired under the standby underwriting arrangement." See Policy Statement No. 45, supra note 3, at 2903.
60. Id. at 2901.
quirements would prepare and file a registration statement for the offering in the United States in accordance with U.S. disclosure requirements. The issuer would also prepare and file a related preliminary prospectus and prospectus for use in Canada with the additional Canadian requirements as set forth in the MJDS. The document filed in Canada can be a separate Canadian prospectus but can also be a “wrap-around” document containing the U.S. prospectus. It is important to note that the document filed in Canada may exclude any disclosure which is solely relevant to the U.S. offerees or purchasers.61 Issuers should note, however, that documents may, in certain circumstances, have to be translated into the French language if the offering is to be made in Quebec.62

Take-over and issuer bids under the MJDS can be extended into Canada and are generally exempt from additional compliance with Canadian requirements if: (1) the target is a U.S. corporation and the bid is subject to the U.S. tender offer requirements; (2) the bid is made to all holders of the class of securities in Canada and the United States; (3) the bid is made on the same terms and conditions as made to U.S. residents; and (4) less than 40% of each class of securities subject to the bid is held by persons or companies whose last address as shown on the books of the issuer is Canada.63 There is also a conclusive presumption which may satisfy the “less than 40%” Canadian holding requirement.64

61. Id. at 2906.
62. Id.
63. Id. at 2925-26.
64. Notice of National Policy Statement No. 45, 14 OSC Bull. 2844, 2848 (June 28, 1991). The presumption that the ownership of Canadian holders is less than 40% applies where either:

(i) a bid is made without the prior knowledge of the directors of the offeree issuer who are not insiders of the offeror or acting jointly or in concert with the offeror, or (ii) those directors are informed of the proposed bid and the offeror has a reasonable basis for concluding that the bid is being regarded as a hostile bid by a majority of those directors and the offeror lacks access to the relevant list of security holders of the offeree issuer. Under these circumstances the 40% eligibility requirement will be conclusively presumed to have been met unless the aggregate published trading volume on the Alberta, Montreal, Toronto and Vancouver exchanges and the Canadian Dealing Network Inc. exceeded the aggregate published trading volume on national securities exchanges in the United States and NASDAQ over the 12 month period prior to the bid, disclosure to the contrary has been made in the most recent annual report filed with the SEC prior to the bid, or the offeror has actual knowledge to the contrary.

Id.
The 1990 re-proposal had limited the use of the MJDS to bids where less than 20% of the class of securities subject to the bid was held by Canadian holders.65 The latter proposal was consistent with the then underlying policy that cross-border bids ought to be accommodated under the MJDS where there was to be a de minimus impact in the host country and the bid was being effected primarily in the home country. The final provisions as implemented in the system represent a shift in the underlying policy for inclusion of bids within the MJDS. The current provisions indicate an acceptance of the general comparability of U.S. and Canadian protections and disclosure requirements in respect of bids.66

The MJDS exempts eligible bids from the conduct requirements of Canadian securities laws, but requires that the document prepared in compliance with bid requirements in the United States (with certain additional information) be filed and delivered in Canada in satisfaction of Canadian requirements to file and deliver a bid or directors' "circular" and notice.67 In connection with the increase from 20% to 40% of the ceiling for Canadian ownership of the class of securities subject to a bid made under the MJDS, certain Canadian bid requirements must still be com-

65. Draft Policy Statement No. 43, supra note 37, at 4617. The re-proposal provided that the MJDS should be extended to take-over bids and issuer bids "primarily to encourage fair treatment of Canadian investors. When few securities are held by Canadian residents, there may be a disincentive to extend a bid to them if doing so would require compliance with additional Canadian regulatory requirements. The security holders who do not receive an offer may be relegated to choosing, without the disclosure and procedural safeguards available under either the Canadian or the U.S. regulatory scheme, whether to sell into the secondary market at less than the full bid price and incur additional transactional costs or to remain minority security holders subject to the possibility of being forced out of their equity position in a subsequent merger. Because the substantive protections and disclosure obligations of U.S. bid rules are comparable to those prescribed by securities law applicable in Canada, Canadian resident holders of securities of U.S. issuers should not be disadvantaged by the application of U.S. rather than Canadian rules." Id.

"The availability of the MJDS for bids for securities of U.S. issuers is intended to alter the offeror's cost-benefit analysis in favor of extending those bids to Canadian residents holding, in aggregate, relatively small numbers of securities. Duplicative regulations seems particularly inappropriate in circumstances where the impact on Canadian residents is incidental to the transaction. Provision already is made in the securities legislation of some Canadian provinces for exemptions from take-over bid and issuer bid requirements if the bid is for the securities of a foreign issuer, the bid is made in compliance with the laws of a recognized jurisdiction and the bid is made to relatively few holders in the province." Id.


67. Id. at 2927.
plied with. Canadian requirements concerning going-private transactions continue to apply, as well as certain requirements to disclose acquisitions of securities upon reaching a certain threshold of ownership or restricting further acquisitions once a certain threshold is met. In the case of bids where more than 20% of the class of securities subject to the bid are held in Canada, Canadian pre-bid integration requirements must be satisfied. Similarly, in the case of insider or issuer bids where the 20% threshold is exceeded, Canadian valuation requirements must be satisfied.58

The MJDS may only be used in the case of a securities exchange bid,69 where the offeror or other issuer is a U.S. corporation with a thirty-six month reporting history in the United States, and the issuer has a public float of not less than $75 million (U.S.) in the case of a take-over bid or the securities being offered are non-convertible investment grade debt or preferred securities.70

Business combinations71 were proposed for inclusion in the MJDS in later drafts of the system. Such transactions may now be conducted by prospectus under the MJDS "on the basis of documentation prepared in accordance with U.S. requirements (with certain additional Canadian disclosure) in connection with a business combination where less than 40%72 of the securities to be distributed by the successor issuer would be held of record by Canadian residents."73 In addition, the issue or exchange of se-

68. Id.
69. A "securities exchange bid" is defined in the Canadian policy as "a bid for which the consideration for the securities of the offeree issuer consists, in whole or in part, of securities of an offeror or other issuer." Id. at 2898.
70. Id. at 2925-36.
71. Including: statutory mergers, consolidations or similar plans or acquisitions which require a vote of security holders of a company in which securities of such or another company will be exchanged for securities of any other company. Id. at 2893.
72. In the 1990 reproposal the ceiling had been set at 20% which was raised in the final document for much the same reasons as the ceiling was raised in the bid context: it signifies a greater degree of comfort with the foreign securities regulation and administrative practices involved.
73. Policy Statement No. 45, supra note 3, at 2937. As in the case of take-over bids, the MJDS is available for business combinations primarily to encourage fair treatment of Canadian investors. The CSA stated:

Securities legislation of most of the Canadian provinces and territories provides for an exemption from prospectus requirements for certain distributions of securities issued in connection with a statutory amalgamation, merger or arrangement. As a result, an issuer may elect not to use the MJDS, but to distribute securities issued in a business combination pursuant to a prospectus exemption. . . . [U]nder blanket rulings issued in certain provinces, the resale of securities acquired under such an exemption is not a distribution in respect of which a prospectus is required if the issuer meets certain eligibility and reporting require-
SECURITIES in connection with the business combination must be made to Canadian residents on the same terms as made to U.S. residents and each participant in the business combination, other than participants constituting less than 20% of the successor issuer's total assets and income, must have a thirty-six month reporting history in the United States, a twelve month listing history on one of the specified U.S. exchanges and outstanding equity shares having a public float of $75 million (U.S.).

Of further interest to U.S. corporations contemplating use of the MJDS are the provisions of the MJDS which deal with continuous disclosure, proxy requirements, shareholder communication requirements and insider reporting. Generally, an issuer that files a prospectus or bid circular in Canada becomes a reporting issuer and is thereby subject to the continuous disclosure, proxy and shareholder communication requirements of each of the provinces and territories of Canada. Additionally, corporate insiders of such corporations become subject to Canadian insider reporting requirements. The MJDS states that U.S. issuers who comply with U.S. requirements relating to current reports, quarterly reports, annual reports, proxy statements, proxy and proxy solicitation requirements are in compliance with Canadian requirements for such information providing that any such documents are filed contemporaneously in Canada and such documents are provided to Canadian residents in the same manner and at the same time as provided to U.S. residents under U.S. law.

Canadian provisions which deal with advertising, distribution of materials to prospective purchasers and press releases apply to offerings made under the MJDS both prior to and during the "waiting period." However, the MJDS provides that, with certain limitations, solicitations of expressions of interest may be made during the

ments and the resale is executed through the facilities of a stock exchange outside of Canada or on [NASDAQ]. A business combination done under the MJDS must comply with the relevant requirements of applicable Canadian securities legislation relating to going private transactions and, if it constitutes a related party transaction, the relevant requirements of applicable Canadian securities legislation relating to minority approvals and valuations. All business combinations remain subject to the fundamental principle that transactions must not be prejudicial to the public interest. The applicable securities regulatory authorities also 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.

Id.

74. Id. at 2937-40.
75. Id. at 2941.
prior to the filing of a preliminary prospectus. Thus, U.S. issuers making offerings under the MJDS may benefit from special Canadian provisions that allow for the making of an offering on a "bought deal basis." 76

With the exception of British Columbia, Canadian trust indenture requirements and requirements for a Canadian resident trustee do not apply to offerings made under the MJDS where the trust indenture is subject to U.S. requirements and the trustee is authorized to do business within the province or territory or has executed and filed forms submitting to jurisdiction and appointing an agent for service of process in the jurisdiction(s) which require a domestic trustee. 77

C. The MJDS for Canadian Issuers

The MJDS as adopted by the SEC (U.S. MJDS) essentially "mirrors" the Canadian MJDS, but is for the use of Canadian issuers. 78 Thus, in order to register securities for an offering under the MJDS, a Canadian issuer will generally take the offering document prepared under Canadian law (i.e. prospectus or circular) and file it with the SEC along with a cover page, certain legends and various exhibits. 79 The SEC stated that, in its view, "permitting certain Canadian issuers to register securities under the MJDS using their home jurisdiction disclosure documents . . . is in the public interest and fully adequate for the protection of U.S. investors." 80 Except where the SEC has reason to believe there is a problem, they will not independently review the filings made under the MJDS by Canadian issuers but will rely on the review conducted in Canada. 81 A cross-border offering under the MJDS will become effective in the United States upon clearance by the Canadian authorities and filing with the SEC.

Under the U.S. MJDS, most of the specific Securities Act

76. Id. at 2907.
77. Id. at 2921.
78. See generally Release No. 6902, supra note 3.
79. Id. at 81,865. For example, discussion of tax consequences, foreign disclosure, and enforcement of U.S. civil liability must be included in legends provided by such documents. Id. at 81,877-81. Similarly, there must be included a discussion of any indemnification of officers or directors provisions which exist and which would not otherwise be filed in Canada. Id. In addition, a submission to jurisdiction and consent to service of process must be filed with the SEC. Id.
80. Id. at 81,865.
81. See id. at 81,877. The SEC and the CSA have, however, retained their discretionary authority to "stop order" or "cease trade" an offering where it is in the public interest to do so.
rules in respect to the preparation and the form of the prospectus do not apply; however, the U.S. MJDS clarifies that Securities Act rules regarding other aspects of the U.S. sale of securities generally continue to apply unless specifically exempted. For example, requirements for prospectus delivery would apply to MJDS offerings in the United States, as would safe harbor provisions relating to advertisements and other notices regarding MJDS offerings. In addition, U.S. civil liability and anti-fraud rules continue to apply as do state securities laws.

The U.S. MJDS is available to Canadian foreign private issuers and crown corporations, but not to issuers required to register as investment companies. Eligible issuers generally would be required to have a thirty-six month reporting history and be in compliance with Canadian reporting requirements at the time of filing. In order to encourage the use of the MJDS by

82. Id. at 81,872.
83. Foreign private issuers are defined to be non-governmental issuers incorporated outside of the United States unless more than 50% of the issuer's voting stock is held by U.S. residents and either the majority of the issuer's officers or directors are U.S. persons, more than 50% of the assets of the issuer are in the United States or the issuer's business is principally administered in the United States. For a discussion of the introduction of the Rule 405 definition of foreign private issuer into the U.S. MJDS see Securities Act Release No. 6879, supra note 35, at 81,114 ("The original proposal referred simply to Canadian issuers. The 'foreign private issuer' definition performs the function of determining when non-governmental issuers despite their incorporation or organization in a foreign country, ought to be viewed as U.S. issuers. Such issuers . . . must use the same forms as U.S. issuers for purposes of registration and reporting under the Securities Act and the Exchange Act."). It is important to note that in the adopting release the SEC stated that: "contrary to commenters' concerns, the business of a Canadian issuer that is a subsidiary of a U.S. company will not be deemed automatically to be "principally administered in the United States [and therefore not a foreign private issuer] . . . by virtue of the parent-subsidiary relationship. The determination of the location of administration of a business will be made in light of all the facts and circumstances in a particular case." Release No. 6902, supra note 3, at 81,865 n.19.
84. A "crown corporation" is defined in the U.S. MJDS as a corporation "all of whose common shares or comparable equity is owned directly or indirectly by the government of Canada or a province or territory of Canada." Release No. 6902, supra note 3, at 81,865. Because much of the use of the MJDS is premised on an issuer's ability to satisfy a public float requirement (an amount of securities held by non-affiliates) and since crown corporations are unable to satisfy such requirements because they are wholly-owned by a governmental body, the MJDS will be used by Crown corporations only for offerings of non-convertible investment grade debt or preferred securities.
85. In the case of certain transactions, including business combinations, rights offerings and exchange offers, issuers are also required to have been listed on certain Canadian exchanges. See infra notes 94, 95 & 99 and accompanying text.
86. Release No. 6902, supra note 3, at 81,867. As in the case of the Canadian MJDS, in certain circumstances an issuer which does not satisfy the issuer
Canadian crown corporations, such corporations (offering investment grade debt or preferred securities non-convertible for at least one year from the date of issuance) need only satisfy a twelve month reporting history. In addition, like the Canadian MJDS, the U.S. MJDS imposes transaction eligibility requirements. Form F-9 may be used for offerings of investment grade debt and preferred securities, while Form F-10 may be used for offerings of "other securities" including common shares.

As in the Canadian MJDS, issuers offering investment grade debt and preferred securities which have no conversion right need not satisfy the market value or public float tests which were originally part of the MJDS proposal, but need only satisfy the reporting history requirements. However, issuers offering investment grade debt and preferred securities which carry a conversion privilege such that the securities are convertible after one year from the date of issuance must additionally satisfy the originally proposed market value and public float tests. Similarly, "substantial issuers" with a thirty-six month reporting history eligibility requirements may nonetheless be able to use the MJDS where such an issuer is the subsidiary of a parent corporation which meets the requirements and where the parent guarantees the securities. See id. at 81,867-68.

87. Under the U.S. MJDS, the rating of investment grade must have been received by a Nationally Recognized Securities Rating Organization (an "NRSRO"). The Canadian rating organizations are currently not NRSROs; therefore, issuers must receive a rating from one of the U.S. rating organizations. In addition, the CSA has mandated that issuers also obtain a Canadian rating. For further discussion of the Canadian requirement, see supra note 49 and accompanying text.

88. See Release No. 6879, supra note 35. The SEC stated:
As originally proposed, an issuer of eligible investment grade securities would have been required to be incorporated or organized under the laws of Canada or any Canadian province or territory, have a total market value for its common stock of at least $180 million (CAD) and have a public float of $75 million (CAD). As noted by commenters [the original proposal] . . . would not have been available to captive finance subsidiaries, crown corporations and other wholly-owned subsidiaries due to their unique inability to meet the public float and market value tests. To avoid such a result, the eligibility requirements for Form F-9 in the repropose have been changed with respect to investment grade securities with no conversion right.

Id.

89. Release No. 6902, supra note 3, at 81,868.

90. See id. The SEC has provided that substantial, in the context of Form F-10, would include those issuers with a common stock market value of at least $360 million (CAD) and a public float of $75 million (CAD). Id. The calculation for determination of eligibility under the market value and public float requirements is based on the issuer's equity shares with the market value being calculated within 60 days of filing. Id. Initially the calculation was to have been determined based on the issuer's common stock and market value was to have
and which meet the greater market value and public float tests may offer any "other securities" under Form F-10. Special rules, paralleling the Canadian MJDS, govern the reporting history requirements for issuers subsisting after a business reorganization such that the successor includes each of the relevant predecessor issuers in calculating reporting periods.

Financial statements filed or incorporated by reference in respect of filings of investment grade debt or preferred securities under cover of Form F-9 need not be reconciled to U.S. GAAP. However, financial statements filed or incorporated by reference in respect of offerings made under cover of Form F-10 must be reconciled in accordance with Item 18 of Form 20-F. This requirement carries a "sunset" date of July 1, 1993. Filings made after July 1, 1991 "will not be subject to any requirement to reconcile the financial statements to U.S. GAAP, absent any future action by the [SEC] to the contrary."

The U.S. MJDS allows rights offerings to be extended by Canadian issuers into the United States by means of compliance and filing of Form F-7, where the issuer has a thirty-six month reporting history in Canada and has had a class of securities listed on the Montreal Exchange (ME), the Toronto Stock Exchange (TSE) or the Senior Board of the Vancouver Stock Exchange (VSE) for the twelve months prior to filing. Rights issued in connection with Form F-7 are limited in transferability to prohibit transfers to

been determined within 30 days of filing. See Release No. 6879, supra note 34, at 81,115.

In addition, it is important to note that "as originally proposed, banks registering securities on proposed Form F-10 would have been required to disclose additional industry-specific information prescribed by Securities Act Industry Guide 3. Upon further review of applicable Canadian law and reports by Canadian banks thereunder, it appears that sufficient disclosure would be required in Canada." Id. at 81,116. Under the reproposal and the adopting release there is no requirement for supplemental disclosure of any industry specific information from Guide 3. Id.

91. Release No. 6902, supra note 3, at 81,867. Derivative securities may not be offered under the MJDS except for certain warrants, options rights and convertible securities. Id. at 81,867 n.35. Securities offered under cover of Form F-10 may be offered for cash or in connection with an exchange offer or a business combination. Id. at 81,867.

92. See id.

93. See id. at 81,868.

94. Id. at 81,871. The reproposal had required that an eligible offer must not increase by more than 25% the number of the outstanding securities of the class of securities to be issued upon exercise of the rights if all rights issued as part of the same offering and within the last 12 months were exercised (and, if applicable, all such securities were converted). Id. This requirement was deleted as unnecessary for, and in some cases inconsistent with, the interests of U.S. investors. Id. The originally proposed 20% de minimus threshold relating
U.S. residents, but resales of such rights outside of the United States in accordance with Rule 904 of Regulation S are permitted.

Under the U.S. MJDS, Forms F-8 and F-80 are available for exchange offers for a Canadian issuer’s securities in which the securities being registered are all or a portion of the consideration offered (Forms F-9 or F-10 may also be used where the eligibility requirements of those forms have been satisfied). Registrants on Form F-8 or Form F-80 must have a public float of at least $75 million (CAD) (other than in the case of issuer exchange offers), must have a thirty-six month reporting history and must have had a class of securities listed on the ME, TSE or VSE for the twelve months prior to filing. In addition, for use of Form F-8 less than 25% of the class of securities subject to the bid may be held by U.S. holders and under Form F-80 there must be less than 40% held by U.S. holders. A conclusive presumption as to the percentage of U.S. holders is provided in the case of third-party exchange offers unless there is knowledge to the contrary. The MJDS further stipulates that the offeror must offer the securities under not less favorable terms to U.S. holders than as offered to Canadian holders.

Under the system, third-party and issuer tender offer or exchange offer filings made in connection with offers made in both jurisdictions for a class of securities of a Canadian issuer would be able to proceed in the United States in compliance with U.S. requirements concerning such transactions on the basis of compliance with Canadian rules and regulations. The target must be a Canadian issuer and less than 40% of the relevant class of securities of the Canadian issuer may be held of record by U.S. residents. In addition, the offer must be extended to all holders of

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95. Id. at 81,869.

96. Id. Thus the presumption that the threshold has not been exceeded is effective unless: (1) the most recent annual report filed in either jurisdiction indicates that more than the threshold amount of U.S. holders hold the relevant securities, (2) data as to trading volumes indicates that more of the relevant securities were traded in Canada than in the United States, or (3) the offeror has actual knowledge that the threshold has been exceeded. See id.

97. The calculation method caused regulators some concern because of the difficulty or impossibility associated with accessing the relevant information. The regulators were sensitive to this issue and the reproposal and adopting release therefore create a safe harbor, as in the case of other exchange offers, for “hostile” bids such that third party bidders will be afforded the benefit of a presumption that U.S. ownership is within the threshold amount, unless filings with either regulator indicate that more than the threshold amount is held by U.S. holders, the aggregate trading volume of the relevant class in the U.S. markets.
the class of securities in the United States and Canada and the transaction must be subject to and not exempt from substantive provisions of Canadian law governing the terms and conditions of the offer.98

Where securities are part of the consideration in the case of a business combination, such securities may be registered on Form F-8, F-80 or F-10 (where the market value and public float requirements have been satisfied) and the SEC has acknowledged that it will recognize the adequacy of Canadian disclosure contained in the information circular provided in such transactions.99 An offering made under the MJDS in connection with a business combination must be made on terms no less favorable to the U.S. holders of a class than to the Canadian holders of the same class. The eligibility criteria for use of Form F-8 in the case of business combinations are similar to exchange offer requirements: each significant participant must have a thirty-six month reporting history, a twelve month listing with the TSE, ME or the VSE and a public float of at least $75 million (CAD).100

As a result of the negotiations involved in the MJDS, the SEC has re-examined the registration and reporting requirements for all Canadian issuers—not just those offering under the MJDS. Previous to the changes contained in the adopting release for the MJDS, certain Canadian issuers were precluded from use of the special forms used by “foreign issuers” and were required to use the reporting and registration forms used by U.S. domestic issuers. This was because of the perceived interrelationship and geo-

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99. In Canada, in the case of business combinations, an exemption is generally granted from the prospectus requirements under Canadian securities regulation and disclosure takes the form of an information circular. Historically, the information circular requirements do not mandate specific financial disclosure but state that the transaction be sufficiently described so as to allow shareholders to make a reasoned judgment and further make reference to the prospectus form for guidance as to what should be included. The requirements in Ontario have been changed to require prospectus-level disclosure in the information circular used in the case of business combinations and the provisions relating to business combinations in the U.S. MJDS are premised upon those changes having been made. The other Canadian regulators are expected to follow, in the near future, in requiring more fulsome disclosure.
100. Release No. 6902, supra note 37, at 81,870. As in the Canadian MJDS, special rules exist for participants who would contribute less than 20% of the aggregate of the assets and revenues of the combined entity. Id. Certain additional variations to the requirements exist in the case of second-step business combinations. Id. at 81,871.
graphic proximity of the two capital markets, which perception has been reevaluated. Thus, all Canadian issuers may now use the F series of documents, including Form 20-F, and all Canadian foreign private issuers are exempt from SEC proxy rules, share ownership reporting requirements and short-swing profit recapture rules. In addition, certain accommodations have been granted to issuers who become reporting issuers in the United States as a result of an MJDS offering. The detail of these provisions is beyond the scope of this paper, but: "[i]n general . . . Canadian companies that use the MJDS to offer securities in the U.S. are, in most circumstances, able to use Canadian continuous disclosure filings to satisfy the resulting U.S. requirements. In addition, 'substantial' Canadian issuers that currently file non-MJDS continuous disclosures in the U.S. (e.g. Form 10-Ks or Form 20-Fs) may switch to filing Canadian disclosure documents."103

In addition to cross-border offerings, the MJDS allows Canadian issuers to make offerings solely in the United States. Such U.S.-only offerings may be selected for review by the securities regulatory authority in the Canadian jurisdiction.104

In conjunction with the implementation of the MJDS certain exemptions were obtained under the Trust Indenture Act of 1939 in order to facilitate debt offerings conducted under the MJDS. Under the exemptions, certain Canadian trust indentures and trustees may be used in satisfaction of U.S. requirements.105

The Canadian bond rating agencies are currently applying for recognition as nationally recognized statistical rating organizations by the SEC. Because of concerns for reciprocity and concerns for the Canadian capital markets and their participants, the CSA has determined that, at least for the first year after imple-

101. See id. at 81,881-82.
102. See id. at 81,882.
105. Trust indentures subject to the Canada Business Corporations Act, R.S.C. 1985 c. C-44, the Business Corporations Act, 1982 (Ontario), R.S.O. 1982 or the Bank Act, R.S.C. 1985 c. B-1 are exempt from most U.S. trust indenture provisions. Similarly, Canadian trust companies subject to the Trust Companies Act or the Canada Deposit Insurance Act may act as sole indenture trustee in satisfaction of U.S. trustee requirements. These exemptions do not apply to trustees incorporated and regulated under British Columbia law or an issuer incorporated in British Columbia because of concerns which the SEC had about reciprocity. Under current British Columbia requirements, no exemptions can be given in respect of U.S. trustees or U.S. indentures.
Internationalization of Securities Regulation

The practical impact of the MJDS in encouraging cross-border transactions remains to be seen. The MJDS should favorably impact on an issuer's cost-benefit analysis in terms of whether to extend an offering abroad, since the MJDS should ease the process in effecting cross-border transactions thereby reducing costs and facilitating such transactions; however, because the current market seems to be focused on private offerings, it may remain of limited use until such time as the climate for public offerings makes cross-border offerings more attractive. In addition, liability concerns and GAAP reconciliation (for certain Canadian issuer offerings) may pose a deterrent to the use of the MJDS.

Only two offerings have been made under the MJDS at the time of writing this article. The views of market participants seem to be varied as to the impact that the MJDS may have, although most concur that use of the MJDS will start slowly until issuers, underwriters and counsel have had an opportunity to become familiar with the system. The continuous disclosure provisions, both in respect of issuers using the MJDS, but perhaps more significantly with respect to other issuers, represent a significant modification of SEC policy in dealing with Canadian issuers, which should impact on Canadian issuers who access the U.S. markets.

Moody's Investors Services (Moody's) canvassed several issuers and found that those market participants believe that the MJDS may be used more by Canadian issuers tapping the U.S.

106. Policy Statement No. 45, supra note 3, at 2943.
107. See Dannis & Poling, supra note 103 and accompanying text. Some issuers and counsel are concerned about what they perceive as differing standards of "materiality" in Canada and the United States. Id. However, some Canadian courts and the OSC have looked to U.S. case law in helping them determine whether a particular fact was material. See, e.g., Sparling v. Royal Trustco Ltd. (1984), 45 O.R.2d 484; In re Standard Broadcasting Corp., 8 OSC BULL. 3672 (Sept. 13, 1985). This indicates a high degree of harmonization between the two jurisdictions on this point.
108. Noranda Forest Inc. filed a rights offering under cover of Form F-7 on July 18, 1991 and Rogers Communications Inc. filed an offering of Liquid Yield Option Notes ("LYONs") under cover of Form F-10.
109. See supra notes 101-03 and accompanying text.
markets than U.S. issuers tapping the Canadian markets.\footnote{110} Nevertheless, smaller U.S. and Canadian issuers who may not otherwise have thought of turning to the foreign capital markets may, if the process becomes sufficiently manageable, add a foreign tranche to an otherwise domestic offering. Moody's further noted that several large Canadian corporate issuers indicated that, for marketing reasons, they intend to continue using U.S. disclosure documents and reconciling to U.S. GAAP until they can gauge the U.S. public's reaction to Canadian disclosure and disclosure documents.\footnote{111}

Certain Canadian bank-owned dealers have expressed concerns and have criticized the introduction of the MJDS at this time. Most prominent amongst their concerns is the fact that these dealers are currently subject to U.S. prohibitions under the U.S. Glass-Steagall Act\footnote{112} which limit the dollar volume of their U.S. underwriting activities. The bank-owned dealers are particularly concerned with the impact that the MJDS will have on their equity underwriting business. In light of these criticisms, the CSA and the SEC have agreed to provide a "safety valve" in the MJDS. The Canadian regulators will continue to monitor the effects of the MJDS on the Canadian dealer community, will continue to solicit input from the dealers and may hold hearings on the matter within a two year period. Both the Canadian and U.S. regulators have committed themselves to re-opening the comment period with a view to structuring changes to the MJDS, if such hearings were to demonstrate that there is a material adverse effect on the Canadian dealers.\footnote{113}

Of great significance is the fact that the MJDS is the first truly multilateral response to internationalization of the securities markets and in this light, it is not solely the culmination of the effort expended in its implementation, but should be viewed as a significant first step towards greater internationalization of securities regulation. Moreover, the implementation of the MJDS is important because it has resulted in the significant harmonization of a substantial segment of securities regulation between two sover-


\footnote{111} Id. at 4.


\footnote{113} Notice of National Policy Statement No. 45, 14 OSC BULL. 2844, 2850 (June 28, 1991).
The MJDS rests on the substantial effort on the part of the securities regulators in both Canada and the United States in learning and understanding each other's system. Through this effort, the securities regulators of Canada and the United States have had the opportunity to study a different system of securities regulation and to appreciate the foreign system as a whole and within a particular context rather than in an isolated or piecemeal fashion. This process of negotiation and study involved in producing the MJDS has, in turn, allowed securities regulators to rediscover and reconsider their home-country regulation.

In Canada, the study and process involved in producing the MJDS has led to: the introduction of a national shelf system of prospectus filings; the extension of the integrated disclosure system for issues of the fourth category of investment grade debt; the modification of the regulations concerning business combinations; and the modification of and/or thorough examination of existing disclosure requirements, including those mandating disclosure of executive compensation.

In the United States, the process of internationalization has led to changes in continuous disclosure and proxy requirements for all Canadian companies (even those not offering under the MJDS), changes in tender offer regulation for all foreign companies and a number of revisions in the market regulation area concerning foreign institutions and issuers. These changes, both in the United States and Canada represent a substantial first step toward the integration and harmonization of securities regulation and a great undertaking on the part of both countries' regulators.

Preliminary study has already begun concerning the introduction of the United Kingdom as a participant in the multijurisdictional disclosure system. Undoubtedly, the introduction of a third country with its own legal and business context and practice in the area of securities regulation will result in even further strides being taken toward mutual recognition and integration of our respective systems.