This Guide is intended only as a general discussion of the issues discussed herein. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For more information on the topics covered in this Guide, please contact:

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I. CONDUCTING A U.S. PUBLIC OFFERING

Canadian companies offering securities to the public in the United States must register the offer and sale of the securities under the Securities Act of 1933 (the ‘‘Securities Act’’). The Securities Act registration process is roughly the equivalent of qualifying a prospectus in Canada. The Securities Act requires full and fair disclosure about the public offering and the business and financial condition of the issuer. To register a public offering, the issuer must file a registration statement with the U.S. Securities and Exchange Commission (the ‘‘SEC’’). The principal part of a registration statement is a prospectus for the offer and sale of the securities. Generally, no offers of securities, or related marketing activities, can take place until a registration statement has been filed with the SEC and no sales can be made until the registration statement is declared effective.

Registration statements must comply with U.S. standards of disclosure. The substance of a registration statement is subject to review and comment by the SEC before being declared effective. However, large and seasoned Canadian issuers may qualify for the Multijurisdictional Disclosure System (‘‘MJDS’’). Registration statements under MJDS are subject to review by the applicable Canadian securities regulatory authority, not the SEC, and are required to comply primarily with Canadian disclosure standards. As a result, an offering under MJDS ordinarily proceeds much more quickly (driven by the Canadian regulatory process) than a typical U.S. offering. MJDS is more fully described in Section 4 below, and differs from the process described in Sections 1 and 3 below.

1. The SEC Review Process

When an issuer files a registration statement, the SEC determines if the filing will be subject to review. The registration statements of first-time entrants to the U.S. market will be subject to a full SEC review. Filings subject to review are assigned two primary examiners, one an attorney and the other an accountant. Generally, the first comment letter, which will include both legal and accounting comments, is issued within 30 days from the date of the initial filing.

After the issuer receives a comment letter from the SEC, the issuer’s attorneys and accountants will help prepare a response. In most cases, the responses are contained in a letter to the SEC, with corresponding amendments to the registration statement. The SEC will issue subsequent comment letters, typically within two weeks after the filing of an amendment to the registration statement. U.S. underwriters are reluctant to print preliminary prospectuses and commence marketing until all substantive SEC comments have been resolved because substantial changes to the prospectus contained in the registration statement could require the deal to be re-marketed.

The SEC review process is likely to take at least 45 to 60 days. It may take longer if there are unique disclosure or accounting questions such as
accounting treatment for an acquisition. Once the SEC’s comments have been resolved and marketing is substantially completed, the issuer will request the SEC to declare the registration statement effective.

A registration statement of an issuer that recently has been subject to an SEC review may not be reviewed by the SEC. However, the SEC has the right to review every registration statement and issuers generally should plan for a full review.

2. The Significance of Foreign Private Issuer Status

Most Canadian companies are “foreign private issuers”, as defined in Rule 405 under the Securities Act. Foreign private issuers are subject to different disclosure requirements in their registration statements and ongoing reports as compared to U.S. domestic issuers. In addition, foreign private issuers are not subject to the U.S. proxy rules, the insider trading reporting requirements or liability for “short-swing” profits under the Securities Exchange Act of 1934 (the “Exchange Act”).

Foreign private issuers are defined as non-U.S. issuers except issuers meeting the following criteria:

(1) more than 50% of the issuer’s outstanding voting securities are owned by U.S. residents; and

(2) any one of the following:
   • the majority of the issuer’s executive officers or directors are U.S. citizens or residents; or
   • more than 50% of the issuer’s assets are located in the United States; or
   • the issuer’s business is administered principally in the United States.

3. Foreign Private Issuers’ Registration Statements

Foreign private issuers that are new or recent entrants to the U.S. public market generally must register offerings on a Form F-1 registration statement. This form requires significant disclosure, similar to a long-form Canadian prospectus, and does not permit information to be incorporated by reference. Required disclosure includes risk factors, extensive detail about the business of the issuer, five years of selected financial data, three years of historical audited financial statements, management’s discussion and analysis (“MD&A”), use of proceeds, biographies and compensation of officers and directors, including securities owned and options held, related party transactions and a description of the underwriting arrangements.

Issuers with a float held by non-affiliates of at least U.S.$75 million and a one-year reporting history with the SEC may use Form F-3 to offer and sell
securities. Form F-3 is a short-form registration statement suitable for seasoned issuers. Substantially less information must be included in Form F-3 as compared to Form F-1 because Form F-3 allows an issuer to incorporate by reference its most recent periodic reports filed with the SEC. Majority-owned subsidiaries of a Form F-3 eligible issuer may also use Form F-3 to register a primary offering of non-convertible investment-grade securities or non-convertible securities guaranteed by the parent.

**Plain English**

The SEC’s “plain English” rules apply to registration statements on Forms F-1 and F-3. These rules require prospectuses to be written in an active voice using short sentences and everyday language. Defined terms should be used sparingly and complex information should be presented in tables or bullet point lists.

**Financial Statements**

Audited financial statements included or incorporated by reference in a registration statement must be reconciled to U.S. GAAP and must be audited in accordance with U.S. generally accepted auditing standards (U.S. GAAS). Foreign issuers reconcile their financial statements pursuant to Item 17 or 18 of Form 20-F. An Item 17 reconciliation must include a narrative description of material variations in the accounting treatment, a reconciliation of net income (in tabular form) and a reconciliation of material variations in balance sheet and cash flow statement line items, but does not require inclusion of other information required under U.S. GAAP. An Item 18 reconciliation must include all other information under U.S. GAAP and Regulation S-X (the primary regulation governing the presentation of financial statements in SEC filings), including full segment information and pension data. The U.S. GAAP reconciliation included in a registration statement usually must follow Item 18 of Form 20-F, except in the case of investment grade securities.

The most recent audited balance sheet in the registration statement may not be older than fifteen months at the time the registration statement becomes effective (twelve months for initial public offerings). Six months of interim financial statements are required in a registration statement dated more than nine months after the end of the fiscal year. Additionally, if the issuer distributes to the public in its home jurisdiction interim financial information more current than described above, such information must also be included in the registration statement. Interim financial statements required to be included must be reconciled to U.S. GAAP. Aside from these technical requirements, the underwriters will have a view on what financials need to be included in the registration statement to effectively market the offering. Underwriters typically will require a review of the interim financials by the issuer’s auditors and will request a “comfort letter” from the auditors, as part of the underwriters’ due diligence investigation, upon pricing and upon closing of the offering.
Registration statements also need to include the financial statements of any significant businesses that have been acquired or whose acquisition is probable. The term “probable” is not defined in the SEC’s rules and must be evaluated on a case-by-case basis. The periods for which financial statements of an acquired business are required depends on the size of the issuer’s investment in the acquired business relative to the size of the issuer, as determined by one of a number of specified measures. The acquired business’ financial statements must be reconciled to U.S. GAAP in accordance with Item 17 of Form 20-F.

Pro forma financial information must be presented if the financial statements of an acquired business are included or if the issuer has disposed of a significant portion of a business (or such disposition is probable). The pro forma financial information must include a balance sheet and income statement, including a U.S. GAAP reconciliation, for the most recent fiscal year and interim periods, to the extent the transaction is not already reflected in the statements for the entire period.

- Due Diligence and Disclosure

Pursuant to Rule 10b-5 under the Exchange Act, it is unlawful, in connection with the purchase or sale of a security, to make any untrue statement of a material fact or omit any material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. Material information is information that a reasonable investor would consider important in making an investment decision or that alters the total mix of information available in the market. In addition, if a registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits a material fact necessary to make the statements therein not misleading, Section 11 of the Securities Act imposes civil liability on the issuer, its directors, the underwriters, the officers who signed the registration statement and any experts, such as accountants or engineers. Defendants other than the issuer may avoid Section 11 liability by invoking a “due diligence” defense, if they can show they conducted a reasonable investigation and had reasonable grounds to believe there were no material misstatements or omissions in the prospectus. U.S. underwriters and their counsel will want to conduct legal and business due diligence in connection with the offering in order to establish this due diligence defense. U.S. underwriters ordinarily expect to receive a disclosure opinion from both U.S. and Canadian counsel at the closing of an offering relating to the absence of material misstatements or omissions in the prospectus.
Frequently Asked Question

As part of a public offering, will the SEC or the public have access to a company’s material contracts?

Issuers are generally required to publicly file non-ordinary course material agreements as exhibits to a registration statement on Form F-1 or F-3. These agreements often contain sensitive, competitive or other proprietary information for which an issuer may request confidential treatment. However, the SEC grants confidential treatment reluctantly and only for specific items such as pricing information, technical specifications and the term of the agreement.

4. The Multijurisdictional Disclosure System

Under MJDS, seasoned Canadian issuers can make public offerings in the United States using a Canadian prospectus not subject to SEC review. This is because MJDS recognizes the Canadian review process and disclosure standards as sufficient for the protection of U.S. investors. However, certain additional disclosures will have to be added to MJDS prospectuses to comply with rules promulgated pursuant to the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”). For example, most prospectuses will have to include a reconciliation of any non-GAAP financial measures to the most comparable GAAP measure.

There are two requirements for any public offering under MJDS:

- the issuer must be a foreign private issuer or crown corporation, incorporated or organized under Canadian law; and
- the issuer must have been subject to Canadian reporting requirements for at least twelve months immediately preceding the MJDS filing (thirty-six months for exchange offers and business combinations on Form F-8 or F-80 and rights offerings on Form F-7).

In addition to these two requirements, there are additional requirements specific to each type of MJDS transaction.

- Form F-10 (Any Security)

A registration statement on Form F-10 can be used for any type of offering except an offering of derivative securities. Under MJDS, the term “derivative security” does not include warrants, options, rights or convertible securities if the underlying securities are those of the issuer, its parent or an affiliate of either. Form F-10 requires that the issuer have a public float of at least U.S.$75 million. The shares of any person who owns or controls more than 10% of an issuer’s equity shares are excluded from the public float calculation. The issuer’s financial statements must be reconciled to U.S. GAAP in accordance
with Item 18 of Form 20-F. Any acquired business’ financial statements must be reconciled to U.S. GAAP in accordance with Item 17.

- **Form F-9 (Investment Grade Debt and Investment Grade Preferred Stock)**

  A registration statement on Form F-9 can be used for offerings of investment grade securities. The securities may be convertible after one year if the issuer has a public float of at least U.S.$75 million. There is no public float test for non-convertible securities offerings. Form F-9 is also available to a majority-owned Canadian subsidiary if its parent is eligible for Form F-9 and provides a guarantee. Form F-9 does not require a U.S. GAAP reconciliation of any financial statements.

- **Forms F-8 and F-80 (Exchange Offers and Business Combinations)**

  Registration statements on Forms F-8 and F-80 may be used for exchange offers or business combinations if the issuer or acquiror and the target are Canadian companies and U.S. holders account for less than a specified percentage of the securities being sought in the exchange offer or the securities of the newly formed entity in a business combination (40% for Form F-80 and 25% for Form F-8). The issuer (and, in the case of a business combination, each other significant participant) must have been listed on the Toronto Stock Exchange (the “TSX”) for at least twelve months and must have a public float of at least Cdn.$75 million. Forms F-8 and F-80 do not require a U.S. GAAP reconciliation of any financial statements. If Form F-8 or F-80 is unavailable, securities offered in an exchange offer may instead be registered on Form F-10 or F-9, subject to the eligibility requirements of those forms.

- **Form F-7 (Rights Offerings)**

  A registration statement on Form F-7 is available for rights offered proportionately to existing security holders. The issuer must have been listed on the TSX for at least twelve months. Form F-7 does not require a U.S. GAAP reconciliation of any financial statements.

- **Marketing and Liability**

  Although the prospectus included in an MJDS registration statement is prepared in accordance with Canadian disclosure standards, U.S. marketing and liability issues will impact its content. Therefore, U.S. underwriters and their counsel should be involved in drafting the prospectus at an early stage. Marketing considerations may lead to the inclusion of additional or more detailed information in the prospectus than is required under Canadian law in order to satisfy the expectations of U.S. investors. For example, U.S. underwriters for a Canadian issuer eligible to use a “short form” prospectus in Canada may request the inclusion of a more detailed description of the issuer’s business and selected financial information if the issuer is not well known in the United States. Because they are consistent with the issuer’s
existing public record, these inclusions to the Canadian prospectus typically have not affected the nature or duration of the review by Canadian regulators.

Offerings on MJDS registration statement forms are subject to the civil liability and antifraud provisions of the U.S. securities laws. The MJDS prospectus must therefore include, in addition to the information expressly required by the applicable form or Canadian disclosure requirements, all such further material information as may be necessary to make the required statements not misleading.

Frequently Asked Question

Do the SEC’s plain English rules apply to MJDS prospectuses?
The SEC’s plain English rules do not apply to MJDS prospectuses. However, U.S. underwriters often prefer MJDS prospectuses to be as similar as possible to U.S.-style prospectuses and may, for marketing reasons, encourage issuers to draft their prospectuses in plain English.

Potential Changes to MJDS

In 1999, informal discussions with the SEC indicated that the SEC intended to either eliminate or amend MJDS. Since that time, the SEC has not made any formal announcement as to its intentions with regard to MJDS. At the date of printing, we are not aware of any forthcoming rule proposals that would eliminate or amend MJDS. However, we do expect that the SEC will eventually propose rule changes to MJDS. If changes to MJDS are proposed, we expect that they may include:

- elimination of Form 40-F for annual reports and Exchange Act registration, which would require that Canadian issuers use Form 20-F, the annual report form used by foreign private issuers, which contains more detailed disclosure requirements beyond Canadian annual information forms and is subject to review by the SEC (Forms 20-F and 40-F are discussed in Chapter III below); and

- increasing the public float eligibility threshold to U.S.$250 million from U.S.$75 million.

If changes to MJDS are made, we expect that there will be a “transition period” to allow MJDS issuers time to comply with a revised reporting regime.

A more detailed discussion of financing opportunities for Canadian issuers under MJDS can be found in our publication, available upon request, entitled U.S. Financing Opportunities Under the Canada-U.S. Multijurisdictional Disclosure System: A Practical Guide for Canadian Issuers.
5. Shelf Registration

Shelf registration allows an issuer to use a single registration statement to register future offerings of a variety of securities. One of the major advantages of the shelf registration system is the ability to publicly offer securities in a very short period of time. Instead of filing a registration statement and facing SEC review at the time of an offering, a shelf registration statement is filed, reviewed and declared effective in advance and the issuer can do a “takedown” offering at any time without further SEC review. Canadian issuers may use Form F-3 for a shelf registration which, as described above, is a short-form registration statement that permits incorporation by reference of disclosure from reports already on file with the SEC. The shelf registration statement is updated automatically by periodic filings that are incorporated by reference into the registration statement. MJDS issuers may use Form F-9 or F-10 for their shelf registrations. MJDS shelf offerings are subject to the Canadian shelf prospectus offering procedures and rules, including the rules for unallocated shelf prospectuses. Companies may combine a universal shelf in the United States with an unallocated shelf prospectus in Canada in order to offer equity or debt securities quickly in both markets.

- Types of Securities Registered

Shelf registration statements typically have a very general description of securities to permit offerings of different types of debt and equity. For example, an issuer may choose to register future offerings of debt securities, convertible debt securities, preferred shares, common shares and warrants. The issuer need not allocate offering amounts among these classes of securities. Although the issuer might have no intention at the time it registers these securities of issuing a particular type, there are advantages to registering a variety of securities, including the flexibility to take advantage of future market conditions favoring a particular security. In addition, if the issuer anticipates issuing common shares in the future, it is often advisable to register debt securities using the same shelf registration statement so that shareholders are less likely to sell their stock in anticipation of future dilution (an effect known as “market overhang”).

The shelf registration statement may cover as many securities as the issuer reasonably expects will be offered and sold within two years. The expiration of the two-year period will not terminate the registration of unsold securities in the United States, although we understand that an MJDS shelf must be renewed every two years in accordance with Canadian securities laws.

- Contents of the Shelf Prospectus

The prospectus filed as part of the shelf registration statement on Form F-3, F-9 or F-10 is called the “base prospectus”. The base prospectus provides the prospective investor with basic information that is unlikely to change from deal to deal, and is drafted to provide maximum flexibility to issue a broad range of securities. The base prospectus contains a description of the business and
financial condition of the issuer, usually through the incorporation by reference of its periodic reports. The base prospectus also includes a description of each type of security that may be offered.

The issuer files the shelf registration statement including the base prospectus with the regulatory authorities and, once it is declared effective, the issuer is in a position to offer and sell its securities using a prospectus supplement when market conditions appear favorable.

Unlike the prospectus in a non-shelf transaction, a base prospectus does not contain specific information on the price or the terms of any particular security. Information on the amount of securities to be sold, the price, the specific terms of the offered security (such as redemption, sinking fund payments, interest rate, maturity and denominations for debt securities) and the specific plan of distribution (including underwriters and amounts purchased) will be provided to investors in a prospectus supplement at the time of an offering.

- **Timing in Shelf Offerings and Due Diligence**

An issuer’s ability to do a takedown quickly may be delayed by the due diligence process that must be undertaken by the underwriters and counsel. Although issuer’s counsel may be up-to-date in its diligence, underwriters’ counsel will likely need to conduct an extensive investigation (or, at the very least, a “bring down” of the due diligence since any prior offering). It is therefore advisable for an issuer to designate underwriters’ counsel at the outset of filing a shelf registration statement. The designated law firm can then become familiar with the issuer and be in a position to deliver a disclosure opinion to the underwriters on an expedited basis at the time of an offering.

### Frequently Asked Question

**How does an issuer update its shelf registration statement?**

An issuer must keep the information in its shelf registration statement current. The issuer will be required to (1) include updated financial statements, (2) reflect new material developments or fundamental changes and (3) include any new material information with respect to the plan of distribution. An issuer meets these requirements by relying on its public filings, which are incorporated by reference into the shelf registration statement, or by filing a post-effective amendment to the shelf registration statement.

### 6. Publicity in Connection with a U.S. Public Offering

One of the basic principles of U.S. securities law is that investors should rely only on the prospectus filed with the SEC in deciding whether or not to invest in the offered securities. Accordingly, there are significant restrictions on publicity,
whether by the issuer, underwriters or others in connection with public offerings of securities. Publicity outside the United States is also restricted because of its potential to “condition” the U.S. market.

- **Publicity During the “Quiet Period” and “Waiting Period”**

Starting a selling effort prior to filing a registration statement (the “quiet period”) is known as “gun-jumping” and is prohibited by the Securities Act. It is unlawful for any person to offer to sell a security unless a registration statement has been filed with the SEC. The phrase “offer to sell” is interpreted very broadly and includes any communication that could condition the market or arouse public interest in a company’s securities. Before filing, there should be no communications by offering participants in print, public speeches, press releases, web announcements, investor conferences, analyst meetings or otherwise related to the offering or that could be construed as conditioning the market in the United States. Ordinary course communications, consistent with past practice, about products or services or other factual business or financial developments should not be problematic, and companies should continue to release their ongoing disclosure reports. However, the SEC has warned that communications that include forecasts, projections or predictions relating to, among other things, revenue, income or earnings are likely to be considered market conditioning.

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**Frequently Asked Question**

**When does the “quiet period” start?**

The quiet period generally begins at the time of the organizational meeting, but may begin even sooner depending on the circumstances. If there is an understanding that the issuer intends to do an offering, it should consider itself “in registration” and the quiet period has started. During the quiet period, offers and sales of securities, or any selling efforts that create interest in the securities, are prohibited.

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The Securities Act provides a safe harbor under Rule 135c that allows limited announcements of proposed public offerings prior to filing a registration statement. Such announcements will not constitute gun-jumping if they state that the offering will be made only by means of a prospectus and contain certain other limited information, such as the title, amount and basic terms of the securities and the purpose and timing of the offering, without naming the underwriters.

After a registration statement has been filed but before it is effective (the “waiting period”), no written offering materials other than the prospectus on file with the SEC may be used to offer the securities. Radio, television and website communications that could be construed as offering the securities are prohibited. Oral solicitations are subject to the antifraud provisions of the
U.S. securities laws and must be consistent in substance and tone with the prospectus.

Rule 134 under the Securities Act is a safe harbor that permits press releases after filing the registration statement. Such press releases may contain slightly more information than Rule 135c press releases, including a brief description of the company’s business and the identity of the managing underwriters. Typically, a press release complying with Rule 134 will be issued immediately after the initial public filing of the registration statement.

Rule 135e under the Securities Act is a safe harbor that permits foreign private issuers to release communications outside the United States during the waiting period and quiet period, as long as the required legends are included in the press releases and the offering is not being conducted solely in the United States.

- **Website Communications**

  During a securities offering, information on a company’s website must be consistent with the legal requirements discussed above. Website information is treated by the SEC as written communications. Therefore, any such communication is subject to the same limitations during a public offering as any other written communication. During the course of a public offering, issuers should monitor their websites diligently to ensure the contents do not become stale.

  It is important to adopt procedures to ensure that no information conditioning the market for the company’s securities is disseminated over the company’s website. As a guideline, a company should forego establishing a new website or materially expanding the scope of an existing website during an offering and limit any discussion of the offering on the website to communications permitted by the safe harbors discussed above. In addition, hyperlinking should be avoided because information hyperlinked with a prospectus may be considered part of the prospectus, upon which there is liability.

- **Consequences of Improper Publicity**

  The consequences of a breach of the U.S. publicity restrictions could be disruptive to the timetable of an offering. The SEC might require a “cooling-off” period or require that the content of the impermissible public statements be included in the prospectus, subjecting the offering participants to liability for those statements.

  In addition, U.S. investors may sue for violations of the foregoing publicity restrictions. Investors may rescind the transaction or obtain damages for one year following the sale. They do not have to show that the information that constituted the violation was misleading or inaccurate. In effect, a violation of the publicity rules gives investors a right to sell back the securities at the initial offering price, and potentially subjects the company, selling shareholders and
underwriters to the market price risk of the securities for a year. A purchaser may also be able to sue under the antifraud provisions of the Securities Act on the ground that the statements made in the improper communications were materially misleading or omitted material facts. Finally, there always exists the possibility that the SEC will impose sanctions, including penalties, fines and injunctions.

7. State Securities Laws; NASD Review; Broker-Dealer Issues

- Blue Sky Laws

Canadian issuers offering securities in the United States are subject to state securities laws in the jurisdictions where offers and sales are made. These laws provide for registration with state securities authorities and substantive review by those authorities. Typically, a registration statement filed with the SEC satisfies state filing requirements as well, but does not preclude state review of disclosure and the imposition of additional substantive standards, unless an exemption from state registration is available. The most common exemption is for sales of securities, or securities ranking equal to or senior to a class of securities, listed on the NYSE or AMEX or quoted on Nasdaq. Issuers contemplating an MJDS offering should consult with U.S. counsel prior to filing any preliminary materials with the SEC to see whether exemptions from state filings are available or to establish a timetable for obtaining state clearances.

- NASD Review

Offerings in the United States are also generally subject to review by the National Association of Securities Dealers, Inc. (“NASD”), which regulates the conduct of U.S. broker-dealers, including the fairness of the underwriting terms and arrangements of public distributions of securities. Before the SEC will declare a registration statement effective, the NASD must have issued a letter stating that it has no objection to the fairness of the underwriting terms. A filing with the NASD must be made within one business day of filing with the SEC and should include the registration statement, draft underwriting agreement, the required fee and certain supplemental information. Because MJDS offerings often proceed quickly, the NASD filing should be initiated at an early stage.

Certain offerings are exempt from NASD review. These include offerings of (i) securities, except in an initial public offering, by an issuer that has outstanding unsecured, non-convertible investment-grade debt with a term of issue of at least four years or unsecured non-convertible investment-grade preferred securities; (ii) non-convertible debt, or non-convertible preferred securities, rated investment grade; and (iii) securities of a Canadian issuer registered on a Form F-10 shelf registration statement and offered pursuant to Canadian shelf prospectus offering procedures.
Broker-Dealer Regulation

Sales of securities in the United States must be conducted by U.S. registered broker-dealers. Canadian dealers may sell in the United States through their U.S. registered broker-dealer affiliates.

II. LISTING ON A U.S. STOCK EXCHANGE OR NASDAQ

Canadian companies may list securities in the United States on the NYSE or AMEX or have them quoted on the Nasdaq National Market or the Nasdaq SmallCap Market. An application to list securities in the United States is not a complicated process, but it does require some advance planning in order to collect the appropriate information and prepare the necessary filings.

A U.S. listing involves a layer of regulation in addition to that of a company’s home jurisdiction. The NYSE, AMEX and Nasdaq each maintain their own rules, regulations and guidelines relating to reporting, issuance of securities, disclosure of material information and corporate governance.

The Sarbanes-Oxley Act requires the U.S. exchanges and Nasdaq to modify their corporate governance rules beginning as early as April 2003. This is in addition to the new corporate governance rules earlier proposed by the NYSE and Nasdaq. At present it is unclear to what extent the new corporate governance rules will apply to foreign private issuers. The traditional policy of the exchanges and Nasdaq of deferring to home country practice is in contrast to the Sarbanes-Oxley Act, which does not create any special exemption for foreign private issuers. At a minimum, foreign private issuers will be required to make enhanced disclosure about how their home country practices differ from U.S. rules. We encourage you to contact us for information and updates on new corporate governance rules as they are implemented.

Frequently Asked Question

May an issuer list its securities in the United States without doing a public offering?

Yes. It is possible for an issuer to list securities on the NYSE or AMEX or have securities quoted on Nasdaq without completing a public offering, and several Canadian companies have chosen to do so. However, listing in conjunction with a public offering may provide advantages such as better analyst coverage and increased trading volume.

1. Summary of Original Listing Procedures

Before starting the formal listing process, a company should contact a listing representative at the relevant exchange who will discuss the merits of a listing. The listing representative usually asks for some historical financial information and a brief business description similar to that contained in an
annual report to shareholders. Based on the informal discussions, the exchange will make a preliminary review of eligibility and give the company an indication of whether it foresees any difficulties with a formal application. If the company has difficulty meeting all of the listing criteria, the representative of the exchange can often be helpful in advising the company how to proceed. This preliminary review, which for Nasdaq (but not the stock exchanges) requires the issuer to pay a portion of the application fee, usually takes approximately two weeks, is confidential and does not commit the company to list.

- **Listing Requirements**

  The stock exchanges and Nasdaq each have quantitative listing criteria. For the most current description of the listing requirements, please refer to the respective websites for the NYSE, AMEX and Nasdaq.

- **Filing**

  An Exchange Act registration statement is filed with the SEC to register the securities under the Exchange Act. The company must also file an original listing application and a listing agreement with the NYSE, AMEX or Nasdaq, as well as pay a listing fee.

- **Timing**

  The NYSE, AMEX and Nasdaq estimate that their review of a formal application takes approximately three to four weeks. Companies filing on Form 20-F will be subject to full substantive review by the SEC, which may require the filing of one or more amendments to the registration statement to respond to SEC comments. This process takes from four to six weeks or longer. Preparation of a Form 40-F registration statement takes considerably less time than preparation of a Form 20-F registration statement. SEC processing of the Form 40-F registration statement takes approximately one week.

- **Specialists/Market Makers**

  The company will either select or be assigned a specialist or market maker who helps maintain a fair and orderly market.

- **Listing**

  The original listing or trading date is established at the company’s convenience and can be set for any day after the company’s registration statement is declared effective by the SEC.

2. **Exchange Act Registration of Listed Securities**

  To list equity securities on the NYSE or AMEX, or to quote them on Nasdaq, a company is required to register the class of equity securities with the SEC under Section 12 of the Exchange Act. Most Canadian companies may use
Form 20-F, or Form 40-F if MJDS-eligible, for such registration if the listing is done without a concurrent public offering. Form 8-A, which incorporates by reference certain information from a Securities Act registration statement, may be used if the listing is done in conjunction with an offering or if the issuer is already subject to a reporting obligation under the Exchange Act.

As a practical matter, a business description meeting Canadian disclosure requirements for an Annual Information Form ("AIF") can be used as a starting point for Form 20-F, with several adjustments. When Form 20-F is used to register securities in connection with a listing, the disclosure must include risk factors, MD&A (including disclosure of off-balance sheet arrangements and contractual obligations), compensation and shareholdings of directors and officers, major shareholders and related party transactions, quantitative and qualitative disclosures about market risk, a reconciliation of non-GAAP financial measures to the most comparable GAAP measure and a description of the usefulness of such measures, and financial statements (including a U.S. GAAP reconciliation).

MJDS issuers can use Form 40-F, which is not reviewed by the SEC, instead of Form 20-F. It includes Canadian disclosure documents, a U.S. GAAP reconciliation of the financial statements and certain additions to the disclosure required pursuant to SEC rulemaking mandated under the Sarbanes-Oxley Act, including enhanced MD&A disclosure of off-balance sheet arrangements and contractual obligations. To qualify to use Form 40-F in connection with a listing, a Canadian company must:

(i) be a foreign private issuer;
(ii) have been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 12 months immediately preceding the filing of the applicable form; and
(iii) have a public float of at least U.S.$75 million at the time of filing the Form 40-F.

3. Continuous Disclosure

Listing on a U.S. stock exchange or being quoted on Nasdaq subjects a company to continuous reporting requirements in the United States, which are discussed in greater detail in Chapter III, Continuous Reporting Obligations. In addition to the disclosure requirements imposed by the SEC, each U.S. stock exchange and Nasdaq maintains its own set of disclosure and reporting requirements, for example, they require issuers to distribute their glossy annual reports to shareholders.

The listing agreement sets forth many of these requirements. Generally, these rules do not impose significant additional obligations on Canadian
companies and, in most cases, are met by providing the applicable exchange with a copy of the company’s SEC filings.

A Canadian company that is listed on a U.S. stock exchange or quoted on Nasdaq must agree to notify the exchange or Nasdaq of significant events such as: (i) a change in its principal executive officers, directors or public accountants, (ii) a stock split or stock dividend or unusual earnings or dividends, (iii) any action taken by it with respect to the allotment of rights to subscribe or any rights or benefits pertaining to ownership of listed securities, or in respect of the payment or non-payment of dividends, (iv) any change in the rights and privileges of the listed security, (v) the public or private sale of a significant amount of additional securities or of a significant asset, or a merger, acquisition, or joint venture, (vi) the acquisition or loss of a significant contract or a significant change in capital investment plans, or (vii) the establishment of a program to purchase its own shares.

The NYSE, AMEX and Nasdaq all require listed companies to disclose in a press release any material information that would reasonably be expected to affect the value of the securities or influence investors’ decisions (such as earnings announcements and unusual or non-recurring events) and promptly dispel unfounded rumors that have an effect on the trading price. However, a company would not usually be required to comment if it has a “no comment” policy and advises the exchange or Nasdaq that the company is not the source of the rumor. If a company’s stock price is significantly affected by the rumor or the rumors are caused by leaks from the company, the exchange or Nasdaq may insist upon disclosure. Corporate disclosure practices are discussed in greater detail in Chapter IV, Corporate Disclosure.

III. CONTINUOUS REPORTING OBLIGATIONS

A Canadian company becomes subject to the U.S. continuous reporting system after making a public offering or listing on a U.S. stock exchange or Nasdaq. The company generally will remain a reporting issuer as long as the relevant class of securities is listed or widely held by U.S. investors. Canadian companies with U.S. reporting obligations must file periodic reports with the SEC. Foreign private issuers who are not MJDS-eligible may use Form 20-F for annual reports and Form 6-K for furnishing information about material events during the remainder of the year, or may choose to comply with the somewhat more extensive requirements of the U.S. domestic forms (Form 10-K for annual reports, 10-Q for quarterly reports and 8-K for current reports). Companies that are not foreign private issuers must report on the U.S. domestic forms.

Canadian companies eligible for MJDS may satisfy their reporting obligations by filing their Canadian disclosure documents with the SEC on Form 40-F for annual reports and Form 6-K for current reports and other material events. Canadian companies should review their eligibility status annually to determine whether they are required to prepare an annual report on Form 20-F or can take advantage of the simpler MJDS process.
Is it possible for a Canadian company to become subject to U.S. reporting obligations without listing on a U.S. exchange, being quoted on Nasdaq, or making any registered public offering?

Yes, if its equity securities are held by more than 300 U.S. residents. In certain cases, however, the company may have an exemption from such reporting obligations under Rule 12g-3-2(b) under the Exchange Act, which allows foreign private issuers to submit home country public documents with the SEC instead of registering pursuant to Section 12.

1. Form 20-F

Form 20-F sets forth the annual report requirements for foreign private issuers. In addition to the specific form requirements, companies must include all other material information necessary to ensure that the required disclosure is not misleading.

Annual Reports on Form 20-F require substantial disclosure, including a description of risk factors, financial statements with a U.S. GAAP reconciliation and MD&A (including disclosure of off-balance sheet arrangements), a reconciliation of non-GAAP financial measures to the most comparable GAAP measure and an explanation of the usefulness of such measures, related party transactions, material contracts and corporate governance information.

Many Canadian issuers that are required to use Form 20-F draft disclosure that meets both the U.S. rules and Canadian AIF rules and then reorder the sections to satisfy the relevant form requirements. Moreover, we understand that Canadian companies are permitted to meet their AIF filing requirements by filing their Form 20-F with Canadian regulatory authorities.

Financial statements in the annual report on Form 20-F must be reconciled to U.S. GAAP. Companies may choose to follow the U.S. GAAP reconciliation requirements set forth in either Item 17 or the more extensive requirements of Item 18 of Form 20-F. Item 17 requires a narrative description of the material variations in accounting treatment under U.S. GAAP, a reconciliation of net income (in tabular form) and a reconciliation of material variations of balance sheet and cash flow statement line items, but does not require inclusion of other information required to be disclosed under U.S. GAAP. Item 18 reconciliation encompasses all the requirements of Item 17, plus all other information required under U.S. GAAP and Regulation S-X (the primary regulation governing the presentation of financial statements in SEC filings), including segment information. Because Item 17 disclosure is insufficient for many U.S. public offerings, companies should consider voluntarily providing the Item 18 information in order to facilitate such offerings in the future.
Annual reports on Form 20-F must be filed with the SEC not later than six months after the end of each fiscal year. Filings on Form 20-F are subject to SEC review.

2. **Form 40-F**

An MJDS issuer may file with the SEC an annual report on Form 40-F instead of Form 20-F. The Form 40-F consists of the company’s Canadian AIF together with its audited consolidated financial statements and the accompanying MD&A, plus certain additions required under the Sarbanes-Oxley Act. An annual report on Form 40-F must be filed with the SEC the same day the AIF is due to be filed in Canada. Financial statements must be reconciled to U.S. GAAP under either Item 17 or 18 of Form 20-F (unless the company has become a reporting issuer solely as a result of publicly offering investment grade debt securities on Form F-9, in which case no reconciliation is required).

### Frequently Asked Questions

**Does a Canadian company need to send its annual report on Form 20-F or Form 40-F to its shareholders?**

No. A Canadian company is not required to send its annual report on Form 20-F or Form 40-F to its shareholders. This annual report is necessary to meet a company’s continuous reporting obligations under U.S. federal securities laws and is different from a company’s glossy annual report to shareholders, which must be distributed, along with financial information reconciled to U.S. GAAP, under the rules of the stock exchanges and Nasdaq.

**What are the consequences of failing to file an annual report on Form 20-F or Form 40-F within the applicable deadlines?**

If a company has an effective shelf registration statement on file, the SEC could issue a stop order that would suspend the company’s ability to issue securities off the shelf registration statement. Generally, the failure to file on time would also disqualify an issuer from filing a registration statement on Form F-3 for twelve calendar months after filing.

3. **Form 6-K**

Form 6-K is used for periodic filings of material information that is:

- made public or required to be made public in Canada;
- filed with and made public by any stock exchange on which the company’s securities are traded; or
- distributed by the company to its security holders.
Material information is information a reasonable investor would consider important in making an investment decision or that alters the total mix of available information. Form 6-K must be furnished to the SEC promptly after such information has been made public in Canada.

Form 6-K does not require a U.S. GAAP reconciliation of quarterly financial statements. However, a U.S. GAAP reconciliation is required, in certain circumstances, for quarterly financial statements incorporated by reference into a prospectus.

Examples of items that are typically furnished on Form 6-K include the following:

- interim financial results;
- glossy annual reports to shareholders;
- material change reports;
- management proxy circulars; and
- audited financial statements, accompanied by MD&A, if filed prior to the filing of an annual report on Form 20-F or Form 40-F.

4. **U.S. Domestic Forms**

U.S. domestic companies, and Canadian companies that are not foreign private issuers or that choose to report as U.S. domestic companies, file annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K. As discussed above, the foreign forms present advantages in terms of the disclosure required. The deadlines for filing the domestic forms are also considerably shorter than those for the foreign private issuer forms and MJDS forms.

5. **Plain English**

The SEC’s plain English requirements do not apply to Exchange Act filings. However, Canadian reporting issuers should consider using plain English in their ongoing reports because doing so facilitates the easy transfer of information to Securities Act prospectuses.

6. **Reporting on EDGAR**

Electronic Data Gathering, Analysis and Retrieval, or EDGAR, refers to the computer system used to receive, review and disseminate documents submitted electronically to the SEC. Foreign private issuers must file most Securities Act and Exchange Act documents electronically via EDGAR.
7. Proxy Circulars / Ownership Reports / Insider Trading During Pension Fund Blackout Periods

Canadian foreign private issuers are exempt from the U.S. proxy rules. Instead, these companies can follow Canadian proxy rules and submit management information proxies on Form 6-K. The Canadian management information proxies can be sent to shareholders in the United States.

Officers, directors and major shareholders of foreign private issuers are also exempt from the ownership and insider trading reporting requirements and short-swing profit recapture provisions of Section 16 of the Exchange Act.

Under the Sarbanes-Oxley Act, directors and executive officers of reporting issuers are prohibited from trading equity securities acquired in connection with their services as a director or executive officer during any “blackout period”, defined as more than three consecutive business days during which a majority of the company’s plan participants or beneficiaries are prohibited from trading. Certain exemptions are available, for example, if there are no more than 50,000 U.S. participants or they represent no more than 15% of a foreign private issuer’s total employees. Any profits realized by a director or executive officer as a result of a transaction during a blackout period are recoverable by the issuer.


The Sarbanes-Oxley Act mandated several new disclosure items required in annual reports on Forms 20-F and 40-F. The SEC’s new rules include disclosure of off-balance sheet arrangements and contractual obligations; reconciliations of non-GAAP measures to the most comparable GAAP measure in Form 20-F and, unless an exemption is available, Form 40-F; disclosure about the effectiveness of internal controls; disclosures regarding an issuer’s code of ethics; and disclosure regarding the financial expert on an issuer’s audit committee. More detailed information on each of these disclosure requirements is available upon request, including our client publication, SEC Rules Relating to Non-GAAP Financial Measures: Special Considerations for Canadian Issuers.

The Sarbanes-Oxley Act also mandated that two certifications be made annually by the chief executive officer and chief financial officer of reporting issuers: the certification under Section 906 is part of the criminal law and the other certification has been implemented by the SEC under Section 302. We refer you to our client publications, available upon request, for details on these certifications: Sarbanes-Oxley Act of 2002: Special Considerations for Reporting Issuers that Use MJDS and SEC Approves Accelerated Filing Deadlines for Section 16(a) Reports, Executive Officer Certification of Periodic Reports and Phase-In of Accelerated Filing Deadlines for Periodic Reports. There are no explicit exemptions from the Sarbanes-Oxley Act for MJDS issuers or other foreign private issuers.
The Sarbanes-Oxley Act requires the SEC to review disclosures by public issuers, including their financial statements, at least once every three years, and to implement a regular and systematic review basis for issuers reporting under Section 13(a) of the Exchange Act. Factors to be considered by the SEC in determining how often to review an issuer include whether the issuer (i) has made a material restatement of financial results, (ii) has had significant volatility in its stock price, (iii) is among the issuers having the largest market capitalization, (iv) is an emerging company with disparities in price-earnings ratios, or (v) has operations that significantly affect any material sector of the economy. It is not yet clear whether the SEC will now review MJDS annual reports on Form 40-F.

IV. CORPORATE DISCLOSURE

Reporting issuers and their executive officers and directors are subject to liability under U.S. securities laws for oral and written disclosures. In addition to liability for reports filed with the SEC, a company may be liable for its ordinary day-to-day disclosures to the marketplace, regardless of the medium used. In addition to legal liability, the appearance of impropriety that accompanies selective disclosure can have significant adverse consequences on a company’s reputation and stock performance. Companies should be mindful of these considerations when communicating with analysts, making information available on their websites and making other disclosures in the ordinary course of business.

1. Full and Fair Disclosure of Material Non-Public Information: Regulation FD

Regulation FD under the Exchange Act prohibits disclosure of material non-public information to a select group rather than to the market as a whole, a practice that is often referred to as selective disclosure. Notably, the provisions of Regulation FD do not apply to foreign private issuers. However, many Canadian companies that report in the United States have elected to comply with Regulation FD, recognizing that its provisions represent good corporate practice and are in keeping with the more general prohibition, in Canada and the United States, against selective disclosure.

Regulation FD requires companies to announce publicly or file with the SEC any material non-public information disclosed on behalf of the company to members of the financial community or select shareholders. However, only disclosures by specified senior officers, or persons who regularly communicate with securities market professionals or with the company’s security holders, will be considered to have been made “on behalf of the company” for purposes of Regulation FD. Regulation FD will also not apply to disclosures made to persons who owe a duty of trust or confidence to the company, such as investment bankers or lawyers, or persons that agree to keep the information confidential and not to trade on it. Finally, Regulation FD does not apply to communications
made in connection with most registered primary offerings and disclosures to ratings agencies, provided the ratings are publicly available.

In cases of intentional selective disclosure, Regulation FD requires a prior or simultaneous public announcement. If unintentional, a public announcement must be made “promptly” (within 24 hours or, in any event, before the start of the next trading day). These public announcements may take the form of an SEC filing (Form 6-K for foreign private issuers) or another method of disclosure reasonably designed to provide broad, non-exclusionary dissemination to the public. Instead of a press release, companies may use pre-announced teleconference calls and webcasts, although it is usually most practical to issue a press release to satisfy the requirements of both the SEC and the relevant stock exchange or Nasdaq. While the SEC strongly encourages companies to post information on their websites, a website posting is not by itself sufficient public disclosure.

**Frequently Asked Question**

**Should foreign issuers be concerned about selective disclosure?**

While Regulation FD does not technically apply to foreign private issuers and foreign governments, the SEC has warned that selective disclosure of material, non-public information by a foreign private issuer to an analyst or any other third party could constitute “tipping” under U.S. insider trading laws. Also, foreign private issuers are still subject to liability for fraudulent conduct. Finally, selective disclosure may run afoul of public disclosure policies of U.S. stock exchanges or Nasdaq.

- **What is “Material Information”**

U.S. securities laws do not contain a standard or “bright-line” quantitative test for determining what information is “material”. However, under case law, information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision or view it as having significantly altered the total mix of information available.

The types of information and events that may be material include:

- earnings information;
- mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- new products or discoveries or the potential outcome of research and development efforts;
- significant litigation or developments in existing litigation;
• developments regarding customers or suppliers (such as the acquisition or loss of a contract);
• changes in control or changes of management or the board of directors;
• changes in auditors or auditor notification that the company may not rely on their audit report;
• significant changes in budgets, long-term plans, reserves or write-offs;
• corporate restructurings, bankruptcies or receiverships; and
• debt or equity offerings, defaults, redemptions, splits, repurchase plans, changes in dividends and changes to the rights of security holders.

Even quantitatively small amounts may be material, particularly with respect to information that would cause significant market reaction (for example, information that is intentionally misleading, conceals a change in earnings or other financial trends or affects an issuer’s ability to meet analysts’ expectations). Also, small items relating to a significant business segment or division, or that affect compliance, may be material.

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**Frequently Asked Question**

**What should a company do if its stock price moves after a selective communication of immaterial information?**

If a stock price moves unexpectedly and it happens immediately after the selective disclosure of information that, in the company’s judgment, was not material, the situation must be reviewed carefully. If the information is seen as a possible cause of the movement, the safest course is to disseminate the disclosure publicly in the appropriate manner within 24 hours or before the start of the next trading day.

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**What is “Non-Public” Information**

Information is non-public if it has not been disseminated in a manner making it available to investors generally. For example, disclosing material non-public information on a company’s website does not make the information public within the meaning of Regulation FD. As well, information that has not yet been fully absorbed by the marketplace is considered non-public. The amount of time it takes the market to absorb information depends on the nature of the information and the method of its dissemination, in addition to the size of a company and how closely analysts follow its securities. For example, information on a very large company that is carried by a major newswire may be made public within 30 minutes, whereas information on a smaller company may take up to several days to become public.
### Frequently Asked Questions

**Can a company satisfy Regulation FD’s public disclosure requirement by disclosing material non-public information at a shareholders’ meeting?**

No. If a shareholders’ meeting is not open to the public, selective disclosure of material non-public information at the meeting would violate Regulation FD.

**Can a company disclose material non-public information to its employees (who may also be shareholders) without making public disclosure of the information?**

Yes. Regulation FD does not apply to communications of confidential information to employees. A company’s officers, directors, and other employees are subject to duties of trust and confidence and face insider trading liability if they trade while in the possession of, or tip, material non-public information.

### 2. Disclosure Obligations

- **Duty to Disclose**

  While there is legal liability for material misstatements or omissions, it is difficult to determine with precision when a legal obligation arises to disclose material information. There are certain disclosures specifically mandated by the SEC, the U.S. stock exchanges and Nasdaq. Under the Sarbanes-Oxley Act, the SEC is required to promulgate rules (no deadline is set) requiring rapid and current disclosure of material events that may expand the existing duty to disclose. Otherwise, the duty to disclose generally arises only in the following circumstances: the company or its insiders want to buy or sell the company’s securities, the information has been leaked or information previously disclosed was inaccurate or misleading.

- **The Duty Not to Mislead**

  Corporate disclosures must be accurate and, on the whole, not misleading. This duty not to mislead through partial disclosure would, for example, prohibit a company from making unqualified positive statements about a new product if it has identified or foresees problems or difficulties.

- **Duty to Correct**

  A company has a duty to correct prior statements that were materially inaccurate when made, even if the company was not aware of the falsehood at the time. As long as a company’s public statements are reasonably expected to be relied upon by investors, there is an ongoing obligation to correct inaccuracies. The duty to correct only ceases when enough time has passed that an investor’s reliance would be unreasonable.
There is no duty to correct rumors or statements by third parties not attributable to the company or its insiders, unless the company has adopted the statements or a stock exchange requests a correction or clarification. For example, if a company entangles itself with an analyst so as to justify attribution of the analyst’s statements to the company, there will be a duty to correct a false or misleading statement in an analyst’s report. Many companies have a “no comment” policy regarding market rumors.

- **Duty to Update**

Sometimes disclosures are accurate when made but subsequently become materially misleading. The duty to update is an unsettled area of U.S. securities law. With respect to forward-looking statements, which are discussed below, the duty to update might impose an obligation to monitor the status of disclosed projections.

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**Frequently Asked Question**

Is there a duty to disclose merger discussions?

Under current law, a company does not have a duty to disclose merger negotiations if they are too preliminary, contingent or speculative to be considered material. However, a company could not deny the possibility of a merger or make any other statement known to be false. Generally, absent a positive disclosure requirement by the SEC to report certain events in one of the periodic or current reporting forms under the Exchange Act or pursuant to applicable stock exchange rules, if there is no insider trading and a company is not in the market for its own securities and has not made previous inaccurate statements, there is no duty to disclose. A company may adopt a policy of not commenting on market rumors of pending mergers. The SEC may, in rule-making under the Sarbanes-Oxley Act, require real-time disclosure of potential mergers. The SEC has already proposed that U.S. domestic companies be required to report on Form 8-K, within two business days, certain material events related to mergers, such as entering into a letter of intent.

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3. **Limited Safe Harbor for “Forward-Looking” Information**

Forward-looking statements are statements about future uncertain events or trends. Forward-looking information generally includes:

- financial projections such as revenue, income or earnings projections;
- management’s plans and objectives for future operations; and
- statements about future economic performance.

There is no legal duty to disclose forward-looking information. Disclosure of forward-looking information, particularly of financial projections, involves the
risk of litigation for misleading disclosure if a company fails to meet its projections. However, in order to encourage companies to disclose such information, the SEC has adopted a “safe harbor” protection from liability for such forward-looking statements by reporting issuers. The safe harbor protects against private actions only, not SEC actions. Under the safe harbor, a forward-looking statement will not give rise to liability if the statement is (1) identified as forward-looking and (2) accompanied by meaningful cautionary statements identifying important risk factors that could cause actual results to differ materially from the forward-looking statement. When making oral forward-looking statements, a company may refer investors to its publicly available documents containing risk factors, rather than orally reciting the factors that could cause actual results to differ.

To take advantage of the safe harbor, we recommend that companies place cautionary language at the end of all company press releases, insert such language into their annual and periodic reports and onto their websites, and read a disclaimer at the beginning of each company conference call.

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**Frequently Asked Question**

**What constitutes “cautionary language”?**

Boilerplate disclosure and cautionary language that does not effectively disclose key risk factors will not protect a company from liability. Cautionary language should be tailored to a company’s business and industry and the level of risk should be clear.

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4. **Communications with the Press**

Communications with the press are subject to the same general principles as communications to security holders, analysts and other interested parties, namely that a company may be liable to investors for communications that contain false or misleading statements.

5. **Communications with Securities Analysts**

It is difficult to provide comprehensive guidelines on how to minimize the risk of liability in connection with communications with analysts because decisions by courts in this area are made on a case-by-case basis. However, certain principles are clear:

- a company should refrain from commenting on analysts’ projections (and make it clear that this is a company policy), as such comments could constitute selective disclosure of inside information or could create a duty to update or correct the projections;

- although a company has no obligation to comment on market rumors connected with an analyst’s report (unless such rumors are attributable
to the company), if a company does comment on such rumors, such comments must be truthful and should be communicated to the general public through a press release; and

- to avoid being responsible for an analyst’s report, a company should not distribute it, post it on its website, hyperlink to it or cite it.

A company may be held responsible for an analyst’s report if it adopts any statements in the report after publication, regardless of the company’s involvement in the preparation of the report. A company may also be liable for statements in an analyst’s report if it provided the basic information for the report or reviewed drafts and provided comments or guidance on the forecasts, or simply distributed the report.

Companies that give earnings guidance to analysts in a non-public forum are very likely to violate Regulation FD. Most companies now make their analysts calls open to the public, either by telephone conference or simultaneous webcast. Notice of the conference call or webcast should be broadly disseminated and given with reasonable advance notice. Moreover, earnings guidance should be based only on information the company has already made public, non-material information or publicly-available, industry-related information.

6. Use of Websites

Companies must monitor the information on their websites because it may form the basis of investment decisions. The antifraud and anti-manipulation provisions of the U.S. securities laws apply to website communications.

In addition to responsibility for its own statements, a company may have responsibility for statements on its website made by third parties, including statements accessible by hyperlinks to third party websites. Generally, the attribution of third party information to a company depends upon whether the company has involved itself in the preparation of the information or endorsed or adopted it (whether explicitly or implicitly).

Because of the risk of liability associated with web content, a company’s website should include disclaimers. A general disclaimer should warn readers to assume that information is current only as of the date posted and that the company does not intend to update or correct the information. A warning with respect to forward-looking statements should also be posted. In addition, third party information should be accompanied by a warning that the company has not prepared or reviewed the information and is not responsible for its content and, if applicable, that the views expressed therein are those of the author and do not necessarily reflect the views of the company.
7. **Insider Trading**

Insider trading means buying or selling securities while in the possession of material non-public information and is prohibited by U.S. securities laws. A person in possession of material non-public information must either disclose the relevant information to the investing public or abstain from trading or recommending a trade to anyone. The Exchange Act imposes both criminal and civil penalties for insider trading.

A person may also be liable for “tipping.” Tipping refers to the transmission of material non-public information to another person. Sometimes this involves a deliberate conspiracy in which the “tipper” passes on information in exchange for a portion of the “tippee’s” illegal trading profits. Even if there is no expectation of profit, however, a tipper can have liability if he or she provides information and has reason to know it might be misused. Breach of the prohibition against tipping may result in both criminal and civil liability for the tipper.

To avoid illegal use of confidential information, companies typically have an internal policy for all personnel relating to the use and protection of sensitive corporate information. These policies typically include blackout periods keyed to the preparation and announcement of a company’s earnings information, during which trading by corporate insiders is prohibited, and post-trade reporting requirements for corporate insiders who trade during periods that are not blacked out.

V. **U.S. PRIVATE PLACEMENTS AND SALES OF SECURITIES OUTSIDE THE UNITED STATES**

When Canadian issuers make public offerings in Canada, they may include a U.S. private placement tranche, offering the securities to a limited number of U.S. institutional investors. Private placements are exempt from the registration requirements of the Securities Act. Private placements have both benefits and drawbacks as compared to registered sales of securities. For example, private placements can generally be executed more quickly and without the costs associated with the registration process, but privately-placed securities will be less liquid in many circumstances and are therefore sold at a discount relative to publicly offered securities. This chapter describes the rules and transaction structures most frequently encountered by Canadian issuers undertaking private placements in the United States.

1. **Private Placements by Issuers**

The Securities Act requires any offer or sale of securities to be registered, unless an exemption from registration is available. Section 4(2) of the Securities Act provides an exemption for transactions by an issuer not involving any public offering. Regulation D sets forth safe harbor requirements, compliance with which will ensure the availability of the Section 4(2) exemption.
Section 4(2) Exemption

The availability of the Section 4(2) exemption depends on many factors, including the number of offerees, the degree of sophistication of the offerees and whether the issuer has used general solicitation or advertising in marketing the securities.

Limits on Offerees and General Solicitation and Advertising. In a Section 4(2) private placement, securities should be offered only to a limited number of sophisticated investors. Although the SEC has not stated how many offers are too many, administrative authority indicates that offerings involving approximately 100 offerees would not be eligible for the exemption.

The participants in the private placement must not engage in “general solicitation” of U.S. purchasers. This means there should be no advertising or other publicity in the U.S. media with regard to the private placement. Advertising or other publicity in the United States relating to the issuer, even if it does not mention the offering, may result in a need to delay the private placement. Rule 135c under the Securities Act provides a safe harbor for certain press releases if they contain specified limited information and are not used for the purpose of conditioning the U.S. market. Offshore publicity is permitted under Rule 135e in connection with a Canadian offering if the materials contain specified legends.

Offering Materials and Liability. Although Section 4(2) does not require specific offering materials or disclosure, investors must have access to adequate information about the issuer upon which to base an investment decision. Thus, the form and amount of information provided will vary depending upon the issuer, the sophistication of the investors and their familiarity with the issuer, and the marketing needs of the placement agents. Any material misstatement or omission in a disclosure document used in connection with the U.S. placement will subject an issuer to liability under U.S. securities laws.

Placement Agents. An issuer may sell securities directly to investors or a placement agent may be engaged. Sales of securities in the United States must be conducted by U.S. registered broker-dealers who must comply with U.S. broker-dealer requirements. Placement agents generally enter into a placement or agency agreement with the issuer whereby they agree to make offers to a limited number of sophisticated U.S. purchasers and not to engage in prohibited solicitation or advertising. If the U.S. private placement is part of a larger Canadian public or private offering, the U.S. placement agent is typically the U.S. affiliate of one of the agents or underwriters participating in the Canadian offering.

Legended Securities. Securities sold to U.S. purchasers must contain a legend indicating that the securities have not been registered and are subject to resale restrictions.
• **Regulation D Exemption**

Regulation D sets forth safe harbor requirements, compliance with which ensures the availability of the Section 4(2) exemption. Because Regulation D is a non-exclusive safe harbor, placements that do not strictly comply with Regulation D may still qualify for the Section 4(2) exemption, depending on the facts and circumstances. Regulation D contains three specific exemptions from registration. Two of these (set forth in Rules 504 and 505) are “small offerings” exemptions. Rule 504 provides an exemption from registration for offerings by non-reporting issuers under U.S.$1 million. Rule 504 imposes no limitation on the number of investors and sometimes permits general solicitation. The resale of securities purchased under Rule 504 is not restricted. Rule 505 provides an exemption from registration for offerings under U.S.$5 million by any issuer. Rule 505 does not permit general solicitation and limits sales to “accredited investors” (as discussed further below) and up to 35 other sophisticated investors.

The third safe harbor, Rule 506, is available to any issuer and there is no limit on the dollar amount of the offering. The basic requirements of Rule 506 are as follows: there must be no general solicitation in connection with the offering, sales must be limited to “accredited investors” and up to 35 other sophisticated investors, and the issuer must exercise reasonable care to ensure that the purchasers are not purchasing securities with a view to distribution. In addition, any non-accredited investors must be provided, prior to the sale, certain information about the issuer and must be capable of evaluating the merits and risks of the investment, or the issuer must reasonably believe this to be the case. The issuer typically requires each purchaser to represent that it meets the foregoing requirements.

**Accredited Investors.** Regulation D is less restrictive for private sales to accredited investors than other investors, because accredited investors are deemed to be sophisticated investors by virtue of their wealth and investment knowledge. There are several categories of accredited investors, including banks, insurance companies, investment companies, corporations with total assets in excess of U.S.$5 million, and natural persons whose net worth exceeds U.S.$1 million or whose income exceeded U.S.$200,000 per year for the last two years and who reasonably expect such an income in the current year. Many issuers limit their U.S. private placements to institutional accredited investors as opposed to natural persons because state securities laws are more onerous for offerings to natural persons.

**No Intent to Distribute.** The issuer must exercise reasonable care to ensure that investors are not purchasing with a view to distribution. The specific means by which issuers should take this precaution are enumerated in Regulation D but are not exclusive: (i) reasonable inquiry as to whether the purchaser is purchasing for its own account; (ii) notice to the purchaser that the securities have not been registered; and (iii) legending the securities to indicate that they have not been registered and are subject to resale restrictions.
Offering Materials. The disclosure requirements for a Regulation D offering depend on the degree of sophistication of the purchasers. If an issuer sells securities only to accredited investors, investors need not be furnished with any information. Nonetheless, issuers often provide investors with a private placement memorandum containing prospectus-type disclosure, both for marketing purposes and to reduce the risk of investors not receiving sufficient information to make informed investment decisions.

Form D. Within 15 days of a Regulation D sale, the issuer must file a Form D with the SEC setting forth the details of the offering. Form D requires information about the issuer (including the names of its directors, executive officers and holders of 10% or more of its equity securities), the offering (including any compensation for solicitation of purchasers), the purchasers (including their status as accredited or non-accredited investors) and the proposed use of proceeds.

2. Resales Following a Private Placement

Unlike securities sold in a public offering, privately-placed securities are subject to resale restrictions. Restricted securities cannot be sold publicly unless the resale is registered under the Securities Act or is made in accordance with the hold periods and volume and trading restrictions of Rule 144 under the Securities Act. In addition to resales under Rule 144, restricted securities may be resold in another private placement exempt from registration.

- Rule 144

Rule 144 under the Securities Act provides a safe harbor exemption from registration for resales of securities by affiliates and non-affiliates of the issuer, subject to certain requirements relating to holding periods, current public information about the issuer, volume limitations and the manner of sale.

“Affiliate” is defined in Rule 144 to mean a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, an issuer. “Control” is defined to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an issuer, whether through the ownership of voting securities, by contract or otherwise. Executive officers and directors of an issuer, as well as shareholders owning 10% or more of the issuer’s voting shares, are presumed to be affiliates.

Under Rule 144, limited amounts of securities may be sold publicly in ordinary brokerage transactions one year after a private placement, if current public information about the issuer is available. Two years after the private placement, non-affiliates of the issuer may freely resell their privately-placed securities in the public markets. The one- and two-year hold periods are measured from the date a non-affiliate purchases from the issuer or an affiliate. In calculating when the one- and two-year periods have expired, non-affiliates
may tack their holding periods to that of previous non-affiliates. No tacking is allowed until the full purchase price of the security is paid or the full investment risk assumed. Affiliates of the issuer remain subject to the volume restrictions of Rule 144 indefinitely.

- **Section 4(1½) Exemption**

  Rule 144 applies to public resales of privately placed securities but does not address private resales. One mechanism for private resales of privately placed securities that has been established by the private bar and sanctioned in SEC no-action letters is the "Section 4(1½)" exemption. An investor who purchased in a private placement may resell in a subsequent private placement exempt from registration if the resale is conducted in the same manner as the initial private placement and the subsequent purchaser agrees to the same restrictions as to distribution and legending of the securities.

- **Rule 144A**

  Rule 144A is an exemption that facilitates the resale of restricted securities to large institutional investors. Under Rule 144A, persons other than the issuer may resell to U.S. qualified institutional buyers ("QIBs"). Rule 144A is not available for securities listed on a U.S. stock exchange or quoted on Nasdaq (or, generally, securities convertible into or exchangeable with such securities). There are certain requirements that must be satisfied to use Rule 144A, including that the securities must be offered and resold only to persons that the seller reasonably believes are QIBs and reasonable steps must be taken to ensure that the purchaser is aware that the seller is relying on Rule 144A. Securities obtained in a Rule 144A resale remain restricted securities.

  Information Delivery. Rule 144A requires the issuer to provide the following information to any holder of Rule 144A securities upon request: (i) a brief statement of the nature of the issuer’s business and its products and services; and (ii) the issuer’s audited financial statements (including balance sheets and profit and loss and retained earnings statements) for the three most recent fiscal years. Reporting companies can satisfy this obligation simply by filing their periodic reports with the SEC. Nonetheless, for marketing and liability reasons, underwriters often require a detailed offering memorandum for Rule 144A offerings. So long as the Rule 144A security is a “restricted security”, information must be provided to any holder, or prospective purchaser designated by a holder, that requests it.

  Legends. Rule 144A does not require securities to be legended indicating applicable resale restrictions, however, it is commonly accepted practice to include such a legend. Rule 144A securities are, in any case, restricted securities. They can only be freely resold amongst QIBs.
Publicity. Publicity in the United States about a Rule 144A transaction must be strictly controlled. Broad distribution of offering materials or other publicity could constitute an illegal offer to persons other than QIBs, which would destroy the Rule 144A exemption.

- **Registration Rights**

To increase the liquidity of restricted securities received in a private placement, investors may negotiate an agreement with the issuer to register the resale of their securities in the United States. Under a typical registration rights agreement, investors will have the right to demand a negotiated number of registrations at the company’s expense. Investors also may receive piggy-back or incidental registration rights, which allow investors to include their securities in a registration statement for offerings initiated by the issuer or other holders. Registration rights may also include shelf registration rights, which require an issuer to keep a shelf registration effective to allow investors to sell securities over time. The holders must be named in the registration statement and prospectus as “selling shareholders”. One of the disadvantages of shelf registration rights is that the company must keep the registration statement effective for a specified period of time or until the holders have completed their resales.

The availability of a liquid market in Canada mitigates the need for U.S. registration rights because the securities of Canadian issuers can often be resold in Canada without restriction pursuant to Regulation S.

- **U.S. Private Placement Followed by Registration (Exxon Capital Exchange Offers)**

U.S. securities laws permit a financing technique similar to the Canadian special warrant transaction structure, commonly referred to as an Exxon Capital Exchange Offer. An Exxon Capital Exchange Offer involves privately placing non-convertible debt securities and subsequently exchanging them for identical, freely tradable securities in a registered exchange offer. The issuer can thereby take advantage of relatively quick access to capital while the subsequent registration means investors have unrestricted, freely tradable securities relatively soon after the private placement.

This transaction structure offers several advantages. As in a Canadian special warrants transaction, the timing advantages of a private sale are combined with the liquidity and pricing advantages that come with selling a registered, freely tradable security. Issuers can avoid the obligation to maintain an “evergreen” registration statement for a number of years, as would otherwise be customary in the case of U.S. privately-placed securities with registration rights. Finally, the registration of the exchange offer can be accomplished using an MJDS registration form if the issuer is eligible.
3. Sales Outside the United States: Regulation S

Regulation S under the Securities Act provides an exemption from registration for offers and sales of securities outside the United States.

- General Safe Harbor Requirements

Regulation S contains two safe harbors from registration for sales outside the United States: a safe harbor for issuers, affiliates and distribution participants, such as underwriters (Rule 903), and a resale safe harbor for secondary market trading (Rule 904). All sales under Regulation S must satisfy the following two conditions:

Offshore Transaction. Regulation S sales must be offshore transactions. This means the offer must not be made to a person in the United States and either (i) the buyer is outside the United States when the buy order is originated (or the seller reasonably believes the buyer is outside the United States) or (ii) the transaction is executed on or through the physical trading floor of a foreign securities exchange (in the case of the issuer safe harbor) or the facilities of a designated offshore securities market, or DOSM, and the seller does not know that the transaction has been prearranged with a U.S. buyer (in the case of the resale safe harbor). The availability of the exemption for sales by issuers and affiliates under Rule 903 is curtailed because none of the exchanges in Canada have a physical trading floor. With respect to secondary market trading, the TSX and the TSX Venture Exchange are DOSMs for purposes of Regulation S.

No Directed Selling Efforts. There can be no selling efforts that could be deemed to be conditioning the market in the United States (such as advertising the offering in the United States, mailings to U.S. investors or promotional seminars in the United States). Advertisements required by Canadian law are permitted, but should include a legend indicating the offer and sale of the securities has not been registered and the securities may not be sold in the United States absent registration or an exemption. If a Regulation S offering is combined with a U.S. offering, any selling efforts undertaken in connection with U.S. sales must be legitimately required in light of the size of the U.S. tranche.

- Additional Issuer Safe Harbor Requirements

If a foreign issuer, an affiliate or distributor is selling securities under Regulation S, it must first consider whether there is substantial U.S. market interest ("SUSMI") in those securities. If there is no SUSMI in the securities being sold, then Regulation S imposes no further restrictions. However, if there is SUSMI in the securities being sold, Regulation S will impose hold periods, during which offers or sales to U.S. persons are restricted, and other requirements.

For equity securities, SUSMI means either (i) U.S. securities exchanges or inter-dealer quotation systems constituted the single largest market for the
equity or (ii) 20% of all trading took place in the United States and less than 55% took place on a single exchange outside the United States. For debt, SUSMI means at least U.S.$1 billion of debt (constituting at least 20% of the issuer’s total debt) is held by 300 or more U.S. persons.

Canadian companies that do not qualify as foreign private issuers are treated as U.S. domestic issuers for purposes of the analysis under Regulation S. A Regulation S sale by such an issuer will be subject to a variety of requirements, including hold periods on the resale of the securities sold.

• **Additional Resale Safe Harbor Requirements**

The resale safe harbor under Regulation S is available to persons other than issuers, distributors (such as underwriters) and their affiliates. Although directors and executive officers are considered affiliates under U.S. securities laws, they can use the resale safe harbor if they are affiliated with the issuer only by virtue of their roles as directors and executive officers. In most cases, resales are subject only to the two general conditions discussed above. As long as there are no directed selling efforts and trades qualify as offshore transactions, secondary market trading over the TSX and the TSX Venture Exchange is permitted by Regulation S.

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**Frequently Asked Question**

**How does Regulation S improve the liquidity of privately-placed securities?**

For Canadian issuers whose securities are listed on the TSX or the TSX Venture Exchange, Regulation S provides a means of additional liquidity to U.S. investors who have purchased securities in a private placement. Investors may generally resell their securities through the facilities of a DOSM exchange in Canada, even if the Rule 144 hold period has not expired. This is subject to Canadian or TSX rules which impose restrictions on resales in Canada.

Regulation S expressly provides that it may not be used for transactions which, although in technical compliance with the Regulation, are part of a plan or scheme to evade the registration provisions of the Securities Act. Any transaction which results in substantial flowback of securities into the United States could be regarded as an abusive transaction which does not qualify for the Regulation S exemption.
4. Other Important Regulatory Requirements

- State Blue Sky Laws

Most U.S. states have their own registration requirements. Thus, a private placement in the United States must qualify for an exemption from each U.S. purchaser’s state laws. Almost every state provides some sort of exemption from registration for offers and sales to institutional purchasers, such as QIBs and institutional accredited investors, and most states have adopted exemptions from registration for financial institutions, including broker-dealers. In addition, federal legislation provides an exemption from state registration requirements if an issuer is selling listed securities. If a Canadian company wants to offer securities in a private placement, U.S. counsel should be advised of the location of U.S. purchasers to determine whether any state law requirements will apply.

- Integration

If an issuer completes multiple private placements of the same or similar securities at about the same time, the issuer must structure the placements so that they will not be “integrated” or treated as a single transaction that must meet all the private placement requirements. In general, private placements more than six months apart will not be integrated. If a U.S. private placement occurs simultaneously with an offering outside the United States in compliance with Regulation S, the two transactions will not be integrated. If an issuer follows a private placement with an immediate U.S. registered public offering, the transactions will not be integrated if the private placement is completed prior to filing the registration statement.

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This Guide is a summary of several complex areas of U.S. securities law and should not be considered an exhaustive description of the law. The regulatory environment in the United States is evolving rapidly due to the implementation of new laws and rules intended to improve corporate governance and the quality of corporate disclosure. For more detailed advice on specific financing transactions or for general advice on any of the matters raised in this Guide, we encourage you to contact us in our Toronto office.