

FREQUENTLY ASKED QUESTIONS ABOUT THE U.S.–CANADIAN MULTIJURISDICTIONAL DISCLOSURE SYSTEM

Introduction

What is the U.S.-Canadian Multijurisdictional Disclosure System?

The U.S.-Canadian Multijurisdictional Disclosure System (the “MJDS”) was adopted in July 1991 by the U.S. Securities and Exchange Commission (the “SEC”) and the Canadian Securities Administrators. The MJDS is designed to facilitate cross-border public offerings of securities between the United States and Canada. The MJDS allows eligible Canadian issuers to make registered public offerings in the United States using a prospectus prepared and reviewed in Canada that is mainly, although not exclusively, in accordance with Canadian disclosure requirements. The MJDS also allows eligible issuers to comply with U.S. continuous reporting requirements by filing their Canadian disclosure documents with the SEC (subject to certain additional U.S. disclosure and corporate governance requirements). MJDS offerings can be made on a U.S.-only basis or in connection with a concurrent offering in Canada.

Although less frequently used, there is also a reciprocal MJDS which allows eligible U.S. issuers to make registered public offerings in Canada.

Source: SEC Release No. 33-6902 (June 21, 1991).

What are the advantages of using the MJDS?

The MJDS registration process avoids duplicative regulatory review and reduces the costs, time and other burdens of complying with two disclosure regimes, allowing eligible Canadian issuers to more easily access the U.S. capital markets.

The principal advantages of using the MJDS are summarized below:

Streamlined Registration Statement. The MJDS registration statement filed with the SEC consists of a prospectus prepared mainly, although not exclusively, in accordance with Canadian disclosure requirements. The MJDS registration statement is generally wrapped around a Canadian prospectus. The prospectus, which is filed as part of the MJDS registration statement, includes a list of all of the documents filed as part of the registration statement and certain legends to notify U.S. investors that the registration statement was prepared in accordance with Canadian disclosure requirements. The prospectus filed with the SEC may omit information that is applicable exclusively to Canadian investors and not material to U.S. investors. The required exhibits that must be filed as part of an MJDS registration statement include copies of all documents incorporated by reference in the prospectus, and all documents required to be filed or made public in

Canada such as experts' written consents and certain material agreements.

Limited SEC Review and Automatic Effectiveness.

While the SEC reserves the right to review filings on MJDS registration forms, they generally do not. Instead, the SEC typically defers to home jurisdiction review in Canada, unless there is reason to believe there is a problem with the filing.

If an offering of securities is being made contemporaneously in the United States and Canada, an MJDS registration statement will generally become effective automatically upon filing with the SEC, unless a Canadian preliminary prospectus is being filed initially as part of the MJDS registration statement in order to permit offers in the United States prior to effectiveness. If an MJDS registration statement relates to a U.S.-only offering, the issuer will file the preliminary prospectus with one Canadian provincial securities regulator, typically in the issuer's home province. The MJDS registration statement will be declared effective after the SEC receives a copy of a receipt from the principal provincial securities regulator.

Simplified Continuous Reporting.

Similar to any U.S. public offering, the filing of an MJDS registration statement will generally create a continuous reporting obligation under Section 13 or 15(d) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"). However, under the MJDS, Canadian issuers can generally satisfy these continuous reporting obligations by filing their Canadian continuous disclosure documents with the SEC.

Annex A to this document includes a summary comparison of the MJDS forms as compared to other SEC registration forms.

MJDS Eligibility

What kinds of issuers are eligible for the MJDS?

Generally, to be eligible to use the MJDS, an issuer must:

- be incorporated or organized under the laws of Canada or any Canadian province or territory;
- be a foreign private issuer ("FPI"), as described below;
- have been subject to the continuous disclosure reporting requirements for the preceding 12 calendar months with a Canadian securities regulatory authority (36 months for Forms F-7, F-8 and F-80) and is in compliance with those reporting requirements;
- have a public float of outstanding equity securities held by persons other than its affiliates of US\$75 million or more; and
- not be an "investment company" registered or required to be registered under the U.S. Investment Company Act of 1940, as amended.

The US\$75 million public float requirement can serve as a barrier for the use of the MJDS, particularly for (1) companies that are not yet public and are planning a simultaneous U.S. and Canadian initial public offering, (2) smaller Canadian public companies, and (3) Canadian public companies that have a significant percentage of their shares held by members of the management team or other affiliates. These types of companies will often need to commence any U.S. registration using the more detailed U.S. forms, such as Form F-1.

What is a foreign private issuer?

An FPI is any issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the United States, unless more than 50% of the issuer's outstanding voting securities are held directly or indirectly by residents of the United States, and any of the following applies:

- the majority of the issuer's executive officers or directors are U.S. citizens or residents;
- the majority of the issuer's assets are located in the United States; or
- the issuer's business is principally administered in the United States.

For additional information, see our "Frequently Asked Questions About Foreign Private Issuers," available at <http://www.mofo.com/files/Uploads/Images/100521FAQForeignPrivate.pdf>.

Can a Canadian governmental agency be eligible for the MJDS?

No, a Canadian governmental agency is not eligible for the MJDS.

If a company is MJDS eligible, must it use the MJDS?

Eligible MJDS issuers are not required to use the MJDS. All Canadian issuers that qualify as FPIs are eligible to use the SEC's foreign issuer forms (Forms F-1, F-3 and F-4) for registration of public offerings under the U.S. Securities Act of 1933, as amended (the "Securities Act"), and for continuous reporting under the Exchange Act (Forms 20-F and 6-K). U.S. domestic offering forms (Forms S-1, S-3 and S-4) and continuous reporting forms (Forms 10-K, 10-Q and 8-K) are generally available to Canadian issuers that voluntarily choose to use them.

However, Canadian issuers are not required to use them unless they no longer qualify as FPIs.

Can an MJDS issuer be a WKSI?

Generally, a well-known seasoned issuer ("WKSI") is an issuer that is required to file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act and as of a date within 60 days of filing its shelf registration statement, either (1) has a worldwide market value of its outstanding voting and non-voting common stock held by non-affiliates of \$700 million or more or (2) has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities in registered primary offerings for cash.

A WKSI benefits from a more flexible registration process and is able to register unspecified amounts of securities in the United States under a shelf registration statement that can be used for most offerings and becomes effective automatically upon filing with the SEC. For additional information about WKSI, see our "Frequently Asked Questions About Shelf Offerings," available at

<http://www.mofo.com/files/Uploads/Images/FAQShelfOfferings.pdf>.

Only issuers that file annual reports on Form 10-K or Form 20-F with the SEC are eligible to be a WKSI. The SEC has confirmed that Canadian issuers filing annual reports on Form 40-F under the MDJS will not qualify for WKSI status. As discussed in the section, "*If a company is MJDS eligible, must it use the MJDS?*" above, Canadian issuers are not required to use the MJDS and may file their annual reports with the SEC on Forms 20-F or 10-K in order to become a WKSI. Utilizing any of these two approaches, however, will subject a Canadian issuer to the burden of complying with an

additional set of different, ongoing and more stringent disclosure requirements, which they are not subject to under the MJDS.

Source: Rule 405 under the Securities Act. *See also* Securities Offering Reform Questions and Answers, Nov. 30, 2005, available at

http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf.

What securities are eligible for the MJDS?

All securities are eligible for the MJDS, except for certain types of derivative securities, as discussed below. While rights offerings are eligible for the MJDS, only the securities issuable upon exercise of those rights are freely transferable in the United States.

Registered Offerings Under the Securities Act

What forms do MJDS companies use to effect public offerings in the United States?

MJDS issuers effect public offerings in the United States on Forms F-7, F-8, F-10 and F-80.

Form F-7 – Rights Offerings. Form F-7 is used for the registration of securities offered for cash upon the exercise of rights to purchase or subscribe for such securities that are granted proportionately to existing security holders. To be eligible for Form F-7, an issuer must have a class of its securities listed on The Toronto Stock Exchange or the Senior Board of the Toronto Venture Exchange for the 12 calendar months immediately preceding the filing of Form F-7 and meet the conditions described in *“What kinds of issuers are eligible for the MJDS?”* above. However, the public float requirement is not applicable.

Form F-10 – General. Form F-10 is the most frequently used MJDS form and may be used to register any kind of security by an eligible issuer meeting the conditions described in *“What kinds of issuers are eligible for the MJDS?”* above. Form F-10 can only be used for “derivative securities” when they are warrants, options, rights and convertible securities that are issued by the registrant, and are convertible only into securities of the registrant or one of its affiliates. Registration on Form F-10 requires that financial statements included in or incorporated by reference be reconciled to U.S. Generally Accepted Accounting Principles (“GAAP”) or prepared in accordance with International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (“IASB”).

Forms F-8 and F-80 – Acquisitions and Other Transactions. Forms F-8 and F-80 may be used for the registration of any security, except a derivative security (other than certain warrants, options, rights and convertible securities), to be issued in connection with an exchange offer or in connection with a statutory amalgamation, merger, arrangement or other reorganization requiring a shareholder vote (a “business combination”). Each of these forms can facilitate merger transactions involving Canadian companies in which a portion of the target’s shareholders reside in the United States.

To be eligible for Forms F-8 and F-80, an issuer must have a class of its securities listed on The Toronto Stock Exchange or the Senior Board of the Toronto Venture Exchange for the twelve calendar months immediately preceding the filing of Forms F-8 and F-80 and meet the conditions described in *“What kinds of issuers are eligible for the MJDS?”* above. However, the public float requirement, which is stated in Canadian dollars, need

not be satisfied if the issuer of the securities to be exchanged is also the registrant on the applicable Form F-8 or F-80. Generally, Form F-8 may be used where U.S. holders own less than 25% of the target securities, and Form F-80 may be used where U.S. holders own less than 40% of the target securities. In the event that Forms F-8 and F-80 are unavailable, certain exchange offers and business combinations may be registered on Form F-10, subject to eligibility requirements.

Retirement of Form F-9. On December 31, 2012, as part of its rule revisions relating to the reduction of its reliance on credit ratings, the SEC rescinded Form F-9. This form was previously used to register investment grade debt and preferred securities under the MJDS. MJDS companies who would have been eligible to use Form F-9 must now use Form F-10. However, there is an “eligibility gap” between Form F-10 and F-9 where F-9 filers were not required to have a public float of \$75 million or have the registered securities guaranteed by a parent that meets the \$75 million public float requirement. This eligibility gap between Forms F-10 and F-9 prevents companies who would have been MJDS eligible on Form F-9 from accessing the MJDS. Moreover, removal of Form F-9 references from Form 40-F caused MDJS companies who were eligible to use Form 40-F based on their registration on Form F-9 to be no longer eligible to use Form 40-F and required them to file on Form 20-F, which requires disclosure in accordance with SEC standards rather than Canadian disclosure rules.

In order to address this eligibility gap, the SEC adopted a temporary grandfather provision that permitted registrants who would have been eligible to use Form F-9 as of December 31, 2012 to file on Form F-10 without satisfying the public float or parent

guarantee requirement until December 31, 2015. The SEC also adopted a permanent grandfather clause allowing filers who have filed and sold securities under a Form F-9 before December 31, 2012 to continue to be eligible to use Form 40-F to satisfy their Exchange Act reporting requirements.

The rescission of Form F-9 also requires MJDS companies in the oil and gas industry to provide ASC 932 “Extractive Activities – Oil and Gas” disclosure, which is required on Form F-10 but not on Form F-9. The SEC did not adopt a grandfather provision for ASC 932 disclosure because it did not consider the disclosure requirement to be burdensome on former Form F-9 filers. As a result, former Form F-9 filers in the oil and gas industry must provide ASC 932 disclosure in their Form F-10 filings. However, the SEC has indicated that it will continue to monitor the necessity of providing such disclosure as regulatory changes occur. These developments impact a large percentage of MJDS filers, due to the number of Canadian public companies that are active in this sector.

Securities linked to currencies, commodities, stocks or indexes (also referred to as “structured notes”) were previously eligible for registration on Form F-9. However, they are no longer eligible for the MJDS and must be registered using the foreign forms (F-1, F-3 and F-4) or the U.S. domestic forms (S-1, S-3 and S-4), as applicable. Canadian financial institutions that issue structured notes typically register these offerings on Form F-3.

Source: SEC Release No. 33-9245; 34-64545 (July 27, 2011).

What are the contents of an MJDS registration statement?

The MJDS registration statement filed with the SEC consists of a cover page, prospectus, exhibits, undertakings and consent to service of process as described below.

The cover page contains basic information relating to the issuer, calculation of the registration fee and a check box which must be selected if the securities are to be offered on a delayed or continuous basis under the home jurisdiction's shelf prospectus offering procedures. Issuers registering on Form F-10 must set forth the approximate date of commencement of the proposed sale of the securities to the public.

The prospectus is governed largely, although not exclusively, by Canadian disclosure requirements with a few modifications, such as the addition of certain legends and a list of all documents filed as part of the registration statement. Information relating solely to Canadian investors and not material to U.S. investors may be omitted from the prospectus. The exhibits that must be filed as part of an MJDS registration statement include copies of all documents incorporated by reference in the prospectus, and all documents required to be filed or made public in Canada such as experts' written consents and certain material agreements.

With the exception of Form F-7, an issuer must undertake to make available to the SEC, upon request, information relating to the securities registered. In the case of an exchange offer, an issuer using Forms F-8 or F-80 must undertake to disclose in the United States, on the same basis as it is required to make such disclosure in Canada under any applicable Canadian law, regulation or policy, information regarding purchases of the issuer's securities.

The issuer and any non-U.S. person acting as trustee must file a written irrevocable consent and power of attorney on Form F-X.

What information from a Canadian prospectus can be omitted from a U.S. registration statement filed under the MJDS?

A U.S. registration statement filed under the MJDS may omit disclosure that is applicable only to Canadian investors and not material to U.S. investors, including:

- any Canadian "red herring" legend;
- any discussion of Canadian tax considerations not material to U.S. investors;
- the names of any Canadian underwriters not acting as underwriters in the United States;
- any description of the Canadian plan of distribution (except to the extent necessary to describe the material facts of the U.S. plan of distribution);
- any description of investors' statutory rights under applicable Canadian securities law; and
- certificates of the issuer or any underwriter that are required under Canadian securities law.

Source: Form F-10, available at

<http://www.sec.gov/about/forms/formf-10.pdf>.

What U.S. GAAP reconciliation requirements are applicable to MJDS registration statements?

Form F-10 requires reconciliation of all financial statements to U.S. GAAP as required by Item 18 of Form 20-F. Reconciliation to U.S. GAAP is not required if the financial statements are prepared in accordance with IFRS as issued by the IASB. U.S. GAAP reconciliation is

not required for the registration of securities on Forms F-7, F-8 or F-80.

Financial statements included in MJDS registration statements must satisfy SEC rules regarding auditor independence, with the exception of registration statements on Form F-7.

In what Canadian and U.S. jurisdictions will MJDS registration statements be filed?

A Canadian issuer conducting a public offering of securities in the United States under the MJDS must file a prospectus with the securities regulators in all of the Canadian territories and provinces where the securities will be offered. Regardless of the number of jurisdictions in which the prospectus is filed, only the principal provincial securities regulator and, if applicable, the Ontario Securities Commission, will review the prospectus. Generally, the determinations of the principal regulator will bind all of the other provincial securities regulators where the prospectus is filed, absent unusual circumstances. For U.S.-only offerings, a Canadian issuer must file the prospectus with the provincial securities regulator in the jurisdiction where the issuer's head office is located.

Subject to the limitations imposed by the National Securities Markets Improvement Act and absent an applicable exemption, a state filing requirement may be triggered in each U.S. state where offers and sales will be made. See *"When are MJDS offerings exempt from state securities laws?"* below.

How are SEC filing fees calculated for MJDS offerings?

All MJDS offerings require the payment of an SEC filing fee in U.S. dollars. The fee is based on the aggregate dollar amount of securities registered. Only securities

offered in the United States need to be registered; however, the possibility of flow back into the United States if the securities are concurrently offered in Canada and the United States should be considered. The filing fee is calculated according to Section 6(b) of the Securities Act and can vary from year to year. The SEC filing fee for MJDS offerings is the same as for other SEC registered offerings.

Does the SEC review MJDS registration statements?

While the SEC reserves the right to review MJDS registration statements, they generally do not. Instead, the SEC typically defers to home jurisdiction review in Canada unless there is reason to believe there is a problem with the filing. However, as required under Section 408 of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), the SEC will review, at least every three years, the periodic filings of MJDS filers whose securities are listed on a U.S. national securities exchange. Accordingly, the issuer may receive written comments as to these filings.

Can an MJDS issuer use non-MJDS forms to register securities?

An MJDS issuer can use non-MJDS forms to register securities in the United States. An MJDS issuer can register its securities in the United States using the foreign forms (F-1, F-3 and F-4) or the U.S. domestic forms (S-1, S-3 and S-4). Unlike the MJDS forms, the foreign forms and U.S. domestic forms are subject to substantive review by the SEC and require presentation of information in accordance with U.S. disclosure standards.

Are MJDS offerings subject to the rules and regulations of FINRA?

MJDS offerings are subject to review by the Financial Industry Regulatory Authority, Inc. ("FINRA"), a self-regulatory organization that oversees U.S. broker-dealers. FINRA, among other things, regulates and reviews the fairness of underwriting terms and arrangements. Unless an exemption is available, a filing consisting of the registration statement and draft underwriting agreement must be made with FINRA and a filing fee paid within one business day of filing with the SEC. The SEC will not declare a registration statement effective until it has received a "no objection letter" from FINRA with respect to the terms of the underwriting arrangement and the plan of distribution.

Certain offerings are exempt from FINRA review. These include, among others, offerings of:

- securities of an MJDS issuer registered with the SEC on Form F-10 and offered under the Canadian shelf prospectus offering procedures;
- securities offered in a redemption standby "firm commitment" underwriting arrangement registered with the SEC on Form F-10;
- securities of a corporate, foreign government or foreign government agency issuer that has unsecured non-convertible debt with a term of issue of at least four years, or unsecured non-convertible preferred securities;
- non-convertible debt securities and non-convertible preferred securities rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories; and

- exchange offers of securities where the issuer qualifies to register securities with the SEC on registration statement Forms S-3, F-3 or F-10.

Source: FINRA Rule 5110.

How does the Trust Indenture Act of 1939 impact MJDS offerings of debt securities?

Public offerings of debt securities are generally subject to the Trust Indenture Act of 1939, as amended (the "TIA"). The TIA requires, among other things, the appointment of an independent and qualified trustee to act for the benefit of the holders of debt securities, and specifies a variety of substantive provisions that must be included in the trust indenture. The TIA requires the trustee to be a corporation subject to supervision or examination by a regulatory authority in the United States.

The SEC adopted exemptive rules under the TIA intended to facilitate MJDS offerings. Rule 10a-5 under the TIA permits Canadian trust companies subject to supervision or examination under the Canadian Trust Companies Act or the Canada Deposit Insurance Corporation Act to act as the trustee for MJDS debt offerings. In addition, Rule 4d-9 under the TIA exempts Canadian trust indentures used to issue debt securities under the MJDS from nearly all of the substantive requirements of the TIA, provided the trust indentures are subject to the Canada Business Corporations Act, the Bank Act (Canada), the Business Corporations Act (Ontario) or the Business Corporations Act (British Columbia). The Canadian trustee also is required to file a consent to service of process on Form F-X as part of each MJDS registration statement.

Shelf Offerings

How do MJDS issuers effect shelf offerings?

MJDS issuers are able to effect shelf offerings in both the United States and Canada by establishing a Canadian shelf prospectus in accordance with Canadian shelf rules and concurrently filing a Form F-10 with the SEC. The Canadian shelf rules are similar to the SEC rules for continuous or delayed offerings of securities under Rule 415 of the Securities Act. Once a Canadian shelf prospectus has been filed with the issuer's principal provincial securities regulator in Canada, a receipt or notification of clearance will be issued.

The SEC must receive this receipt in order for the Form F-10 to become effective. The shelf prospectus may be used for a period of 25 months before a new shelf prospectus must be filed in Canada. For 25 months after the date the receipt or notification of clearance is issued, an issuer may then issue any combination of debt or equity securities off the shelf (depending on the types of securities contemplated by the shelf prospectus) in the United States, Canada, or both, by filing and delivering a prospectus supplement for each shelf offering. The prospectus supplement setting forth the terms of the specific takedown will be filed with the issuer's principal securities regulator in Canada in accordance with Canadian shelf prospectus rules on or before the date it is first delivered or, if earlier, two business days after pricing. A corresponding prospectus supplement to the shelf prospectus must be filed with the SEC in electronic format on the EDGAR system within one business day of being filed in Canada. Each SEC filing will set forth the applicable registration fee and include the following legend in the upper right hand corner of the cover page:

"Filed pursuant to General Instruction II.L. of Form F-10; File No. 333-[insert number of the registration statement]."

The Canadian shelf rules allow a final receipt to be issued before the offering price is determined, and are similar to Rules 430A and 424(b) under the Securities Act. Although the MJDS forms do not allow Rules 415, 424(b) or 430A under the Securities Act to be relied upon in an MJDS offering, they permit the use of the corresponding Canadian rules in accordance with General Instruction II.L. to Form F-10.

Source: National Instrument 44-102. *See also* General Instruction II.L. to Form F-10.

U.S. State Securities Laws

When are MJDS offerings exempt from state securities laws?

Securities offerings in the United States, including offerings by MJDS companies, are exempt from state registration in the United States if the security being offered is a "covered security" as defined under Section 18 of the Securities Act.

A covered security is:

- a security that is listed or authorized for listing on the New York Stock Exchange (the "NYSE"), NASDAQ or a U.S. national securities exchange with substantially similar listing standards as the NYSE or NASDAQ;
- a security that is equal in seniority or that is senior to a security listed or authorized for listing on the NYSE, NASDAQ or a U.S. national securities exchange with substantially

similar listing standards as the NYSE or NASDAQ;

- a security offered and sold only to qualified purchasers; or
- a security issued under Section 4 of the Securities Act, subject to certain restrictions.

However, U.S. state antifraud laws still apply to these transactions and registrants must comply with U.S. state fee requirements and filing requirements that are solely for notice purposes.

What is “registration by coordination”?

If the offered securities are not covered securities, the issuer must comply with applicable U.S. state securities laws. Some U.S. states will provide an exemption for securities registered with the SEC, but may require filing of a notice of intention to sell. Most U.S. states have adopted the Uniform Securities Act’s registration by coordination provisions, which allow a registration statement to become effective in such U.S. states upon, among other requirements, notice to U.S. state administrators of an effective registration statement with the SEC and filing of the registration statement seven days prior to the effective date with U.S. state administrators. U.S. states that have not adopted the Uniform Securities Act’s registration by coordination provisions have accommodated MJDS registrants by providing automatic effectiveness of the registration statement when it is declared effective by the SEC, providing an exemption from registration upon payment of a fee and the filing of a disclosure document seven days before the offering is made or expediting the review process.

Exchange Act Reporting

How do MJDS companies comply with the Exchange Act reporting requirements?

MJDS companies will be subject to the reporting requirements under the Exchange Act upon registering an offering on the MJDS forms. They may satisfy their reporting requirements by filing Canadian periodic disclosure filings on Form 40-F for annual reports and Form 6-K for interim reports, supplemented by additional disclosure requirements under the Dodd-Frank Act and the Sarbanes-Oxley Act that are reflected in the instructions to Form 40-F. Both Form 40-F and Form 6-K must be filed in English.

Are MJDS companies subject to Sections 14 and 16 of the Exchange Act?

Rule 3a12-3 under the Securities Act exempts FPIs, including MJDS companies, from complying with the U.S. proxy solicitation rules under Section 14 (except for the tender offer related provisions) and Section 16 of the Exchange Act. Therefore, an MJDS company does not have to file with the SEC a proxy statement prepared in accordance with Schedule 14A, and is exempt from certain reporting obligations and the short-swing trading profit and insider trading recovery rules under Section 16 of the Exchange Act. However, MJDS companies will typically file with the SEC the Canadian version of the proxy statement called the Management Proxy Circular or Management Information Circular on Form 6-K.

What is Form 40-F and what is required under Form 40-F?

MJDS companies may use Form 40-F to file their annual report. The Form 40-F must be filed on the same day that the information included in the form is due to be filed with the applicable Canadian securities commission or regulatory authority. Form-40 includes the issuer's annual information form (the Canadian version of an annual report), audited annual financial statements and management's discussion and analysis for the fiscal year ended prepared in accordance with Canadian disclosure requirements. In addition, under the requirements of the Sarbanes-Oxley Act, the issuer must include:

- a management's annual report on internal control over financial reporting;
 - an attestation report from a registered public accounting firm on management's assessment of internal control over financial reporting; and
 - additional disclosure on:
 - disclosure controls and procedures;
 - internal control over financial reporting;
 - any financial experts on their audit committee or lack thereof;
 - principal accountant fees and services;
 - off-balance sheet arrangements; and
 - tabular disclosure of contractual obligations.
- certifications required under Sections 302 and 906 of the Sarbanes-Oxley Act from each principal executive officer and principal financial officer, or persons performing similar functions at the time the Form 40-F is filed;
 - any notices required by Rule 104 of Regulation BTR sent in the past fiscal year to directors and executive officers concerning any equity security subject to a blackout period;
 - a copy of the filer's code of ethics; and
 - a Form F-X for service of process information in the United States, unless a Form F-X was previously filed with a registration statement.

Is GAAP reconciliation required under Form 40-F?

If the financial statements included in the Form 40-F are prepared in accordance with IFRS, reconciliation to GAAP is not required. All publicly accountable enterprises in Canada have transitioned to IFRS for their financial years beginning on or after January 1, 2011 under the rules adopted by the Canadian Securities Administrators.

What is Form 6-K and what do MJDS companies file on Form 6-K?

Reporting requirements under the Exchange Act require an FPI to furnish interim reports on the basis of their home country's regulatory and stock exchange practices, rather than the quarterly reports on Form 10-Q and current reports on Form 8-K required for U.S. companies. An MJDS company may use Form 6-K to furnish (1) information it has made public or is required to make public under Canadian securities laws, (2) information it has filed or is required to file with the applicable stock exchange on which its securities are

A Form 40-F filer also is required to include as exhibits copies of:

- materials incorporated by reference;

traded, and (3) information it has distributed or is required to be distributed to its shareholders. This information is limited to material information with respect to the MJDS company and its subsidiaries and may be related to any of the following:

- changes in business;
- changes in management or control;
- acquisitions or dispositions of assets;
- bankruptcy or receivership;
- changes in the MJDS company's certifying accountants;
- financial condition and results of operations;
- material legal proceedings;
- changes in securities or in the security for registered securities;
- defaults upon senior securities;
- material increases or decreases in the amount of securities or indebtedness outstanding;
- the results of the submission of matters to a vote of security holders;
- transactions with directors, officers or principal security holders;
- the granting of options or payment of other compensation to directors or officers; and
- any other information which the MJDS company deems as materially important to its shareholders.

This information must be furnished promptly after the information is made public, and a copy of any information incorporated by reference must be attached as an exhibit to the Form 6-K. Information on Form 6-K is deemed "furnished," and not "filed" for liability purposes under Section 18 of the Exchange Act.

However, an MJDS company that is filing a registration statement may elect to deem the Form 6-K information as "filed" by specifying that the information is incorporated by reference into the registration statement. For more information, see "Securities Liability Issues for MJDS Companies — *What potential liability may MJDS companies face based on their Form 6-K filings?*" below.

MJDS companies should note that although they are only required to furnish information made public in Canada, if the applicable Canadian disclosure requirements are less comprehensive than U.S. disclosure requirements, MJDS companies should consider complying with the Form 8-K requirements for similar events to make sure all material information has been provided, in order to help avoid potential liability under Section 10 and Rule 10b-5 of the Exchange Act. For more information, see "Securities Liability Issues for MJDS Companies — *What potential liability under U.S. securities laws may MJDS companies face?*" below.

FPIs, including MJDS companies, are not subject to U.S. Regulation FD, which requires prompt disclosure of material, non-public information that has been unintentionally disclosed to market professionals or security holders. However, FPIs, including MJDS companies, can voluntarily comply with U.S. Regulation FD by publicly furnishing the relevant information in a Form 6-K filing. Doing so can help avoid any reputational risk or potential liability under Rule 10b-5 under the Exchange Act. For more information on liability, see "Securities Liability Issues for MJDS Companies" below, and for more information on U.S. Regulation FD, see our "Frequently Asked Questions About Regulation FD," available at.

<http://media.mofo.com/files/Uploads/Images/FAQs-Regulation-FD.pdf>

Does the SEC review Exchange Act filings of MJDS companies?

The SEC generally will not review periodic reports filed using the MJDS forms. Instead, the SEC will typically rely on the review conducted by Canadian regulators. However, as required under Section 408 of the Sarbanes-Oxley Act, the SEC will review, at least every three years, the periodic filings of MJDS filers whose securities are listed on a U.S. national securities exchange.

Are there any Exchange Act filing exemptions applicable to MJDS companies?

Rule 12g3-2 under the Exchange Act exempts FPIs from the periodic reporting requirements under Sections 13(a) and 15(d) of the Exchange Act. Rule 12g3-2(a) exempts issuers with fewer than 300 holders resident in the United States and Rule 12g3-2(b) exempts FPIs that (1) are not subject to Exchange Act periodic reporting requirements; (2) currently maintain a listing on an exchange in their home jurisdiction that is their primary trading market; and (3) publish disclosure documents made public in their home jurisdiction on their website or through an electronic information delivery system. These exempt issuers are also exempt from the corporate governance, accounting and certification requirements of the Sarbanes-Oxley Act, since they do not have securities registered under the Exchange Act. MJDS companies whose periodic reporting obligations arise solely from filing a Form F-7, F-8 or F-80 are exempt from the reporting requirements of Section 15(d) of the Exchange Act under Rule 12h-4 of the Exchange Act.

Securities Liability Issues for MJDS Companies

What potential liability under U.S. securities laws may MJDS companies face?

Sections 11 and 12 of the Securities Act. Under Section 11 of the Securities Act, an MJDS company that issues securities in the United States will be strictly liable to purchasers of its securities if its registration statement at the time of effectiveness “contains an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” In addition, every person who signs the registration statement and current directors or certain persons who are about to become directors are also subject to potential liability under Section 11 for material misstatements or omissions in the registration statement.

An MJDS company that issues securities in the United States is also subject to potential liability under Section 12 of the Securities Act. Under Section 12(a)(1), an MJDS company will be subject to strict liability for offering or selling a security in violation of the registration requirements of Section 5 of the Securities Act. Under Section 12(a)(2), an MJDS company is subject to strict liability for material misstatements or omissions in any prospectus or prospectus supplement relating to the offering filed under Rules 424 or 497 under the Exchange Act, a free writing prospectus, any communication that is an offer of securities or any oral or written “test-the-water communications” made under Section 5(d) of the Securities Act by the MJDS company as an “emerging growth company” (“EGC”) under the Jumpstart Our Business Startups Act (the “JOBS Act”). However, if an MJDS company elects to

file as an EGC, under Section 105 of the JOBS Act, the MJDS company will not be subject to Section 12(a)(2) liability for research reports issued in connection with its initial public offering or other public equity securities offerings.

U.S. underwriters participating in an MJDS offering also are subject to potential liability under Sections 11 and 12 of the Securities Act. However, unlike the issuer who has strict liability, the underwriters have a due diligence defense against such potential liability. Therefore, underwriters participating in an MJDS offering will generally require, among other things, company representations, a comfort letter and legal opinions from U.S. and Canadian counsel regarding adequate disclosure in the MJDS filings to help establish their due diligence defense.

Anti-Fraud Liability. MJDS companies who issue their securities in the United States also are subject to antifraud rules under Section 17 of the Securities Act and Exchange Act Section 10(b) and Rule 10b-5. Under Section 17, an MJDS company issuing securities in the United States will be subject to liability for material misstatements or omissions in the “disclosure package” provided to an investor prior to or at the time of the contract of sale or any fraudulent activities in connection with a sale of securities. Under Section 10(b) and Rule 10b-5, an MJDS company will be subject to liability for use of manipulative or deceptive practices in connection with a purchase or sale of a security and for false statements about, or omission of, a material fact in connection with, the issuance of securities.

As discussed earlier, the MJDS allows eligible Canadian issuers to meet the U.S. disclosure and periodic reporting requirements through use of a document prepared in accordance with Canadian

disclosure standards and periodic filings made in their home jurisdiction. Therefore, MJDS companies are not required to comply with the line-item disclosure requirements of U.S. filing forms unless specifically required in the applicable MJDS form. However, MJDS forms require disclosure of all “material information” necessary to make the required statements not misleading. Therefore, MJDS issuers should consider whether additional information should be disclosed to avoid potential liability under U.S. securities law.¹

What potential liability may MJDS companies face based on their Form 6-K filings?

Information disclosed in a Form 6-K is “furnished” not “filed” for purposes of Section 18 of the Exchange Act. In other words, an MJDS company is not subject to Section 18 liability based on the disclosure in a Form 6-K. However, if a Form 6-K contains materially misleading information or omits material information, the SEC may bring administrative proceedings against the MJDS company which can result in significant fines. Moreover, if a Form 6-K is incorporated by reference in a registration statement, an MJDS company will be subject to potential liability under Sections 11, 12 and 17 of the Securities Act based on the Form 6-K information, which becomes part of the registration statement.

An MJDS company may also be subject to liability if it fails to make a Form 6-K filing. Failure to make a Form 6-K filing would be a violation of Sections 13(a) and 15(d) of the Exchange Act, subjecting a company to SEC administrative proceedings. Failure to file a Form 6-K may also be considered an omission or a failure to

¹ For an example of potential liability for MJDS companies based on material misstatements and omissions in MJDS filings, see *In the Matter of Sony Corporation and Sumio Sano*, Release No. 34-40305 (Aug. 5, 1998)

disclose material information which may lead to liability under Exchange Act Section 10(b) and Rule 10b-5.

The Dodd-Frank Act and MJDS

What are the Dodd-Frank Act rules applicable to MJDS companies?

The Dodd-Frank Wall Street Reform and Consumer Act (the “Dodd-Frank Act”), signed into law on July 21, 2010, contains disclosure requirements that apply to all SEC reporting companies, including MJDS companies. Among the several requirements of the Dodd-Frank Act, the following are most frequently applicable to MJDS companies:

- additional corporate governance requirements relating to compensation committees or any other board committee that oversees executive compensation;
- the repeal of Rule 436(g) under the Exchange Act, relating to the disclosure of credit ratings; and
- additional specialized disclosure requirements relating to conflict minerals, government payment in connection with resource extraction and mine safety.

Corporate Governance Requirements. Under Section 952 of the Dodd-Frank Act, the SEC adopted rules implementing Section 10C of the Exchange Act, which prohibits national securities exchanges from listing equity securities of companies that do not comply with the following Dodd-Frank Act requirements:

- the independence of each compensation committee member;

- the compensation committee’s authority to retain or obtain advice from compensation advisers;
- the compensation committee’s evaluation of the independence of compensation advisors and consultants;
- funding requirements for payments to compensation advisers;
- the adoption of a claw-back policy that provides for recoupment of executive incentive compensation if financial statements are restated due to a material noncompliance with financial reporting requirements;
- the disclosure of policies regarding incentive-based compensation based on publicly reported financial information; and
- additional disclosure in proxy or consent solicitation materials for an annual meeting of the shareholders relating to the use of compensation consultants and any conflict of interests relating to such consultants.

MJDS companies are exempt from having an independent compensation committee as long as they disclose in their annual reports to shareholders the reason why they do not have an independent compensation committee. It is unclear whether the other requirements apply to MJDS companies; however, given that MJDS companies are exempt from the proxy rules of Section 14 of the Exchange Act and are generally exempt from the corporate governance rules of national securities exchanges, MJDS companies likely would be exempt from these requirements. However, the SEC’s proposed clawback rules

<http://www.sec.gov/rules/proposed/2015/33-9861.pdf>

would, by their terms, apply to MJDS companies.

Conflict Minerals, Government Payments in Resource Extraction and Mine Safety. The Dodd-Frank Act requires additional specialized disclosure relating to use of conflict minerals, government payments made in connection with resource extractions and periodic reports on mine safety. Additional disclosure on mine safety for FPIs is limited to mines located in the United States. Again, these disclosures are generally more relevant for Canadian companies, which are more concentrated in the extractive minerals sector. An MJDS company that is required to disclose this additional information must do so using Form SD, which will be deemed as “filed,” thus subjecting the MJDS company to potential liability under Section 18 of the Exchange Act if any of the information is inaccurate. However, Form SD will not be deemed to be incorporated by reference into any Securities Act or Exchange Act filings unless the MJDS company expressly incorporates the Form SD.

Repeal of Rule 436(g). The repeal of Rule 436(g) under the Securities Act pursuant to the Dodd-Frank Act has required registrants to obtain and file consents from the applicable credit rating agency when including ratings information in their registration statements. Since credit rating agencies are reluctant to grant their consent, these ratings have largely been removed from U.S. prospectuses.

By **Lloyd S. Harnetz, Partner,**
in the Corporate Group of **Morrison & Foerster LLP**

© Morrison & Foerster LLP, 2016

Annex A

Comparison of MJDS and Other SEC Registration Forms

	Foreign Private Issuer	MJDS-Eligible Issuer	U.S. Domestic Issuer
Exchange Act Registration Forms (required when listing in the United States)	Form 20-F, which requires SEC-specified disclosure regarding the FPI and is subject to SEC review.	Form 40-F, which consists of all material information made public in Canada since the end of the previous fiscal year and is generally not subject to SEC review.	Form 10, which requires SEC-specified disclosure regarding a U.S. domestic issuer and is subject to SEC review.
Exchange Act Reporting Forms (required when registering a class of securities under the Exchange Act or offers and sales of securities under a Securities Act registration statement)	Form 20-F for annual information, including annual audited financial statements. Form 6-K for all other material information disclosed by the FPI according to home-country or stock exchange requirements.	Form 40-F for annual information, including the Canadian annual information form, audited annual financial statements and accompanying MD&A. Form 6-K for all other material information disclosed by an MJDS-eligible issuer under Canadian or stock exchange requirements.	Form 10-K for annual information required by the SEC, including annual audited financial statements. Form 10-Q for interim period financial and other information. Form 8-K for disclosure of specified material events.
Securities Act Registration Forms (required when registering the offer and sale of securities in the United States)	Form F-1, which requires a long form prospectus that includes SEC-prescribed material information about the FPI. While the disclosure required by Form F-1 is in accordance with U.S. disclosure standards, the disclosure requirements are somewhat less demanding than what would be required by Form S-1. Among other things, Form F-1 contains less specific requirements about the description of business, and permits disclosure of executive compensation in the aggregate, unless otherwise disclosed on an individual basis.	Form F-10 is available for the registration of any security other than certain derivative securities by an MJDS-eligible issuer with a public float of US\$75 million or more. Form F-10 consists of a prospectus filed with the SEC, certain other information and exhibits. The disclosure in the prospectus is governed by disclosure requirements applicable in Canada, except that the MJDS prospectus may omit information that is applicable solely to Canadian investors and not material to U.S. investors. The MJDS prospectus also must contain specified legends and a list of all other documents filed as part of the registration statement.	Form S-1, which is the registration statement available for initial public offerings by U.S. domestic issuers and when such issuers are not eligible to use other forms. Form S-1 includes the most extensive disclosure requirements, which specify the material information that must be included in the prospectus that is part of the registration statement. Form S-1 also requires disclosure of other specified information and exhibits.