

How To Benefit From The US-Canada MJDS

Law360, New York (October 31, 2013, 3:51 PM ET) -- The Multijurisdictional Disclosure System is a system developed by the U.S. Securities and Exchange Commission and the Canadian securities regulatory authorities that enables a very different regulatory regime for Canadian issuers.

This system eliminates major hurdles for qualifying Canadian companies to register an offering of securities in the U.S. under the Securities Act of 1933, as amended (the "Securities Act") or become a reporting company with the SEC by registering a class of securities under the Securities Exchange Act of 1934, as amended, (the "Exchange Act").

The principal benefit is to allow use of the public filing in the U.S. of a Canadian prospectus that is subject to review only by Canadian securities regulators. The MJDS forms comprise Forms F-7 (for rights offerings), F-8 and F-80 (for certain exchange offerings and business combinations), F-10 (for offerings of securities, exchange offers and business combinations), and Form 40-F (for Exchange Act registration and reporting).

Form F-9, formerly among the forms for MJDS filers and used to register investment grade debt was rescinded by the SEC effective Dec. 31, 2012, in part because Form F-10 may be used to register debt securities.

The instructions to this series of forms includes requirements for financial statements which, if presented in accordance with Canadian generally accepted accounting principles, must include an reconciliation to U.S. GAAP, often done in the form of a note to the financial statements.

As of Jan. 1, 2011, most Canadian reporting companies are required to prepare their financial statements in accordance with International Financial Reporting Standards. Under recent SEC rule changes, FPIs are not required to provide a reconciliation to U.S. GAAP if their financial statements are prepared in accordance with IFSB as issued by the International Accounting Standards Board. As a result, most Canadian filers, once they have transitioned fully to IFRS, no longer encounter the need to undertake a U.S. GAAP reconciliation.

Form 40–F

Form 40-F is the counterpart of Form 20-F for Canadian companies that qualify to use this form. Like Form 20-F, it may be used to register a class of securities under Section 12(b) or 12(g) (15 USCS § 78l) of the Exchange Act and subsequently as the annual report for a Canadian foreign private issuer (FPI).

It may also be used by Canadian filers that have become subject to the Exchange Act reporting requirements by having previously registered an offering of securities under the Securities Act on Form F-7, F-8, F-10 and F-80. Also like Form 20-F, Form 40-F filings must be made electronically through the SEC's EDGAR filer system unless a hardship exemption is procured.

Note also that if the registration statement or report contains information derived from a statement made by an accountant, appraiser or engineer, a written consent to the inclusion of the information must be included as an exhibit to the form and specify use of the report or valuation in the United States.

Insofar as many Canadian companies are involved in the natural resource or mining sector, and often include reports of summaries of engineers as to their exploration or production properties, consents of these experts must be procured.

Form 40-F has two major virtues that are not available to Form 20-F filers. First, a company may use its filings with the applicable Canadian securities regulatory authority as the basis for disclosure without having to redraft (or supplement information in) them as is often necessary to meet the requirements of Form 20-F.

In this respect, Form 40-F is sometimes referred to as a “wrap” around the Canadian documents required to be filed in the form. Second, a Form 40-F Exchange Act registration statement is effective on filing. In other words, it does not receive the review for quality of disclosure by the SEC that an initial Form 20-F filer receives. That means achieving an effective registration is typically far quicker and more cost-efficient for a Canadian FPI than FPIs based in other countries.

In order to qualify to use Form 40-F to register a class of securities under Section 12 of the Exchange Act, a Canadian company:

- must be incorporated or organized under Canadian law,
- be an FPI,
- have been subject to the periodic reporting requirements of a securities commission (e.g., Ontario Securities Commission or British Columbia Securities Commission) for at least 12 calendar months preceding the filing and be in compliance with the reporting requirements of such commission, and
- have a market value of the public float for its outstanding equity shares of at least \$75 million.

Note that the instructions to the form define certain key terms such as “equity security” and “public float” and provide a computational method to determine the applicable public float.

The disclosure requirements for purposes of a Form 40-F registration statement are met by including all information material to an investment decision for the last full fiscal year, and in particular, must include information contained in:

- all reports made public pursuant to applicable Canadian law,
- filings with a stock exchange on which the company’s securities are traded and which is made public by the exchange, and
- distributed to security holders under applicable law.

The filing requirements for a Form 40-F annual report are substantially similar, except that in addition the company must file its audited financial statements and accompanying management’s discussion and analysis (generally two separate documents, the comparable parts of which are components of a Form 10-K annual report for U.S. companies).

In either case, Canadian filers customarily comply with the requirements by attaching their Canadian documents (or incorporating them by reference from another document furnished or filed with the SEC) as a series of exhibits to the Form 40-F registration statement or annual report.

Similar to Form 20-F, the Form 40-F instructions contain items that are required only for annual reports on the form. Most or all of these are comparable to information required by U.S. companies and are based on requirements that have their origins in the Sarbanes-Oxley Act of 2002.

These, other than the officer certifications discussed below, are generally included in the “wrap”. These “wrap” items should be discussed in advance with a first-time registrant to remove any unfamiliarity, and in some cases, closely comparable information is found in the Canadian reports.

The Form 40-F annual report requirements include the Exchange Act Rule 13a-14(a) (17 CFR 240.13a-14) and Rule 15d-14(a) (17 CFR 240.15d-14) certifications — sometimes referred to as Section 302 certifications — and the Rule 13a-14(b) and 15d-14(b) certifications — sometimes referred to as the Section 906 certifications — that are required from the principal executive officer and principal financial officer.

The form of the Section 302 certifications is set forth in the Form 40-F instructions and cannot be modified. U.S. counsel should educate a first-time filer if this requirement is unfamiliar and as to the legal consequences for the signing officer.

The report must also state the conclusions of the principal officers as to the effectiveness of the disclosure controls and procedures, as well as matters related to internal control over financial reporting (note the recommended language in the Form 40-F instructions).

Also required is the attestation report of the outside auditor as to the effectiveness of internal control over financial reporting (so-called SOX 404 report) and disclosure of changes in internal control over financial reporting. One should note that the instructions permit a one-year delay on these two items for first-time filers, which, if elected, must be disclosed using language similar to that contained in the instructions to the form.

In addition, Form 40-F, when used as an annual report, requires a statement of whether the board of directors has determined whether the company has an “audit committee financial expert,” whether it has adopted a code of ethics applicable to certain “C-level” officers and how the code is made public, or has been amended or waived, principal accounting fees and services (broken out into four categories), any off-balance sheet arrangements, and tabular disclosure of certain contractual obligations, identification of the audit committee, an interactive data file (XBRL) and mine safety disclosure.

The Form 40-F annual report must be filed on the same date the information included in it is filed in Canada. Note that after the Form 40-F is effective, the Canadian FPI maintains current reporting by submitting documents under cover of Form 6-K.

Form F-10

Form F-10 is used by MJDS-qualified Canadian companies to register an offering of securities in the U.S. under the Securities Act, including initial and follow-on primary offerings, exchange offers (provided the terms of the offered securities are no less favorable to U.S. holders), and business combinations (if both companies are Canadian).

It may also be used for a secondary offering, often referred to as a resale registration filed by a company on behalf of selling security holders. It can also be used for dividend reinvestment plans (DRIPS), rights offerings not eligible for Form F-7, and so-called “A/B” or “Exxon Capital” offers.

The primary advantages of a Form F-10 registration are two-fold:

First, the Canadian prospectus serves as the primary disclosure document and is not subject to separate review by the SEC. That means that for cross-border offerings, the issuer is not subject to comments by securities regulators in both the U.S. and Canada.

Second, the F-10 is effective upon filing with the SEC unless the filing is designated as preliminary. That allows the Canadian and U.S. offerings to commence simultaneously, or, if the offering is only in the U.S., for the timing to be controlled.

The “effective on filing” provision all but eliminates uncertainty as to regulatory compliance in the U.S. A Canadian company may use Form F-10 without conducting an offering in Canada; however, the registration statement and any amendments must be prepared and filed with the applicable Canadian securities regulatory authority as if there were to be a contemporaneous offering in Canada.

Similar to Form 40-F, a Canadian company electing to use Form F-10 must meet certain qualifications. It must:

- be organized or incorporated under Canadian law,
- be an FPI,
- be subject to the continuous disclosure requirements of a securities regulatory authority in Canada for at least 12 calendar months before filing the Form F-10 (which applies to both companies in a business combination with certain qualifications), and
- have an aggregate public float of its outstanding equity securities that is at least \$75 million (with certain special rules for business combination companies).

The Form F-10 instructions define, among others, “equity shares” and “public float” and provide rules for calculating public float. The SEC’s Division of Corporation Finance staff has indicated that a company remains eligible to use Form F-10 if it meets the requirements at the time of filings but later fails to do so (as, e.g., by falling below the minimum public float) in its Compliance and Disclosure Interpretations (C&DI).

That is important, for example, when a Canadian company files a universal shelf registration on Form F-10 for “takedowns” sometime in the future.

The bulk of the disclosure of the Form F-10 registration statement is contained in the Canadian prospectus and related documents, which are typically attached as exhibits (instructions state which documents depending on the anticipated transaction) or, probably less often, as part of the registration statement. As such, the Form F-10 document is commonly referred to as a “wrap.”

The Canadian prospectus filed in the U.S. may omit disclosure applicable solely to Canadians that would not be material to U.S. purchasers. Examples of items that could be omitted are included in the instructions. Disclosure information may also be incorporated by reference from prior reports filed with the SEC under the Exchange Act (e.g., from Form 20-F, 40-F or 6-K).

The instructions require certain legends (Part I, Item 3) to be included in the “wrap” portion, for which “plain English” versions may be substituted. Under Part I, Item 2 of Form F-10, which references Item 18 of Form 20-F, financial statements included in the Canadian documents must be reconciled to U.S. GAAP (unless prepared in accordance with IFRS issued by the IASB).

As noted by SEC staff in C&DI Question 109.01, the reconciliation requirement also applies to interim financial statements of the registrant. A Form F-10 registration statement must be filed electronically with the SEC via its EDGAR filer system.

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