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LISTING AND OFFERING EQUITY SECURITIES IN THE UNITED STATES: A GUIDE FOR CANADIAN COMPANIES

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MAY 2000

In recent years, a growing number of Canadian companies have entered the U.S. public equity markets, taking advantage of both the liquidity and sophistication of these markets and the increasing interest among U.S. investors in the securities of Canadian and other non-U.S. issuers. This memorandum has been prepared to assist Canadian companies in understanding the alternatives available to them, and the procedures that must be followed under each alternative, as they consider listing or offering their securities in the United States.

Canadian companies may enter the U.S. securities markets in several different ways:

- Such companies may wish to further enhance the visibility and liquidity of their equity securities by listing such securities on a national securities exchange or automated quotation system. Although other possibilities exist, most Canadian companies considering this option will give serious thought to three alternatives: listing their securities on the New York Stock Exchange (the "NYSE") or the American Stock Exchange (the "AMEX")[1/] or applying to have such securities quoted on the National Market of The Nasdaq Stock Market ("Nasdaq"), an automated quotation system established by the National Association of Securities Dealers, Inc. ("NASD").

- Such companies may also wish to raise capital from U.S. investors through the issuance of equity securities in the United States. Such an issuance may be effected through a registered public offering, or through a "private placement" to sophisticated institutional investors (in a traditional private placement or in a so-called "Rule 144A offering").

Although beyond the scope of this memorandum, Canadian companies may also wish to access the U.S. capital markets by issuing debt instruments in either the public or private markets. An approach that is being used by an increasing number of Canadian companies is an issuance of debt (often in the form of high-yield instruments) in the private placement market to sophisticated institutional investors, followed by an exchange offer that permits such instruments to be resold on a retail basis.

Part I of this memorandum provides a general overview. Part II explains the procedures for listing equity securities on the NYSE or Nasdaq. Part III provides an overview of the process of effecting a public offering in the United States and also briefly discusses the private placement alternative. Part IV outlines some of the consequences of effecting a public offering in the United States or of becoming listed on the NYSE or Nasdaq, including a discussion of the periodic reporting obligations imposed by the U.S. securities laws and the potential sources of liability for Canadian issuers under the U.S. securities laws. Part V discusses some practical considerations that may be significant to Canadian companies considering entering the U.S. capital markets.

I. Overview.

Generally speaking, any company—whether U.S. or non-U.S.—that wishes to offer or sell its securities through a public offering in the United States must register the proposed public offering, and follow the other rules set forth in, the Securities Act of 1933 (often called the

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[1/] Because the AMEX listing process is similar to that of the NYSE, and because the AMEX is not as frequently chosen as the NYSE (or NASDAQ,) this paper does not address the AMEX process. The listing criteria for the AMEX are lower than those of the NYSE.

"Securities Act" or the "1933 Act"); any such company that wishes to list its securities on a national securities exchange (such as the NYSE) or on the Nasdaq National Market must register those securities under the Securities Exchange Act of 1934 (often called the "Exchange Act" or the "1934 Act").

The Exchange Act also imposes a separate registration requirement on companies whose equity securities are traded in the U.S. markets, but an exemption is available for certain Canadian and other non-U.S. issuers whose equity securities are held but not listed in the United States. In general, under the Exchange Act, if an issuer's equity securities are held of record by 500 or more persons and the issuer has assets exceeding U.S. $5 million,[2/] the issuer must register the class of securities with the SEC and thereafter comply with certain reporting requirements. Eligible Canadian issuers[3/] may, however, obtain an exemption from the registration and reporting requirements under the Exchange Act under the so-called "information-supplying" exemption of Rule 12g3–2(b). Under this exemption, eligible Canadian and other non-U.S. issuers may provide to the SEC copies of reports required to be filed in their home country in lieu of reports required to be filed under the Exchange Act.[4/]

In order to obtain an exemption under Rule 12g3–2(b), a Canadian issuer must furnish to the SEC whatever information, since the beginning of its last fiscal year, the issuer (i) has made or is required to make public pursuant to the law of Canada or the province in which it is incorporated or organized, (ii) has filed or is required to file with the Canadian stock exchange on which its securities are traded and which was made public by such exchange or (iii) has distributed or is required to distribute to its security holders. Generally speaking, the information required to be furnished under Rule 12g3–2(b) is information that would be material to an investment decision. Such information would include: the financial condition or results of operations; changes in business; acquisitions or dispositions of assets; issuance, redemption or acquisitions of the issuer's securities; changes in management or control; the granting of options or the payment of other compensation to directors or officers and transactions with directors, officers or principal security holders. Once the exemption has been granted, any such information made public during each subsequent fiscal year must be furnished to the SEC "promptly" after it is made public.

[2/] The SEC has proposed amendments to the Exchange Act that would double the total assets threshold from U.S. $5 million to U.S. $10 million.

[3/] References to "Canadian companies" or "Canadian issuers" in this memorandum are to Canadian corporations that qualify as "foreign private issuers" under regulations adopted under the Exchange Act and the Securities Act. These regulations define "foreign private issuer" to mean any issuer (other than a government) that is organized or incorporated under the laws of any country other than the United States, other than an issuer (i) more than 50% of the outstanding voting securities of which are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States and (ii) (a) the majority of the executive officers or directors of which are U.S. citizens or residents, (b) more than 50% of the assets of which are located in the United States or (c) the business of which is administered principally in the United States. A Canadian issuer that does not qualify as a foreign private issuer would be treated in the same manner as a U.S. issuer for purposes of the U.S. securities laws.

[4/] There is also an exemption under the Exchange Act for any class of securities issued by a Canadian issuer if that class has fewer than 300 holders resident in the United States, notwithstanding that there are 500 or more holders worldwide. For purposes of determining whether securities are held by fewer than 300 U.S. residents, securities held of record by a broker, dealer, bank or a nominee for any of the foregoing for the accounts of customers resident in the United States are counted as held in the United States by the number of separate accounts for which the securities are held.

Under Rule 12g3–2(b), the copies of press releases and all other communications or materials distributed directly to security holders that are filed with the SEC must be in English. In lieu of original English translations, however, English "versions" or "adequate summaries" in English may be furnished. Other documents need not be furnished unless the issuer has prepared or caused to be prepared English translations, versions or summaries thereof. If no English translations, versions or summaries of these other documents have been prepared, however, a brief description in English of any such document must be furnished.

None of the information furnished to the SEC under Rule 12g3–2(b) is considered to be "filed" with the SEC or otherwise subject to the liabilities of Section 18 of the Exchange Act, which imposes liability for false and misleading statements made in any application, report or document filed under the Exchange Act.

The Rule 12g3–2(b) exemption is not available if the Canadian issuer's equity securities are listed on a U.S. national securities exchange (such as the NYSE) or quoted on Nasdaq, or if the Canadian issuer has made or is making a public offering of securities in the United States.

In order to qualify under the Rule 12g3–2(b) exemption, before having 300 or more holders of its equity securities resident in the United States, the Canadian issuer must provide to the Office of International Corporate Finance in the SEC's Division of Corporation Finance the material information that the issuer has made public or distributed (as described above), a list identifying such information that it is required to provide (including when and to whom such information is required to be furnished) and providing information regarding the number of holders of each class of outstanding equity securities held by residents in the United States, the circumstances in which such securities were acquired and the date and circumstances of the most recent public distribution of securities by the issuer or any affiliate thereof. If the submission is satisfactory, the issuer will then be notified that it has been included in the list of Canadian and other non-U.S. issuers eligible to claim the exemption, and assigned a file number.

Canadian issuers may establish an exemption under Rule 12g3–2(b) for a variety of reasons. First, a Canadian issuer that may in the future have or that may have 300[5/] or more security holders in the United States but does not have securities listed on a national securities exchange or quoted on Nasdaq would be well advised to obtain the exemption. Without the exemption, upon reaching such threshold the Canadian issuer would be obligated to register under the Exchange Act, whether or not it has assets in the United States, has actively sought to build up its shareholder base in the United States or has any other connection with the United States. Second, a Canadian issuer that is not otherwise subject to the reporting requirements of the Exchange Act may apply for the exemption so as to satisfy the information requirement of Rule 144A (discussed below).

[5/] This number is significant because Rule 12g3–2(a) affords an exemption to Canadian issuers with less than this number of U.S. security holders. See preceding footnote.

II. NYSE Listing/Nasdaq Quotation.

A Canadian issuer that wishes to have its equity securities listed on a national securities exchange, such as the NYSE, or quoted on Nasdaq is required to register the securities pursuant to the Exchange Act,[6/] and to follow the procedures for listing set forth in the rules of the NYSE or the procedures for Nasdaq quotation contained in the rules of the NASD.

a. Exchange Act Registration.

To register its securities under the Exchange Act, a Canadian issuer must prepare and file with the SEC and have declared effective a registration statement on Form 20–F.[7/] The information required to be included in the registration statement is set forth in Annex A hereto, which reflects the revisions adopted in October 1999 by the SEC that become effective at various points beginning September 30, 2000.

Form 20–F contains alternative financial statement requirements. Item 17 of the Form contains the basic financial statement requirement for registration statements on Form 20–F, whereas the more comprehensive financial statements described in Item 18 will generally be included where the issuer is also registering the offering and sale of the underlying securities under the Securities Act.[8/]

Both Item 17 and Item 18 require that the registration statement include balance sheets as of the end of the two most recent fiscal years and statements of income and cash flows for the three most recent fiscal years. Both Items provide that financial statements may be prepared either in accordance with U.S. generally accepted accounting principles ("U.S. GAAP") or in accordance with Canadian accounting principles. If the financial statements are prepared in accordance with Canadian GAAP, the issuer must reconcile the financial statements to U.S. GAAP by providing a discussion of material variations. Canadian issuers providing reconciled statements under Item 18 must include all information required by U.S. GAAP and Regulation S–X (which specifies the financial statement disclosure requirements for filings to be made under the Exchange Act and the Securities Act), whereas the reconciliation required under Item 17 is somewhat more limited. Item

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[6/] As noted above, the exemption afforded by Rule 12g3–2(b) is not available to Canadian issuers that list their securities on a U.S. exchange or have them quoted on Nasdaq.

[7/] In 1991, Canada and the United States entered into the Multi-jurisdictional Disclosure System ("MJDS") which permits certain large, seasoned Canadian issuers to register their securities under the Exchange Act and Securities Act by using their Canadian filings, covered by a short "wrap", supplemented with certain legends and accompanied by certain exhibits, together with a reconciliation of financial statements to the U.S. GAAP. This memorandum does not discuss the MJDS. The MJDS has been a very useful mechanism for such large Canadian issuers. Unfortunately, there is substantial speculation that the SEC intends to end its participation in the MJDS, in which case those Canadian issuers who have previously been using the MJDS will be treated as all other Canadian issuers and will have to follow the procedures set forth in this memorandum.

[8/] As discussed in Part III below, subject to limited exceptions, Forms F–1, F–2 and F–3 require the inclusion of financial statements providing the full disclosure required by U.S. GAAP and Regulation S–X. Accordingly, Item 18 financial statements must be used if the Form 20-F is to be incorporated by reference into a Securities Act registration statement on Form F–3. As a practical matter, if the Canadian issuer intends to file a registration statement on Form F–1 or Form F-2, it will want to include Item 18 financial statements in Form 20–F in order to achieve consistency of presentation.

18, for example, requires compliance with industry and geographic segment information requirements currently in effect under U.S. GAAP, while Item 17 does not. First-time registrants need only reconcile financial statements for the most recent two years. Similarly, first-time registrants presenting financial statements in accordance with U.S. GAAP need only provide audited financial statements for the two most recent fiscal years.

Regulation S–X also includes rules regarding the permissible age of financial statements to be included in registration statements. Accordingly, an issuer considering the filing of a registration statement must factor into its schedule the availability of financial statements that will be deemed current for purposes of Regulation S–X. The rules are as follows:

- if the date of the registration statement is more than nine months after the end of the company's last fiscal year, the registration statement must contain interim financial statements (including U.S. GAAP information), which may be unaudited, covering at least the first six months of the issuer's fiscal year.

- the last audited statements may be no older than 15 months at the time of effectiveness. In addition, in the case of the issuer's initial public offering, the audited financial statements must be as of a date no older than 12 months at the time the offering document is filed. The 12-month rule does not apply to an issuer offering securities in the United States for the first time if it is already public in its home country of if the issuer adequately represents to the SEC that it is not required to comply with this requirement in any other jurisdiction outside the United States and to do is impractical. These financial statements may cover a period of less than one year.

- if the company has published interim financial information that covers a period more current than that required by the rules, the more current financial information must be presented.

- for offerings of securities upon the exercise of rights, under dividend or interest reinvestment plans, or upon conversion or exercise, the 15-month rule is extended to 18 months, and the nine-month rule is extended to 12 months.

The nine-month rule requires companies offering securities or effecting listings in the second half of a fiscal year to include six-month interim statements for offerings or listings made after nine-months, instead of after ten months as was the case under the old rules. The 15-month rule has the effect of imposing a blackout period three months after the close of a fiscal year.

b. NYSE Listing.

In order to list its equity securities on the NYSE, a Canadian issuer must meet the NYSE eligibility standards, file a listing application, and enter into a listing agreement.

1. *Eligibility Standards.* Canadian companies may elect to qualify for listing either under the NYSE's "Alternate Listing Standards" for Canadian and other non-U.S. companies or under the NYSE's domestic listing criteria. The Alternative Listing Standards of the NYSE for a Canadian issuer require that:

- the issuer have 5,000 or more shareholders worldwide, each owning at least 100 shares of the issuer's equity securities,
- at least 2.5 million of the issuer's equity securities be publicly held, and[9/]
- the market value of the issuer's publicly-held securities be at least U.S. $100 million.[10/]

In addition to the foregoing criteria, the Canadian issuer must meet *all* of the criteria listed under any of the alternatives set forth below.

Alternative 1 ("Pre-Tax Income Alternative"):

- the issuer must have had U.S. $100 million of pre-tax income on a cumulative basis for the last three fiscal years, and
- the issuer must have had at least U.S. $25 million in pre-tax income for each of the last two fiscal years.

Alternative 2 ("Cash Flow Alternative"):

- the issuer must have market capitalization of not less than U.S. $500 million worldwide and revenue of at least U.S. $200 million for the most recent 12 months, and
- the issuer must have had aggregate cash flow for the last three fiscal years of at least U.S. $100 million and a minimum of U.S. $25 million for each of the last two fiscal years.

Alternative 3 ("Global Market Capitalization Alternative")

- the issuer must have had market capitalization of U.S. $1 billion worldwide (based on the average of the last six months), and

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[9/] Shares held by directors, officers or their immediate families, and other concentrated holdings of 10% or more are excluded in calculating the number of publicly-held shares for this purpose.

[10/] In cases of adverse market conditions on a significant concentration of the outstanding shares, shareholders' equity of U.S. $100 million will be given consideration. In connection with initial public offerings and spinoffs, the NYSE will accept a letter of undertaking from the underwriter that the offering will meet or exceed the NYSE's standards.

- the issuer must have had revenue of at least U.S. $250 million for the latest fiscal year.

Alternatively, the Canadian issuer may elect to qualify under the standards applicable to domestic U.S. companies, which (as applied to a Canadian issuer) require that:

- the corporation have (i) at least 2,000 shareholders resident in North America, each owning at least 100 shares,[11] of the issuer's equity securities, (ii) at least 2,200 shareholders resident in North America and have a monthly North American trading volume of 100,000 shares for the most recent six months, or (iii) at least 500 shareholders resident in North America and have a monthly North American trading volume of 1,000,000 shares for the most recent 12 months,[12]

- at least 1.1 million of such equity securities be held by the U.S. public, and [13]

- such equity securities have a market value in the United States of (i) at least U.S. $60 million worldwide for NYSE listings for initial public offerings[14] and spinoffs and (ii) at least U.S. $100 million worldwide for all other listings.[15]

Under this alternative, in addition to the foregoing criteria, the Canadian issuer must meet *all* of the criteria listed under any of the alternatives set forth below.

Alternative 1 ("Pre-Tax Income Alternative"):

- the Canadian issuer must have had either (x) at least U.S. $2.5 million of pre-tax income for the latest fiscal year and at least U.S. $2 million for each of the preceding two fiscal years or (y) U.S. $6.5 million aggregate pre-tax

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[11] One hundred shares is the standard unit of trading shares in the U.S. If the standard unit of trading for the security to be listed is less than 100 shares, this requirement will be adjusted accordingly.

[12] When considering a listing application from a Canadian issuer, the NYSE will include all North American holders and North American trading volume in applying the minimum stockholder and trading volume requirements. "North America" refers to the U.S., Canada and Mexico.

[13] See footnote 10.

[14] For purposes of these rules, an initial public offering refers to an offering for a company that, prior to its original listing, did not have a class of common stock registered under the Exchange Act.

[15] In cases of adverse market conditions on a significant concentration of the outstanding shares, shareholders' equity of U.S. $60 million or U.S. $100 million, as applicable, will be given consideration. In connection with initial public offerings and spinoffs, the NYSE will accept a letter of undertaking from the underwriter that the offering will meet or exceed the NYSE's standards.

income for the past three fiscal years together with a minimum of U.S. $4.5 million pre-tax income in the most recent fiscal year.

Alternative 2 ("Cash Flow Alternative"):

- the issuer had market capitalization of not less than U.S. $500 million worldwide and revenue of U.S. $200 million for the most recent 12 months, and
- the issuer must have had aggregate cash flow for the last three fiscal years of U.S. $25 million and all three years must have been profitable.

Alternative 3 ("Global Market Capitalization Alternative")[16/]

- the issuer must have had market capitalization of U.S. $1 billion worldwide (based on the average of the last six months), and
- the issuer must have had revenue of at least U.S. $250 million for the latest fiscal year.

The Alternative Listing Standards are designed to encourage major Canadian companies to list their shares on the NYSE. Domestic listing requirements call for minimum distribution of a company's shares within the U.S., which can be a major obstacle for many large Canadian companies that otherwise would easily qualify under the normal size and earnings requirements for listing. The Alternative Listing Standards for Canadian companies apply only where there is a broad, liquid market for the Canadian issuer's shares in Canada.

The staff of the NYSE is available to confer, on a confidential basis, with Canadian companies to determine whether such companies are eligible for NYSE listing. The following information is generally requested by the NYSE staff for the purpose of conducting a confidential eligibility review:

- Certified copy of the company's charter and by-laws (translated into English, if necessary).
- Specimens of certificates traded or to be traded in the U.S. market. Also, a copy of any depository agreement, if applicable.
- The annual reports to shareholders for the last five years. (If no English version is available, a translation of the last three years' reports is required.)

[16/] This financial test is designed to assist companies whose early stage of development or operations in an emerging local economy preclude earnings or that are the subject of short-term fluctuations in profitability. There is no earnings requirement for eligible companies under this financial test.

- The latest available prospectus covering an offering under the Securities Act and latest annual SEC filing, if any. Where no SEC documents are available, equivalent Canadian documents are requested.

- The proxy statement or equivalent material made available to shareholders for the most recent annual meeting (translated into English, if necessary).

- Worldwide and U.S. share distribution schedules.

- Supplementary data to assist the NYSE in determining the character of the worldwide and U.S. share distribution and the number of publicly-held shares.[17/]

- If the company has any partially-owned subsidiaries, data regarding the ownership (public or private) of the remainder (as well as any director or officer ownership therein).

- A list of the company's principal bankers and a statement of the holdings of the applicant's shares by any one of these bankers which is in excess of 5%.

- The identity of any regulatory agency which regulates the company or any portion of its operations, together with a description of the extent and impact of such regulation on taxation, accounting, Canadian exchange control, etc.

- Identification of the company's directors and principal officers by name, title and principal occupation.

- Total number of employees and general status of labor relations.

- A description of pending material litigation and opinion as to potential impact upon the company's operations.

In practice, not all of this information is always required, and often a substantial portion of this information is provided to the NYSE staff in the form of a draft of a Form 20–F or Form F–1.

2. *Listing Application; Fees.* Once a Canadian issuer has determined that it is eligible to be listed on the NYSE, it must file an original listing application before the listing can occur. The listing application does not require significant information in addition to that which appears in the Form 20–F registration statement filed under the Exchange Act (or, if applicable, the

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[17/] The following information is requested: (a) names of the 10 largest holders; (b) exchange member organizations holding 1,000 or more shares or other units; (c) a list of the stock exchanges or other markets upon which the company's securities are currently traded as well as the price range and volume of those securities over the past five years; (d) shares owned or known to be controlled by: (1) directors, officers and their immediate families, and (2) other holdings of 10% or more; (e) any type of restriction (and the details thereof) relating to shares of the company; (f) estimate of non-officer employee ownership; and (g) company shares held in profit-sharing, savings, pension, or similar plans for benefit of the company's employees.

registration statement on Form F–1 filed under the Securities Act). Indeed, the Form 20–F (or Form F–1) registration statement typically is attached to, and incorporated by reference in, the listing application. Certain documents, such as copies of certain corporate records and legal opinions, must also be filed in support of the application. Draft copies of the listing application are provided to the staff of the NYSE at least three weeks before formal NYSE action is desired in order to ensure that there is sufficient time for the NYSE to review and suggest revisions to the application. Admission to trading normally takes place within 30 days after the NYSE's formal approval, and in certain cases can occur even faster.

Companies that list their shares on the NYSE must pay both an original listing fee and annual fees. The original listing fee for Canadian companies is calculated based upon the number of shares issued in the United States (not worldwide). The minimum original listing fee is U.S. $100,000. If the listed Canadian company thereafter issues additional shares in the U.S., an additional fee must be paid to list such shares. In addition, a Canadian listed company pays an annual fee based upon the four-quarter average of shares issued in the U.S. Where there is any question as to the amount of the fee payable, or in unusual situations, it is advisable to discuss the calculation of fees in advance with the NYSE staff in order to avoid misunderstandings and ensure a result acceptable to both the NYSE and the listing company.

3. *Listing Agreement.* In order to list on the NYSE, a Canadian issuer must sign a listing agreement in which it agrees to provide information regarding material events to the NYSE and to the public in a timely fashion. Listed companies must also comply with certain NYSE policies, although these policies often will give recognition to the laws and business practices of the country of domicile. The NYSE may grant exemptions with respect to certain of its policies, including, for example, (i) annual and interim reporting requirements; (ii) delivery of reports to shareholders; (iii) record dates relating to dividends and share distributions; (iv) notices to the NYSE regarding shareholders meetings; (v) the procedure for public release of information; and (vi) rights offerings.

A listed company must also agree to provide annual financial statements to its stockholders prepared in accordance with U.S. GAAP or reconciled to U.S. GAAP and to provide quarterly financial information prepared on the same basis to its shareholders. It is customary for representatives of the Canadian issuer to meet with NYSE officials in advance to discuss how these requirements will apply.

c. Nasdaq Quotation.

In general, many of the largest Canadian issuers seeking to enter the U.S. capital markets have opted to list their shares on the NYSE (and, historically the AMEX). The NYSE is generally recognized as the most prestigious of the U.S. securities exchanges, and a substantial percentage of the largest U.S. public companies are listed on the NYSE. In recent years, however, numerous Canadian companies have chosen instead to have their securities quoted on the Nasdaq system, which provides members of the National Association of Securities Dealers, Inc. (essentially, all U.S. securities dealers) with electronic price quotations, trading volume information and transaction data.

1. *Quotation Criteria.* Nasdaq has two quotation systems: its "regular" system (known as the "SmallCap Market") and the so-called National Market. In order to have its equity securities quoted on the "regular" Nasdaq system, a Canadian issuer must meet the basic listing requirements, including:

- the issuer must have (i) net tangible assets[18/] of at least U.S. $4 million; (ii) market capitalization of at least U.S. $50 million or (iii) net income of U.S. $750,000 in latest fiscal year or in two of the last three most recently completed fiscal years,
- be at least 300 holders of the security, and at least 1,000,000 shares[19/] must be publicly held which must have a market value of at least U.S. $5 million,
- an operating history of at least one year or market capitalization of U.S. $50 million,
- common or preferred stock must have a minimum bid price of U.S. $4 per share, and
- at least three registered "market makers" (broker-dealers) must be prepared to "make a market" in the securities to be quoted.

The requirements for quotation on the "National Market" of Nasdaq are more stringent than those listed above. To be eligible for quotation on the National Market, a Canadian issuer must meet *all* of the criteria listed under any of the alternatives set forth below.

Alternative 1:

- the issuer of the security had annual pre-tax income of at least U.S. $1,000,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.
- there are at least 1,100,000 publicly held shares,[20/]
- the market value of publicly held shares is at least U.S. $8 million,
- the bid price per share is U.S. $5 or more,
- the issuer of the security has net tangible assets of at least U.S. $6 million dollars,

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[18/] For purposes of this rule, net tangible assets means total assets, excluding goodwill, minus total liabilities.

[19/] See footnote 10.

[20/] See footnote 10.

- the issuer has a minimum of 400 shareholders, and
- there are at least three registered and active market makers with respect to the shares.

Alternative 2:

- the issuer of the security has net tangible assets of at least U.S. $18 million,
- there are at least 1,100,000 publicly held shares,[21/]
- the market value of publicly held shares is at least U.S. $18 million,
- the bid price per share is U.S. $5 or more,
- there are at least three registered and active market makers with respect to the security,
- the issuer has a two-year operating history, and
- the issuer has a minimum of 400 shareholders.

[21/] See footnote 10.

Alternative 3:

- there are at least 1,100,000 publicly held shares,[22/]
- the market value of publicly held shares is at least U.S. $20 million,
- the bid price per share is U.S. $5 or more,
- there are at least four registered and active market makers with respect to the security,
- the issuer has a minimum of 400 shareholders, and
- the issuer has (A) a market capitalization of U.S. $75 million or (B) total assets and total revenue of U.S. $75 million each for the latest fiscal year or two of the last three most recently completed fiscal years.

In general, a Canadian company that meets the higher thresholds for quotation on the National Market will choose to do so, as the National Market offers considerably more liquidity and will encourage a much greater following among U.S. securities professionals. Among other things, the last sales price of securities quoted on the National Market is reported immediately to brokers and dealers, as opposed to the regular Nasdaq system, on which only current bid and offer quotations are available. In addition, U.S. investors are permitted to purchase all National Market securities "on margin"—in other words, by borrowing a percentage of the purchase price—while such borrowings are not permitted for purchases of non-National Market Nasdaq–quoted securities (unless such securities have been designated as "OTC margin stock" by the Board of Governors of the Federal Reserve System).

2. *Listing Application; Fees.* Application for inclusion in Nasdaq and designation as a National Market security is made by letter and on a simple form supplied by the NASD. No material additional information, other than information that will already be disclosed in the Canadian issuer's registration statement on Form 20–F or F–1, or that is directly related to satisfying the NASD as to the company's eligibility under the standards described above, need be provided in the application.

When a company submits an application for inclusion of its securities in the National Market, it must pay an "entry fee" consisting of a listing fee of U.S.$5,000 plus an additional fee calculated based on the number of shares outstanding, not to exceed U.S. $50,000 in the aggregate. In special cases, all or a part of the entry fee may be waived. An annual fee is also payable.

Somewhat lower fees apply for inclusion in the "regular" (*i.e.* non-National Market) Nasdaq system.

[22/] See footnote 10.

3. *Listing Agreement.* Each company whose securities are to be traded in the National Market is required to execute a listing agreement in the form designated by the NASD. The listing agreement is a very simple form, pursuant to which the issuer, among other things, agrees to pay the applicable fees and abide by the rules of the NASD, including rules requiring the issuer: to distribute to shareholders annual and interim reports; to maintain at least two "independent" directors, and to establish and maintain an "Audit Committee," a majority of the members of which must be independent directors; to hold an annual meeting of shareholders; to set a quorum requirement of no less than 33 1/3%; to provide proxy statements to shareholders for all shareholder meetings; to review all related party transactions on an ongoing basis; and to seek shareholder approval for certain extraordinary transactions. Notwithstanding these requirements, the NASD's rules provide that they are not to be construed to require any Canadian issuer to do any act that is contrary to any law, rule or regulation or to generally accepted business practices in Canada. The NASD has the ability to provide, and generally does provide upon request, exemptions from the applicability of the foregoing substantive provisions.

III. Offering of Securities.

The offering and sale of any security in the United States must be registered under the Securities Act (unless an exemption from such registration requirement is available). This registration requirement applies regardless of whether the securities being offered are also registered pursuant to the Exchange Act. Registration is accomplished by filing with the SEC a registration statement and is deemed to have occurred when the registration statement is declared effective by the SEC. In addition, a disclosure document called a "prospectus" complying with the requirements of the Securities Act must be provided to every purchaser of any security being publicly offered.[23/]

a. The Registration Statement.

Three forms—F–1, F–2 and F–3[24/]—are typically used to register the public offering and sale of the securities of a Canadian or other non-U.S. issuer in the United States (other than an MJDS issuer. See footnote 7). These forms correspond generally to the registration forms (S–1, S–2 and S–3) used to register public offerings by U.S. issuers. In addition, Form F–4 may be used by Canadian or other non-U.S. issuers to register under the Securities Act the issuance of securities in connection with business combination transactions, such as mergers, reclassifications, consolidations and exchange offers.

[23/] In addition to the requirements of the federal securities laws, issuers effecting a public offering in the U.S. must comply with the registration requirements under the securities laws of each of the individual states (commonly referred to as "Blue Sky laws") in which their securities are to be offered. The Blue Sky laws of virtually all the states require the registration of securities being distributed in such states unless an applicable exemption is available. Most states have adopted the Uniform Securities Act, which allows issuers to satisfy the registration requirements by complying with the SEC's registration procedure. Moreover, substantially all Blue Sky laws exempt securities listed on the NYSE or another national securities exchange or, in most cases, the Nasdaq National Market, and provide additional exemptions for various other types of securities and transactions.

[24/] The SEC recently proposed amendments to the forms used for offering securities in the United States in its so-called "Aircraft Carrier" release. The likelihood of adoption of these proposals is in doubt, and this memorandum does not address these proposals.

1. *Eligibility.* In general, Form F–1 is the form that will be used by a Canadian company seeking to issue securities in the U.S. for the first time, unless such company has previously filed a Form 20–F and meets the other eligibility requirements to use Form F–2 or F–3, as described below. With very limited exceptions, all offerings registered on Form F–1 must include financial statements with full reconciliation to U.S. GAAP. As noted above, first-time registrants are only required to reconcile two years of financial statements.

In general, Form F–2 and Form F–3 provide for simplified disclosure and are available for use by companies with a history of reporting under the Exchange Act. To be eligible to use Form F–3, a Canadian issuer must (i) have a class of securities registered, or otherwise be a reporting company, under the Exchange Act, (ii) have been subject to reporting obligations under the Exchange Act and have filed all required reports (usually, Form 20–F) for the last 12 months, (iii) have had no material default on loans or long-term leases or failure to pay a sinking fund installment or dividend on preferred stock since the end of its last fiscal year and (iv) have voting stock held by non-affiliates with a market value of at least U.S. $75,000,000 (unless the issuer is registering non-convertible investment-grade securities to be offered for cash). In general, Form F–3 is available for primary offerings of securities for cash only if the latest Form 20–F contains financial statements with full reconciliation to U.S. GAAP, though partial reconciliation to U.S. GAAP may be used for all offerings of investment-grade securities (whether debt or preferred stock), regardless of the registration form used. Form F–3 is also available for secondary offerings (offerings by shareholders), if the issuer's latest Form 20–F contains financial statements with full reconciliation to U.S. GAAP.

The eligibility requirements for the use of Form F–2 are essentially similar to those for Form F–3, with a few exceptions, namely, that Form F–2 may be used by companies whose voting stock held by non-affiliates has a market value of less than U.S. $75,000,000, provided the issuer has been a reporting company for 36 months or if non-convertible investment-grade securities are being registered (and in certain other special circumstances). Form F–2 may be used to register securities to be offered in any transaction other than an exchange offer for securities of another person (for which Form F–4 or F–1 may be used).

2. *Contents of Registration Statements.* A registration statement has two parts: information required to be included in the prospectus (Part I) and information not required to be included in the prospectus (Part II). Technically, the registration statement and the prospectus are separate documents, but the form of prospectus almost always serves as Part I of the registration statement. The prospectus will also be printed separately, first as a “preliminary” or “red herring” prospectus and then as the “final” prospectus, and in each case circulated to prospective investors.

Each of the three basic registration statement forms for Canadian and other non-U.S. issuers—F–1, F–2 and F–3—require essentially the same information, but a registration statement on Form F–1 must set forth all required disclosures in its body, while Forms F–2 and F–3 permit increasing amounts of the required disclosures to be incorporated by reference to the issuer's filings under the Exchange Act (including, most importantly, its filings on Form 20–F). This system of incorporation by reference is facilitated by the SEC's so-called integrated disclosure system, under which the standard disclosures required under the Exchange Act and the Securities Act have been made consistent.

Generally speaking, registration statements filed by Canadian and other non-U.S. issuers under the Securities Act must contain information concerning the following matters (determined largely by reference to the requirements of Form 20-F (see Annex A hereto)):

- certain standard legends, tables and similar disclosure items common to all registration statements;
- a summary of the prospectus,
- a description of the risks associated with an investment in the issuer;
- information about the business of the issuer
- the identity of the directors, senior management and advisers of the issuer
- offer statistics and the expected timetable for the offering
- selected financial data
- a table of capitalization and indebtedness
- the reasons for the offering and the use of proceeds;
- the manner of determining the offering price (unless the offering price is based on the market price);
- if there is a substantial disparity between the offering price and the cost to insiders of stock acquired by them in the previous five years, information on dilution to be suffered by new investors;
- if the offering is a secondary offering by shareholders of the issuer, information about the selling shareholders;
- disclosure regarding directors, senior management and employees
- disclosure regrading major shareholders and related party transactions
- the plan of distribution, including disclosure of the underwriting arrangements;
- a description of the securities being offered;
- interests of named experts and counsel;
- financial statements of the issuer, in the form and for the periods specified in the rules and instructions, and in compliance with the rules governing the age of financial statements.

A Form F–1 prospectus must include all of the information and financial statements outlined above, without any incorporation by reference. A Form F–2 or F–3 prospectus will set forth certain basic disclosures, as described above, but will incorporate by reference the latest annual report on Form 20–F filed by the issuer, and will include a description of all material changes (if any) since the end of the period covered by such annual report on Form 20–F. An F–3 prospectus will also incorporate by reference all subsequent annual reports on Form 20–F filed prior to the termination of the offering.

A copy of the issuer's latest annual report on Form 20–F must be delivered with a Form F–2 prospectus. To the extent that a Form 6–K is available to describe recent changes, the issuer may incorporate such form by reference into a Form F–2 prospectus, in which case such form must be delivered with the prospectus.

As is the case for registration statements for U.S. issuers, the Part II of all three registration statement forms for Canadian and other non-U.S. issuers require similar disclosure, including an itemization of the expenses of the issuance and distribution, information relating to indemnification of directors and officers, a list of exhibits, the appropriate undertakings and the signature pages. The Part II of a Form F–1 also includes information relating to recent unregistered sales of securities and certain schedules to the financial statements.

b. The Registration Process.

3. *Filing the Registration Statement.* The process of preparing and submitting to the SEC staff a registration statement for a Canadian issuer is similar to that applicable to U.S. issuers. One principal difference, which is designed to facilitate offerings by Canadian and other non-U.S. issuers, is that a registration statement for a Canadian issuer may be submitted to the SEC staff on a confidential basis. A U.S. issuer does not have that option; if it submits its registration statement to the SEC, that document is immediately available in the public records of the SEC whether or not it has been circulated to investors.

Upon filing its registration statement with the SEC, the filing issuer must pay a registration fee equal to U.S. $264 for each U.S. $1 million of securities proposed to be offered.

After a registration statement is filed with the SEC, it is usually reviewed and commented upon by the staff of the SEC's Division of Corporation Finance. During the review process, the issuer's counsel will be advised by the staff of the staff's comments. If the staff decides to review and comment upon a registration statement, the staff usually takes 30-45 days to provide its initial comments to the issuer. Assuming such comments are received, the issuer will file one or more amendments to the registration statement in response to the staff's comments. Once there are no further comments, the issuer and the managing underwriters will request that the SEC declare the registration statement to be effective. The issuer and the managing underwriters customarily request that the registration statement be declared effective once all of the staff's comments have been

addressed. In the case of registration statements filed by seasoned issuers,[25] the staff may decline to review and comment upon the registration statement, in which case the issuer and managing underwriters will request that the registration statement be declared effective upon being advised of the "no–review" decision or, if later, upon completion of the managing underwriters' offering activities.

4. *The "Waiting Period."* Prior to the time that a registration statement is filed with the SEC, the Securities Act prohibits any offer to sell, or solicitation of an offer to buy (whether written or oral), the securities to be offered pursuant to the registration statement. Once the registration statement is filed, the securities may be offered for sale, but until the registration statement is declared effective no sale or contract for sale may be made. Between the filing of the registration statement and immediately prior to effectiveness (the so-called "waiting period"), oral offers may be made, but any written offer must take the form of a preliminary prospectus.[26] A preliminary (or "red herring") prospectus distributed during the waiting period must contain substantially the information required to be included in the final prospectus and must include a red legend on the front cover (hence the name "red herring") which, among other things, advises the reader that the document is subject to completion.

5. *Prospectus Delivery Requirements.* Once the registration statement is declared effective, the securities may continue to be offered and actual sales may be consummated. Written offers must take the form of a final prospectus, although other offering documents may also be used if preceded or accompanied by a final prospectus. When sales are made, the underwriters must deliver the final prospectus to each purchaser with or prior to the confirmation of sale. Unless the issuer is a reporting company under the Exchange Act prior to its filing of the registration statement, securities dealers effecting transactions in the after-market must also deliver copies of the prospectus to purchasers during the 25 days following the later of the effective date of the registration statement and the commencement of the offering in the case of an initial public offering if the security is, as of the offering date, listed on a U.S. securities exchange or authorized for trading on Nasdaq, and for a longer period (40 days or 90 days) in other cases involving issuers not previously reporting under the Exchange Act.

6. *Publicity by an Issuer During an Offering.* In general, from the time an issuer begins to proceed towards a public offering until the end of the period during which dealers are required to deliver a prospectus to purchasers of the offered security (often called the "quiet period"), the issuer may not engage in any publicity to promote the sale of its shares. There are certain types of permitted communications, however, as explained below.

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[25] Although the Division of Corporation Finance reviews registration statements on a selective basis, registration statements on Form F–1 generally will be subject to full review by the staff. Registration statements filed by seasoned issuers on Form F–2 or F–3 may or may not be reviewed. The staff does not make public the criteria by which it determines whether a particular registration statement will be reviewed.

[26] In certain circumstances, the underwriters of a proposed offering may decline to circulate a preliminary prospectus immediately upon the filing of a registration statement. Such a filing is then known as a "quiet filing." One reason why a preliminary prospectus might not be circulated initially is the concern with "recirculation." If the changes to the registration statement requested by the SEC staff are material, revised information must be "recirculated" to prospective purchasers to protect against the possibility of rescission by purchasers who learn of the change only upon receipt of the final prospectus.

Pursuant to Rule 135 under the Securities Act, a notice given by an issuer prior to the filing of a registration statement that it proposes to make a public offering of the securities to be covered by the registration statement is permissible if such notice (which may be a news release, notice to employees or similar communication) discloses only certain limited items of information, as specified in the Rule. Between the time a registration statement is filed and the time it is declared effective, a somewhat longer (but still quite limited) list of information concerning the offering may be published pursuant to Rule 134.

The prohibition on offers prior to the filing of a registration statement and the limitation on the type of written offers that are permitted after a registration statement is filed are not limited to communications that on their face constitute offers to purchase a security. On the contrary, the SEC will characterize as an offer any form of publicity designed to condition the market for the securities or to generate public interest in the securities. The prohibitions on so-called "gun-jumping" are not, however, intended to interfere with the normal functioning of a company that is preparing for a public offering. In the normal conduct of its business, a company may continue to advertise its products and services without interruption, to send out customary reports to security holders, to send out dividend notices and make routine announcements to the press and to respond to unsolicited requests for information about the company's affairs, though any such public statements should be reviewed to ensure that they do not raise legal issues.

c. The Underwriting Process.

Most public offerings of securities in the United States are effected pursuant to so-called "firm commitment" underwriting arrangements. Under these arrangements, one (or several) investment banks will act as the "managing underwriter(s)" of a proposed offering and will, working together with the issuer, the issuer's counsel and the underwriters' counsel, coordinate the various participants in the offering process. Among other things, the managing underwriters will assist in the preparation of the registration statement (including particularly the prospectus), and will organize a series of meetings between executives of the issuer and prospective investors (often called the "road show") after the registration statement has been filed and before it is declared effective. The managing underwriters will also assemble a syndicate of underwriters that will, once the issuer's registration statement has been or is about to be declared effective by the SEC, commit to purchase all of the securities being offered at a fixed price, based upon information about market conditions and demand for the issuer's securities gathered in the preceding days. This commitment will be expressed in an "underwriting agreement" between the issuer and the underwriters, in which the issuer will make various representations about itself, its business and its offering documents, and the underwriters will commit to purchase the entire offering, subject to the satisfaction of various conditions.

As discussed below, the underwriters of a public offering are legally liable for any material misstatements or omissions in the registration statement, unless they can demonstrate that they had, after reasonable investigation, reasonable ground to believe that the statements therein were true and that there was no omission of any material fact (generally referred to as the "due diligence defense"). As a consequence, the underwriters will insist upon undertaking, together with their legal counsel, a thorough review of the proposed issuer before the registration statement is declared effective (and, if possible, before it is filed). Because of the importance of the "due diligence defense," U.S.

underwriters and their counsel have no choice but to conduct such a probing inquiry into the business affairs of any prospective issuer.

d. Private Placements.

As explained above, all offerings of securities in the United States must be registered under the Securities Act unless an exemption from such registration requirement applies. There are two types of exemptions available: exemptions based on the type of security being offered (*e.g.*, securities issued or guaranteed by banks, prime quality commercial paper, etc.) and exemptions based on the type of transaction in which the securities are being offered. Perhaps the best-known exemption of the latter type is the exemption for issuances of securities not involving a public offering, the so-called "private placement" exemption under Section 4(2) of the Securities Act.

An issuer relying on the private placement exemption available under Section 4(2) must ensure that the transaction does not involve a public offering. Whether a transaction involves a public offering will depend on all of the circumstances of the transaction, including the number of offerees and their relationship to the issuer, and the manner in which the offering is conducted. In a private placement, offerees receive, in lieu of a prospectus, a private placement memorandum, the contents of which will vary depending upon the nature of the offering, the type of offerees and marketing considerations. In addition, various mechanisms are used to ensure that the purchasers of the securities do not in turn resell the securities in a "distribution" that could cause the private placement to be converted into an unregistered (and thus illegal) public offering.

Because of the uncertainties inherent in the vagueness of Section 4(2), issuers often seek to rely on a "safe harbor" (*i.e.*, a series of conditions which if complied with assure availability of an exemption) where it is available. Regulation D under the Securities Act provides various safe harbors. Rule 505 and 506 under Regulation D provide "safe harbors" for offerings to an unlimited number of "accredited investors," provided the number of non-accredited investors does not exceed 35. The term "accredited investors," includes banks, insurance companies, registered investment companies, certain employee benefit plans, entities with total assets in excess of U.S. $5 million and certain wealthy individuals (based on income or net worth). Regulation D does not require that specific information be delivered to purchasers, unless one or more non-accredited investors are included. Where non-accredited investors are included, issuers will be required to provide information contemplated by Regulation D, which generally would be of the same type that would be required in a registration statement. Regulation D also requires the filing of a Form D (which includes basic information about the issuer and the offering) with the SEC within 15 days after the first sale of securities.

A similar type of "safe harbor" is afforded by Rule 144A, which was adopted in 1990. Rule 144A provides a non-exclusive "safe harbor" from the registration requirements of the Securities Act for the resale of securities acquired directly or indirectly from an issuer or its affiliate in a transaction or chain of transactions not involving a public offering ("restricted securities"). The Rule permits the resale of restricted securities (other than securities issued by investment companies or securities listed on a national securities exchange or quoted on Nasdaq) to so-called "qualified institutional buyers" (basically, institutions holding at least U.S. $100 million in securities and registered broker-dealers holding at least U.S. $10 million in securities).

Since Rule 144A's adoption, an increasing number of U.S. and Canadian issuers have offered securities in private placements to securities firms, who in turn have offered and sold the securities to qualified institutional buyers pursuant to the Rule. Because Rule 144A is a resale exemption (that is, it is not available to exempt sales by the issuer), the first step in a Rule 144A offering involves a private placement by the issuer under the exemption afforded by Section 4(2) of the Securities Act (and perhaps Regulation D thereunder) to a securities firm or one or more institutional purchasers, who are then free to resell under Rule 144A to qualified institutional buyers in accordance with the terms and conditions of the Rule.

Many Rule 144A offerings look very much like underwritten public offerings, without the disadvantages associated with registration under the Securities Act. The offering memorandum for such deals will look very much like a prospectus for a public offering (although, to an extent, information that would be technically required by the SEC's rules for public offerings but that is determined not to be material to investors may be omitted and financial statements need not be reconciled to U.S. GAAP). Instead of an underwriting agreement, the issuer and the "underwriters" (who for this purpose are referred to as "initial purchasers") enter into a purchase agreement, but this agreement will be similar in many respects to a standard underwriting agreement in a public offering. As in a public offering, once the purchase agreement is signed, the initial purchasers will usually be committed to purchase the securities being offered, subject only to the satisfaction of the conditions in the agreement. Notwithstanding these similarities to a public offering, however, a Rule 144A offering gives the issuer greater control over the timing of the offering, since there is no review of the offering document by the staff of the SEC. In addition, a Rule 144A placement eliminates the need to pay the SEC registration fee. Canadian issuers may elect to offer a tranche of securities in the United States pursuant to Rule 144A as part of a Canadian (or global) offering of securities or may effect a Rule 144A offering targeted only to U.S. investors.

One of the few requirements imposed upon an issuer desiring to effect a private placement of securities that may be resold under Rule 144A is the requirement that the issuer (i) be subject to the reporting requirements of the Exchange Act, (ii) file home country reports pursuant to a Rule 12g3–2(b) exemption or (iii) agree to provide both holders and prospective purchasers of the securities, upon request, reasonably current financial statements and other information. Because it is often easiest for a Canadian issuer simply to provide home country reports under Rule 12g3–2(b), some Canadian companies have applied for this exemption primarily to facilitate future Rule 144A offerings in the United States.

In an accommodation to Canadian issuers, the SEC permits Canadian issuers to take advantage of a procedure known as a "registered exchange offer," which allows an issuer that has issued securities under Rule 144A to file a registration statement to effect a registered exchange offer for such securities. An issuer that has offered securities on a Rule 144A basis may subsequently decide to take advantage of the registered exchange offer procedure, or may commit to do so as part of the initial offering under Rule 144A. In either case, once the exchange offer registration statement has been cleared by the SEC, the issuer undertakes an exchange offer, pursuant to which the Rule 144A securities are exchanged for identical securities that are freely tradable. The exchange may, but need not, be undertaken concurrently with a registered public offering in the United States.

IV. Consequences of Becoming a Public Company.

A Canadian issuer that lists its securities on a U.S. national securities exchange or on Nasdaq will, as noted above, be required to register its shares under the Exchange Act. Such registration will subject the Canadian issuer to reporting requirements under the Exchange Act. A Canadian issuer that effects a public offering of securities in the U.S., even if those securities are not listed on an exchange or quoted on Nasdaq, will be subject to such reporting requirements, at least during the year in which such offering occurs, and thereafter if the Canadian issuer has 300 or more U.S. shareholders.

A Canadian company that lists its securities on a U.S. securities exchange or Nasdaq or that effects a public offering in the United States also subjects itself to a variety of potential liabilities under the U.S. securities laws.

A summary of these consequences of a Canadian issuer becoming a publicly-traded company in the U.S. follows:

Periodic Reporting.

Issuers who have securities registered under the Exchange Act are required to update and supplement their initial registration statement disclosures by filing annual and periodic reports with the SEC and with any securities exchange on which their securities are listed. The principal forms for this purpose are Form 20–F and Form 6–K.

1. *Form 20–F*. A Canadian issuer (other than an MJDS issuer. See footnote 7) generally must file annual reports on Form 20–F within six months after the end of each fiscal year. In addition to updating much of the information originally contained in its Exchange Act registration statement on Form 20–F (or Form 8–A), the annual report on Form 20–F requires disclosure of any material modification to the rights of the holders of the securities covered by the registration statement, or any material change in such rights occasioned by the issuance or modification of any other securities, and any material default with respect to any indebtedness of the issuer exceeding five percent of the total assets of the issuer.

The financial statement requirements for annual reports on Form 20–F are the same as those applicable in the case of registration statements on Form 20–F.

2. *Form 6–K*. In addition to filing annual reports on Form 20–F, Canadian issuers are also required to submit reports on Form 6–K, which requires disclosure of certain reports or documents that are (a) required to be made public by the issuer in Canada, (b) filed with and made public by any Canadian securities exchange in Canada or elsewhere, or (c) otherwise distributed to security holders. Not all such reports or documents need be filed with the SEC. Form 6–K only requires the filing with the SEC of reports or documents of the issuer concerning: changes in management or control; acquisitions or dispositions of assets; bankruptcy or receivership; changes in the issuer's certifying accountants; its financial condition and results of operations; changes in its business; material legal proceedings; changes in securities or in the security for registered securities; defaults upon senior securities; material increases or decreases in the amount outstanding of

securities or indebtedness; the results of the submission of matters to a vote of security holders; and "any other information which the registrant deems of material importance to security holders."

a. Liabilities under the Securities Act.

The Securities Act establishes civil liabilities for certain practices by all issuers, both U.S. and non-U.S., in connection with the sale of securities. Section 11 imposes liability for untrue statements or omissions of material facts in a registration statement. Section 12(1) establishes civil liability for offers or sales of securities that (a) should have been but were not registered, (b) should have been but were not accompanied by a prospectus or (c) were accompanied by a prospectus issued under a registration statement that had not yet become effective under the SEC's rules. Section 12(2) establishes liability for misstatements or omissions contained in a prospectus or any oral communication made in connection with any offer or sale of securities, whether or not registered under the 1933 Act. Section 17 makes it unlawful to engage in fraudulent or deceitful practices in connection with any offer or sale of securities, whether or not registered under the Securities Act.

Although the liability provisions under the Securities Act apply equally to Canadian and U.S. issuers, and the SEC and U.S. courts take an expansive view of extraterritorial jurisdiction, it may be more difficult for a U.S. resident to obtain jurisdiction over a Canadian issuer to adjudicate its liability. Thus, to ensure that there is an affiliate of the Canadian issuer subject to jurisdiction in the U.S., the Securities Act requires a "duly authorized representative in the United States" to sign, and an agent for service of process to be named in, a Canadian issuer's registration statement.

b. Liabilities Under the Exchange Act.

Section 18 of the Exchange Act imposes liability on any person who makes a false or misleading statement in any registration statement filed pursuant to the Exchange Act (e.g. a Form 20–F) or in any document or report filed with respect to such registration statement. In addition, documents so furnished to the SEC may give rise to liability under Section 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder. The documents included in Form 6–K are not deemed to be "filed" for the purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that Section, but may give rise to liability under Section 10(b) and Rule 10b–5. Section 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder, generally prohibit manipulation and fraud in connection with the purchase or sale of any security. A Canadian issuer may violate these provisions by intentionally creating an artificial demand for its shares to inflate their market price, by knowingly or recklessly making false or misleading statements (or omissions) that could reasonably be expected to influence the purchase or sale of securities, or by engaging in other types of deceptive practices. Lawsuits may be brought under these provisions either by U.S. governmental authorities or by private parties who claim to have been injured as a result of alleged misstatements or other manipulative or deceptive practices.

c. Foreign Corrupt Practices Act.

The Foreign Corrupt Practices Act of 1977 amended the Exchange Act by adding Sections 13(b)(2)(A) and 13(b)(2)(B), which impose important requirements with regard to record-keeping and internal accounting controls on issuers that have registered securities under the Exchange Act.

In light of these provisions, a Canadian issuer considering such registration should consult with its auditors to insure that its internal control systems are adequate to maintain the basic integrity of its internal record-keeping, thereby preventing the unauthorized expenditure of funds or dissemination of other assets for unlawful purposes.

In addition, Section 30A of the Exchange Act prohibits an issuer (including a Canadian issuer) with securities registered under the Exchange Act, or director, officer, employee, or agent thereof or any shareholder acting on its behalf, from using the U.S. mails or "any means or instrumentality of [U.S.] interstate commerce corruptly in furtherance of" any offer, promise or authorization to pay, or payment of, any improper payments, either directly or indirectly, to non-U.S. political parties or officials. Issuers, or their related persons, that violate Section 30A may be subject to civil enforcement or criminal penalties, including fines (which, in the case of an individual, may not be paid by the issuer) and imprisonment.

V. Practical Considerations.

Effecting a simultaneous public offering, NYSE or Nasdaq National Market listing, and registration under the Exchange Act entails the preparation of financial statements in accordance with, or reconciled to, U.S. GAAP (which can take many months, for companies that have not previously reconciled their financial statements to U.S. GAAP), the preparation of a registration statement on Form F–1 for submission to the SEC (which can take two to four months for first-time registrants), completion of the SEC review and comment process (which can take from ten weeks to four months for a first-time registrant), completion of the NYSE or National Market listing process (which will normally not take longer than the SEC review process), and consummation of the offering process (including participation in "road show" and "due diligence" meetings, negotiation of the terms of the underwriting agreement and compliance with the underwriters' many closing conditions). Such a process is time-consuming, may require the disclosure of much previously undisclosed business information, and will result in the Canadian issuer becoming subject to additional continuing reporting obligations and potential legal liabilities under the U.S. securities laws.

Because of the substantial time involved in raising money in the U.S. capital markets for first-time registrants, some Canadian companies have elected to enter the U.S. capital markets on a step-by-step basis, beginning with an exchange listing. Not only does such a strategy raise the profile of these issuers in the U.S. capital markets, thus increasing the likelihood of a successful future financing, but it may also materially reduce the amount of time, effort and expense required at the time the company decides to issue securities in the U.S. public markets. As explained above, for example, a large Canadian company whose securities have been registered under the Exchange Act for one year is likely to be able to register a public offering on the relatively simple Form F–3, perhaps with no SEC staff review, with an exemption from most applicable state securities or "Blue Sky" filing requirements, and on a more predictable offering timetable.

A more conventional approach, however, has been to issue securities in a registered public offering in the United States at the same time that those securities are listed on the NYSE or Nasdaq, or to effect a Rule 144A offering in the U.S. in conjunction with a public offering in Canada.

Decisions with respect to entering the U.S. capital markets often will be made with the assistance of advisors, such as legal advisors, investment bankers and accountants. Together with its advisors, each company can chart an appropriate strategy—both short-term and long—for availing itself of the potential financing opportunities afforded by the U.S. capital markets. Although the process may seem daunting, with the assistance of experienced advisors and counsel it can be made both understandable and manageable, and offer significant benefits to Canadian issuers.

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Form 20-F Disclosure Rules

The 20-F disclosure standards consist of ten core disclosure items and a glossary of terms. The ten core items are discussed below. Unless otherwise noted, these disclosures must be included in registration statements for public offerings or registered exchange offers (i.e., under the Securities Act), registration statements on Form 20-F for listings (i.e., under the Exchange Act) and annual reports.

Item 1. Identity of Directors, Senior Management and Advisers.

This item includes disclosure of directors and senior management, as well as legal advisers, principal bankers and auditors. This information is not required to be provided in annual reports. The term "senior management" includes members of administrative, supervisory and management bodies. Legal advisers and principal bankers need be disclosed only if the information is required to be disclosed in a non-U.S. jurisdiction.

Item 2. Offer Statistics and Expected Timetable.

This item includes key information regarding an offering and key dates that will be set forth in a Securities Act registration statement. For most offerings, disclosure of the sequence of events, rather than specific dates, should suffice.

Item 3. Key Information.

This item requires:

- selected financial data for five years and any interim periods for which financial statements are required to be provided (and interim income statement data for the corresponding prior period). The first two years may be omitted if the issuer represents to the SEC, before or at the time the document is filed, that those years cannot be provided, or cannot be provided on a restated basis, without unreasonable effort or expense, and states in the offering document the reason for the omission. U.S. GAAP reconciliations of the selected data are required in respect of the annual and interim periods for which reconciled financial statements need to be provided. This item also sets forth the disclosure requirements for information concerning exchange rates.

- in a Securities Act or Exchange Act registration statement, a statement of capitalization and indebtedness, distinguishing between guaranteed and non-guaranteed, and secured and unsecured, debt, as of a date within 60 days before the date of the offering document. For shelf offerings, the capitalization table in a prospectus supplement may be as of the date of the most recent balance sheet filed as part of the registration statement, updated to reflect securities issued up to 60 days before the date of the prospectus supplement.

- in a Securities Act registration statement, the reasons for the offer and the expected use of proceeds, including:

    - a breakdown of the principal intended uses;

    - if the proceeds will not be sufficient, the order of priority and source of other funds needed;

    - if applicable, a description and cost of assets to be acquired outside the ordinary course of business and if assets are to be acquired from an affiliate, the identity of the affiliate and how the purchase price will be determined;

- if applicable, a brief description of businesses to be acquired and the status of the acquisition; and
- if applicable, the interest rate and maturity of any debt being repaid.

- risk factors.

Item 4. Information on the Company.

This item includes requirements for a description of the company's business and properties.

Item 5. Operating and Financial Review and Prospects.

This item corresponds to the old requirement for a management's discussion and analysis of financial condition and results of operations ("MD&A"). To reinforce the importance that the SEC places on MD&A and to remind issuers that the adoption of international standards was not intended to dilute the quality and quantity of disclosure, this item makes specific reference to the SEC's seminal 1989 release on MD&A. The instructions remind issuers that the discussion is to focus on the primary financial statements used in the document, but reference should be made to any aspects of the differences between local GAAP and U.S. GAAP that may be material to an understanding of the primary financial statements as a whole.

Item 6. Directors, Senior Management and Employees.

This item includes disclosure of the identity, background and experience, as well as compensation and share ownership, of directors and senior management, and board practices. Compensation is to be disclosed on an individual basis unless individual compensation is not required in the home jurisdiction and is not otherwise made public by the company. Share ownership and options are to be disclosed on an individual basis. Disclosure regarding employees includes numbers and significant changes in such numbers over the past three years.

Item 7. Major Shareholders and Related Party Transactions.

This item includes disclosure in respect of major shareholders (now defined as beneficial owners of 5% or more, unless the home jurisdiction requires disclosure of a lesser percentage) of their identity and holdings, any significant change during the past three years in such holdings and any disparate voting rights. Disclosure must also be provided with respect to the portion of outstanding securities and number of record owners of securities in the United States.

This item also calls for disclosure of related party transactions since the beginning of the three preceding fiscal years to the date of the offering document (or, in the case of an annual report, from the beginning of the last full fiscal year to the latest practicable date). The disclosure covers loans or other transactions between the company and:

- entities controlling, controlled by or under common control with the company;
- associates (unconsolidated enterprises in which the company has a significant influence or that has a significant influence over the company);
- individuals having significant influence over the company by virtue of direct or indirect interests in the voting power of the company; and

- key management personnel (persons having authority and responsibility for planning, directing and controlling the activities of the company, including directors and senior management and close members of their families).

Significant influence is defined as the power to participate in financial and operating policy decisions, but is less than control over such policies. A beneficial owner of 10% of the voting power is presumed to have significant influence.

Item 8. Financial Information.

This item specifies the financial statements that must be included, as well as the periods to be covered, the age of the financial statements and other information of a financial nature. Financial statements must cover the latest three financial years, although a balance sheet for the earliest of the three years need not be provided if that balance sheet is not required by a jurisdiction outside the United States. This item makes clear that the financial statements, whether prepared in accordance with local GAAP or U.S. GAAP, must be audited in accordance with U.S. generally accepted auditing standards, and the auditor must comply with SEC standards for auditor independence. The item also notes that the circumstances in which the SEC will accept an audit report containing a disclaimer or qualification are extremely limited and advises issuers that plan to submit this type of a report to contact the accounting staff at the SEC well in advance of filing.

This item also requires disclosure of legal and arbitration proceedings.

The offering document must disclose whether or not there have been significant changes since the date of the most recent audited or interim financial statements.

Item 9. The Offer and Listing.

This item includes requirements (depending on the type of document) for a description of the offering, including the plan of distribution, trading markets, selling shareholders, dilution and expenses. Disclosure concerning the plan of distribution is to include, to the extent known by the company, whether major shareholders, directors and senior management will participate in the offering or whether any person intends to subscribe for more than 5% of the offering, and to identify groups of targeted potential investors.

Item 10. Additional Information.

This item includes requirements for, among other things, a description of the company's share capital, significant provisions of its articles of incorporation and bylaws, its material contracts, exchange controls and relevant tax consequences.