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Over the past few months the Securities and Exchange Commission (the “SEC”) has adopted several rules designed to make the U.S. capital markets more attractive and accessible to Canadian companies. These new rules have also reduced the cost of entering the U.S. capital markets and complying with the ongoing reporting requirements. The rules (i) permit Canadian companies to use financial statements prepared in accordance with International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board, without a reconciliation to U.S. GAAP, (ii) relax the requirements for cross-border offerings making it easier for U.S. shareholders to participate in tender offers, rights offerings, exchange offerings, and other business combinations involving Canadian companies, (iii) simplify the procedure for obtaining the Rule 12g3-2(b) exemption from registration, (iv) facilitate entry into the U.S. public capital markets by foreign companies, and enhance the information available to investors in the Form 20-F, and (v) simplify the procedures for a Canadian company to deregister its securities in the United States and exit the U.S. regulatory system if the level of U.S. interest in a Canadian company’s securities decreases below a certain level.

This brief memorandum summarizes the new rules permitting Canadian companies to use financial statements prepared in accordance with IFRS. It is anticipated that these new rules will have a dramatic impact by making it much easier and less expensive for Canadian issuers to prepare the necessary financial statements required for U.S. trading of their shares.

I. BACKGROUND AND SUMMARY

Effective March 4, 2008, the SEC adopted rules that permit Canadian companies to file financial statements that are prepared in accordance with IFRS, as issued by the International Accounting Standards Board (“IASB”), without reconciliation to generally accepted accounting principles as used in the United States (“U.S. GAAP”).

In announcing the new rules the SEC stated that it supported the efforts of the IASB and the Financial Accounting Standards Board to converge their accounting standards, and noted that approximately 100 countries now require or allow the use of IFRS. By 2011 Canadian companies will be required to prepare their financial statements in accordance with IFRS.

The SEC believes that use of a single set of high-quality, globally accepted accounting standards will help investors understand investment opportunities outside the U.S. and enable companies to access capital markets worldwide at lower cost. Having noted the growing convergence between IFRS and U.S. GAAP, the SEC concluded that investors can work with both sets of accounting standards, and the two systems could co-exist in the U.S. public capital markets until a single set of global standards is adopted.

The Old Rules. Previously, a Canadian company meeting certain conditions with respect to stock ownership, assets, and management (*i.e.*, a “foreign private issuer” under SEC rules) that filed financial statements prepared in accordance with Canadian accounting principles (“Canadian GAAP”) was required to include a reconciliation to U.S. GAAP in its SEC filings. This was often done by adding a note to the financial statements. In accordance with detailed SEC rules, the company would prepare a table that provided a comparison of how the applicable items would be treated under U.S. GAAP and Canadian GAAP, along with an explanation of any differences between U.S. GAAP and Canadian GAAP. Although this measure was intended to protect investors by reducing the disparity between different sets of accounting principles, preparation of the reconciliation was viewed by some Canadian companies as potentially burdensome because the Canadian company would be required to develop familiarity with U.S. GAAP and engage an audit firm capable of reviewing the reconciliation note.¹

The New, Amended Rules. The new amendments to the financial reporting rules for foreign companies filing with the SEC:

- Permit the filing of financial statements prepared in accordance with IFRS (as issued by the IASB) without reconciliation to U.S. GAAP;
- Require that a company using this option state “explicitly and unreservedly” in the notes to its financial statements that the financial statements are in compliance with IFRS as issued by the IASB, and include a unqualified auditor’s opinion as to such compliance (Note: the absence of this statement in the report triggers the requirement to provide U.S. GAAP reconciliation);
- Allow the filing of financial statements for interim periods (which are generally unaudited) without reconciliation to U.S. GAAP; and
- Enable first time filers using IFRS to provide only two years, rather than three years, of financial statements in their SEC filings.

¹ Please note that it has been our experience that the time, cost and expenses of preparing a reconciliation to U.S. GAAP were, in fact, far less than companies had expected.

Foreign private issuer eligibility. In order to be able to take advantage of the new rules, a Canadian company must be a “foreign private issuer,” as defined in SEC rules, eligible to make filings on Form 20-F. The Form 20-F is used by foreign private issuers: (i) as a registration statement to register a class of securities for secondary non-issuer trading under the Securities Exchange Act of 1934, as amended (“Exchange Act”); and (ii) as the form for an annual report (similar to Form 10-K) filed under the Exchange Act. In addition, the Form 20-F contains disclosure instructions for forms (e.g., Form F-1) used to register an offering of securities under the United States Securities Act of 1933, as amended.

Special application to Canadian MJDS filers. Certain Canadian companies are eligible to file registration statements and annual reports under the Multijurisdictional Disclosure System (“MJDS”). MJDS-eligible companies use disclosure documents meeting Canadian requirements in their filings with the SEC, some of which do not require U.S. GAAP reconciliation for financial statements. However, Form 40-F (the short-form used by certain companies instead of Form 20-F), when used for annual reports, and both Form 40-F and Form F-10, when used as registration statements for common equity securities, securities convertible into common equity, and other securities not rated investment grade, require a reconciliation to U.S. GAAP. Under the new rules, a Canadian MJDS company that changes its accounting to IFRS will not be subject to a U.S. GAAP reconciliation requirement.

The foregoing is only a brief summary of the revisions to the SEC’s rules permitting Canadian companies to file financial statements prepared in accordance with International Reporting Financial Standards, without a U.S. GAAP reconciliation. If you have any questions on these changes, or any of the SEC’s other recent changes regarding Canadian issuers in the United States, please contact either James Berns or Michael Berns at (212) 332-3320.