

SEC Issues No Action Letter Regarding Canadian Companies' Registration of Rights Offerings on MJDS Form F-7

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In December 2015, the Canadian Securities Administrators (CSA) announced an amended regime for a prospectus-exempt rights offering in Canada. This amended regime allows certain public companies in Canada to conduct a prospectus-exempt rights offering without prior CSA review of the rights offering circular, and using a greatly simplified rights offering circular that assumes, without incorporation by reference, that the shareholder is familiar with the issuer's other continuous disclosures.

While the new regime revitalized the market in Canada for rights offerings, it raised several questions regarding the extension of the rights offering to U.S. shareholders. Form F-7 under the Multi-Jurisdictional Disclosure System (MJDS) has historically provided a means for eligible Canadian issuers to register securities issued in a rights offering under the U.S. Securities Act of 1933, as amended (the 1933 Act). Based on the SEC's determination that Canadian disclosure requirements are adequate, Form F-7 allows the offering document (whether prospectus or rights offering circular) to comply principally with Canadian requirements, imposing only a few additional SEC requirements. Unlike most SEC registration forms, conducting an offering on Form F-7 does not subject the issuer to ongoing SEC reporting requirements. However, because the securities are treated as having been issued in a registered offering, the issuer is liable under the 1933 Act for any material misstatement or omission in the offering document, as it is in other registered public offerings.

Following the passage of the December 2015 amendments, it was unclear whether the SEC would allow the use of Form F-7 under the new, abbreviated Canadian regime. Preliminary verbal guidance received from the SEC's staff suggested that the staff was not, at that time, sufficiently comfortable with the new regime to give any assurance of Form F-7's availability in such circumstances. It was also unclear how, if such registration was permitted, an issuer would protect itself from liability under the 1933 Act for material misstatements or omissions, given the limited amount of disclosure that is required or permitted under the new Canadian regime. As a result, since December 2015, Canadian issuers have not extended rights offerings under the new regime into the

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United States on Form F-7, and have often prevented U.S. shareholders from participating in the rights offering.

Last week, the SEC published a no action letter allowing the use of Form F-7 for rights offerings by eligible Canadian issuers under NI 45-106, as amended by the CSA. The no action letter was issued following the receipt of an acknowledgment from the law firms submitting the request that:

“When so registering securities on Form F-7, an issuer would need to assure that the registration statement and the prospectus satisfied the antifraud and liability provisions under the [1933 Act]”,

and assurances that:

“To do so, for purposes of the offering materials made available to U.S. holders, the issuer could provide a brief description of its business, risk factors, discussion of results of operations and capital resources and such other matters as it deemed material or otherwise in the offering circular.”

Therefore, it appears that the SEC will allow the use of Form F-7 for rights offerings extended under NI 45-106, as amended by the CSA; however, a Canadian issuer taking advantage of this form of registration must include in the offering document sufficient information to protect itself from liability under the 1933 Act for material misstatements or omissions.

It remains to be seen how the market will react to the SEC's no action letter, including (1) the amount of disclosure that issuers will be comfortable including, and omitting, from a rights offering circular that is filed on Form F-7, knowing that the offering will be subject to U.S. prospectus liability, and (2) how frequently issuers will decide to follow this approach.