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# Taking That First Step: the Securities and Exchange Commission's Proposed Multijurisdictional Disclosure System

Alan Goggins

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## COMMENT

### TAKING THAT FIRST STEP: THE SECURITIES AND EXCHANGE COMMISSION'S PROPOSED MULTIJURISDICTIONAL DISCLOSURE SYSTEM

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## I. INTRODUCTION

This Comment presents a review of the developments leading up to the joint decision by the United States Securities and Exchange Commission (the "SEC"), the Ontario Securities Commission (the "OSC") and the Commission des valeurs mobilières du Québec (the "CVMQ") on July 26, 1989 to propose in a recent release<sup>1</sup> a multijurisdictional disclosure system to regulate the disclosure requirements of qualifying United States and Canadian securities issuers. The new proposed multijurisdictional system is, in the words of the SEC, "a hybrid between the reciprocal approach and the common prospectus approach"<sup>2</sup> to facilitating simultaneous multijurisdictional offerings of securities, periodic disclosure and other reporting currently required.

This comment will also discuss certain major aspects of the proposed system. Additionally, after a review of some of the comment letters the SEC has received, the proposed system will then be analyzed to determine whether the proposed system adequately meets the goals of securities regulation in the areas reviewed.

## II. OVERVIEW

In recent years the SEC has noted the trend towards the globalization of international securities markets.<sup>3</sup> Since the adoption of Form 20-F in 1979<sup>4</sup>, the SEC has continued to respond to this trend.<sup>5</sup> With

1. Multijurisdictional Disclosure, Securities Act Release No. 6841, Exchange Act Release No. 27055, Trust Indenture Act Release No. 2217, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,432 at 80,281 (July 24, 1989) [hereinafter "The Release"]. A short explanation about the three commissions involved is perhaps warranted. The SEC is the primary regulatory body in the United States for the securities industry and regulates on a federal level. Each state exercises concurrent jurisdiction with the SEC but state securities statutes (collectively known as "Blue Sky" laws) provide only secondary regulation. In Canada the opposite is true. The primary regulatory bodies are the provincial securities commissions with only some secondary regulation occurring at the federal level. However, over 92% of the value of securities traded in Canada are subject to the jurisdiction of either the OSC or the CVMQ due to the location of the Toronto and Montreal stock exchanges within their jurisdictions. I will refer to the provincial securities regulations of the OSC and CVMQ as Canadian Securities regulation. For a more detailed explanation, see *id.* at 80,289-290.

2. *Id.* at 80,282.

3. Facilitation of Multinational Securities Offerings, Securities Act Release No. 6568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743 at 87,318 (Feb. 28, 1985), [hereinafter "The 1985 Release"].

4. Rules, Registration and Annual Report Form for Foreign Private Issuers, Ex-

the new multijurisdictional disclosure system proposed, the SEC has indicated it intends to take its first step toward integrated regulation of the United States - Canadian securities market, with possible expansion in the future to additional jurisdictions.<sup>6</sup>

### A. *International Developments*

There has been a tremendous growth in recent times of both the size and number of new foreign issues of securities in the United States and in the number<sup>7</sup> and volume<sup>8</sup> of foreign securities traded in the United States as the financial markets have become increasingly integrated across national borders.<sup>9</sup> The single largest source of such investment activity in the United States is Canada.<sup>10</sup>

The above-mentioned integration has not been a one way street. Foreign investors have had an even greater proclivity toward investing in the securities of United States corporations.<sup>11</sup> Again, the single larg-

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change Act Release No. 16371 [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,363 at 82,547 (November 29, 1979) and Form 20-F, 17 C.F.R. § 240.220f (1979) were adopted as an integrated registration statement and annual reporting form for use by foreign private issuers.

5. The 1985 Release, *supra* note 3, at 87,318.

6. The Release, *supra* note 1, at 80,281.

7. There are 150 foreign securities traded on U.S. stock exchanges and 291 are quoted on NASDAQ. Including all the foreign securities traded over-the-counter, there are over 2,000 foreign issues traded in the United States. The Release, *supra* note 1, at 80,284.

8. Gross transactions by United States investors in foreign corporate stocks exceeded \$151 billion in 1988, an almost 900% increase since 1980. Gross transactions by United States investors in foreign debt securities exceeded \$445 billion in 1988, a 1200% increase since 1980. The Release, *supra* note 1, at 80,284.

9. See SIMONDS, *MULTINATIONAL CORPORATIONS LAW: BIBLIOGRAPHY OF MULTINATIONAL CORPORATIONS AND FOREIGN INVESTMENT*, (1989); *WORLD ECONOMIC AND FINANCIAL SURVEYS, INTERNATIONAL CAPITAL MARKETS: DEVELOPMENTS AND PROSPECTS*, (International Monetary Fund, Washington, D.C., April 1989) [hereinafter "International Monetary Fund"].

10. Canadian issuers accounted for 124 public offerings in 1987 and 1988 aggregating \$10 billion, of which over \$8 billion consisted of equity or convertible debt. Additionally, over \$1.7 billion in Canadian debt has been registered in the last three years, pursuant to the SEC's shelf registration process under Rule 415. See 17 C.F.R. § 330.415 (1983). More than half of the 516 foreign issuers that file periodic reports with the SEC are Canadian. As of June 30, 1989, there were 21 Canadian issuers listed on the New York Stock Exchange, 38 on the American Stock Exchange and 146 quoted on NASDAQ. See The Release, *supra* note 1, at 80,285. Compare with the figures in note 7, *supra*.

11. See, Gira, *Toward a Global Capital Market: the Emergence of Simultaneous Multinational Securities Offerings*, 11 MD. J. INT'L L. & TRADE 157, 163 (1987).

est source of such investment in the securities of United States corporations by the investors of a foreign country has been from Canada.<sup>12</sup> The United States and Canada are the world's largest bilateral trading partners<sup>13</sup> and, next to the European Community, represent the most significant geographic integration of financial services markets.<sup>14</sup>

Simultaneous multinational issues of securities, one of the trends that the SEC, OSC and CVMQ hope to address in the proposed regulations<sup>15</sup> present, perhaps, the most clear evidence that globalization is real. In 1983, Alcan Aluminum and Bell Canada, both Canadian companies, each simultaneously offered equity issues in the United States, Canada and Japan.<sup>16</sup> In 1984, British Telecommunications offered 2.5 billion shares of common stock in a privatization simultaneously in the United Kingdom, Japan, Canada, and the United States.<sup>17</sup> In 1986, British Gas PLC conducted a similar offering of 4 billion shares while in 1987, British Airways PLC offered 720 million shares simultaneously in those four countries and Switzerland.<sup>18</sup> In 1988, the British Steel PLC privatization offered 2 billion shares simultaneously in the United States, Canada, Japan and throughout western Europe and Hong Kong Telecommunications Limited offered 877 million shares simultaneously in the United States, Hong Kong and elsewhere.<sup>19</sup> This is just the beginning, however, and simultaneous multinational issues should be even more popular in the future.<sup>20</sup>

This globalization of the world's securities markets has not occurred without good reason. Exchange rate fluctuations, high interest rates, technological progress in the securities markets and deregulation have all contributed toward the globalization trend.<sup>21</sup> This trend has produced substantial benefits for securities issuers, borrowers, savers, investors and bankers<sup>22</sup>, and it is unlikely that this trend will reverse.<sup>23</sup>

12. See, International Monetary Fund, *supra* note 9, at 51. At the end of 1987, there were 50 U.S. security dealers registered with the OSC. Additionally, there is a large volume of offshore activity. *Id.*

13. *Id.* at 50.

14. *Id.*

15. The Release, *supra* note 1, at 80,282.

16. The 1985 Release, *supra* note 3, at 87,320.

17. *Id.*

18. The Release, *supra* note 1, at 80,284 n.16.

19. *Id.*

20. Debs, *The Development of International Equity Markets*, 4 B.U. INT'L L. J. 5, 9 (1986) [hereinafter "Debs, *Development*"].

21. *Id.*

22. Debs, *Globalization of Financial Markets: What is Happening and Why?*, 15 INT'L BUS. LAW 198, 201 (1987) [hereinafter "Debs, *Globalization*"].

There is, however, a downside. With increased international linkage comes increased risk due to the greater consequences of a single failure.<sup>24</sup>

The constraints on further globalization have been summarized by Richard Debs<sup>25</sup>:

The constraints on further globalization will not be market constraints. They are not questions of supply and demand for the services. The demand is there and the financial institutions are eager to meet the demand. The constraints on further globalization relate to infrastructure. The financial infrastructure of the global financial system is based on domestic systems - domestic systems of law, of regulation and supervision, of accounting rules, of clearing and settlement, of stock exchanges, etc. Most of these systems, which together constitute the basic institutional framework of the global markets, are still predominantly based on national market practices, and are as yet not adequately geared to the global markets.<sup>26</sup>

Properly handling those constraints will not be easy because there is no worldwide regulatory authority and any efforts to harmonize regulation will require political and economic compromise.<sup>27</sup>

### *1. Effect of European Community Actions*

Efforts parallel to the United States - Canadian multijurisdictional disclosure system are already underway to integrate securities regulation in the European Community.<sup>28</sup> The European Community efforts can be traced back to the Treaty of Rome<sup>29</sup>. By 1992, mutual recognition of prospectuses meeting minimum common requirements is ex-

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23. Debs, *Development*, *supra* note 20, at 9.

24. Debs, *Globalization*, *supra* note 22, at 201.

25. In 1986, Richard Debs served as the President of Morgan Stanley International, the Chairman of the Subcommittee on International Economic Development of the United States Chamber of Commerce, and was a member of many other committees and councils concerned with international economics. Debs, *Development*, *supra* note 20, at 5.

26. *Id.* at 201.

27. Karmel, *Can Regulators of International Capital Markets Strike a Balance Between Competing Interests?*, 4 B.U. INT'L L. J. 105, 106 (1986).

28. See International Monetary Fund, *supra* note 9, at 52-55.

29. 2 ALAN CAMPBELL, COMMON MARKET LAW, 2-4 (1969) (Annotated Treaty of Rome, arts. 1 to 3).

pected throughout the European Community.<sup>30</sup> The inclusion of only Canada in the current negotiations thus gives the SEC the advantage of a "wait and see" position with respect to the events occurring in the European Community.<sup>31</sup>

## 2. *The Basle Agreement*

In July, 1988 the "Group of Ten"<sup>32</sup> finally agreed upon a plan, entitled the Basle Agreement, to harmonize regulations in the banking industry.<sup>33</sup> This gradual integration of the banking industry has encouraged multilateral efforts to coordinate regulatory policies in other areas, including securities regulation<sup>34</sup> which has lagged considerably behind banking regulation.<sup>35</sup>

## 3. *International Organization of Securities Commissions Efforts*

The October 1987 stock market crash spurred on new efforts by the International Organization of Securities Commissions to coordinate the regulation of the securities markets.<sup>36</sup> This organization has realized that striking the right balance between regulatory objectives - fostering competition and protecting investors<sup>37</sup> - becomes an increasingly complex task as the international linkages deepen.<sup>38</sup>

The result of this organization's efforts have been attempts to establish more effective policy coordination.<sup>39</sup> Securities regulators have realized, however, that the efficient and safe operation of the national and international securities markets can no longer be assured without

30. International Monetary Fund, *supra* note 9, at 54.

31. *See supra* note 6 and accompanying text.

32. The "Group of Ten", oddly enough, contains twelve members: Belgium, Canada, France, the Federal Republic of Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States. International Monetary Fund, *supra* note 9 at 55 n.25.

33. Committee on Banking Regulation and Supervisory Practices, *International Convergence of Capital Standards* (July, 1988).

34. International Monetary Fund, *supra* note 9 at 58.

35. *Id.* at 60.

36. *Id.* at 15, 73.

37. *Id.* at 7.

38. International Monetary Fund, *supra* note 9, at 15.

39. *See, e.g.*, Committee on Financial Markets, *Minimum Disclosure Rules Applicable to All Publicly Offered Securities*, Paris (1976). According to SEC Chairman David Ruder, IOSCO has also been preparing a report on international securities offerings that could guide further multijurisdictional disclosure efforts. *Ruder Says Unreleased IOSCO Report Could Be Blueprint for Global Offerings*, Sec. Reg. & L. Rep. 1438 (BNA Sept. 22, 1989).

more effective and comprehensive policy coordination amongst the nations.<sup>40</sup>

### *B. United States - Canadian Efforts: The Free Trade Agreement*

While efforts have been underway in the European Community, serious efforts between the SEC, OSC and CVMQ have been underway since 1985 when the SEC released a request for comments entitled "Facilitation of Multinational Securities Offerings".<sup>41</sup> Then, in 1987, The Canada - United States Free Trade Agreement<sup>42</sup> provided additional incentive to coordinate and harmonize United States and Canadian securities regulation as it heightened awareness of the differences in Canadian and United States securities regulation.<sup>43</sup>

The FTA also removed barriers to trade in the financial services and lifted many restraints on United States and Canadian financial institutions.<sup>44</sup> Thus, the FTA is a response to and is expected to help continue the trend towards increased cross-border financial services activity.<sup>45</sup>

## III. THE SEC'S REQUEST FOR COMMENTS IN 1985

Against this background of activity, the SEC initially researched the possibility of a multijurisdictional disclosure system when the SEC published a request for comments on February 28, 1985.<sup>46</sup> The system then proposed would have included the United States, Canada and the

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40. International Monetary Fund, *supra* note 9, at 59.

41. The 1985 Release, *supra* note 3, at 87,318. *See infra* notes 46-48 and accompanying text.

42. Free Trade Agreement, Jan. 2, 1988, United States - Canada, 27 I.L.M. 293 (1988) [hereinafter the "FTA"].

43. International Monetary Fund, *supra* note 9, at 52.

44. *Id.* at 8. *See generally*, GOLD AND LEYTON-BROWN, TRADE-OFFS ON FREE TRADE, 321-45 (1988).

45. International Monetary Fund, *supra* note 9, at 51.

46. *See* The 1985 Release, *supra* note 3. For an in-depth analysis of the 1985 Release and the responses the SEC received *see* Gira, *supra* note 11, 171-76; Cox, *Internationalization of the Capital Markets: The Experience of the Securities and Exchange Commission*, 11 MD. J. INT'L L. & TRADE 201, 204-207 (1987); Note, *SEC Proposals to Facilitate Multinational Securities Offerings: Disclosure Requirements in the United States and the United Kingdom*, 19 N.Y.U. J. INT'L L. & POLICY 457 (1987)[hereinafter "Note"]; Spencer, Jr., *The Reaction of the Securities and Exchange Commission to the Internationalization of the Securities Markets: Three Concept Releases*, 4 B.U. INT'L L. J. 111 (1986); Lorenz, *EEC Law and Other Problems in Applying the SEC Proposal on Multinational Offerings to the U.K.*, 21 INT'L LAW 795 (1987).



United Kingdom and would facilitate simultaneous multinational securities offerings under either a reciprocal approach or a common prospectus approach.<sup>47</sup>

The common prospectus approach would necessitate all three countries agreeing on the disclosure standards for an offering document that would be acceptable to all three jurisdictions.<sup>48</sup> The advantages of such an approach are that it would harmonize disclosure requirements, provide greater comparability of financial information from issuers from different countries and would expedite the development of a uniform international database suitable for use by the secondary markets.<sup>49</sup> Unfortunately, the disadvantage of the common prospectus approach is its impracticability.<sup>50</sup>

Under a reciprocal approach, however, each country would accept the prospectuses of issuers from the other countries as long as minimum standards were met.<sup>51</sup> Thus, only the home country would review the prospectus.<sup>52</sup> The advantages of the reciprocal approach are its ease of implementation and the time and expense it would save issuers.<sup>53</sup> The disadvantages to the reciprocal approach are that it eliminates incentives to harmonize disclosure standards, compromises the comparability of financial information and does not expedite the creation of a suitable database for the secondary market.<sup>54</sup>

The responses to the SEC's 1985 Release were overwhelmingly in favor of the reciprocal approach because of its practicality, but several commentators suggested modification of the reciprocal approach.<sup>55</sup> While many commentators realized the inclusion of the United Kingdom in a multijurisdictional disclosure system creates additional obstacles to clear,<sup>56</sup> very few commentators suggested scrapping the whole idea.<sup>57</sup> Commentators from jurisdictions not included welcomed the

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47. The 1985 Release, *supra* note 3, at 87,318.

48. *Id.* at 87,322.

49. *Id.* at 87,323.

50. *Id.*

51. *Id.* at 87,322.

52. *Id.*

53. *Id.* at 87,323.

54. *Id.*

55. Gira, *supra* note 11, at 174-76.

56. *See infra* notes 69 - 71 and accompanying text.

57. Gira, *supra* note 11, at 175. Of all of the law review articles I have come across, only one comment suggested scrapping the whole idea. *See Note, supra* note 46. However, the primary reason given was that the author thought the differences between disclosure standards in the United States and the United Kingdom were too great.

SEC's reciprocal approach and remarked that they would like to see such efforts extended to their countries.<sup>58</sup>

After reviewing the responses received, the SEC began discussions with the OSC and the CVMQ.<sup>59</sup> These discussions resulted in a 1988 Memorandum of Understanding between the three commissions which is the foundation for the currently proposed multijurisdictional disclosure system.<sup>60</sup>

#### IV. GOALS OF SECURITIES REGULATION

Any multijurisdictional disclosure system must adequately meet the divergent goals of securities regulation. The SEC's two primary securities regulation goals are to foster competition and to protect United States investors.<sup>61</sup> The fostering competition goal seeks to minimize restraints and entry barriers to foreign issuers by removing unnecessary impediments to transnational capital formation without unduly disadvantaging United States issuers.<sup>62</sup>

The investor protection goal seeks to ensure that United States investors have sufficient disclosure of comparable, consistent, reliable and relevant financial information to make an informed investment decision.<sup>63</sup> The SEC hopes that the proposed multijurisdictional disclosure system can meet these two goals.

State Blue Sky laws also attempt to protect investors within their states. As of 1985, 34 states had "fair, just and equitable" statutes which regulate the offer and sale of securities based on the merit of the investment and the quality of the issuer whereas the remaining 16 states have "full disclosure" statutes which, like the SEC's regulations, allow any securities to be offered as long as adequate disclosure is made.<sup>64</sup> These Blue Sky laws will not be changed by the proposed multijurisdictional disclosure system.<sup>65</sup>

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58. Gira, *supra* note 11, at 175.

59. The Release, *supra* note 1, at 80,282.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. The 1985 Release, *supra* note 3, at 87,323 n.26.

65. Any further explanation of state Blue Sky laws is beyond the scope of this comment. For an analysis of the efficacy of state Blue Sky laws and merit regulation in an international securities market see Note, *State Securities Regulation: Merit Review of Foreign Equity Offerings*, 25 VA. J. INT'L L. 939 (1985). Some Blue Sky regulators such as the North American Securities Administrators Association and the Idaho Finance Department, however, have already endorsed the SEC's proposed multijurisdictional disclosure standards. *State Developments: Regulatory Briefs*, Sec. Reg. & L.

Canadian regulatory goals are remarkably similar to those found in the United States. Canada has also sought to protect investors through the mechanism of full and fair disclosure of financial information to investors so that investors may make an informed investment decision while at the same time maintaining fairness and equality.<sup>66</sup> Thus, both the United States and Canada have historically relied on a refined and well developed system of disclosure as the principal protection for investors.<sup>67</sup>

#### V. WHY CANADA?

Canada is a logical first step for the SEC to take. Not only are Canadian securities regulations comparable in many ways to those of the SEC, Canada is also the largest source of foreign securities in the United States.<sup>68</sup>

Many of the obstacles that would have to be overcome with a system including the United Kingdom do not present a problem with a system limited to the United States and Canada. The methods of offering, underwriting, registering and marketing securities in the United Kingdom differ substantially from those in the United States and Canada.<sup>69</sup> Also, disclosure, accounting and auditing standards vary considerably more between the United Kingdom and the United States than they do between Canada and the United States.<sup>70</sup> Finally, a recent English court decision could potentially hamper SEC insider trading investigations.<sup>71</sup>

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Rep. 21 (BNA Jan. 5, 1990).

66. The Release, *supra* note 1, at 80,282; 80,289.

67. *Id.* at 80,282.

68. *See supra* notes 10-16 and accompanying text.

69. The 1985 Release, *supra* note 3, at 87,321. In the United Kingdom, a definitive prospectus which cannot be subsequently amended is filed generally two weeks before the price setting date. Only after the price setting date or "impact date" can prospectuses be circulated and offers solicited. By contrast, in the United States and Canada, preliminary prospectuses, which are subject to subsequent amendment, can be circulated before the effective date during the waiting period to solicit offers. *Id.*

70. For a detailed analysis of the differences between the United Kingdom and the United States, *see* Gira, *supra* note 11 at 164-170; Note, *supra* note 46; Lorenz, *supra* note 46.

71. *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985*, slip. op. (Ch. Mar. 31, 1987). [hereinafter the "Warner decision"]. In the Warner decision, an English court ruled that journalists may withhold their sources of information predicting the results of government reviews of takeover bids from government inspectors. The Warner decision may thus hamper SEC requests for information under the Memorandum of Understanding on Exchange of Information Between the SEC,

One commentator from the United Kingdom strongly supported the SEC's efforts and stated that it understood why Canada was chosen as the first logical partner but also expressed its hope that the United Kingdom will be chosen as the next participant at the earliest possible opportunity.<sup>72</sup> Another commentator hoped to see the system extended to Europe and Japan.<sup>73</sup> For now, however, the proposed system is limited to the United States and Canada.

#### A. *The Registration Process*

Both Canada and the United States have a waiting period after the filing of a prospectus and before the effective date during which the disclosure documents are reviewed by the regulatory authorities.<sup>74</sup> While the SEC focuses exclusively on the adequacy of disclosure, the OSC and CVMQ also evaluate the merit of the offering.<sup>75</sup> Thus, the OSC and CVMQ individually perform a review process comparable to the combined review process undertaken by the SEC and some of the state Blue Sky commissioners.

During the waiting period in Canada, as in the United States, securities may be offered, but not sold, while only limited types of information may be disseminated to generate interest in the prospective offering.<sup>76</sup> Canadian underwriting and marketing practices are also similar to those employed in the United States.<sup>77</sup>

Prospectuses in Canada and the United States have many similar common required elements. Some of the major items requiring a description and discussion in both countries are the issuer's capital structure, property and business, development of business, acquisitions

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CFTC, and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Futures [1986-1987 Transfer Binder] Fed. Sec. C. Rep. (CCH) ¶ 84,027, at 88,244 (Sept. 23, 1986). For a more detailed analysis of the Warner decision, see Note, *The British-U.S. Memorandum of Understanding of 1986: Implications After Warner*, 11 *FORDHAM INT'L L. J.* 110 (1987).

72. Letter from Barclays Bank PLC to Jonathan G. Katz, Secretary of the SEC (September 26, 1989) [hereinafter the "Barclays Letter"]. The hopes of Barclays Bank PLC will likely be realized. The United Kingdom has already been identified by Sara Hanks, former Chief of the SEC's Office of International Finance, as the next candidate. *Hanks Cites SEC's "Practical Stance" on International Securities Issues*, Sec. Reg. & L. Rep. 103 (BNA Jan. 19, 1990).

73. Letter from Sullivan and Cromwell to Jonathan G. Katz, Secretary of the SEC at 3 (October 31, 1989) [hereinafter the "Sullivan Letter"].

74. The Release, *supra* note 1, at 80,290-291.

75. *Id.* at 80,291.

76. *Id.* at 80,291 n.67.

77. *Id.* at 80,292.

and operating results, officer and director compensation, officer and director indebtedness to the issuer, and interests in material transactions.<sup>78</sup> Also required in both countries is a description and discussion of the securities offered, use of the proceeds, underwriter's obligations, plan of distribution, distribution spread, and material risks and risk factors.<sup>79</sup> Finally, prospectuses in both countries require audited financial statements for the past five years, an auditor's report, and various resolutions or certifications by the officers and directors of the issuer approving the prospectus.<sup>80</sup>

The OSC and CVMQ have both adopted the use of a short form prospectus in their Prompt Offering Qualification system.<sup>81</sup> Like the SEC's Forms S-3 and F-3, this short form prospectus also contains virtually all of the information contained in a long form prospectus by incorporating by reference other documents filed with the regulatory body.<sup>82</sup>

Like the SEC's Rule 415<sup>83</sup> shelf registration process, the CVMQ also has a shelf registration process available.<sup>84</sup> Both shelf registration processes are designed to allow the frequent issuer of securities easier and quicker access to the market over a maximum one year period of distribution.<sup>85</sup> The OSC has not yet, however, adopted a shelf registration process.

### B. Periodic Reporting Requirements

As in the United States, once a company registers securities in Canada, it becomes subject to periodic reporting requirements.<sup>86</sup> These

78. *Id.* at 80,291.

79. *Id.* at 80,291-292.

80. *Id.* at 80,292. For a more detailed analysis of the comparability of United States and Canadian prospectus requirements, see generally Connelly, *Multinational Securities Offerings: A Canadian Perspective*, 50 LAW & CONTEMP. PROBS. 251, 258 (1987).

81. The Release, *supra* note 1, at 80,292.

82. *Id.* Form S-3, 17 C.F.R. 239.13 (1987) and Form F-3, 17 C.F.R. 239.33 (1987) are abbreviated registration forms for certain qualifying domestic (S-3) and foreign (F-3) issuers for certain transactions.

83. 17 C.F.R. § 230.415 (1983).

84. The Release, *supra* note 1, at 80,293.

85. *Id.*

86. *Id.* at 80,293. The Securities and Exchange Act of 1933, 15 U.S.C.A. §§ 77a (1933), 77b - c (1987), 77d (1980), 77e (1954), 77f (1987), 77g (1933), 77h (1940), 77i (1987), 77j (1954), 77k (1934), 77l (1954), 77m (1934), 77n (1933), 77o (1934), 77p (1933), 77q (1954), 77r (1933), 77s - t (1987), 77u (1933), 77v (1987), 77w (1933), 77x (1975), 77y - aa (1933) governs the registration process in the United

periodic reporting requirements are also similar. Like United States reporting companies, Canadian reporting companies must file audited annual financial statements,<sup>87</sup> unaudited quarterly financial statements,<sup>88</sup> and reports of any material changes in the company.<sup>89</sup> Additionally, Canadian reporting companies are subject to proxy regulation as are United States reporting companies.<sup>90</sup>

### C. Auditing and Accounting

Although auditing standards in Canada differ in some aspects from those in the United States, generally accepted practice in Canada routinely encompasses all significant auditing procedures required in the United States.<sup>91</sup> The Canadian Institute of Chartered Accountants ("CICA") periodically reviews new auditing standards adopted by its United States counterpart, the American Institute of Certified Public Accountants ("AICPA").<sup>92</sup>

AICPA standards require the inclusion of an explanatory paragraph in an auditor's report if there are substantial doubts about the entity's continued existence as a going concern<sup>93</sup> or if other material uncertainties exist.<sup>94</sup> Canadian standards prohibit such a paragraph if

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States. All companies that register securities for sale in the United States pursuant to this act automatically become reporting companies for purposes of the Securities and Exchange Act of 1934, 15 U.S.C.A. §§ 77b - c (1987), 77d (1980), 77e (1954), 77j (1954), 77k (1934), 77m (1934), 77o (1934), 77s (1987), 78a - c (1988), 78d - d2 (1987), 78e (1934), 78f (1987), 78g (1984), 78h (1989), 78i (1982), 78j (1934), 78k (1984), 78k-1 - 1 (1987), 78m (1988), 78n (1985), 78o (1987), 78o-3 (1986), 78p (1964), 78q - q-1 (1987), 78r (1936), 78s (1975), 78t - t-1 (1987), 78u - u-1 (1988), 78v (1934), 78w (1987), 78x (1975), 78y (1986), 78z (1935), 78aa - bb (1987), 78cc (1938), 78dd (1934), 78dd-1 - dd-2 (1988), 78ee (1975), 78ff (1988), 78gg - hh (1934), which regulates periodic reporting requirements.

87. The Release, *supra* note 1, at 80,293. Annual reports including audited financial statements are required by reporting companies in the United States by either Form 10-k, 17 C.F.R. § 249.310 (1989) or Form 20-F, 17 C.F.R. § 249.220f (1989).

88. The Release, *supra* note 1, at 80,293. Unaudited quarterly financial statements are required on Form 10-Q, 17 C.F.R. § 249.308a (1989) for United States reporting companies.

89. The Release, *supra* note 1, at 80,293. Material changes in the business, operations or capital of the issuer are required to be reported on Form 8-K, 17 C.F.R. § 249.308 (1977) for United States reporting companies.

90. The Release, *supra* note 1, at 80,293.

91. *Id.* at 80,293-294.

92. *Id.* at 80,294.

93. See AICPA Statement of Auditing Standards [hereinafter "SAS"] No. 59.

94. The Release, *supra* note 1, at 80,294.

there is adequate disclosure in a note to the financial statements.<sup>95</sup> But is this really a difference? In substance it is not. Under either standard the same result is achieved: the doubts or uncertainties are disclosed to the readers of the financial statements.

This difference in form, however, may also be soon ameliorated. The CICA has recently published guidelines encouraging Canadian auditors to add comments for United States readers that explain the variation in reporting standards and cross-reference to the adequate disclosure whenever the auditor's report is included in a document to be filed with the SEC.<sup>96</sup> The proposed multijurisdictional system would require such explanation.<sup>97</sup>

Thus, significant differences between Canadian and United States auditing standards do not exist. Under either set of standards, investors are given sufficient disclosure to make informed investment decisions. There are differences between the ethical and independence standards promulgated by the CICA and the AICPA,<sup>98</sup> but these differences generally have no effect on an audit performed in a competent, professional manner.

United States generally accepted accounting principles ("GAAP") are similar in many respects to Canadian GAAP, but there are some differences.<sup>99</sup> Canadian GAAP require the purchase method of accounting<sup>100</sup> for most business combinations that would be accounted for by the pooling-of-interests method under United States GAAP.<sup>101</sup> United States GAAP require the expending of certain development costs<sup>102</sup> that may be capitalized under Canadian GAAP.<sup>103</sup> United

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See CICA Handbook § 1580. The purchase method of accounting for business combinations is used in both the United States and in Canada. Under this method, the acquired assets are revaluated to their fair market value in the acquiror's financial statements. Any excess of purchase price over the fair market value of the net assets acquired is generally attributed to goodwill, a long term asset.

101. AICPA Statement of Financial Accounting Standards [hereinafter "SFAS"] No. 16. Under the pooling-of-interests method of accounting for business combinations, the acquired assets are included in the financial statements of the acquiror at the values previously stated in the acquired company's financial statements. Thus, under this method, there is no revaluation of assets to fair market value and no recognition of goodwill.

102. SFAS No. 2.

103. CICA Handbook § 3450. The capitalized development costs would then be expended generally over their expected useful life within certain maximum lifespans

States GAAP require current recognition of foreign currency gains and losses<sup>104</sup> in some cases where Canadian GAAP allow deferral.<sup>105</sup>

There are differences in pension accounting measurement methods<sup>106</sup> and, under United States GAAP but not Canadian GAAP, an expense must be recognized in certain situations under an employee stock compensation plan when the stock options are granted.<sup>107</sup> Canadian GAAP follow the income statement approach to accounting for income taxes.<sup>108</sup> United States GAAP previously followed the income statement approach but recently switched to the balance sheet approach.<sup>109</sup>

Canadian GAAP do not consider the effect of common stock equivalents on earnings per share,<sup>110</sup> whereas United States GAAP require reporting earnings per share both on a primary basis (the same as Canadian GAAP - without the effect of common stock equivalents) and on a fully diluted basis (with the effect of dilutive common stock equivalents).<sup>111</sup> Also affecting earnings per share information, United States GAAP define extraordinary items more restrictively.<sup>112</sup> Canadian GAAP do not require the consolidation of nonhomogeneous subsidiaries,<sup>113</sup> whereas United States GAAP do.<sup>114</sup>

Finally, differences may be significant in certain heavily regulated industries, such as insurance or banking.<sup>115</sup> In these types of industries,

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through the process of amortization.

104. SFAS No. 52.

105. CICA Handbook § 1650.

106. Compare CICA Handbook § 3460 with SFAS No. 87.

107. Accounting Principles Board Opinion [hereinafter "APB"] No. 25.

108. CICA Handbook §§ 3470 to 3471.

109. SFAS No. 96, which superceded APB No. 11. Deferred taxes arise from timing differences between the recognition of income for tax purposes and the recognition of income for financial statement purposes. Typically, one of the largest timing differences giving rise to deferred taxes results from the allowed use of accelerated depreciation for tax purposes while straight line depreciation is used for financial statement purposes. Such a timing difference can be significant in a capital intensive industry. The balance sheet approach (currently in vogue in the United States) accounts for deferred taxes using currently existing tax rates, regardless of when the timing difference originated. The income statement approach (previously in vogue in the United States and currently followed in Canada) accounts for deferred taxes using the tax rates that existed when the timing difference originated.

110. CICA Handbook § 3500.

111. APB No. 15.

112. Compare CICA Handbook § 3480 with APB No. 30.

113. CICA Handbook § 1600.

114. SFAS No. 94.

115. The Release, *supra* note 1, at 80,294.



specialized accounting practices may have developed.<sup>116</sup>

#### D. Other Similarities and Differences

Canada's federal and provincial takeover laws impose on incumbent management and third-party bidders detailed disclosure requirements that closely resemble those required by the Williams Act<sup>117</sup> under schedule 14D-1,<sup>118</sup> the United States federal takeover law. Also, the substantive protections of Canadian law are similar to the Williams Act. Both provide for acceptance of tendered shares on a pro rata basis<sup>119</sup> and minimum time periods that the tender offer must be open.<sup>120</sup> Also, generally all holders of the same class of security must be offered the same consideration.<sup>121</sup>

There are some differences between Canadian takeover law and its United States counterpart, however. Under Canadian law, when a variation in the terms of the tender offer increases the value of the consideration offered, all shareholders must receive such increase.<sup>122</sup> A final difference between Canadian and United States takeover law is that the Williams Act prohibits the purchase by the bidder of the target shares by any means other than the tender offer while the tender offer is open, whereas Canadian law allows a bidder to purchase up to 5 percent of the target shares by other means while the tender offer is open.<sup>123</sup>

116. *Id.*

117. 15 U.S.C.A. §§ 781(i) (1987), 78m(d) - (e) (1988), 78n(d) -(f) (1985).

118. The Release, *supra* note 1, at 80,295 and 17 C.F.R. § 240.14d-100 (1986). Various states have case law and statutes governing takeovers. They govern anything from the required duties of care of incumbent officers and directors to addressing the extent to which the successful acquiror can sell off the acquired assets. Such state laws are beyond the scope of this comment.

119. Compare Canadian Business Corporations Act [hereinafter "CBCA"] § 196(1)(c), Ontario Securities Act [hereinafter "OSA"] § 94(7), and Quebec Securities Act [hereinafter "QSA"] with the Securities and Exchange Act, 15 U.S.C.A. § 78n(d)(6) (1985).

120. Compare CBCA § 197(b), OSA §§ 94(2), 97(5), and QSA §§ 147.3, 147.8 (21 calendar-day minimum offering period) with Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1986) (20 business-day minimum offering period).

121. Compare CBCA § 197(d), OSA § 96 and QSA §§ 145 to 146 with Rule 14d-10(a)(2), 17 C.F.R. § 240.14d-10(a)(2) (1986) and 13e-4(f)(8)(ii), 17 C.F.R. § 240.13e-4(f)(8)(ii) (1986).

122. The Release, *supra* note 1, at 80,296 n.133.

123. See Letter from Cohen Swados Wright Hanifin Bradford & Brett to Jonathan G. Katz, Secretary of the SEC at 2 (October 25, 1989) [hereinafter the "Cohen Letter"]. See also Letter from the American Bar Association to Jonathan G. Katz, Secretary of the SEC at 6 (November 10, 1989) [hereinafter the "ABA Let-

## VI. PROBLEMS IN ANY MULTIJURISDICTIONAL DISCLOSURE SYSTEM

Any multijurisdictional disclosure system must not only adequately meet each jurisdiction's securities regulation goals, as previously discussed, but should also harmonize disclosure standards as much as possible while still reducing the costs inherent in complying with multijurisdictional disclosure standards.<sup>124</sup> A minimum of harmonization of disclosure standards is necessary to provide potential investors in each jurisdiction with the minimum of information they need to make an informed investment decision by ensuring sufficient comparability of information when making an investment choice between a home country investment and a foreign investment.<sup>125</sup>

On the other hand, for a multijurisdictional system to have any value, it must reduce the costs inherent in complying with differing but often duplicative disclosure requirements. The latter is accomplished through a mutual recognition approach.<sup>126</sup>

Finally, member countries must effectively enforce their securities laws throughout the multiple jurisdictions when applicable.<sup>127</sup> Such effective enforcement requires comprehensive cooperation and enforcement assistance among the regulatory bodies.<sup>128</sup> Memoranda of Understanding are already in place between OSC, CVMQ and the SEC.<sup>129</sup>

## VII. THE PROPOSED SYSTEM

The proposed system would permit certain Canadian issuers to register securities and meet periodic disclosure requirements in the United States using Canadian disclosure documents.<sup>130</sup> The system would also allow certain Canadian tender offers to be made in compliance with Canadian tender offer regulation.<sup>131</sup>

As proposed, the system would allow Canadian issuers subject to United States proxy regulation to use Canadian documents for certain proxy solicitations<sup>132</sup> and certain rights and exchange offers.<sup>133</sup> Finally,

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ter"]; Sullivan Letter, *supra* note 73, at 24.

124. The Release, *supra* note 1, at 80,288.

125. *Id.*

126. *Id.* at 80,288-289.

127. *Id.* at 80,289.

128. *Id.*

129. *Id.* at 80,289; n.54.

130. *Id.* at 80,281.

131. *Id.*

132. *Id.*

133. *Id.* at 80,297.

Canadian companies subject to the insider reporting requirements of Section 16 of the Securities Exchange Act<sup>134</sup> could fulfill these requirements using Canadian forms.<sup>135</sup> Comparable reciprocal treatment would be given to United States issuers in Canada.<sup>136</sup>

Canadian issuers generally must have at least a three year reporting history with either the OSC or CVMQ and meet minimum market value and public float tests to participate.<sup>137</sup> The public float and market value tests may be varied depending on the type of security issued.<sup>138</sup> All Canadian issuers would still be subject to United States civil liability and anti-fraud provisions.<sup>139</sup> Finally, all Canadian prospectuses filed with the SEC would have a wraparound form giving the name and address of the company's resident agent in the United States and containing appropriate warnings.<sup>140</sup>

### A. Registration of Offerings

The system would distinguish between offerings of investment grade debt or preferred stock and other offerings. The distinction has been made because much less disclosure is required for an investor to make an informed investment decision about the former as opposed to the latter type of investment.<sup>141</sup>

#### 1. Investment Grade Debt and Preferred Stock

Debt and preferred stock offerings that are non-convertible for at least one year would be considered investment grade if the securities had a rating signifying such by at least one of the nationally recognized statistical securities rating services in the United States.<sup>142</sup> Proposed

134. 15 U.S.C.A. § 78p (1964).

135. The Release, *supra* note 1, at 80,281.

136. *Id.*

137. *Id.* at 80,298.

138. *Id.* at 80,303.

139. *Id.* at 80,301 n.155. See also the Securities and Exchange Act, 15 U.S.C.A. §§ 77k (1934); 77l (1954); 77o (1934) and the Security and Exchange Act, 15 U.S.C.A. §§ 78o (1987); 78r (1936); 78t (1987) and the Securities and Exchange Act, 17 C.F.R. §§ 240.10b-5 (1987); .13e-4 (1986); .14e-3 (1980).

140. *Id.* at 80,301. Such warnings would include that the investment may have tax consequences in Canada, that investors may have to pursue remedies for securities law violations against persons and assets located in Canada and that the financial statements are prepared in accordance with Canadian GAAP. *Id.*

141. *Id.* at 80,318.

142. *Id.* at 80,303 n.172. At present, Moody's and Standard and Poor's are the only rating services that meet the definition of nationally recognized rating service. See

Form F-9 would rely entirely on Canadian disclosure for such offerings and Canadian companies that had at least (CN) \$180 million market value for their common stock and at least (CN) \$75 million public float would be eligible to use Form F-9.<sup>143</sup> No reconciliation of the financial statements to United States GAAP would be required when using Form F-9.<sup>144</sup>

## 2. Other Offerings

All other security offerings could be made under proposed Form F-10 for eligible Canadian issuers.<sup>145</sup> Form F-10 would require the wraparound to include a reconciliation of the financial statements to United States GAAP as specified by Item 18 of Commission Form 20-F.<sup>146</sup> Canadian banks and bank holding companies would also have to include supplemental industry specific information required by Item III.(C), "Risk Elements" and Item IV., "Summary of Loss Experience" of Industry Guide 3 under the Securities Act.<sup>147</sup> Eligible Canadian issuers must have common stock with a market value of at least (CN) \$360 million and public float of at least (CN) \$75 million.<sup>148</sup>

### B. Periodic Reporting

Issuers that either registered securities under Form F-9<sup>149</sup> or are eligible to use that form<sup>150</sup> could fulfill their periodic disclosure require-

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Letter from Dominion Bond Rating Service Limited to Jonathan G. Katz, Secretary of the SEC, at 1 (October 18, 1989) [hereinafter "DBRS Letter"].

143. The Release, *supra* note 1, at 80,303. "Public float" is defined as the monetary value of all outstanding equity securities owned by non-affiliates. *Id.* at 80,303 n.173.

144. *Id.* at 80,298.

145. *Id.* at 80,303. Included in this category would be debt or preferred stock that is convertible within one year and common stock.

146. *Id.* at 80,303. Item 18 of Form 20-F, 17 C.F.R. § 249.220f (1989) requires full disclosure of all of the information required by regulation S-X and United States GAAP. *See* The Release, *supra* note 1, at 80,303.

147. *Id.* at 80,304.

148. *Id.* at 80,303.

149. Under 15 U.S.C.A. § 78o(d) (1987) and Regulation 15D 17 C.F.R. §§ 240.15d-1 (1982), .15d-2 (1971), .15d-3 (1983), .15d-5 (1983), .15d-6 (1984), .15d-10 (1989), .15d-11 (1985), .15d-13 (1989), .15d-16 (1985), .15d-17 (1971), and .15d-21 (1962) all issuers who register with the SEC become subject to periodic reporting requirements thereafter.

150. Canadian issuers could be subject to United States periodic reporting disclosure requirements if they had previously made offerings in the United States of the securities covered by proposed Form F-9; or if such a security is listed on a national

ments by filing their Canadian periodic reporting disclosure documents with the SEC under proposed Form 40-F.<sup>151</sup> As with the original registration on Form F-9, no reconciliation to United States GAAP would be required.<sup>152</sup>

Issuers that either registered securities under Form F-10 or are eligible to use that form<sup>153</sup> could also fulfill their periodic reporting requirements by filing their Canadian periodic disclosure documents with the SEC under Form 40-F.<sup>154</sup> Such issuers, however, would be required to include the reconciliation indicated under Item 17 of Form 20-F.<sup>155</sup>

### C. Tender Offers

Under the system proposed, tender offer filings related to offers for a class of shares of a Canadian issuer could proceed in the United States under Canadian law if less than 20 percent of the shares were held of record by United States residents, the tender offer was extended to all United States shareholders and the transaction is not subject to an exemption from substantive Canadian takeover law.<sup>156</sup> Compliance with Canadian law under the circumstances outlined would suffice for compliance with the Williams Act,<sup>157</sup> the federal United States tender offer law.<sup>158</sup> State takeover laws<sup>159</sup>, however, would not be affected by the proposed system and, as such, would still have to be complied with.<sup>160</sup>

Canadian tender offer disclosure documents would be filed under proposed Form F-8, along with a wraparound including additional SEC

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securities exchange in the United States (*see* 15 U.S.C.A. § 781(b) (1987)); or if such a security is held of record by more than 500 shareholders, more than 300 of which are United State residents and certain asset tests are met (*see* 15 U.S.C.A. § 781(g) (1987), as supplemented by Rules 12g-1 and 12g3-2(b), 17 C.F.R. §§ 240.12g-1 (1986) and .12g3-2(b) (1984)).

151. The Release, *supra* note 1, at 80,309.

152. *Id.*

153. *See supra* notes 145 to 148 and accompanying text.

154. The Release, *supra* note 1, at 80,309.

155. *Id.* Item 17 of Form 20-F, 17 C.F.R. § 249.220f (1989) requires reconciliation of only the measurement items which are the income statement and the balance sheet. *See* The Release, *supra* note 1, at 80,303 n.177.

156. *Id.* at 80,305.

157. *See supra* note 117.

158. The Release, *supra* note 1, at 80,305.

159. *See supra* note 118.

160. The Release, *supra* note 1, at 80,305 n.193. Where state takeover law prohibited extending the offer to shareholders residing in that state, the offeror could exclude such shareholders from the offer. *Id.*

mandated disclosure and informational legends.<sup>161</sup> Bidders making all cash tender offers would not have to meet market value and float eligibility requirements. Those making exchange offers<sup>162</sup> would have to meet such eligibility tests.<sup>163</sup>

Finally, the proposed system would offer no relief from the reporting obligations imposed by Schedule 13D.<sup>164</sup> This occurs whenever any Canadian entity acquires more than five percent of the target company's equity securities within a specified period of time.<sup>165</sup>

#### *D. Proxy Solicitation and Rights Offerings*

Under the proposed system, Canadian companies soliciting proxies from United States shareholders need only provide the proxy material required under Canadian law if the only matters being voted on at the annual meeting are routine matters such as the election of directors or ratification of accountants.<sup>166</sup> If, however, the matters to be voted on include nonroutine matters or are such that preliminary proxy materials would be required under United States proxy rules, then such proxies of United States shareholders must be solicited in accordance with United States proxy rules.<sup>167</sup> Canadian issuers that comply with Canadian shareholder proposal laws will be deemed to have complied with United States shareholder proposal rules<sup>168</sup> under Rule 14a-8.<sup>169</sup>

Similar to the tender offer rules proposed, certain rights offerings could be made pursuant to Canadian law under cover of Form F-7.<sup>170</sup> No market value or float tests would apply but eligible issuers would be required to have had the class of securities to which the rights pertain listed on either the Toronto or Montreal Exchange for the previous 36 months.<sup>171</sup>

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161. *Id.* at 80,306.

162. An exchange tender offer is one that offers either all securities or a mixture of securities and cash for shares of the target company.

163. The Release, *supra* note 1, at 80,306.

164. 17 C.F.R. § 240.13d-101 (1982).

165. The Release, *supra* note 1, at 80,306.

166. *Id.* at 80,308.

167. *Id.*

168. *Id.*

169. 17 C.F.R. § 240.14a-8 (1987).

170. The Release, *supra* note 1, at 80,304.

171. *Id.*

VIII. RESPONSES TO THE RELEASE, ANALYSIS AND  
RECOMMENDATIONS

Responses to the Release were overwhelmingly in favor of the SEC's initiative. Only one response reviewed was entirely opposed to the whole idea.<sup>172</sup> Another unique response favored the proposed system but recommended full Item 18 reconciliation to United States GAAP in all financial statement filings.<sup>173</sup> The rest of the responses generally either gave opinions on specific questions opened for commentary by the SEC or suggested some refinements to the proposed system.

A. *Civil Liability*

Several commentators suggested that SEC rules should be amended to specifically provide Canadian issuers who otherwise fully comply with the multijurisdictional disclosure requirements a safe harbor from civil liability.<sup>174</sup> Such a safe harbor appears to be a vital prerequisite.

The proposed system would allow certain Canadian issuers to use Canadian disclosure documents to meet SEC filing requirements.<sup>175</sup> Such filings using Canadian documents would not violate United States disclosure law. Absent a safe harbor, however, an anti-fraud action could still be brought alleging that the documents are misleading because information which normally appears in a United States disclosure document, but not in a Canadian document, has been omitted.<sup>176</sup> This would completely defeat the purpose of the proposed system.<sup>177</sup>

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172. Letter from Financial Analysts Federation to Jonathan G. Katz, Secretary of the SEC (November 6, 1989). This two page letter stated that Canadian issuers should be subject to full United States requirements, regardless of the type of securities offered or the nature of the investors. Anything less would be a "significant disservice to U.S. investors". *Id.* at 2.

173. Letter from Ernst & Young to Jonathan G. Katz, Secretary of the SEC, at 1 (November 28, 1989) [hereinafter the "Ernst Letter"].

174. Letter from the Toronto Stock Exchange to Jonathan G. Katz, Secretary of the SEC, at 6 (October 31, 1989) [hereinafter the "Toronto Letter"]; Letter from the New York Bar Association to Jonathan G. Katz, Secretary of the SEC, at 6 (November 29, 1989) [hereinafter the "NY Bar Letter"]; Letter from Northern Telecom Limited to Jonathan G. Katz, Secretary of the SEC, at 2 (October 30, 1989) [hereinafter the "NT Letter"]; Letter from Osher, Hoskins & Harcourt to Jonathan G. Katz, Secretary of the SEC, at 3 (November 13, 1989) [hereinafter the "Osher Letter"]; Letter from Inco Limited to Jonathan G. Katz, Secretary of the SEC, at 4 (October 31, 1989) [hereinafter the "Inco Letter"]; Sullivan Letter, *supra* note 73, at 5.

175. See *supra* note 130 and accompanying text.

176. The Release, *supra* note 1, at 80,301 n.155.

177. Sullivan Letter, *supra* note 73, at 5; Inco Letter, *supra* note 174, at 4.

Thus, my first recommendation is the creation of such a safe harbor.

### *B. Securities Offerings and Periodic Reporting*

Distinguishing non-convertible investment grade debt and preferred stock from other securities seems appropriate.<sup>178</sup> The price of such securities is almost entirely due to the relationship between the yield and the risk that the issuer will default. The price of other securities typically is determined by many additional factors.

Most commentators thought that the same or less stringent eligibility requirements and reconciliations used for offerings should also be used for periodic reporting.<sup>179</sup> As a conservative first step and for the sake of simplicity, the same standards should apply. If this proposed system functions smoothly, the eligibility and reconciliation requirements for periodic reporting companies can be further relaxed at a later date.

#### *1. Eligibility Requirements*

Two commentators suggested that the eligibility requirement of investment grade as rated by a nationally recognized statistical rating service be expanded to include not just Canadian issuers so rated by the United States rating services of Moody's or Standard and Poor's, but also Canadian issues so rated by comparable Canadian rating services.<sup>180</sup> Such a suggestion appears appropriate. Moody's and Standard and Poor's only rate 32 Canadian issuers that are investment grade whereas Dominion Bond Rating Service Limited alone rates an additional 85 Canadian issuers that are investment grade but not rated by the United States rating services.<sup>181</sup> My second recommendation appears obvious. The definition of nationally recognized rating service should be expanded to include comparable Canadian rating services.

Five commentators mentioned the non-convertible for one year eligibility requirement for investment grade debt and preferred stock. Two commentators stated that the one year non-convertible definition was appropriate and this period need not be extended.<sup>182</sup> One commen-

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178. Only the Ernst Letter, *supra* note 173, at 2, stated that such a distinction is inappropriate.

179. Sullivan Letter, *supra* note 73, at 30 (less stringent standards for periodic reporting); ABA Letter, *supra* note 123, at 7 (the same standards for continuous reporting purposes).

180. Sullivan Letter, *supra* note 73, at 11; DBRS Letter, *supra* note 142, at 1.

181. DBRS Letter, *supra* note 142, at 1.

182. ABA Letter, *supra* note 123, at 2; Letter from Bow Valley Industries Ltd. to



tator suggested that such a period of non-convertibility should be extended to at least two years.<sup>183</sup> Another commentator saw no reason for treating securities that are convertible after one year as non-convertible because the commentator has seen very few issues of securities that become convertible after a specified period of time.<sup>184</sup>

The last commentator on the non-convertible criteria raised an interesting point. While the investment grade debt or preferred stock is non-convertible, perhaps there are sufficient differences between these types of securities and other securities to merit different disclosure requirements.<sup>185</sup> The differences, however, disappear as the date for potential conversion nears.<sup>186</sup>

Imposing the additional disclosure requirements of Form F-10 issuers on Form F-9 issuers when the date the securities becomes convertible is sufficiently close so that the convertibility feature has a significant enough impact on the price of the securities would be an ideal solution. This solution would respond to the growing similarities in the information needs of these investors as the convertibility date approached. Implementing such a solution, however, would be too unduly complicated and unwarranted given the small volume of issues of securities that become convertible after a specified time.<sup>187</sup>

Until such issues become more common, I do not recommend adjusting the proposed system to make special accommodations for such issues. Rather, only investment grade debt and preferred stock that is never convertible should be eligible for Form F-9. This approach is much simpler to implement while it still meets investors' information needs should these needs change over the life of the securities as the convertibility feature of the securities changes. Also, this approach eliminates the need to determine how significant an effect the conversion feature has on the price of the securities. Finally, this approach, if it errs, does so on the conservative side.

Two commentators felt the market value and public float eligibility criteria for investment grade debt and preferred stock issuers should be supplemented with alternative criteria because such tests do not ade-

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Jonathan G. Katz, Secretary of the SEC, at 2 (October 30, 1989) [hereinafter the "Bow Letter"].

183. Letter from the Financial Executives Institute to Jonathan G. Katz, Secretary of the SEC, at Attachment page 1 (November 20, 1989) [hereinafter "FEI Letter"].

184. Sullivan Letter, *supra* note 73, at 10-11.

185. See *supra* notes 141-148 and accompanying text.

186. Ernst Letter, *supra* note 173, at 4.

187. See *supra* note 184 and accompanying text.

quately reflect the market following of a captive finance subsidiary.<sup>188</sup> Such issuers would not meet the eligibility criteria even though they may fit the definition of substantial issuers<sup>189</sup> that the system was designed for. I also feel that the criteria defining substantial issuers should include some additional alternative criteria.

One commentator suggested scraping the market value test and retaining only the public float eligibility criteria.<sup>190</sup> Another commentator suggested scraping both the market value and public float tests and replacing them with a trading volume test.<sup>191</sup> While I do not recommend scraping either test initially, I do recommend creating some trading volume test as an alternative criteria for eligibility.

## 2. *Accounting Reconciliations*

Whether a reconciliation to United States GAAP should be required in the wraparound and, if so, whether such reconciliation should be in conformity with Item 17 (requiring reconciliation of only the measurement items<sup>192</sup>) or Item 18 (requiring full reconciliation to United States GAAP and all disclosure required by regulation S-X<sup>193</sup>) of Form 20-F were the two areas most often addressed by the commentators. Only one commentator thought full Item 18 reconciliation should be required in all circumstances.<sup>194</sup>

Most commentators, however, felt that no reconciliation was necessary for Form F-9 issuers of investment grade debt or preferred stock and that only Item 17 reconciliation was necessary for Form F-10 issuers of other securities.<sup>195</sup> Some commentators went further to state that

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188. Letter from General Motors Acceptance Corporation to Jonathan G. Katz, Secretary of the SEC, at 2 (October 26, 1989) [hereinafter the "GMAC Letter"]; NY Bar Letter, *supra* note 174, at 2.

189. "Substantial issuers" are defined as those issuers that have a large enough market following so that the prices of such securities reflect all available public information. The Release, *supra* note 1, at 80,282. A more precise definition of substantial issuers is those issuers whose size is large enough that the market operates efficiently for them. NY Bar Letter, *supra* note 174, at 2.

190. ABA Letter, *supra* note 123, at 2-3. As previously discussed, the market value and public float eligibility criteria apply to both offerings of non-convertible investment grade debt or preferred stock and other offerings.

191. Sullivan Letter, *supra* note 73, at 10.

192. See *supra* note 155 and accompanying text.

193. See *supra* note 146 and accompanying text.

194. Ernst Letter, *supra* note 173, at 2-4.

195. FEI Letter, *supra* note 183, at 1-2; ABA Letter, *supra* note 123, at 3; GMAC Letter, *supra* note 188, at 2; Cohen Letter, *supra* note 123, at 3; Letter from NOVA Limited to Jonathan G. Katz, Secretary of the SEC, at 6 (October 30, 1989)

such Item 17 reconciliation for Form F-10 issuers should not be mandatory but should only be necessary when there are material differences between United States GAAP and Canadian GAAP.<sup>196</sup> Still other commentators thought there should be no reconciliation in any circumstances.<sup>197</sup>

Just how significant are the differences between Canadian GAAP and United States GAAP? The difference between the purchase method and pooling-of-interests method of accounting for business combinations only arises in the context of certain types of business combinations.<sup>198</sup> This difference arises because the former method requires a revaluation of the net assets acquired while the latter does not.<sup>199</sup> This difference, however, only creates a significant difference in long term assets.

Every dollar of current assets and current liabilities represents either an actual dollar of cash or cash equivalents or a claim to receive or pay a dollar in the near future. Since the fair market value of a dollar is generally a dollar, regardless of whether that dollar is received now or in the near future, current assets and current liabilities are generally stated at values that very closely approximate fair market value. Thus, using one or the other business combination accounting method has virtually no effect on current assets or current liabilities.

The differences in pension accounting<sup>200</sup> and income tax accounting<sup>201</sup> have their primary effect on the footnotes of the financial statements and on long term liabilities or long term assets. However, the footnotes generally explain how the pension account numbers and the income tax account numbers were derived.

As far as comparability of financial statements is concerned, since Canadian GAAP requires a method of accounting for income taxes that was previously required in the United States, Canadian GAAP financial statements are just as comparable to current United States

[hereinafter the "NOVA Letter"]; NY Bar Letter, *supra* note 174, at 7.

196. Inco Letter, *supra* note 174, at 5; Sullivan Letter, *supra* note 73, at 3; NT Letter, *supra* note 174, at 2.

197. Osher Letter, *supra* note 174, at 2 (however, Item 17 of Form 20-F, 17 C.F.R. § 249.220f (1989) suffices if some reconciliation required); Letter from Norcen Energy Resources Limited to Jonathan G. Katz, Secretary of the SEC, at 1-2 (November 3, 1989) [hereinafter the "Norcen Letter"]; Letter from Placer Dome, Inc. to Jonathan G. Katz, Secretary of the SEC, at 1 (October 27, 1989) [hereinafter the "PD Letter"]; Bow Letter, *supra* note 182, at 2.

198. See *supra* notes 100-101 and accompanying text.

199. *Id.*

200. See *supra* note 106 and accompanying text.

201. See *supra* notes 108-109 and accompanying text.

GAAP financial statements as United States GAAP financial statements from several years ago are. Pension accounting in the United States seems to change every couple of years. Thus, pension accounting is inherently inconsistent and attempting to obtain comparability is a meaningless waste.

The differences in reporting earnings per share data<sup>202</sup> and extraordinary items<sup>203</sup> can produce significant differences in the amount of information available to investors in equity securities. Earnings per share data are a primary and frequently relied upon means for investors to make quick evaluations of equity investments. As such, this information is very valuable to an investor.

The rest of the general differences in the GAAP of the United States and Canada are either fairly insignificant or are merely a question of timing differences which are also fairly insignificant when financial statements are evaluated over an extended period of time. No prudent investor makes an investment decision based on financial statements covering only one year. Indeed, both Canadian disclosure regulations and United States disclosure regulations require financial statements for period of time that is generally long enough so that timing differences are fairly insignificant.

The primary factors necessary to decide whether or not to invest in an investment grade debt or preferred stock issue are the yield and the risk. The yield on such securities is determined by only two factors and is the quotient of the fixed return divided by the price. Both of these factors are readily determinable without any reconciliation.

The risk represents the possibility that the issuer cannot pay interest or preferred dividend payments on a regular basis. A strong working capital position<sup>204</sup> and strong cash flows indicate low risk. Since working capital is generally unaffected by the differences in GAAP, a reconciliation would not provide any useful information on working capital. Also, none of the differences have any direct effect on cash flow.<sup>205</sup> Finally, the investment grade rating is an alternative evaluation

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202. See *supra* note 110-111 and accompanying text.

203. See *supra* note 112 and accompanying text.

204. Working capital equals current assets less current liabilities.

205. However, there may be some indirect effects due to the timing of when taxable income is recognized. For example, assuming an item where income tax laws followed GAAP, if U.S. GAAP required expensing the item immediately while Canadian GAAP required capitalization and amortization of the item, U.S. GAAP would produce lower current taxable income and lower current income taxes. Hence, current cash flow would be greater under U.S. GAAP. However, this advantage is short lived because taxable income and income taxes would be lower in future years under Canadian GAAP and, hence, future cash flow would be greater under Canadian GAAP.

of the risk involved. Thus, reconciliation of financial statements for Form F-9 issuers of investment grade debt or preferred stock is not justified and should not be required.

Other types of investments are evaluated based on many additional factors. Comparability of earnings per share data certainly provides valuable information to the common stock investor or to other Form F-10 issuance investors. An Item 17 reconciliation, however, is sufficient to provide such comparable earnings per share data and much additional comparable information.

Item 18 reconciliation, while it does provide even more information, does not seem necessary. Requiring Item 18 reconciliation would defeat the purpose of the multijurisdictional system because such reconciliation would not significantly simplify multijurisdictional disclosure over present methods.<sup>206</sup> Also, just because there are some differences between Canadian GAAP and US GAAP, it does not follow that disclosure documents prepared in accordance with Canadian standards cannot meet the SEC's sufficient disclosure goal.

The SEC does not require disclosure of everything. Only disclosure of material matters is required. The SEC has defined "material" as describing those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.<sup>207</sup> Thus, disclosure documents prepared according to Canadian standards, although differing from those prepared according to US standards, can still meet the SEC's disclosure goal as long as the material matters are disclosed. Since Canadian securities regulation has a similar disclosure goal<sup>208</sup>, the material matters are disclosed in documents prepared in accordance with Canadian standards.

One commentator even remarked that no one other than the SEC has ever expressed any interest in its reconciliation disclosure.<sup>209</sup> Just because investors do not question such reconciliations, however, it does not follow that such reconciliations do not provide helpful information with which a reasonable investor is substantially likely to form the basis for an informed investment decision. Thus, Item 17, but not Item 18, reconciliation should be required for Form F-10 issuers.

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Again, when the risk is evaluated over multiple years, these differences become insignificant.

206. Cohen Letter, *supra* note 123, at 3.

207. Rule 405, 17 C.F.R. § 230.405 (1985).

208. See *supra* notes 65-66 and accompanying text.

209. PD Letter, *supra* note 197, at 1.

### C. Tender Offers

One commentator noted that the implementation of the proposed multijurisdictional system does not eliminate the need to continue attempts to harmonize the standards in both countries.<sup>210</sup> This is especially true in the area of tender offers.<sup>211</sup> The real problem occurs when two bidders vying for the same target have their bids governed by different sets of regulations.<sup>212</sup>

Two commentators noted how this could occur.<sup>213</sup> An initial Canadian bidder could commence a tender offer for a target company that had less than 20 percent of its shares held of record by United States shareholders.<sup>214</sup> The initial bidder thus could make its bid pursuant to Canadian tender offer law and still be in compliance with the Williams Act.<sup>215</sup> By the time a rival United States bidder commenced a competing tender offer, a sufficient number of shareholders could have sold their shares to one of the large United States arbitrageurs, so that United States shareholders would then represent over 20 percent of the shareholders.<sup>216</sup> The second bidder would thus have to comply with the Williams Act.<sup>217</sup>

This would create a bifurcated bidding process.<sup>218</sup> The first bidder, pursuant to Canadian law, could purchase an additional five percent of the shares of the target company while the tender offers were still open.<sup>219</sup> However, the second bidder, pursuant to United States law, would be precluded from doing the same.<sup>220</sup>

Such an anomaly must be addressed by the proposed system. Somehow, the competing bidder should be subject to the same rules as the initial bidder.<sup>221</sup> Perhaps this could be accomplished by determining the percentage of United States shareholders (and thus the applicable set of rules) for the second bidder retroactively to the date the ini-

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210. Letter from the American Stock Exchange to Jonathan G. Katz, Secretary of the SEC, at 7 (November 20, 1989).

211. Cohen Letter, *supra* note 123, at 2; Toronto Letter, *supra* note 174, at 4.

212. Toronto Letter, *supra* note 174, at 4.

213. Sullivan Letter, *supra* note 73, at 23-24; ABA Letter, *supra* note 123, at 6.

214. ABA Letter, *supra* note 123, at 6.

215. *See supra* notes 156-158 and accompanying text.

216. ABA Letter, *supra* note 123, at 6.

217. *See supra* note 156 and accompanying text.

218. Sullivan Letter, *supra* note 73, at 24.

219. *See supra* note 123 and accompanying text.

220. *Id.*

221. ABA Letter, *supra* note 123, at 6.

tial bidder commenced its bid.<sup>222</sup>

Only one commentator disagreed with the 20 percent threshold<sup>223</sup> for tender offers, stating that the threshold should be 49 percent.<sup>224</sup> The other commentators mentioning this threshold thought 20 percent was appropriate.<sup>225</sup> I agree with the latter group. Acquisition of 20 percent of the stock of the target company is the minimum threshold necessary to constitute a tender offer under Canadian law.<sup>226</sup>

#### D. Shelf Registration

Currently, shelf registration is possible under SEC Rule 415<sup>227</sup> and under rules promulgated by the CVMQ in Quebec.<sup>228</sup> However, the OSC has no similar process in Ontario. This could result in very few offerings of shelf registration eligible securities in Ontario, a disadvantage to Ontario investors and Ontario issuers. The adoption by the OSC of a similar shelf registration process would eliminate this disadvantage, and is recommended.<sup>229</sup>

#### E. Expected Cost Savings

Over the years, Canadian issuers have been deterred from issuing securities in the United States because of the perceived excessive cost and practical difficulty in complying with United States disclosure and reporting requirements.<sup>230</sup> The proposed multijurisdictional system should help remove the unnecessary impediments to such issuers.<sup>231</sup> Two commentators expected to realize cost savings due to the reduced compliance burden on the periodic reporting.<sup>232</sup> Another commentator expected to save substantial legal and printing costs.<sup>233</sup> Finally, one commentator expected to save up to two-thirds of its rights offerings expenses incurred, exclusive of underwriting fees, because 15 to 20 per-

222. Sullivan Letter, *supra* note 73, at 25.

223. *See supra* note 156 and accompanying text.

224. ABA Letter, *supra* note 123, at 5.

225. Sullivan Letter, *supra* note 73, at 22; PD Letter, *supra* note 197, at 2.

226. Sullivan Letter, *supra* note 73, at 22.

227. 17 C.F.R. § 230.415 (1983).

228. *See supra* notes 83-85 and accompanying text.

229. NT Letter, *supra* note 174, at 3; Osher Letter, *supra* note 174, at 7.

230. Sullivan Letter, *supra* note 73, at 2.

231. Letter from Shearson Lehman Hutton to Jonathan G. Katz, Secretary of the SEC, at 1 (October 24, 1989).

232. Inco Letter, *supra* note 174, at 2; NT Letter, *supra* note 174, at 6.

233. Norcen Letter, *supra* note 197, at 3.

cent of its shareholders are United States residents.<sup>234</sup>

#### IX. CONCLUSION

The globalization of the world's capital markets is no longer a prediction about the future, it is today's reality. The SEC, OSC and CVMQ must respond to this. The Release is a major step in the right direction. This comment has analyzed some of the major aspects of the proposed multijurisdictional system and has pointed out some of the system's shortcomings. These shortcomings can be overcome, however. Through further cooperative efforts by the SEC,<sup>235</sup> OSC, CVMQ and other regulatory bodies, the obstacles standing in the way of an effective multijurisdictional disclosure system can be removed and the goals of security regulation can be met.

*Alan Goggins*

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234. NOVA Letter, *supra* note 195, at 8-9.

235. The SEC is setting up an International Affairs Office to improve cooperative efforts with securities regulators abroad. Cooperative agreements have recently been reached with France and the Netherlands to improve information flow and curb insider trading and other market abuses. USA Today, Dec. 19, 1989 at 1, col. 1.



