

2005 BCSECCOM 591

July 12, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 71-101 - Multijurisdictional Disclosure System - An issuer wants relief from having to incorporate by reference into its prospectus certain documents it must file in the United States and Canada - The issuer can rely on MJDS to offer securities in Canada; under US laws, the issuer must incorporate certain documents into its US registration statement that would not be required to be incorporated by reference into a Canadian prospectus; the issuer will file the documents in Canada; the issuer's Canadian prospectus will refer to the fact that the documents have been filed and are available on SEDAR

National Instrument 71-102 – Continuous Disclosure and Other Exemptions Relating to Foreign Issuers - An issuer wants relief from having to file certain documents in Canada that it must file in the United States - The issuer is an SEC foreign issuer that can comply with all of the conditions for continuous disclosure relief in Part 4 of National Instrument 71-102; the Filer is required to file Form 8-Ks with the SEC that are technical filings relating solely to takedowns under its US offerings; the Form 8-Ks are not relevant to Canadian shareholders and would not have to be filed under Canadian material change reporting requirements; the issuer will file copies of all Form 8-Ks it files with the SEC except the non-essential Forms 8-K

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 171

National Instrument 71-101, ss. 4.4 and 21.1

National Instrument 71-102, s. 4.2

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova
Scotia, New Brunswick, Prince Edward Island, Newfoundland, the Yukon
Territory, the Northwest Territories and Nunavut (the “Jurisdictions”)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
Merrill Lynch & Co., Inc. (the “Filer”)

2005 BCSECCOM 591

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application (the “Application”) from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) exempting the Filer from the following requirements of the Legislation, subject to certain terms and conditions:

- (a) the requirement contained in section 4.4 of *National Instrument 71-101 – The Multijurisdictional Disclosure System* (“NI 71-101”), as it relates to the requirement for the Filer to incorporate by reference into a prospectus filed by the Filer under NI 71-101, the Non-Incorporated Exhibits (as defined below); and
- (b) the requirement contained in section 4.2 of *National Instrument 71-102 – Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (“NI 71-102”) as it relates to the requirement for the Filer to file the Non-Essential 8-Ks (as defined below).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in *National Instrument 14-101 – Definitions* have the same meaning in this decision unless defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

General

1. The Filer was incorporated under the laws of the State of Delaware on March 27, 1973. The Filer has been a reporting issuer or the equivalent thereof (where applicable) in the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Québec and Nova Scotia since October 22, 1999 (or earlier, in the case of certain of such Jurisdictions) and since June 2004 in the Provinces of Ontario, New Brunswick, Prince Edward Island and

2005 BCSECCOM 591

Newfoundland and Labrador and in the Yukon Territory, the Northwest Territories and Nunavut, and is not on the list of defaulting reporting issuers in those provinces and territories.

2. The Filer has securities registered under sections 12(b) and 12(g) of the *Securities Exchange Act of 1934*, as amended (the “1934 Act”), and is required to file reports under section 15(d) of the 1934 Act.
3. The Filer has filed with the Securities and Exchange Commission (the “SEC”) all 1934 Act filings for a period of 12 calendar months immediately before the date hereof and will file all 1934 Act filings required to be filed with the SEC between the date hereof and the date it files a prospectus under the MJDS in the principal jurisdiction. The Filer is not registered or required to be registered as an investment company under the *Investment Company Act of 1940*, as amended. The Filer is not a commodity pool issuer (as such term is defined in NI 71-101).
4. The principal office of the Filer is located at 4 World Financial Centre, New York, New York, 10080.

MJDS Program

5. On June 29, 2004, the Filer filed a base shelf prospectus (the “Original Shelf Prospectus”) pursuant to *National Instrument 71-101 – The Multijurisdictional System* (“NI 71-101”). The Original Shelf Prospectus qualified the issuance of up to US \$18,362,988,000 of debt securities, warrants, preferred stock, depositary shares and common stock. On March 8, 2005, after the maximum amount of securities under the Original Shelf Prospectus was issued, the Filer filed a new base shelf prospectus (the “New Shelf Prospectus”) pursuant to NI 71-101. The New Shelf Prospectus qualifies the issuance of up to US \$39,390,000,000 of debt securities, warrants, preferred stock, depositary shares and common stock.
6. The Filer previously obtained exemptive relief in relation to its offering of securities under NI 71-101 in the Decision *In the Matter of Merrill Lynch & Co., Inc.* dated June 30, 2004 (the “Previous MJDS Decision”). In particular, the Filer obtained exemptive relief from the requirement in section 4.4 of NI 71-101 to incorporate by reference into a prospectus filed under NI 71-101 all current reports of the Filer on Form 8-K that are incorporated or deemed to be incorporated by reference into its U.S. prospectus under U.S. federal securities law, to the extent that such Form 8-Ks do not relate to the financial condition of, or disclose a material change in the affairs of, the Filer

2005 BCSECCOM 591

7. The Filer has made this Application as it wishes to amend certain of the terms and conditions of the Previous MJDS Decision relating to the Filer's obligations to file certain of the Filer's continuous disclosure documents with the Decision Makers and to incorporate by reference certain of its continuous disclosure documents into a prospectus (and any supplement thereto) filed by the Filer under NI 71-101.
8. If the relief requested in this Application is granted, any prospectus (and any supplement thereto) filed by the Filer under NI 71-101 will incorporate by reference the following information:
 - (a) the Filer's most recent annual report on Form 10-K filed under the 1934 Act, excluding any Non-Incorporated Exhibits (as defined below) thereto;
 - (b) the Filer's most recent quarterly report on Form 10-Q, excluding any Non-Incorporated Exhibits (as defined below) thereto; and
 - (c) all current reports on Form 8-K, other than the Non-Essential 8-Ks (as defined below) that are filed subsequent to the filing of the Filer's most recent annual report on Form 10-K under the 1934 Act, excluding any Non-Incorporated Exhibits (as defined below) thereto.

Continuous Disclosure Filings

9. The consolidated annual and interim financial statements of the Filer and its consolidated subsidiaries to be included in or incorporated by reference into any prospectus or prospectus supplement filed by the Filer under NI 71-101 are prepared in accordance with U.S. GAAP (as defined in *National Instrument 52-107 – Acceptable Accounting Principles, Auditing Standards and Reporting Currency* (“NI 52-107”)) and otherwise comply with the requirements of U.S. law, and, in the case of the Filer's consolidated annual financial statements, such financial statements are audited in accordance with U.S. GAAS (as defined in NI 52-107).
10. In connection with takedowns under the Filer's base shelf prospectus in the U.S., the Filer is required to file with the SEC a large number of current reports on Form 8-K (the “Non-Essential 8-Ks”) whose contents are comprised solely of:
 - (a) exhibits attaching the form of securities for each such takedown,

2005 BCSECCOM 591

- (b) the consent and opinion of counsel relating thereto, and
 - (c) other documentation, all of a non-financial nature, that may be required to be filed with the SEC in connection with such takedowns.
- 11. In the present Application, in addition to the exemptive relief that the Filer is requesting be granted with respect to the Filer's obligations to incorporate by reference into a preliminary prospectus, a (final) prospectus and any prospectus supplement thereto filed by the Filer under NI 71-101 certain of the Filer's continuous disclosure documents, the Filer is seeking an exemption from the requirement in section 4.2 of NI 71-102 as it relates to the requirement to file Non-Essential 8-Ks. The Non-Essential 8-Ks are publicly available on the SEC's Internet website at www.sec.gov.
- 12. In the Previous MJDS Decision, the Filer was granted relief from the requirement to incorporate by reference a preliminary prospectus and a (final) prospectus filed by the Filer under NI 71-101 any current reports on Form 8-K of the Filer other than those current reports on Form 8-K of the Filer relating to the financial condition of, or disclosing a material change in the affairs of, the Filer (the "Material 8-Ks").
- 13. In addition to the Non-Essential 8-Ks, the Filer may attach certain documents as exhibits to or incorporate by reference into its annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, definitive proxy or information statements or other continuous disclosure documents filed under the 1934 Act (the "1934 Act Filings") the following documents which would not be required to be incorporated by reference in a Canadian issuer's prospectus (each, a "Non-Incorporated Exhibit"):
 - (a) contracts not made in the ordinary course of business that are material to the Filer, limited partnership agreements, indemnification and severance agreements, deferred compensation plans, stock unit and stock option plans and other stock option or award plans, and all amendments, supplements and restatements thereto (collectively, the "Material Contracts") and any underwriting agreements or voting trust agreements of the Filer and all amendments, supplements and restatements thereto;
 - (b) plans of acquisition, reorganization, arrangement, liquidation or succession;
 - (c) articles of incorporation (or instruments corresponding thereto) and by-laws of the Filer and any amendments or restatements thereof;

2005 BCSECCOM 591

- (d) instruments defining the rights of security holders, including deposit agreements, rights agreements and any supplements to and amendments or restatements thereof;
 - (e) charters of committees of the Filer's Board of Directors, other than the audit committee charter;
 - (f) opinions of: (a) legal counsel as to legality of securities being registered in the U.S. indicating whether such securities will, when sold, be legally issued, fully paid and non-assessable and, if debt securities, whether they will be binding obligations of the Filer; and (b) legal counsel or an independent or public certified accountant, or revenue rulings from the Internal Revenue Service, supporting the description of tax matters and consequences to the shareholders in certain filings of the Filer;
 - (g) published reports regarding matters submitted to security holders which are required to be filed with the SEC;
 - (h) manually signed powers of attorney filed with the SEC if any name is signed to a registration statement or report of the Filer pursuant to a power of attorney;
 - (i) indentures and supplemental indentures relating to the issuance of debt securities and forms of certificates and depositary receipts relating to securities of the Filer;
 - (j) current reports on Form 8-K of the Filer (excluding, for greater certainty, any exhibits to the Material 8-Ks that would otherwise constitute a Non-Incorporated Exhibit) other than the Material 8-Ks; and
 - (k) codes of ethics that the Filer voluntarily files as exhibits to its annual report on Form 10-K and also posts on its website.
14. By virtue of the Non-Incorporated Exhibits being filed as current reports on Form 8-K or being attached as exhibits or being incorporated by reference into the Filer's 1934 Act Filings, the Filer is required under section 4.4 of NI 71-101 to incorporate the Non-Incorporated Exhibits in a preliminary prospectus or (final) prospectus (and any supplement thereto) by the Filer under NI 71-101.

2005 BCSECCOM 591

15. The Non-Incorporated Exhibits are typically very lengthy and incorporation by reference of such documents into a preliminary prospectus, a (final) prospectus and any supplements thereto filed by the Filer under NI 71-101 would therefore impose a disproportionately burdensome translation obligation on the Filer in comparison to Canadian issuers.
16. In lieu of the Non-Incorporated Exhibits being incorporated by reference into a preliminary prospectus or a (final) prospectus (and any supplement thereto) filed by the Filer under NI 71-101, the Filer will file the Non-Incorporated Exhibits, other than Non-Incorporated Exhibits that have previously been filed, as soon as practicable following the filing of such disclosure documents with the SEC and, in any event, prior to the filing of any subsequent supplement to any such prospectus.
17. If the requested relief is granted, any preliminary prospectus or a (final) prospectus filed by the Filer under NI 71-101 (and any supplement thereto) and delivered to Canadian purchasers will incorporate by reference similar continuous disclosure documents that would be required to be incorporated by reference by a Canadian issuer in connection with similar offerings of securities by a Canadian issuer, notwithstanding that such preliminary prospectus or (final) prospectus will not incorporate by reference certain information that would be incorporated by reference into a U.S. base shelf prospectus filed with the SEC pursuant to a registration statement on Form S-3.
18. All of the Filer's continuous disclosure documents except for the Non-Essential 8-Ks will continue to be filed with the Decision Makers and, except for the incorporation by reference relief granted herein, will remain subject to the requirements under the Legislation. Such materials are also available on EDGAR.
19. The Filer will include a statement in any supplements to a preliminary prospectus or a (final) prospectus filed by the Filer under NI 71-101 explaining that the Filer has received exemptive relief exempting the Filer from the requirement to include certain materials in the prospectus, identifying this Decision, and explaining how investors can obtain a copy of this Decision.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides each Decision Maker with the jurisdiction to make the Decision has been met.

2005 BCSECCOM 591

The Decision of the Decision Makers is that the Filer is exempt from the requirement of section 4.4 of NI 71-101 as it relates to the requirement to incorporate by reference into a preliminary prospectus and (final) prospectus filed by the Filer under NI 71-101 the Non-Incorporated Exhibits, so long as:

- (a) the Filer continues to incorporate by reference into a preliminary prospectus and (final) prospectus (and any supplements thereto) filed by the Filer under NI 71-101 the Filer's most recent annual report on Form 10-K, its most recent quarterly report on Form 10-Q and all of its other 1934 Act filings that are filed since the date of the Filer's most recent annual report on Form 10-K, other than the Non-Incorporated Exhibits; and
- (b) the representations in paragraphs 16, 18 and 19 remain true.

The Further Decision of the Decision Makers that the Filer is exempt from the requirement of Section 4.2 of NI 71-102 as it relates to the requirement to file with the Decision Makers the Non-Essential 8-Ks, provided that the Filer will file all of its other continuous disclosure documents required to be filed under the 1934 Act with the Decision Makers as soon as practicable following the filing of such documents with the SEC and, in any event, prior to the filing of any subsequent supplement to a prospectus filed under NI 71-101.

Charlie MacCready
Assistant Manager
Ontario Securities Commission