Cassels

Finance Releases Draft Legislation for Issuers of Flow-Through Shares

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On December 16, 2020, the Department of Finance (Canada) released draft legislative proposals to implement certain proposals announced on July 10, 2020 (the July 10 Proposals) to protect jobs and safe operations of junior mining exploration and other flow-through share issuers (FT Share Issuers) whose operations may have been impacted by COVID-19.

The proposals relate generally to two rules in the *Income Tax Act* (Canada) which apply to the time period during which a FT Share Issuer must incur and renounce eligible expenditures – the general rule and the "look-back rule." These proposals will have no application to FT Share Issuers who enter into flow-through share subscription agreements with investors after 2020. In addition, these relieving rules may have no application depending on the particular contractual terms and conditions in any flow-through share subscription agreement which is entered into between an investor and a FT Share Issuer.

Further details on the general rule and the "look-back rule" can be found in our previous article, "Proposed Relief for Issuers of Flow-Through Shares."

Proposed Legislative Changes

The legislative proposals are consistent with the July 10 Proposals and are meant to be relieving in nature to the FT Share Issuer.

General Rule - Time Extension to 36 Months

1. The draft legislation would extend the period for FT Share Issuers to incur eligible expenses under the general rule from 24 months to 36 months for flow-through share agreements entered into after February 2018 and before 2021.

Look-back Rule – Expenses Deemed Incurred Earlier

2. The legislation would extend the period for FT Share Issuers to incur eligible expenditures under the "look-back rule" by 12 months for agreements entered into in 2019 or 2020. Under the current rules, FT Share Issuers may incur expenses in the calendar year (the "normal look-back year") following

the calendar year in which a flow-through share agreement is entered into. The legislation provides that eligible expenditures incurred by a FT Share Issuer in the calendar year following the normal look-back year would be deemed to be incurred 12 months earlier.

As a result of such extension, a FT Share Issuer that enters into a flow-through share subscription agreement in 2020 may incur eligible expenses before the end of 2022 which can be renounced to investors effective December 31, 2020.

Look-back Rule – Certain Reporting Requirements and Part XII.6 Tax

3. Certain reporting requirements would be extended by 12 months with respect to FT Share Issuers relying on the "look-back rule" for flow-through share agreements entered into in 2019 or 2020. Also, the filing and payment deadline for FT Share Issuers in respect of Part XII.6 tax would be extended by one year for flow-through share agreements entered into in 2019 and 2020.
4. Certain expenditures would be deemed to be incurred earlier than they are actually incurred, in order to eliminate or reduce the Part XII.6 tax that would otherwise be payable by FT Share Issuers.

Eligible expenditures that are incurred in the normal look-back year would be deemed to be incurred in January of the normal look-back year with the result that no Part XII.6 tax would be payable for such expenditures. In addition, for purposes of calculating any Part XII.6 tax payable, eligible expenditures incurred in the year following the normal look-back year would be deemed to have been incurred 12 months earlier.
