

New Proposed Listed Issuer Financing Exemption

Sean Maniaci, Shannon Scrocchi

September 14, 2022

On September 8, 2022, the Canadian Securities Administrator (the CSA) [announced](#) proposed amendments to [National Instrument 45-106 – Prospectus Exemptions \(NI 45-106\)](#) to add a new prospectus exemption for issuers listed on a Canadian stock exchange (the Listed Issuer Financing Exemption).

The Listed Issuer Financing Exemption will rely on the issuer's continuous disclosure record, in addition to a short offering document (the Offering Document), to provide issuers with a more efficient way to access the public markets and raise capital. The Listed Issuer Financing Exemption is intended to mirror investors' ability to purchase securities on the secondary market without a hold period, and as such, securities issued under the Listed Issuer Financing Exemption will be freely tradeable at the time of issuance (subject to certain restrictions).

The addition of the Listed Issuer Financing Exemption is reflective of capital-raising requirements in other countries and was developed in response to the specific comments received on the CSA Consultation Paper [51-404 – Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers](#)

Subject to all necessary approvals being obtained, the amendments to NI 45-106 are expected to come into force on November 21, 2022.

Prospectus Exemptions

Canadian securities laws generally prohibit the trade in a security if the trade would be a distribution of the security, unless (i) a prospectus has been filed and receipts have been issued, or (ii) a prospectus exemption is available. Most of the exemptions from the prospectus requirements for distributions of securities in Canada are found in NI 45-106.

The proposed amendments to NI 45-106 will result in the addition of the Listed Issuer Financing Exemption as one of the prospectus exemptions available to issuers listed on a Canadian stock exchange.

Qualification Criteria

To rely on the Listed Issuer Financing Exemption, the issuer must:

Cassels

- have securities listed on a Canadian stock exchange and have been a reporting issuer in at least one jurisdiction in Canada for a minimum of 12 months prior to the announcement of the offering;
- have filed all timely and periodic disclosure documents, as required under applicable Canadian securities legislation;
- have prepared and filed the Offering Document (as further described below); and
- have active business operations at the time of the offering and not have cash (or cash equivalents) or its exchange listing as its principal asset.

The issuer is *not* required to have a current annual information form (or to have filed a notice of intention to be short form eligible).

Limitations

- The amount of funds raised pursuant to the Listed Issuer Financing Exemption in any 12-month period, will be limited to the greater of \$5 million or 10% of the issuer's market capitalization (up to a maximum of \$10 million).
- The distribution of securities pursuant to the Listed Issuer Financing Exemption during any 12-month period may not result in more than 50% shareholder dilution.
- The Listed Issuer Financing Exemption will not be available to an issuer if the issuer is planning to use the proceeds for a significant acquisition (as described under Part 8 of National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102)) or a restructuring transaction (as such term is defined in NI 51-102), such that the issuer would be required to provide additional financial statements under prospectus rules, or for any other transaction that requires approval of any securityholder under applicable corporate laws, exchange requirements or the issuer's constating documents.
- The securities issued pursuant to the offering must be (i) listed equity securities, or (ii) units consisting of listed equity securities and warrants exercisable into listed equity securities.

Disclosure Requirements

To rely on the Listed Issuer Financing Exemption, an issuer must meet the following disclosure requirements:

- The issuer must file a completed Offering Document in the form prescribed in NI 45-106 with the relevant securities regulators. The Offering Document must also be filed on SEDAR and posted to the issuer's website (if the issuer has a website) before the issuer begins soliciting purchasers and no later than three business days after the date of the Offering Document. The Offering Document will need to include the following information:

Cassels

- details of the offering, including the number and type of securities being offered, a description of the securities, the offering prices, the minimum and maximum number of securities being offered (as applicable), the expected closing date of the offering and whether the offering is expected to close in multiple tranches, the exchange(s) and quotation system(s), if any, on which the securities are listed, traded or quoted and the closing price of the securities on the most recent trading day prior to the date of the Offering Document;
 - a disclaimer that the Offering Document has not been reviewed by any securities regulatory authority or regulator;
 - a certification that both the Offering Document and the issuer's 12-month continuous disclosure record contain no misrepresentations;
 - a summary description of the business of the issuer and any new developments in the issuer's business;
 - any material facts about the issuer or the securities being distributed pursuant to the offering if that material fact has not been disclosed elsewhere since the date that is 12 months before the date of the Offering Document and the date that the issuer's most recent audited annual financial statements were filed;
 - the issuer's financial condition, including confirmation that the issuer will have sufficient funds to last at least 12 months after the offering;
 - a summary of the intended use of proceeds from the current offering and the business objectives that the issuer expects to accomplish using the available funds;
 - a summary of the use of proceeds from any other offering in the previous 12 months;
 - details of any dealers or finders involved in the offering and their respective fees, as applicable; and
 - a description of the purchaser's rights, as further set out in NI 45-106.
- Prior to soliciting an offer to purchase securities, the issuer must issue a news release announcing the offering and stating that purchasers can access the Offering Document on the issuer's SEDAR profile or on the issuer's website (if the issuer has a website). The distribution of securities must end no later than the 45th day after issuing the news release.
 - Issuers will be required to report the use of the Listed Issuer Financing Exemption by filing a Form 45-106F1 – *Report of Exemption Distribution* (Form 45-106F1) within ten days of the distribution of securities.

Issuer Liability

- The issuer must certify that the Offering Document, together with the continuous disclosure of the issuer for the past 12 months, contains disclosure of all material facts about the issuer and the securities being distributed and does not contain a misrepresentation.
- The Offering Document will be considered a "core document" under Canadian securities legislation, forming part of the issuer's continuous disclosure record for the purposes of secondary market civil

Cassels

liability.

- In the event of a misrepresentation under the Listed Issuer Financing Exemption, purchasers will have two options for recourse: (i) rights of action under secondary market civil liability; and (ii) a contractual right of rescission against the issuer.

Additional details on the proposed amendments and the Listed Issuer Financing Exemption can be found [here](#).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.