

Alert

November 30, 2023



One Year with the Listed Issuer Financing Exemption

It has been one year since the Canadian Securities Administrators (the CSA) introduced the listed issuer financing exemption (the LIFE Exemption) under Part 5A of National Instrument 45-106 *Prospectus Exemptions*, which is intended to reduce costs for issuers raising smaller amounts of capital through public markets. The LIFE Exemption has seen significant use over the past year, in part because it enables issuers to offer prospectus-exempt, free-trading securities to investors with fewer regulatory hurdles.

This Alert overviews the requirements for issuers to rely on the LIFE Exemption, including qualification criteria, offering parameters and disclosure requirements, and provides commentary on how the rules have been applied over the past year. This Alert also discusses certain special considerations, including the applicability of the hold period prescribed by the TSX Venture Exchange (TSXV), practical issues relating to the LIFE Exemption offering document, sales to U.S. investors, and the different structures available for offerings under the LIFE Exemption.

Qualification Criteria

To qualify for the LIFE Exemption, an issuer must:

1. be a reporting issuer not in default and have been a reporting issuer in at least one jurisdiction of Canada for the 12 months immediately before the date of the news release announcing the financing;
2. have listed equity securities on a recognized exchange in Canada;
3. have active business operations (e.g., its operations have not ceased, and it is not a capital pool company or special purpose acquisition company) and not have recently completed a restructuring transaction with a person or company that did not have active business operations;
4. not be an investment fund;
5. have filed all timely and periodic disclosure documents as required under applicable Canadian securities laws; and
6. reasonably expect that it will have available funds to meet its business objectives and liquidity requirements for a period of 12 months following the distribution (the Liquidity Requirement).

The Liquidity Requirement

To determine eligibility for the LIFE Exemption, the issuer must calculate its available funds on closing. Among other things, this calculation must account for the offering costs, including selling commissions and fees and any working capital deficiency of the issuer. If the issuer is expecting to receive additional funding from other sources, such funding must be committed to be considered for the purposes of the Liquidity Requirement. For example, committed funds from a concurrent bought deal private placement or an available credit facility may be included in the issuer's available funds on closing, but contingent amounts or merely anticipated financings may not. If necessary, the issuer must set a minimum offering amount to ensure that it has sufficient funds on closing to meet the Liquidity Requirement.

Listing and Securities Law Requirements



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Regardless of whether the issuer is a reporting issuer, the issuer must have equity securities listed on a Canadian exchange prior to using the LIFE Exemption. This means that the LIFE Exemption cannot be used concurrently with a listing transaction.

Because the issuer must have filed all timely and periodic disclosure documents as required under applicable Canadian securities laws, an issuer is ineligible for the LIFE Exemption if it is in default of securities laws or any order by or undertaking to a securities regulatory authority. Once the issuer addresses all defaults to the satisfaction of the CSA, the issuer can use the LIFE Exemption provided it satisfies the other conditions of the LIFE Exemption.

Offering Parameters

The LIFE Exemption is only available for offerings within the following parameters:

1. The distribution, combined with all other distributions under the LIFE Exemption during the 12 months immediately preceding the news release announcing the distribution:
 - a. must not exceed the greater of (i) \$5 million, or (ii) 10% of the market value of the issuer's listed equity securities, to a maximum of \$10 million (the Dollar Limit); and
 - b. must not result in an increase of more than 50% in the issuer's outstanding listed equity securities, as of the date that is 12 months before the date of the news release announcing the distribution (the Dilution Limit).
2. The security being distributed must be a listed equity security or a unit consisting of a listed equity security and a warrant exercisable to acquire a listed equity security.
3. The issuer must not allocate the available funds to (i) a significant acquisition (as defined in Part 8 of National Instrument 51-102 *Continuous Disclosure Obligations*), (ii) a restructuring transaction, or (iii) any other transaction for which the issuer seeks approval of any security holder.

Calculating the Offering Limits

When calculating the Dollar Limit for a unit offering, the issuer need not include the value of listed equity securities (i.e., common shares) issuable upon exercise of the warrants. That is, the Dollar Limit only includes the gross proceeds from the initial distribution and not any future proceeds from the exercise of warrants. On the other hand, the issuer must include common shares issuable upon exercise of warrants when calculating the Dilution Limit.

Eligible Securities

Because the LIFE Exemption may only be used to distribute listed equity securities or units consisting of a listed equity security and a warrant, it cannot be used to issue broker warrants. If the issuer wants to issue broker warrants to a dealer that was involved in an offering under the LIFE Exemption, the broker warrants must be issued pursuant to a different prospectus exemption and will be subject to applicable securities law and exchange hold periods.

Notably, the LIFE Exemption can be used to issue flow-through shares (including charitable flow-through shares), provided that the flow-through shares are listed on a Canadian exchange.

Disclosure Requirements

To rely on the LIFE Exemption, the issuer must meet the following disclosure requirements:

1. The issuer must issue and file a news release that announces the offering and contains prescribed language,¹ and the issuer must close the financing within 45 days of such news release.
2. The issuer must file a completed *Form 45-106F19 Listed Issuer Financing Document*² (the Offering Document), which is the streamlined disclosure document for the LIFE Exemption, in accordance with the following requirements:
 - a. the Offering Document must be filed before soliciting an offer to purchase and no later than three business days after the date of the Offering Document;
 - b. if the issuer has a website, the Offering Document must be posted on its website, and the issuer must take reasonable steps to ensure that prospective purchasers are aware of the means of accessing the Offering Document; and

- c. the Offering Document, together with all documents filed under Canadian securities laws within the earlier of (i) 12 months before the date of the Offering Document and (ii) the date that the issuer's most recent audited annual financial statements were filed, must disclose all material facts relating to the securities being distributed under the LIFE Exemption and must not contain a misrepresentation.
3. The issuer must include prescribed language in any initial written communication with a prospective purchaser.
4. The issuer must file a *Form 45-106F1 Report of Exempt Distribution* disclosing information related to the financing and the purchasers within 10 days of the distribution.

Resale Restrictions

The LIFE Exemption permits issuers to distribute free-trading securities, which may provide an additional incentive to investors and assist issuers in negotiating more attractive offering terms. However, the issuer must ensure that the distributed securities comply with any applicable hold period under stock exchange policies, including the hold period prescribed by the TSXV (the TSXV Hold Period), which runs for four months and a day after the distribution date. Pursuant to TSXV policies, the issuer must include a prescribed legend³ reflecting the TSXV Hold Period on securities issued to:

1. directors, officers, and promoters of the issuer;
2. certain consultants of the issuer; and
3. persons holding securities carrying more than 10% of the voting rights attached to the issuer's securities (both immediately before and after the issuance).

A legend reflecting the TSXV Hold Period must also be included on securities that are issued at a price that is less than \$0.05, notwithstanding the identity of the subscriber.

Moreover, if securities are distributed to U.S. purchasers, the securities will be subject to applicable U.S. resale restrictions, notwithstanding that the securities may not be subject to resale restrictions under Canadian securities laws.

Offering Document

In addition to setting out the terms of the offering, the Offering Document must include, among other things, a summary description of:

1. the business of the issuer and recent developments involving or affecting the issuer;
2. the business objectives that the issuer expects to accomplish using its available funds on closing and the milestones necessary to achieve those objectives;
3. the expected available funds on closing (see the discussion under the heading The Liquidity Requirement above);
4. the use of available funds, which must include the purposes necessary to meet the issuer's business objectives and liquidity requirements for the 12 months following closing of the offering;
5. the use of funds from any financing that the issuer completed in the 12 months prior to the date of the Offering Document; and
6. the identity of any dealer, finder or other person who will receive any compensation in connection with the offering, and the details on any such fees or commissions.

Because the Offering Document will contain forward-looking information, the issuer must include a forward-looking disclaimer to ensure compliance with Part 4A.3 of *National Instrument 51-102 Continuous Disclosure Obligations*. The issuer is also required to include certifications in the Offering Document regarding compliance with the requirements of the LIFE Exemption. Ensuring the accuracy of the disclosure in the Offering Document is crucial, as purchasers under the LIFE Exemption have statutory rights of action against the issuer in the event of any misrepresentation.

Purchaser Remedies for Misrepresentation

If the Offering Document, together with any document filed by the issuer under Canadian securities laws during the year prior to the date of the Offering Document, contains a misrepresentation, purchasers of securities under the Life Exemption have either:

1. a right to rescind their purchase of the securities; or
2. a right to damages against the issuer and, in certain jurisdictions, a right to damages against the officers that signed the Offering Document and the issuer's directors.

These rights arise regardless of whether the purchaser relied on the misrepresentation. The specific remedies and timeframes within which the remedies may be exercised by the purchaser vary by province. In Ontario, the right of rescission is exercisable not later than 180 days from the date of purchase of the securities, and the right of action for damages is exercisable not later than the earlier of:

1. 180 days from the date the purchaser first had knowledge of the facts giving rise to the cause of action; and
2. three years from the date of purchase of the securities.

If the purchaser elects to exercise the right of rescission, the purchaser will have no right of action for damages against the issuer. In any event, the amount recoverable by the purchaser will not exceed the price at which the securities were offered to the purchaser, and if the purchaser is shown to have purchased the securities with knowledge of the misrepresentation, the issuer will have no liability. In the case of an action for damages, the purchaser may keep the securities, and the issuer may be liable for all or any portion of the depreciation in value of the securities that is proven to be a result of the misrepresentation.

The issuer may also be liable to any purchasers on the secondary market for the misrepresentation under secondary market liability provisions in Canadian securities laws.

Dealer Liability

Unlike prospectus offerings, dealers involved in offerings under the LIFE Exemption are not subject to statutory liability in the event that the Offering Document contains a misrepresentation. However, the CSA stated that they expect registered dealers will still perform due diligence on the issuer and its disclosure to meet the dealer's suitability obligations under securities laws, which include know-your-client and know-your-product requirements. Registered dealers may also be subject to common law liability and reputational risk in connection with their participation in a private placement offering under the LIFE Exemption.

U.S. Offerings

U.S. securities laws do not include a similar exemption to the LIFE Exemption. Generally, issuers distributing securities under the LIFE Exemption must use one of the following exemptions from U.S. registration requirements to offer and sell the securities to U.S. investors:

1. Rule 144A under the U.S. Securities Act of 1933 (the U.S. Securities Act), which permits the private resale of securities from an underwriter to a U.S. qualified institutional buyer; or
2. Rule 506(b) of Regulation D under the U.S. Securities Act,⁴ which permits a distribution of securities to U.S. accredited investors, provided that there was no general solicitation or general advertising in connection with the distribution.

The concern with offerings under the LIFE Exemption is that the issuer must file the Offering Document on its website, which risks the U.S. Securities and Exchange Commission (the SEC) considering the issuer to have used general solicitation to market the offered securities. "General solicitation" includes advertisements published in newspapers and magazines, public websites, communications broadcasted over television and radio, and seminars where attendees have been invited by general solicitation or general advertising. The SEC has clarified that the use of an unrestricted, and therefore publicly available, website constitutes general solicitation.

To reduce the risk that the SEC deems the posting of the Offering Document on the issuer's website to be general solicitation, the issuer must take steps to prevent U.S. investors from accessing the Offering Document on the issuer's website. Some issuers have used geo-blocking technology to restrict Internet users in the United States from accessing the Offering Document.

The mandatory news release to announce the offering under the LIFE Exemption must also comply with U.S. rules on the purpose, content, and use of the news release to ensure that it falls within a

“safe harbor” under which the SEC will not deem the news release to be general solicitation or general advertising of a U.S. offering.

Notwithstanding the foregoing, the issuer may instead rely on Rule 506(c) of Regulation D under the U.S. Securities Act to offer securities to U.S. investors through means of general solicitation, provided that:

1. all purchasers in the offering are accredited investors;
2. the issuer takes reasonable steps to verify their accredited investor status; and
3. certain other conditions in Regulation D are satisfied.

However, due to the higher due diligence costs to the issuer associated with a Rule 506(c) offering, as well as the privacy concerns for investors who are required to disclose additional personal information, Rule 506(c) has seen limited use to date.

Regardless of the U.S. exemption relied on, if the issuer plans to distribute securities under the LIFE Exemption to U.S. investors, the Offering Document should contain a U.S. Securities Act disclaimer on the face page and should include a U.S. appendix or “wrap” that explains the U.S. offering and contains acknowledgments, covenants, representations and warranties of U.S. investors. Moreover, if a prospective U.S. investor contacts the issuer after seeing the news release or Offering Document, the issuer should discuss the response to the prospective investor with counsel to ensure compliance with U.S. securities laws.

Deal Structure

In its first year, the LIFE Exemption has been used most commonly for non-brokered private placements and best efforts or commercially reasonable efforts brokered private placements. The LIFE Exemption is also suitable for a variety of other offering structures, including in combination with other prospectus exemptions or in combination with a prospectus offering in certain jurisdictions. For example, an issuer conducting a public offering pursuant to a prospectus supplement to a base shelf prospectus may use the LIFE Exemption to offer securities in other Canadian jurisdictions that are not covered by the base shelf prospectus. However, issuers conducting a concurrent public offering must be careful to ensure compliance with applicable securities laws, including the requirements of the LIFE Exemption discussed above, such as the restriction from marketing or otherwise soliciting offers to purchase prior to the filing of the Offering Document and the news release announcing the offering. Moreover, issuers may not use the LIFE Exemption in Québec concurrently with a prospectus offering in other provinces, as the Autorité des marchés financiers views this as an attempt to avoid the requirement to translate the prospectus and continuous disclosure documents.

Bought Deals

The LIFE Exemption may also be used for a bought deal offering, provided that:

1. the actual purchasers receive all the rights contemplated under the LIFE Exemption and are named in the report of exempt distribution;
2. the underwriter is not required to purchase any securities not taken up by purchasers;⁵ and
3. the issuer and the underwriter ensure that no solicitations to purchase occur prior to the filing of the Offering Document and the news release announcing the offering (i.e., no pre-marketing, as discussed above).

The restriction on pre-marketing an offering made pursuant to the LIFE Exemption means that the underwriter will have to consider investor participation prior to launching the offering and will be limited from contacting potential investors to conduct a market check.

Multiple Tranches

Issuers conducting an offering under the LIFE Exemption have flexibility to close the offering in multiple tranches, provided that:

1. the issuer meets the Liquidity Requirement⁶ upon closing of the first tranche; and
2. the last tranche is closed within 45 days of the news release announcing the offering.

Securities for Debt

The LIFE Exemption cannot be used to issue securities for debt. As discussed above, the LIFE Exemption requires that the issuer not solicit an offer to purchase prior to filing the Offering Document and the news release announcing the offering, which, in the view of the CSA, is contravened if the issuer already has bona fide debt outstanding with the intended subscriber.

Subscription Agreement

The LIFE Exemption does not require a subscription agreement or risk acknowledgment to be signed by the purchaser, but issuers may want a subscription agreement for their own benefit and protection. Similar to any other private placement offering, the subscription agreement would include customary representations, warranties, acknowledgments and covenants of the subscriber. However, considering the streamlined nature of offerings under the LIFE Exemption, some issuers and dealers have preferred to use a simplified investor questionnaire for offerings under the LIFE Exemption. The investor questionnaire would require subscribers to complete a one page form with the basic information required for their subscription. In lieu of a full subscription agreement, the investor questionnaire can include a schedule containing deemed representations, warranties and acknowledgments of the subscriber. However, if securities are distributed to U.S. investors, the issuer should ensure that they obtain a signed U.S. agreement or letter containing appropriate representations, warranties and acknowledgments of the U.S. investor.

The approach taken by issuers and dealers in negotiating and preparing transaction documents is best determined on a case-by-case basis, dependent on various factors such as the issuer's industry, demand for the issuer's securities and broader market conditions. Overall, the CSA intended the LIFE Exemption to provide qualifying issuers a more efficient avenue of financing for smaller capital raises, and issuers can apply the LIFE Exemption in various circumstances and with varying deal structures to achieve this goal.

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This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisers.

¹ Prescribed language: "There is an offering document related to this offering that can be accessed under the issuer's profile at www.sedarplus.ca and at [include website address and provide link, if the issuer has a website]. Prospective investors should read this offering document before making an investment decision."

² See pages five to 10 of the linked document for the full text of Form 45-106F19 *Listed Issuer Financing Document*.

³ Prescribed legend: "Without prior written approval of TSX Venture Exchange and compliance with all applicable securities legislation, the securities represented by this certificate may not be sold, transferred, hypothecated or otherwise traded on or through the facilities of TSX Venture Exchange or otherwise in Canada or to or for the benefit of a Canadian resident until [insert the date that is four months and a day after the distribution date]."

⁴ Rule 506(b) of Regulation D is considered a "safe harbor" under Section 4(a)(2) of the U.S. Securities Act, which exempts from registration transactions by an issuer not involving any public offering.

⁵ If the underwriter were to purchase any securities not taken up by purchasers, that distribution could be made pursuant to section 2.33 of National Instrument 45-106 *Prospectus Exemptions*, which provides a prospectus exemption for a purchaser acting as an underwriter.

⁶ See paragraph 6 under the heading "Qualification Criteria" above.