

LIFE's big questions answered

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With close to half a billion dollars worth of securities qualified under the listed issuer financing exemption (LIFE) since it became effective in November 2022, the Canadian Securities Administrators (CSA) have set out responses to a number of questions related to LIFE in a new Staff Notice.

Takeaways

- The CSA are of the view that LIFE can be used to qualify a bought deal offering only if (i) the actual purchaser has all rights contemplated under LIFE and will be named in the report of exempt distribution and (ii) any marketing of the offering complies with LIFE so that no solicitations occur under LIFE prior to the issuance and filing of the news release and completed LIFE offering document.
- The Staff Notice includes guidance with respect to how an issuer can assess whether it will have sufficient funds to continue its operations and achieve its objectives for the requisite period of 12 months following a LIFE distribution.
- The CSA have confirmed that LIFE can be used to distribute charitable flow-through shares provided that the end purchaser is named in a report of exempt distribution and has all statutory rights under LIFE.
- Broker warrants are not to be distributed under LIFE and must be issued in reliance on a separate exemption.

Listed issuer financing exemption

Recently published [CSA Staff Notice 45-330 Frequently Asked Questions about the Listed Issuer Financing Exemption](#) (the Staff Notice) discusses key issues and questions market participants have posed related to LIFE, as well as the CSA's preliminary observations on the use of LIFE since its inception. As we have [previously discussed](#), LIFE permits a reporting issuer listed on a Canadian exchange to sell and issue up to the greater of \$5 million, or 10% of the issuer's market capitalization (to a maximum of \$10 million) in a 12-month period of freely tradeable securities on a prospectus exempt basis. To rely on LIFE, an issuer must prepare and file an offering document in the prescribed form (Form 45-106F19), have filed all periodic and timely disclosure documents required under securities legislation, and reasonably expect to have available funds to meet its business objectives and liquidity requirements for a period of 12 months following each distribution, among other things.

Since November 2022, a significant number of reporting issuers have taken advantage of LIFE with offering documents having been filed qualifying close to \$500 million worth of securities. With this level of uptake, it is unsurprising that market participants have raised a number of questions related to the interpretation, implementation and availability of LIFE and we anticipate further questions will arise as more issuers begin to take advantage of LIFE.

Four key themes

The questions and answers provided in the Staff Notice related to four main themes:

1. **Qualification to use LIFE.** Issuers who are in **default of securities legislation** or who **do not have any listed equity securities** currently trading on a Canadian exchange are not permitted to use LIFE. An issuer must address all defaults to the satisfaction of CSA Staff before they can avail themselves of LIFE, assuming all other conditions are satisfied. Similarly, an issuer must complete an exchange listing before using LIFE so that investors can easily monitor market price, fluctuations and trading volumes and make informed investment decisions.
2. **Available Funds.** Issuers should consider several factors to determine whether they have **sufficient funds to meet their business objectives and liquidity requirements for 12-months** following a distribution using LIFE. Issuers are required to state their business objectives and the related costs in their offering documents. In most cases, an issuer will need to set a **minimum offering amount** which cannot be less than the issuer's estimate of funds required to continue operations and achieve business objectives for the 12-month period. If the funds set out in the offering document are not sufficient to cover the business objectives and liquidity requirements for the 12-month period, the issuer must increase the minimum offering amount. Where an issuer closes a LIFE offering in **multiple tranches**, all tranches must close within 45 days of the date of the issuer's new release announcing the offering and the first tranche must satisfy 12-months of business operations and liquidity if the issuer does not already have the requisite funds on hand. **Misrepresentations** in an issuer's LIFE offering document will provide investors with a right of rescission or damages.
3. **Types of Securities.** The LIFE only permits the issuance of "listed equity securities" or units comprised of listed equity securities and warrants exercisable for listed equity securities. As **flow-through securities** are not a separate class of security but rather indicate a tax benefit attributed to the securities, they may be issued under LIFE. Similarly, **charitable flow-through securities** may be issued using LIFE; however, given that such structures involve multiple back-to-back trades, the end purchaser must be named in the report of exempt distribution and have all statutory rights under LIFE. Given that **broker warrants** are not typically listed equity securities, they cannot be issued under LIFE. In addition, LIFE may not be used to issue **securities for debt** given the condition that purchasers cannot be solicited in advance of announcing the offering and filing an offering document.
4. **Types of Offerings.** To date, a handful of LIFE offerings have been conducted on a **bought deal**. While the CSA have noted a number of concerns in the Staff Notice that bought deal offerings using LIFE raise, if a bought deal is conducted so that the actual purchaser has all the rights contemplated by LIFE and is named in the report of exempt distribution, the CSA is of the view that LIFE may be available. To the extent that an underwriter has to purchase securities in the

bought deal offering, such purchases should not be made using LIFE but rather in reliance on the underwriter prospectus exemption in section 2.33 of NI 45-106. Any marketing of the offering must comply with LIFE so that **no solicitations occur pursuant to LIFE prior** to the issuance and filing of the news release and filing of the completed offering document. Issuers are **permitted to combine offerings** under LIFE and other prospectus exemptions (for example, the accredited investor exemption) but **cannot use LIFE in Québec concurrently with a prospectus** filed in other Canadian jurisdictions as this structure appears to intentionally avoid the translation requirement and leave Québec investors with fewer statutory rights than other Canadian investors.

Other guidance

In addition to responses to questions related to the four key themes noted above, the Staff Notice sets out the CSA's position with respect to calculating the 50 per cent dilution limit and the total dollar amount of the distribution. Common shares issuable on the exercise of any warrants issued under LIFE would be included in the calculation of the dilution limit but are not included when determining the total dollar amount of the distribution.

Next steps

BLG will continue to monitor developments in the exempt market, and in particular with respect to LIFE. Issuers and market participants interested in using LIFE should contact any of the key contacts named below for assistance.

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