

DON'T PUT YOUR LIFE ON THE LINE: US SECURITIES LAW CONSIDERATIONS FOR THE LISTED ISSUER FINANCING EXEMPTION

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McMillan previously wrote on the Listed Issuer Financing Exemption (“**LIFE**”) from prospectus requirements, which as of November 21, 2022, allows eligible reporting issuers to raise limited amounts of capital from the public based on the issuers’ existing continuous disclosure record by filing an “**Offering Document**” in prescribed form in connection with the offering (see [Bulletin](#)). These reporting issuers are able to distribute listed equity securities (or units consisting of a listed equity security and a warrant) without a hold period of four months and one day under Canadian securities laws, which, among other benefits, is intended to increase the pool of possible investors that companies can turn to.

While there are many advantages to this exemption, caution does need to be taken if intending to use this exemption in connection with an offer and sale of the securities in the United States. While LIFE provides an exemption from Canadian securities laws, issuers must still comply with the United States Securities Act of 1933, as amended (the “**U.S. Securities Act**”), and applicable U.S. state securities laws (together with the U.S. Securities Act, “**U.S. Securities Laws**”), by either registering the securities or relying on an exemption from registration, when they are offering securities to persons in the United States. Importantly, while the LIFE exemption may not have a hold period under Canadian securities laws, this would not affect any resale restrictions that would apply under applicable U.S. Securities Laws.

In effecting cross-border private placements, eligible Canadian public companies frequently rely on Rule 506(b) (“**Rule 506(b)**”) of Regulation D under the U.S. Securities Act to offer and sell securities to U.S. Accredited Investors. However, Rule 506(b) is subject to a broad prohibition on general solicitation or general advertising, which generally limits Rule 506(b) offerings to U.S. Accredited Investors with whom the issuer (or, in the case of a brokered private placement, the agent or its affiliates) have pre-existing, substantive relationships. Unfortunately, issuers seeking to rely on the LIFE exemption must make the Offering Document available on their website, if they have one. The availability of this Offering Document on the website would constitute general solicitation or general advertising under U.S. Securities Laws.

While other avenues may be available to Canadian reporting issuers to ensure that their LIFE offering is compliant with U.S. Securities Laws, issuers that intend to rely on Rule 506(b) must take steps to limit access to the Offering Document on the issuer's website, such as through the inclusion of geographic restrictions, and additionally should take steps to document the existence of a pre-existing, substantive relationship between the issuer (or its broker-dealer or investment adviser) and each U.S. investor.

If your company is contemplating a LIFE offering - either with or without a concurrent unregistered offering to U.S. investors – and require legal advice, please contact any member of our Capital Markets Group. Our team includes U.S. securities attorneys with extensive experience in cross-border financing and M&A transactions.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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