

FINANCE RELEASES DRAFT LEGISLATION TO ENACT FLOW-THROUGH SHARE AMENDMENTS

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On December 16, 2020, the Department of Finance released draft legislative proposals to extend by 12 months the deadline for corporations to expend capital raised through certain flow-through share issuances.

The Federal Government had previously announced its intention to extend the deadlines on July 10, 2020. [\[1\]](#)

The intention behind the new legislative amendments is to allow flow-through share issuers additional time to incur eligible expenses without incurring additional tax costs.

Overview

Flow-through shares are frequently issued by mining companies that have ongoing exploration expenditures that exceed their current revenues. The flow-through share regime generally allows mining companies to renounce (i.e., flow-through) certain expenses to shareholders who can personally deduct such amounts when calculating their personal income tax liabilities.

The expenses that mining companies can flow-through to their shareholders include certain “Canadian exploration expenses” (“**CEE**”). However, there are time limits on when these amounts must be incurred and flowed through to the shareholders, which are governed by a “general rule” and a special “look-back rule”.

General Rule

Under the “general rule”, a corporation issuing flow-through shares must incur CEE to be renounced to shareholders within 24 months of the end of the month in which the relevant flow-through share agreement is made. Such expenses can be renounced to a shareholder after the expenses have been incurred and before March of the first calendar year that begins after this 24-month period.

The proposed legislative amendments extend this 24-month period to 36 months for agreements entered into after February 2018 and before 2021.

Look-Back Rule

Under the “look-back rule”, under certain circumstances, a corporation can renounce CEE to its flow-through shareholders, effective December 31 of the year prior to the year in which the CEE is incurred by the corporation.

The proposed legislative amendments extend the December 31 deadline to incur CEE to be renounced in a previous year to December 31 of the subsequent year. This legislative change will apply in respect of agreements entered into in 2019 or 2020.

Part XII.6 Tax

Part XII.6 of the *Income Tax Act* (Canada) (the “**Tax Act**”) imposes an additional tax on amounts that have been renounced under the “look-back rule”, but have not been incurred before the end of each month (other than January) in the calendar year following the year in which the flow-through share agreement is made.

In addition, a further tax equal to 10% of the amount of the renounced CEE that has yet to be incurred by an issuing corporation is payable by the issuing company if it fails to incur CEE equal to the amount renounced by the end of the calendar year following the calendar year in which the flow-through share agreement is executed. (Investors will also face retroactive changes to their tax payable under such circumstances.)

The proposed legislative amendments to Part XII.6 of the Tax Act apply in respect of agreements made in 2019 or 2020. For the purposes of Part XII.6 of the Tax Act, the proposed legislative amendments provide that (i) where expenses were incurred in 2020 and the relevant flow-through share agreement was entered into in 2019, the company is deemed to have incurred the expenses in January 2020; and (ii) where expenses are incurred in 2021 and the relevant flow-through share agreement was entered into in 2020, the company is deemed to have incurred the expenses in January 2021. In any other case, for the purposes of Part XII.6 of the Tax Act, expenses are deemed to have been incurred 12 months earlier than they were actually incurred. The proposed legislative amendments to Part XII.6 of the Tax Act also extend the filing and payment deadlines in respect of Part XII.6 tax by one year.

These legislative amendments allow mining companies greater time to incur expenses that they have renounced before being subject to the special tax levied under Part XII.6 of the Tax Act. In particular, issuers of flow-through shares relying on the “look-back rule” will generally have an additional 12 months to incur their renounced expenses before becoming subject to Part XII.6 tax.

The text of the proposed legislative amendments, and the accompanying Technical Notes issued by the Department of Finance, can be accessed [here](#).

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[1] For an in-depth discussion of the announcement, see our previous bulletin.

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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