



# Capital Markets

2022 Highlights

FASKEN



# Capital Markets: 6 Highlights in 2022

Amid geopolitical conflicts, inflation, instability in public and private capital markets, emerging from lockdown and successive waves of COVID-19, 2022 transformed our daily lives, including that of the business world.

Despite this, the capital market sector was impacted by a number of regulations and amendments that came into effect or were submitted for comment, specifically to ease the burden on issuers.

Additionally, environmental, social and governance (ESG) considerations continued to gain traction in Canada. The number of shareholder proposals presented at annual meetings across the country has returned to the peak seen in 2013, this time mostly due to the large number of ESG proposals, as legislators and regulators increase legislative and regulatory initiatives related to these considerations.

**Looking back, Fasken presents the highlights of the capital markets industry in 2022.**

01. Listed Issuer Financing Exemption (“LIFE”) under *National Instrument 45-106*
02. *Canada Business Corporations Act* : changes to the election of directors and shareholder proposals
03. Preliminary prospectus exemption for Well Known Seasoned Issuers (WKSII)
04. Access equals delivery model for Prospectuses, Financial Statements and MD&A
05. 2022 Trends for Shareholder Meetings
06. ESG regulatory initiatives

This document does not constitute legal advice or opinions. It is intended to provide general guidelines that should be followed by specific advice tailored to your own situation.

# 01. Listed Issuer Financing Exemption (“LIFE”) under *NI 45-106*

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Effective: November 21, 2022.

Amends the *National instrument 45-106* – Prospectus Exemptions.

## Goal

- ✓ Provide a more efficient method of capital raising by removing prospectus requirements for certain financings by eligible issuers. Securities issued under this prospectus exemption are freely tradable; there is no hold period as in a private placement. LIFE is a less-costly alternative to financing by way of short form prospectus.

## Who can use LIFE?

- The Issuer must (i) have been a reporting issuer in at least one jurisdiction of Canada for the last 12 months and have listed equity securities; (ii) be up to date in the filing of its continuous disclosure documents; (iii) not be an issuer whose operations have ceased or whose principal asset is cash (including capital pool companies and special purpose acquisition companies); and (iv) not be an investment fund.

## When and how can you use LIFE?

- Maximum value of the financing: greater of \$5M or 10% of market cap of the issuer (up to \$10M).
- The distribution will not result in an increase of more than 50% of the outstanding listed equity securities as of 12 months before the announcement.
- The funds generated are not allocated to a significant acquisition, a restructuring transaction or any other transaction for which the issuer needs approval of securityholders.
- The financing and use of the exemption must be announced by news release.

- The issuer must file a completed *Form 45-106F19* – Listed Issuer Financing Document (the “LIFE Document”) before any solicitation of offers to purchase (to be posted on the issuer’s website).
- The filed LIFE Document is signed by the CEO and the CFO.
- The issuer has 45 days to close the distribution from the date of the announcement.

#### **Of note**

The LIFE Document constitutes a “core document” and as such, the issuer will be liable to purchasers of securities issued pursuant to the exemption under the secondary market liability provisions if there is a misrepresentation in the LIFE Document signed by the CEO and CFO.

In Québec, issuers will need to produce the LIFE Document in French or in French and English.

A registered dealer may assist in the offering and exempt market dealers are permitted to facilitate distributions of freely tradable securities (before the distribution is complete).



## 02. *Canada Business Corporations Act*: changes to the election of directors and shareholder proposals

Effective: August 31, 2022.

Amends the *Canadian Business Corporations Act* (CBCA).

### What is new for public companies?

#### Election of directors: Length of the term and procedure for the vote

##### Before

Maximum term of three years and voting for a slate of candidates at once was allowed.

##### Now

Maximum term of one year term ending at the next annual meeting and separate vote for each candidate is required, which was already required by the TSX.

##### Of note

A director cannot be appointed between meetings if the person was a candidate at the last annual meeting and did not receive a majority of votes cast in that election, subject to limited exceptions in its group.

## Vote for directors: Election requirements

### Before

Proxy forms provided that shareholders gave instructions to vote “for” or “withhold” from voting. As a result, a director could be elected with only one vote “for” if the election was uncontested.

### Now

If an election is uncontested, the proxy form must provide for votes “for” or “against”, and in order to be elected, directors must receive a majority of “for” votes.

### Of note

As a result, for CBCA corporations listed on the Toronto Stock Exchange, a Majority Voting Policy requiring the resignation of a director who fails to receive sufficient “for” votes will no longer be necessary. The change referred to here must also be considered when preparing proxy forms for annual meetings.

## Shareholder proposals: Timeframe to receive proposals

### Before

Shareholders were allowed to submit proposals up to 90 days before the anniversary of the date of the notice of meeting for the last annual meeting.

### Now

Shareholders can submit proposals from the 150<sup>th</sup> day to the 90<sup>th</sup> day before the anniversary of the previous annual meeting.



## 03. Preliminary prospectus exemption for Well Known Seasoned Issuers (WKSI)

Effective: January 4, 2022, until July 4, 2023, unless extended.

Amends *National Instrument 44-102* – Shelf Distribution.

### Goal

- ✓ Remove certain requirements in the base shelf prospectus process for large established issuers. This exemption is based on a similar concept that is already in place in the United States. It is available to issuers who qualify for the short form prospectus process.

### Who can use this exemption?

- Issuer must be a WKSI with (i) outstanding listed equity securities having a public float of at least \$500M or (ii) \$1B aggregate amount of non-convertible securities (other than equity) distributed under a prospectus for cash in the last three years. The exemption is not applicable to investment funds. Issuers with mining operations must meet additional criteria in order to be eligible.

### How can you use this exemption?

- Qualifying issuers will be able to file a preliminary base shelf prospectus, which will allow for more timely execution of transactions.
- Issuers will no longer be required to indicate the maximum amount they intend to be able to distribute during the 25-month life of the prospectus. This will avoid the disruption to the share price sometimes associated with the filing of a base shelf prospectus with an imposing amount of offering in terms of possible dilution or leverage.
- The issuer is still required to pay filing fees associated with the preliminary base shelf prospectus and file the required personal information forms.

## 04. Access equals delivery model for Prospectuses, Financial Statements and MD&A

Effective: Under review by the Canadian Securities Administrators (comment period ended July 6, 2022).

Amends the general physical delivery requirements under several national instruments and companion policies.

### Goal

- ✓ Generally permit electronic delivery of prospectuses, financial statements and related management discussion and analysis (MD&A) for non-investment fund reporting issuers.
- ✓ Providing public electronic access to a document by filing it on Sedar and alerting investors by way of press release that it is available would constitute delivery of prospectuses under applicable securities legislation.
- ✓ This would be the default transmission model unless issuers use the other methods provided for in the regulations, including the notice-and-access regime.

### Of note

The model does not cover certain documents requiring a shareholder response, such as management information circulars sent in connection with shareholder meetings. This may lead issuers that work well with the notice-and-access regime to continue to use this model to manage the mailing of all their annual meeting materials.

Even if this is adopted, other corporate laws and regulations providing for the delivery of financial statements and other documents to shareholders will continue to apply, such as the *Canada Business Corporations Act* (CBCA). Amendments to the CBCA, similar to those soon to be made with respect to notice-and-access and delivery of financial statements, may therefore be required to harmonize matters.



## 05. 2022 Trends for Shareholder Meetings

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### Wave of ESG and Say on Climate Proposals

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- In 2022, all six principal Canadian banks received ESG-related proposals from their shareholders, including say on climate proposals asking the banks to hold non-binding advisory votes regarding their plan to address climate change.
- The banks recommended that shareholders vote against such proposals, but for five of them, more than 20% of shareholders supported the proposal.
- In 2022, Canadian National Railway Company and Canadian Pacific Railway Limited both presented say on climate non-binding advisory votes and received strong shareholder support for their environmental policy (98% and 87% respectively).

### Gender Diversity on a Constant Rise

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- The percentage of women holding director and officer positions continues to rise. In October 2022, the Canadian Securities Administrators (CSA) reported that 70% of TSX issuers<sup>1</sup> had at least one woman in their senior management and 87% of them had at least one woman on their Board, while women generally constituted 24% of board members. The CSA noted a correlation between issuers that adopted gender diversity measures and the percentage of board seats held by women, with 30% of board seats held by women for issuers with targets, compared to 20% for those without targets.
- Proxy advisor ISS also issued similar data in August 2022, indicating that while women make up a quarter of directors on Russell 3000 boards, larger companies lead the charge with women holding 30% of directorships among S&P 500 companies.

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<sup>1</sup> The report is based on a sample of 625 issuers with fiscal years ending between December 31, 2021 and March 31, 2022 (Year 8) that filed an information circular or annual information form on or before July 31, 2022.

## Virtual & Hybrid Meetings Remain Popular

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- When sampling the 50 largest issuers listed on the TSX, including the six principal banks, we note that 35 of them held virtual-only meetings in 2022, while 13 chose the hybrid format, and only two opted for in-person meetings.
- According to proxy advisor Glass Lewis, virtual-only meetings have the potential to curb the ability of a company's shareholders to meaningfully communicate with the company's management, and as such, when analyzing the governance profile of companies that choose to hold virtual-only meetings, Glass Lewis looks for robust disclosure in a company's proxy statement, which assures shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting.

70%

Virtual

26%

Hybrid

4%

In person



## 06. ESG regulatory initiatives

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### Update on the proposed climate change risk disclosure requirements

In mid-October, the CSA issued a news release indicating it is “actively considering international developments and how they may impact or further inform” proposed *National Instrument 51-107* Disclosure of Climate-related Matters, which was published for public comment in October 2021.

Among the factors motivating the CSA’s review are subsequently-published proposed environmental disclosure frameworks by the SEC and the International Sustainability Standards Board (“ISSB”). In the news release, the CSA noted that the previously proposed rule was based on the Task Force on Climate-Related Financial Disclosure (“TCFD”) recommendations because at that time, there was “a growing convergence and widespread acceptance of TCFD recommendations in different jurisdictions”. While the proposed SEC and ISSB proposals are also based on the TCFD recommendations, there are substantive differences between those and the CSA’s. As a result, the CSA is “analyzing the key differences and monitoring the evolution of these proposals” to determine how the international developments impact or further inform its 2021 proposed rule.

### Update on the CBCA Diversity Disclosure

In February 2022, Corporations Canada updated its guidelines on mandatory diversity disclosure regarding designated groups for federally incorporated public companies. After a review of the past two years of disclosure since the release of the diversity disclosure requirements under the CBCA, Corporations Canada published observations and guidelines to assist corporations with their disclosure.

## Observations by Corporations Canada after 2 years of data collection

- Federal distributing corporations should be continuously encouraged to recognize the benefits of diverse backgrounds in decision-making.
- Diversity information could be more effectively communicated if it is consistently disclosed in a common format. Consistency in disclosure will:
  - enhance shareholder/management dialogue about the benefits of diversity;
  - improve the comparability of information disclosed by various corporations, and help investors, shareholders and other stakeholders efficiently identify and assess relevant information concerning the corporation;
  - ensure that diversity information is collected and analyzed in a consistent way; and
  - enable a sound year-over-year analysis that will foster steady progress toward more diverse corporate leadership.
- More information on the updated guidelines on disclosure can be found [here](#).

## Update on anti-slavery legislation

A 2017 study by the International Labor Organisation (“ILO”) estimated that 25 million people were in forced labour worldwide. In the same year, the ILO estimated that 157 million children were engaged in child labour and, of those, 75 million were engaged in hazardous work.

Bill S-211 was introduced in the Senate in November 2021. The Bill’s primary purpose is to serve as a tool for transparency by imposing supply chain reporting requirements on Canadian government institutions and businesses that meet certain criteria. All listed entities on Canadian stock exchanges will be required to report on the steps taken during that year to prevent and reduce the risk that forced labour or child labour is used in any step of the production of goods in

Canada or overseas. In addition, any entity that has a place of business, or does business, in Canada, will have to report if it has assets in Canada and meets at least two of the following three conditions: (i) it has at least \$20 million in assets; (ii) it has revenues of at least \$40 million; (iii) it has at least 250 employees. Those thresholds for reporting reflect those found in Canada’s Extractive Sector Transparency Measures Act. Finally, the Bill provides for a regulatory power to require additional entities to report.

The entity’s reports will be public and will have to include information on the entity’s structure and the goods that it produces or imports, its anti- forced or child labour policies, its activities that carry a risk of forced labour or child labour being used and the steps taken to manage that risk, any remediation measures taken, and its internal training on forced and child labour.

The third reading of the bill was completed on April 28, 2022 and is currently in committee review at the House of Commons.

# On the cutting edge of legal developments

We are in a position to assist you with all of your questions. In addition, the Fasken team provides you with numerous resources to help you better understand the upcoming changes in the legislation.

As leaders in their field, Fasken's lawyers publish articles, podcasts, and organize numerous talks and webinars on current issues.

# Economic Fluctuations: Are you ready?

Scan the QR code or [click here](#) to learn about seven key questions to include in your business planning in the current economic context.

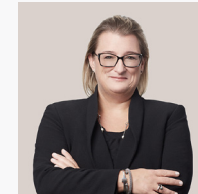


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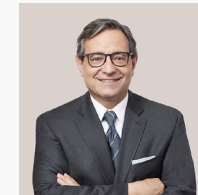
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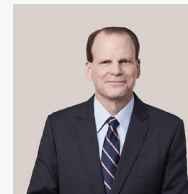
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