A New Era for the CSE: What Issuers Need to Know

May 2023

On March 30, 2023, the Canadian Securities Exchange (the "**CSE**") announced the approval of significant amendments (the "**Amendments**") to their listing policies and forms (the "**CSE Policies**") by the applicable securities commissions. The Amendments became effective on April 3, 2023. Issuers that are currently listed on the CSE ("**Listed Issuers**"), as well as issuers considering listing their securities on the CSE, will need to adhere to the Amendments going forward and, in particular, larger and later-stage Listed Issuers should be aware that the creation of the "Senior Tier" may have notable effects on their continuous disclosure obligations if they are designated as "Non-Venture Issuers" (defined and discussed further below). Furthermore, the new shareholder approval requirements for certain corporate finance transactions and for acquisitions, dispositions and certain corporate actions (e.g., consolidations) should be considered by Listed Issuers and discussed with their legal counsel prior to moving forward with any such transactions.

Below, we discuss some of the key changes to the CSE Policies as a consequence of the Amendments and their effects on Listed Issuers, namely:

- creation of a "Senior Tier" for larger and later-stage Listed Issuers to be "Non-Venture Issuers";
- new security holder approval requirements in connection with the related party transactions, the sale of securities, acquisitions and dispositions, rights offerings, security-based compensation plans and certain other transactions and corporate actions;
- new "eligibility review" for issuers intending to list on the CSE;
- new rules for SPAC listings;
- increase in the minimum "public float" for Listed Issuers;
- heightened requirements for natural resource companies, including increased expenditures and additional escrow requirements;
- changes to private placements, including changes to CSE pricing rules; and
- miscellaneous distribution and corporate finance-related amendments, including related to acquisitions, security-based compensation arrangements, control block sales, takeover bids, issuer bids and normal course issuer bids.

Creating a Senior Tier

One of the most notable Amendments is the creation of a new senior tier (the "**Senior Tier**") category for larger and later-stage Listed Issuers, which seeks to close a regulatory gap by imposing "*enhanced disclosure and governance requirements [on senior Listed Issuers] that are consistent with the policies governing other senior issuers globally.*"[1] The aim of introducing the Senior Tier is to enable Listed Issuers to broaden access to a range of institutional investors that could not previously trade in "venture" securities.

[1] Canadian Securities Exchange, *Updated Policies for Canadian Securities Exchange Usher in New Era for Exchange and its Stakeholders* (Ontario: Canadian Securities Exchange, 2023) <https://www.thecse.com/en/about/publications/cse-news/updated-policies-for-canadian-securities-exchange-usher-in-new-era-for>.

The Senior Tier consists of a new class of Listed Issuers, designated as non-venture issuers ("**Non-Venture Issuer**"). Beginning in May of 2023, the CSE will review the audited financial statements of Listed Issuers to determine whether they meet the qualifying criteria for the Non-Venture Issuer designation. Listed Issuers who qualify for the Non-Venture Issuer designation will be given advance notification from the CSE and will be subject to the continuous disclosure and other securities rules that are required of Non-Venture Issuers. The CSE anticipates that, if applicable, the Non-Venture Issuer designation will be effective for the Listed Issuer's second quarter interim filings (for Listed Issuers on a calendar year-end).

The newly amended CSE Policy 2 sets out the qualifications for listing for Non-Venture Issuers. Non-Venture Issuers are required to meet the basic listing qualifications and must also meet ***at least one*** of the four enhanced standards set out in Appendix 2A:

1. **Equity Standard**: requires shareholders' equity of at least $5 million and an expected market value of public float of at least $10 million;

2. **Net Income Standard:** requires net income of at least $400,000 from continuing operations in the most recent fiscal year or in two of three most recent fiscal years, shareholders' equity of at least $2.5 million and an expected market value of public float of at least $5 million;

3. **Market Value Standard**: requires a market value of all securities (excluding warrants and options) of at least $50 million, shareholders' equity of at least $2.5 million (including the value of any offering concurrent with listing) and an expected market value of public float of at least $10 million; or

4. **Assets and Revenue Standard**: requires total assets and total revenues of at least $50 million each in the most recent fiscal year or in two of three most recent fiscal years, and an expected market value of public float of at least $5 million.

The CSE may, in its sole discretion, designate a Listed Issuer as a Non-Venture Issuer if the Listed Issuer is sufficiently advanced in capitalization or operations such that it is near the thresholds of at least two of the four tests and the CSE determines it would be in the public interest to do so.

Issuers applying for listing as a Non-Venture Issuer must have a public float of at least one million freely tradeable securities and 300 public holders, each holding a board lot.

The Non-Venture Issuers listed on the CSE meet the definition of "venture issuer" under applicable Canadian securities law; therefore, these issuers may continue to be considered as such. However, for those Listed Issuers who become a Non-Venture Issuer, the Amendments will result in the Listed Issuer needing to meet a number of enhanced continuous disclosure requirements meant to replicate requirements applicable to Non-Venture Issuers under Canadian securities laws. These include the requirement to prepare and file an annual information form within 90 days from the Non-Venture Issuer's financial year end. Non-Venture Issuers are also subject to shorter filing deadlines for the annual and interim financial statements and accompanying management's discussion and analysis (90 days and 45 days, respectively). Additionally, each Non-Venture Issuer must adopt a majority voting policy for election of directors and each director of a Non-Venture Issuer must be individually elected by a majority of votes cast with respect to their election, similar to the majority voting requirement set out in the Toronto Stock Exchange (the "**TSX**") Company Manual.

New Security Holder Approval Requirements

Another major Amendment is the inclusion of new shareholder approval requirements for certain transactions, corporate actions and corporate governance matters. These requirements are intended to mirror those found in the policies of other Canadian stock exchanges.

General Requirements

An issuer may satisfy the CSE requirement for security holder approval using a written resolution signed by security holders of more than 50% of the securities having voting rights. Related parties of Listed Issuers that have a material interest in a transaction that differs from the interests of security holders generally and would "materially affect control" (as such term is defined in the CSE Policies) of the Listed Issuer are prohibited from voting to approve that transaction. Materials sent to security holders in connection with a vote for approval (i.e., an information circular) must contain information in sufficient detail to allow a security holder to make an informed decision. If the matter being voted upon requires CSE review or approval, the information circular must be filed with the CSE for review before it is sent to security holders.

Additionally, security holder approval is required if, in the opinion of the CSE, the transaction will materially affect control of the Listed Issuer.

Sale of Securities

Subject to a limited exemption for when a Listed Issuer is in serious financial difficulty (and certain other criteria with respect to related party participation and independent director approval are met), Listed Issuers, who are not designated as Non-Venture Issuers, must obtain security holder approval for a proposed securities offering, either by way of prospectus or by private placement, if the number of securities in the proposed offering is: (1) more than 50% of the Listed Issuer's total number of outstanding securities or votes and a new control person is created; or (2) more than 100% of the total number of securities or votes outstanding.

Non-Venture Issuers are required to obtain security holder approval for a proposed security offering if the number of securities issuable in the proposed offering is more than 25% of the total number of securities or votes outstanding. The Amendments also require Non-Venture Issuers to obtain security holder approval if the number of securities issuable to "related persons" (as such term is defined in the CSE Policies) in the proposed offering, when added to the number of securities issued to such related persons in private placements or acquisitions in the previous 12-month period (calculated on a fully diluted basis), is more than 10% of the Listed Issuer's total number of securities or votes outstanding (calculated on a non-diluted basis and regardless of the price of the offering).

In addition, all Listed Issuers require security holder approval in circumstances where a proposed security offering has an issuance price that is lower than the market price, less the "maximum permitted discount" (as defined in the CSE Policies. See, however, our discussion of "maximum permitted discount" in the context of a private placement below $0.05 under *Private Placements*, below). This requirement applies irrespective of the number of shares to be issued under the proposed security offering.

Acquisitions and Dispositions

Listed Issuers who are not designated Non-Venture Issuers (and are not investment funds) are required to obtain security holder approval for acquisitions if the total number of securities issuable (calculated on a fully diluted basis): (1) is more than 50% of the total number of securities or votes outstanding (calculated on a non-diluted basis) and a new "control person" is created; (2) is more than 100% of the Listed Issuer's outstanding securities or votes; or (3) would materially affect control of the Listed Issuer, as determined by the CSE. Non-Venture Issuers are required to obtain security holder approval for acquisitions if the total number of securities issuable (calculated on a fully diluted basis) is more than 25% of the total number of securities or votes outstanding (calculated on a non-diluted basis).

Non-Venture Issuers must obtain security holder approval for an acquisition if a related person of a Non-Venture Issuer has a 10% or greater interest in the assets to be acquired and the total number of securities issuable (calculated on a fully diluted basis) are more than 5% of the total number of securities or votes outstanding (calculated on a non-diluted basis).

It is important to note that the "total number of securities issuable," for the purposes of determining whether an acquisition requires security holder approval, includes securities issuable pursuant to the acquisition agreement, certain security-based compensation arrangements and any concurrent private placement upon which the acquisition is contingent or otherwise linked.

Further, the Amendments include a requirement that all Listed Issuers must obtain security holder approval for a disposition of all or substantially all of the assets, business or undertaking of the Listed Issuer, similar to the security holder approval requirement for such transactions under most Canadian corporate statutes.

Rights Offerings

The CSE requires that all Listed Issuers obtain security holder approval when securities offered by way of rights offering are offered at a price greater than the maximum permitted discount to the market price. However, security holder approval will not be required for this kind of offering where the audit committee (comprised solely of independent directors), or the majority of the Listed Issuer's independent directors in a vote in which only independent directors participate, determine that the rights offering, including the pricing thereof, is in the best interest of the Listed Issuer and is reasonable in the circumstances.

Other Transactions and Corporate Actions Requiring Security Holder Approval (Security-Based Compensation Plans, Shareholder Rights Plans and Consolidations)

Listed Issuers are also required to obtain security holder approval for various transactions and corporate actions, including:

- the adoption of, or amendments to, a security-based compensation arrangement. Additionally, security holder approval is required every three years if the plan is an "evergreen" or "rolling" plan;
- the adoption of, or amendments to, a shareholder rights plan; and
- consolidations of a listed security in instances where the consolidation ratio is greater than 10 to one, or when combined with any other consolidation in the previous 24 months, inclusive of those that were not approved by security holders, the consolidation ratio is greater than 10 to one.

Introducing an 'Eligibility Review' for Listing Applicants

Pursuant to the Amendments, an issuer that intends to apply for listing on the CSE must first undergo an "eligibility review" and subsequently receive written confirmation from the CSE that all eligibility requirements have been sufficiently met. For the purpose of obtaining written confirmation of eligibility, an issuer may submit a draft prospectus and a natural resource issuer may submit a technical report, provided the required information is included. Upon review, the CSE will either provide confirmation of eligibility or identify any conditions to be met prior to listing on the CSE. The eligibility review is subject to a fee which will be applied to the non-refundable portion of the listing fee charged by the CSE.

New Rules for SPAC Listings

Similar to the requirements for listing Special Purpose Acquisition Corporations (each, a "**SPAC**") on the TSX and NEO Exchange, the CSE has introduced requirements for SPACs to be listed on the Senior Tier, including:

- **Initial Public Offering ("IPO"):** a minimum IPO raise requirement of $30 million through the sale of shares or units;
- **Capital Structure:** a capital structure that is acceptable to the CSE, which may include a redemption feature or a liquidation distribution feature;
- **Float and Distribution:** (1) at least one million freely tradeable securities held by public holders, (2) the requirement of the aggregate market value of the securities held by public holders is at least $30 million, and (3) at least 150 public holders of securities, holding at least one board lot each; and
- **Pricing:** a minimum IPO price of $2.00 per share or unit.

Increase in the Minimum Public Float

The Amendments require that all Listed Issuers have a public float of at least one million freely tradeable shares, consisting of at least 150 public holders each holding a board lot at minimum. The public float requirement has been increased from 10% to 20% of the total issued and outstanding of that security. As previously mentioned, Non-Venture Issuers must have a public float of at least one million freely tradeable securities and at least 300 public holders each holding at least a board lot.

Correspondingly, the substantial float related to the number of free trading shares has been increased to two million and capital raised amount has been increased to $2 million. Notably, the 20% public float threshold has been deleted from the substantial float description.

Heightened Requirements for Natural Resource Companies

The Amendments have enhanced the industry-specific requirements for mineral exploration-stage natural resource companies, including the following standards for past and future property expenditures and escrow requirements:

- an issuer is required to have title to a property that is prospective for minerals on which there has been a qualifying expenditure of at least $150,000 during the most recent preceding 36 months (an increase of 100% in qualifying expenditures from the previous $75,000 requirement);

- an issuer will be required to obtain an independent report that complies with National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* technical report disclosure obligations and that recommends further exploration on the property, with a budget for the first phase of at least $250,000 (an increase of 150% from the previous $100,000 requirement); and

- additional escrow requirements for mineral exploration-stage natural resource issuers.

Private Placements

The Amendments have removed the previous minimum offering price requirement and allow a Listed Issuer to complete a private placement at a price lower than $0.05, provided that the following criteria are satisfied: (1) the proposed price is not lower than the volume weighted average price for the preceding 20 trading days (as determined by the CSE) which, for the purposes of security holder approval, will be considered to be the market price less the "maximum permitted discount"; (2) the proceeds will be used for working capital or for *bona fide* debt settlement, excluding accrued salaries to officers or directors of the Listed Issuer and payment for investor relations activities; and (3) the CSE has approved the price in advance of closing and has been provided with certain basic information with respect to the Listed Issuer and the financing.

The Amendments also provide for other rules relating to private placements, including increased guidance for price protection requests, requiring Listed Issuers to publicly announce their intention to complete a private placement at least five days prior to closing of a private placement and post notice of the same in a Form 9, and requiring Listed Issuers to provide treasury orders and reservation orders to the CSE post-closing.

Miscellaneous Distribution and Corporate Finance-Related Amendments

The Amendments have broadened the scope of CSE Policy 6 and include revisions to the following requirements:

- **Acquisitions:** a Listed Issuer that seeks to complete an acquisition transaction must give public notice of its intention to do so at least five business days prior to closing, during which period the CSE may object to the acquisition;
- **Security-Based Compensation Arrangements:** additional filing, reporting and posting requirements have been introduced in relation to security-based compensation arrangements. Please also see our discussion of security holder approvals required for security-based compensation arrangements, above;
- **Control Block Sales:** various reporting requirements and restrictions on control block sales have been imposed, including a requirement that each seller file a report of each sale within three days of the trade with the CSE; such report shall contain substantially the same information as an insider report to be filed in accordance with securities law; and
- **Takeover Bids, Issuer Bids and Normal Course Issuer Bids:** new reporting requirements have been included in the Amendments that relate to takeover bids, issuer bids and normal course issuer bids. Stringent trading restrictions have been instituted for normal course issuer bids, such as restrictions on purchase and limits on price and volume.

Conclusion

The Amendments have made transformative changes to the CSE and better align the CSE Policies with those of other Canadian stock exchanges. While the Amendments came into force on April 3, 2023, the CSE will be working with issuers impacted by the Amendments to manage the changes over the course of the upcoming year.

In particular, larger and later-stage issuers should consider whether they will qualify for the Senior Tier and should discuss this with their legal counsel and the CSE as soon as possible, in order to better prepare for the enhanced continuous disclosure requirements set out in the Amendments. Listed Issuers considering securities offerings, acquisitions, dispositions or consolidations should consult with their legal counsel well in advance of these transactions to consider whether any security holder approvals are required as a consequence of the Amendments. Finally, Listed Issuers with upcoming annual shareholders' meetings should consider whether they should add approval of "evergreen" or "rolling" security-based compensation plans as an item for security holder approval, in light of the Amendments.

The Capital Markets Group at Aird & Berlis LLP continues to monitor changes to the CSE Policies and can assist issuers in preparing relevant disclosure documents and ensuring they are compliant.

Please contact your Aird & Berlis relationship partner if you have questions or require any assistance with respect to the matters discussed above.

Contacts

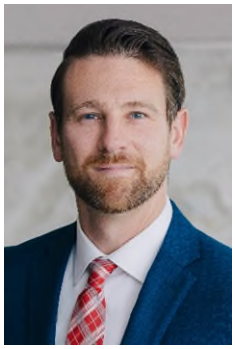


Fiona Brown
Partner
T 416.865.3078
E fbrown@airdberlis.com

Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised over 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for over a decade, and is a regular speaker and writer on market expansion matters. Fiona is proud to have been recognized by *The Best Lawyers in Canada, The Canadian Legal Lexpert Directory* and *Benchmark Litigation Canada.*

A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.



Jackson Phillips
Partner

Jackson is a member of the firm's Capital Markets Group. His practice focuses on mergers and acquisitions, initial public offerings, reverse take-overs and other going-public transactions, as well as public and private corporate finance matters. He also assists his clients with a range of corporate and securities law compliance matters, including corporate governance and continuous disclosure. Jackson advises public and private companies across a variety of sectors, with a focus on mining, cannabis, psychedelics and technology.

Prior to joining Aird & Berlis, Jackson worked at a national law firm and completed a secondment with the Corporate Finance Branch of the Ontario Securities Commission.



Danny Kharazmi

Partner

Danny is a member of the firm's Capital Markets, Corporate/Commercial and Mergers & Acquisitions/Private Equity Groups. He has expertise in a broad range of transactions and has led complex going public transactions and mergers and acquisitions. Danny is a trusted advisor to public and private companies, guiding them through all aspects of the startup phase, going public and transformational transactions. He also regularly advises members of senior management and boards of directors on continuous disclosure obligations and corporate governance matters.

Danny advises both public and private issuers in a broad range of industries, including biotech, esports, Fintech, mining and cannabis.

Danny is also an adjunct professor at Osgoode Hall Law School.

Zafir Jetha-Rattani, an articling student, assisted in the preparation of this article.