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To whom it may concern,

Re: Comments on draft Form 45-106F2 – the role of independent professionals

I am writing in response to your request for comment on CSA's proposed changes to the Offering Memorandum (OM) form - Form 45-106F2.

By way of background, I retired last year after working for a provincial securities regulator for 35 years. The last 15 years of my career were spent reviewing and investigating Exempt Market offerings for compliance with the rules and regulations. My primary focus was on OMs filed by private issuers.

General

I believe the changes CSA proposes to make to Form 45-1062, if approved, will significantly improve the quality of information investors receive in OMs. This should help them make better informed investment decisions.

I also believe the changes will make it easier for issuers, and their professional advisers, to provide the level of disclosure in an OM that CSA expects from them. Currently, many issuers and their advisers, particularly those who haven't previously filed an OM with a securities regulator, only learn of many of these requirements if their OMs are selected for review by the regulator.

The improved instructions and guidance should ultimately reduce costs to issuers as they will be able to avoid the costs associated with, in some cases, having to retract and reissue their OMs as a result of defective disclosure.

When time permits, I suggest CSA review Form 45-106F2 in its entirety and, after consulting with users and preparers of OMs, take the necessary steps to condense, simplify and 'plain language' the document, e.g. more than half of Form 45-106F2, as it currently exists, is devoted to financial statement requirements. This would make it easier for issuers, particularly small businesses for which the OM exemption was originally created, to comply with the disclosure requirements.

Role of independent professionals in OM distributions

I am focusing my comments on one issue – the role independent professionals play in OM distributions. Currently, Form 45-106F2 requires issuers to include audit reports and, in certain cases, engineering reports in their OMs. Under the proposed changes, this will be expanded to include reports prepared by independent professional valuators.

Based on my experience, I know many investors, particularly those who are not financially sophisticated, feel confident investing in an Exempt Market issuer when they see an independent professional's report included in the issuer's OM – particularly if the professional represents a well-known firm.

Unfortunately, if my understanding is correct, this sense of security may be misplaced. As the *Hercules* and *Livent* decisions have shown, independent professionals do not owe a legal duty of care, under Common Law, to individual investors or groups of investors who may have relied on their reports when they made their investment decision. This seems ironic considering CSA presumably imposed the requirement for such reports specifically to protect investors.

Similarly, aside from British Columbia, no jurisdiction in Canada offers statutory rights to investors for misrepresentations contained in an independent professional's report included in an OM. Unlike Common Law, under statutory law an investor is ***deemed*** to have relied on a misrepresentation contained in a prescribed document like an OM – they do not have to prove they ***actually*** relied on it.

While BC introduced statutory rights for investors for such misrepresentations in 2019, the new law requires that independent professionals provide their consent for the inclusion of their reports in an OM.

Draft Form 45-106F2 does not appear to contain a consent requirement, either in the body of the form or as an attached appendix, i.e. Appendix E. Consequently, the BC legislation doesn't appear to actually provide statutory protection to investors at this point.

Recommendation:

When Form 45-106F2 was originally drafted 25+ years ago, I presume CSA mandated the inclusion of reports prepared by independent professionals because it believed professionals *were* liable, under Common Law, to investors for misrepresentations in their reports. However, based on Hercules and Livenet, that level of protection does not exist.

Until effective statutory liability legislation is introduced by securities regulators across Canada for OMs and other prescribed documents, CSA should consider eliminating the requirement to include independent professional reports and, instead, make their inclusion voluntary.

The lack of such reports would highlight the risk associated with investing in *some* Exempt Market issuers to prospective investors. It would also let issuers spend money on the development of their business that would otherwise be required to pay professional service fees.

If CSA retains the requirement for independent reports then it should consider including a consent requirement in Form 45-106F2, with the professional's consent being included in the body of the OM. The consent document would clarify the professional's role, rights and obligations to people who are considering investing in the issuer.

While this would not protect investors under Common Law, it would correct the misunderstanding that currently exists among many investors. I also believe it would strengthen an issuer's ability to sue a professional it retained to prepare a report for its OM that was subsequently found to have contained a misrepresentation.

Including a consent requirement would also make BC's statutory liability provision enforceable.

On a related note, Item 11.2 of Draft Form 45-106F2 requires issuers to disclose certain "cautionary" language in Item 11 – *Purchaser's Rights* regarding the relationship between a prospective investor and an independent professional whose report appears in the OM. It refers to the lack of statutory right of action and suggests the investor "consult with a legal adviser for further information."

With respect, I think this section should be reworded to simply state that a prospective investor has no legal right to sue a professional for misrepresentations that may be contained in their reports. This would eliminate any potential misunderstanding and the need for an investor to seek, and pay for legal advice simply to confirm they cannot sue an independent professional in an effort to recover their investment.

Given its importance and, based on my experience, the reluctance of many investors to read through the body of an OM, I recommend this warning, if adopted, should also be required disclosure, in bold-face type, on the Face Page of OMs.

Regards,

Larry Wilkins