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Multilateral CSA Staff Notice 45-309 (Revised)
Guidance for Preparing and Filing an Offering Memorandum under National Instrument 45-106 *Prospectus Exemptions*

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Introduction and Purpose

Staff of the Canadian Securities Administrators, except in Ontario, (Staff or we) are publishing this Staff Notice (the Notice) to provide guidance to issuers, underwriters and their advisors that intend to rely on section 2.9 (the OM Exemption) of National Instrument 45-106 *Prospectus Exemptions* (NI 45-106). This Notice also summarizes common deficiencies we have observed in offering memoranda (each an OM) prepared in accordance with Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* (the F2) and discusses the potential consequences of non-compliance with the terms of the OM Exemption (the Requirements).

This Notice replaces a prior version of the Notice issued April 26, 2012.

Background

NI 45-106 provides issuers with exemptions from the prospectus requirement for distributions of securities. Prospectus exemptions, including the OM Exemption, require issuers to adhere to the conditions or requirements of the exemption. Responsibility for compliance with NI 45-106 rests with the issuer purporting to rely on the applicable exemption(s).

An issuer's reliance on the OM Exemption does not require a receipt prior to the distribution as a prospectus does. However, the use of the OM Exemption is subject to regulatory oversight and monitoring. Staff may review an OM as a result of planned compliance-monitoring programmes, observed market activity, or following specific complaints or referrals. An issuer's reliance on the OM Exemption may come under Staff scrutiny, and non-compliance may result in one or more of the consequences outlined in the section *Consequences of Failing to Comply with the Requirements* at the end of this Notice.

Guidance and Common Deficiencies

This Notice focuses on the F2, which is the required form of OM under the OM exemption, except in certain circumstances.[1] When preparing an OM, issuers must comply with the instructions for completing the F2 (the Instructions), which are included in the F2, and should

[1] Qualifying issuers (as defined in NI 45-106) can use Form 45-106F3 *Offering Memorandum for Qualifying Issuers*.

refer to section 3.8 of the Companion Policy 45-106CP *Prospectus Exemptions* (the CP) for additional guidance.

Issuers must ensure that the OM complies with the applicable requirements when it is prepared, when it is delivered to prospective purchasers and when the issuer accepts an agreement to purchase the security from the purchaser. This means that the OM must be in the correct form, not contain any misrepresentations,[2] and provide sufficient information to enable a prospective purchaser to make an informed investment decision. Issuers must also ensure that the OM is easy to read and understand, concise, and drafted in clear, plain language.

The following are common issues identified in OMs that have been filed with us.

1. Failing to file an OM on time

An issuer using the OM exemption is required to file a copy of the OM it delivered to prospective purchasers with us no later than 10 days after the first distribution under that OM.[3] An issuer that has already filed its most current OM does not need to re-file it after subsequent distributions unless the OM is amended. Staff have observed that some issuers are filing their OMs late and in some cases are not filing them at all.

2. Failing to amend the OM when distributions are ongoing

We have observed a number of issuers making distributions under the OM exemption using an OM that no longer meets the Requirements. An OM can cease to meet the Requirements for reasons that include not amending an OM to reflect a material change or the requirement to amend the OM to include more recent financial statements.

An issuer relying on the OM Exemption must ensure that the OM does not contain a misrepresentation. Please see the CP for guidance on this point. If a material change occurs in the business of an issuer after the OM has been prepared, the issuer cannot accept an agreement to purchase a security from a purchaser until it amends the OM to reflect the material change (see item 3 below for guidance on amending an OM).

In cases where distributions under the OM are ongoing, item B.12.1 of the Instructions requires the OM to be amended to include annual audited financial statements for the issuer's most recently completed financial year no later than 120 days after the issuer's financial year-end. For ongoing distributions to Ontario residents, item B.13.1 of the Instructions requires the OM to be amended to include financial statements for the issuer's most recently completed six-month interim period no later than 60 days after the end of that period, unless the issuer meets the conditions in item B.13.2 of the Instructions.

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[2] Misrepresentation is defined in local securities acts.

[3] Under section 40.1 of Securities Act (Québec), the OM prescribed by section 2.9 of NI 45-106 shall be drawn up in French only or in French and English for issuers distributing securities in Québec. The issuer must file the French version or the French and English versions of the OM with the Autorité des marchés financiers no later than 10 days after the distribution.

An issuer should have processes in place to ensure that OMs are not delivered to prospective purchasers by any of its directors, officers, staff, promoters, exempt market dealers, or agents if the OM no longer meets the Requirements.

3. Failing to include sufficient information to make an informed investment decision

An issuer must not deliver an OM unless it provides a reasonable purchaser with sufficient information to make an informed investment decision (see subsection 2.9(13.3) of NI 45-106). To comply with this requirement an issuer may need to disclose information about its subsidiaries.

For example, we encountered cases where issuers intended to use a significant portion of the proceeds from an offering to acquire or establish a subsidiary and then have the subsidiary transact the main business of the issuer (such as acquiring and developing assets, entering into agreements, managing operations and acquiring additional financing as required). However, the OM neglected to include disclosure at the level of the subsidiary, such as how the subsidiary intended to use the available funds, the business of the subsidiary and key terms of the material agreements entered into by the subsidiary. The OM only provided this information at the level of the parent. Since, in this example, the subsidiary was the ultimate recipient and user of the offering proceeds, prospective purchasers would require information at the level of the subsidiary in order to have sufficient information to make an informed investment decision.

In addition, item 1.2.1 of the F2 applies when a significant amount of the proceeds of the offering will be invested in, loaned to, or otherwise transferred to another issuer that is not a subsidiary controlled by the issuer. In these situations, the disclosure of certain items of the F2, including Schedule 1 and Schedule 2, if applicable, must be made as if each of those other issuers were the issuer preparing the offering memorandum

4. Inadequately disclosing the issuer's business

Some issuers, particularly new entities, have provided very little disclosure about their business and its development as required under items 2.2 and 2.3 of the F2. In some cases, only a few generic sentences regarding the business have been provided.

As noted, an issuer must provide sufficient information in its OM to enable a purchaser to make an informed investment decision.

Issuers should consider providing information in a tabular format if doing so would make the section easier to read and understand.

Issuers may also need to include information about the resources required to complete their product's development (in the case of research and development issuers), the competition they face, or the political, technological, economic and other factors they are currently aware of that may impact their business. When discussing competition, issuers should discuss both their current *and prospective* competition. This discussion should also address both competing companies and competing/alternative technologies the issuer faces.

Entities with more complex business structures (such as various subsidiaries, partnerships, or joint ventures), may need to include information about the business structure, including an organizational chart, to enable a reader to understand the business.

Issuers should ensure they update the business and the development of the business sections, when an amended OM is prepared for ongoing distributions.

5. Failing to provide balanced disclosure

Some issuers appear to present an unrealistic or misleading picture of themselves to prospective purchasers in their OMs.

For example, a newly formed investment fund, with no track record, and no assets or capital, may propose raising $100,000,000 under its "maximum offering" that it will use to build an investment portfolio.

While this may be the issuer's long-term goal, we believe that it is unrealistic, and potentially misleading, to present it in an OM that must, at a minimum, be amended annually. Disclosing, under "Risk Factors" in the OM, that there is no assurance the issuer will actually be able to raise the maximum offering does not justify, in our view, the potentially misleading nature of such disclosure.

Issuers should ensure that disclosure in their OMs is balanced, and realistic – relative to their current stage of development.

6. Inadequately disclosing available funds and use of available funds

We have observed several forms of non-compliance with respect to the requirements under items 1.1 and 1.2 of the F2. Issuers must ensure that the disclosure in these two items meets the form requirements and that the disclosure does not misrepresent to prospective purchasers the available funds or use of funds.

In the table under item 1.1 - *Funds*:

a) Some issuers have assumed that line E of the table "additional sources of funding required" is intended to capture anticipated future financings. However, the intent of line E is to enable an issuer to show other sources of funding currently available to the issuer (such as financing that has been arranged through a bank), that the issuer plans to combine with the available funds from the offering to achieve its principal capital-raising purposes.

b) Some issuers have disclosed that there were no commissions or offering costs, when other disclosure in the OM indicated otherwise. For example, in one case, an issuer entered $0 for offering costs, and then disclosed in a footnote that the offering costs

would be paid out of general corporate funds. In this instance, the offering costs should have been disclosed in the table as required.

c) Issuers frequently fail to include their existing working capital deficiency (as required by item F of the table) when determining their funds available.

In the table under item 1.2 - *Use of available funds*:

d) Several start-up entities have failed to include interest payments or cash distributions as intended uses of available funds, when the issuer does not or will not have other sources of cash flow to meet such obligations, other than the net proceeds from the offering.

   For example, a start-up mineral resource company offering bonds with a 10% coupon to prospective purchasers may require three to five years, or longer, for its proposed project to begin generating cash flow. Assuming a three year timeline, the issuer would be required to use 30% of the offering to fund interest payments on the bonds if no other sources of funding were available. Failing to disclose this intended use of available funds would not meet the form requirements and would likely be considered a misrepresentation.

e) Many issuers have used generic descriptions for the use of available funds, such as "for the purposes of investment in eligible properties" and then stated the entire amount of the available funds being used for such purpose.

   The F2 requires issuers to provide a detailed breakdown of the intended uses of available funds. For start-ups, this may include capital costs, general and administrative costs, and sustaining capital until the issuer expects to be self-sufficient. While the F2 does not prescribe specific line items, issuers should carefully consider if the disclosure they provide in this table is sufficient for a purchaser to make an informed investment decision and if omission of material information would constitute a misrepresentation.

f) Issuers frequently fail to identify payments to be made to related parties as required by the instructions to the table (for example, payments to management companies controlled by insiders of the issuer).

7. Inappropriately reallocating available funds

Item 1.2 of the F2 requires issuers to disclose the intended use of available funds. Disclosing that funds may be reallocated for sound business purposes does not allow the issuer to use the funds for purposes quite different than the stated use of funds.

The decision, *Shire International Real Estate Investments Ltd., Re, 2011 ABASC 608,* clarifies that including disclosure that funds may be reallocated, does not entitle the issuer to open-ended use of the funds. The funds may only be reallocated for sound business reasons, and it would be expected that those business reasons would have something to do with the stated business of the

issuer. In addition, the exceptional business reasons would be expected to be assessed with regard to the interests of the issuer and its investors.

Issuers must ensure that purchasers are provided accurate and complete information with respect to how the issuer intends to use the available funds.

8. Omitting key terms of material agreements

Item 2.7 of the F2 requires issuers to disclose the key terms of all material agreements to which the issuer is a party as at the date of the OM.

Issuers often omitted key terms of material agreements, especially those with related parties including the form and amounts of compensation being paid by the issuer to a related party and a description of the goods, services, or other value being received in return.

Also, issuers sometimes neglected to disclose key terms of an agreement if the agreement was disclosed in the notes to the financial statements or attached in its entirety to the OM. Including an agreement as an attachment to the OM, or making a statement that a copy of the agreement is available upon request, is not a substitute for disclosing a summary of the key terms of the material agreements as required under item 2.7 of the F2.

9. Omitting compensation disclosure

We have observed cases where the OM did not clearly or completely disclose compensation paid to directors, officers, and promoters, and related parties.

It is Staff's view that compensation must be disclosed whether or not the compensation was (or will be) immediately received by the director, officer, promoter, principal holder or related party. Also, issuers should include compensation paid and anticipated to be paid to an individual's professional corporation or holding company, whether or not such compensation was (or is) anticipated to be "paid out" to the individual.

While other requirements of the F2 may result in such forms of compensation being disclosed elsewhere in the OM (such as under material agreements or in the notes to the financial statements as a related party transaction), issuers must also disclose the total amount of the compensation in the table required under item 3.1 of the F2. Including a footnote reference in the table and then disclosing the amount of the compensation in those footnotes that should be disclosed directly in the table does not meet the requirements.

10. Inadequately disclosing management experience

Staff have reviewed certain OMs where the disclosure of management experience is misleading in nature or is generic and insufficient for a purchaser to evaluate management's background and ability to operate the issuer's business. Item 3.2 of the F2 requires the disclosure of the principal occupations of the directors and executive officers over the past five years, including a description of experience associated with the occupation. To enable a purchaser to make an

informed investment decision, an issuer should ensure the description of the directors' and officers' previous experience and occupations is accurate, relevant and clearly described, rather than simply listing prior occupations held by the respective individuals or including a general statement such as "*has over 15 years of real estate experience*." Such disclosure could be misleading without further explanation, depending on the nature of the experience.

11. Disseminating material forward-looking information not included in the OM

We have observed some issuers relying on the OM Exemption and disseminating material forward-looking information that was not included in the OM. For example, some issuers are providing information about expected returns to prospective purchasers without disclosing information about those expected returns in the OM.

Item A.12 of the Instructions prohibits issuers from disseminating any material forward-looking information during the course of a distribution of securities, unless that material forward-looking information is set out in the OM. Further, item B.14 of the Instructions states that material forward-looking information included in an OM must comply with sections 4A.2 and 4A.3 of NI 51-102 *Continuous Disclosure Obligations*.

12. Omitting required interim financial reports

Various issuers have filed OMs that omitted the required interim financial reports. In certain circumstances issuers prepared an amended OM with up-to-date information during the fiscal year, but neglected to include the interim financial reports that became required as a result of the OM's new date. Under item B.5 of the Instructions, an issuer that has completed at least one financial year must include financial statements for any interim period completed more than 60 days before the date of the OM.

13. Omitting key elements of financial statements

Under National Instrument 52-107 *Accounting Principles and Auditing Standards* (NI 52-107)Financial statements contained in an OM must comply with Canadian Generally Accepted Accounting Principles (Canadian GAAP) applicable to publicly accountable enterprises. We have reviewed various OMs that did not meet this requirement because the interim financial reports or annual financial statements omitted one or more of the following key elements:

- statement of financial position
- statement of comprehensive income
- statement of changes in equity
- statement of cash flows
- appropriate comparative periods for the above noted statements
- notes to the financial statements

Issuers must ensure that each set of interim financial reports or annual financial statements included in the OM complies with NI 52-107 and is complete.

14. Failing to obtain required audits

We have reviewed various OMs that included financial statements that were not audited as required under item B.9 of the Instructions.

Under item B.9 of the Instructions, issuers that have not completed their first financial year, or their first financial year-end is less than 120 days before the date of the OM, are required to include *audited* financial statements for a period from inception to a date not more than 90 days before the date of the OM. In addition, issuers that have completed one or more financial years are required to include audited financial statements for the most recently completed year. In some instances issuers have not complied with this requirement.

15. Omitting required audit reports or including non-compliant audit reports

In certain instances issuers neglected to include the audit report for comparative financial statements when those financial statements had been audited, contrary to the requirements under item B.9 of the Instructions.

Also, in some circumstances, issuers attached to the financial statements in the OM an auditor's report that contained a qualified opinion or that was not prepared in the specified form. Issuers, other than investment funds, are required to include in the OM financial statements that comply with NI 52-107. Section 3.3 of NI 52-107 requires the financial statements to be accompanied by an auditor's report that, among other things, expresses an unmodified opinion and is in the form specified by Canadian generally accepted auditing standards (Canadian GAAS) (although, in certain situations, item D.2 of the Instructions permits a qualification related to inventory). Issuers should also ensure that the audit report included in the OM complies with the form specified in Canadian Auditing Standard 700 *Forming an Opinion and Reporting on Financial Statements* of Canadian GAAS.

16. Inappropriately using a Notice to Reader

In some OMs issuers attached a Notice to Reader to their interim financial reports that included wording similar to the following:

> "*Readers are cautioned that these financial statements may not be appropriate for their purposes.*"

This type of statement is not permitted, as it is the issuer's responsibility to ensure that the financial statements included in the OM comply with the OM requirements and are thereby appropriate for the purposes of the OM. Although interim financial reports are not generally required to be audited, they still must comply with the applicable Canadian GAAP. Issuers that do not have the in-house expertise to prepare financial statements that comply with the applicable Canadian GAAP may need to obtain assistance from external advisors to do so.

17. Failing to prepare financial statements in accordance with appropriate accounting principles

We have reviewed financial statements in OMs that reflected a variety of inappropriate accounting principles, including financial statements that were prepared in accordance with Canadian GAAP applicable to private enterprises.

Item B.1 of the Instructions states that all financial statements included in an OM must comply with NI 52-107, regardless of whether the issuer is a reporting issuer. NI 52-107 generally requires financial statements to be prepared in accordance with Canadian GAAP applicable to publicly accountable enterprises. Item B.1 of the Instructions also states that an issuer ***cannot*** use Canadian GAAP applicable to private enterprises, except for preparation of certain acquisition statements.

18. Improperly certifying the OM

We have reviewed OMs that were not properly certified for one of the following reasons:

- not all the required signatories signed the certificate
- the signatories did not date the certificate
- the signatories did not date the certificate the date they signed it
- the date on the certificate differed from the date on the face page
- the date on the certificate was prior to the date of the audit report
- the certificate was not placed in the correct location in the OM

Issuers must date the certificate the date it is signed (see item 13 of the F2) and therefore must not back-date it.

The certificate states: "*This Offering Memorandum does not contain a misrepresentation*." When a signatory certifies this statement he or she is certifying the contents of the entire OM. Therefore, it is Staff's view that the signatories should have a complete version of the OM, including required financial statements, before reviewing and signing the OM.

Item A.2 of the Instructions states that an issuer must address the items required by the F2 in the order set out in the F2. As a result, the certificate should be placed after all other items in the OM. In some instances, issuers have placed the certificate before other items in the OM, such as the financial statements.

Consequences of Failing to Comply with the Requirements

Failing to comply with the Requirements may result in a CSA regulator taking one or more of the following actions (depending on the nature and extent of the securities law breach):

- Requiring the issuer to file an amended OM
- Requiring the issuer to prepare and deliver an amended OM to existing purchasers
- Requiring the issuer to grant rescission rights to certain investors
- Imposing a cease trade order
- Taking enforcement action

Questions
Please refer your questions to any of the following:

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