

October 11, 2016

Ms. Sherry Hazel
American Institute of Certified Public Accountants
1211 Avenue of the Americas, 19th Floor
New York, NY 10036-8775
USA

Re: Proposed Statement on Auditing Standards, Auditor Involvement With Exempt Offering Documents

Dear Ms. Hazel:

Deloitte & Touche LLP ("D&T," "our" or "we") is pleased to respond to the request for public comment from the Auditing Standards Board (ASB) of the American Institute of Certified Public Accountants (AICPA) on its proposed Statement on Auditing Standards (SAS), *Auditor Involvement With Exempt Offering Documents* (the "proposed SAS"). We support the issuance of this proposed SAS requiring the auditor, when involved with the exempt offering document,¹ to perform certain procedures so as to determine whether the information included or incorporated by reference in (hereafter referred to only as "included in") the exempt offering document could undermine the credibility of the financial statements and the auditor's report thereon. The performance of these procedures will provide an additional level of scrutiny by the auditor of the information included in the exempt offering document, thereby enhancing the trust that the user can place on the information provided by the entity and upon which the user may make investment decisions.

D&T recognizes that the AICPA is aware of the Securities and Exchange Commission's (SEC) findings pertaining to violations of compliance with continuing disclosure obligations in municipal bond offering documents of municipal issuers and certain not-for-profit entities. However, given the more recent and high profile related enforcement actions filed by the SEC, we recommend that the proposed SAS also require the auditor to consider performing the procedures in the proposed SAS where the auditor becomes aware that the auditor's report is to be included in the exempt offering document and the triggers outlined in paragraph 8 have not been met, as this would better serve the public interest. We have elaborated further on this position, as well as providing other recommendations related to the proposed SAS for the ASB's consideration, in our letter below.

ISSUES FOR COMMENT

1. Commenters are asked to provide feedback on the types of offerings included in the scope of the standard, specifically whether franchise offerings should be included in the scope of the proposed SAS.

D&T believes that because most franchise offerings require the inclusion in the offering documents of the auditor's report and the related financial statements, it is appropriate

¹ This includes (a) securities exempt from registration under the Securities Act of 1933, as amended, or (b) franchise offerings regulated by the Federal Trade Commission.

for the franchise offerings regulated by the Federal Trade Commission (FTC) to be included in the scope of the proposed SAS.

2. Commenters are asked to provide feedback on (a) whether they believe the activities that have been identified should trigger involvement and (b) whether additional activities should be considered as triggers for involvement.

We believe that the specified activities that have been identified do trigger involvement of the auditor, and as such are appropriate.

In addition, D&T strongly believes that, in the absence of a triggering event, when auditors otherwise become aware that the auditor's report and the related financial statements are being included in an exempt offering document, it is in the best interest of the public for the auditor to consider performing the procedures outlined in the proposed SAS in paragraphs 10-17. To that end, we recommend that an additional requirement be added to the proposed SAS addressing the auditor's consideration to perform the procedures when the auditor has knowledge that the auditor's report will be included in an exempt offering document or otherwise used for due diligence purposes. See our proposed recommendation at paragraph 8x below.

3. Commenters are asked to provide their views regarding the proposed requirement for subsequent event procedures to be performed when the auditor is deemed involved with an exempt offering document.

D&T concurs with the approach adopted in the proposed SAS relating to the required subsequent event procedures. While management of the entity, or the franchisor, as applicable, issuing the exempt offering document may not be required by the applicable financial reporting framework or otherwise to evaluate the impact of subsequent events on the financial statements, we don't believe that means that management of the entity, or the franchisor, shouldn't be considering the impact of subsequent events on the information reflected in the exempt offering document and whether there are any additional required continuing disclosure obligations that need to be fulfilled.

Consideration should, however, be given to providing additional application guidance in paragraph A17 of the proposed SAS pertaining to situations where a subsequent event has occurred that has implications to the financial statements that need to be addressed retrospectively. D&T believes that after consideration of the facts and circumstances it may be appropriate to revise the annual financial statements that are included in the exempt offering document if interim financial statements have been issued that reflect the change. Examples of these situations may include when the entity has issued interim financial statements and has either adopted a new accounting principle that is being applied on a retrospective basis, or a discontinued operation that has occurred in an interim period subsequent to the previously audited financial statements.

SPECIFIC COMMENTS

The following comments relate to specific paragraphs in the proposed SAS. Edits are highlighted as follows: additions are noted in bold underline and deletions are noted in strikethrough text.

Paragraphs 1 and Ax

D&T notes that “exempt offering document” is a defined term in the proposed SAS; therefore, the use of the abbreviated phrase “offering document” should not be used and rather “exempt offering document” should be used consistently throughout the proposed SAS. We also believe that *offering document*, first mentioned in paragraph 1, may also be referred to as an *offering statement* or an *offering circular*. Accordingly, we recommend that language to that effect be added to the proposed SAS as the first application guidance paragraph under the Application and Other Explanatory Material section.

Ax. An exempt offering document may also be referred to as an offering statement or an offering circular.

Paragraphs 5, A5 and A5x

In order for a franchisor to sell a franchise in the United States, the franchisor must comply with the FTC Franchise Rule, including the preparation of a Franchise Disclosure Document. Since the FTC Franchise Rule does not override state franchise laws, those state laws would also need to be adhered to by the franchisor. In addition, certain states are also members of the North American Securities Administrators Association (NASAA). NASAA has adopted the disclosure requirements of the FTC Franchise Rule as well as requiring the franchisor to submit additional application documents; together this package constitutes the Uniform Franchise Registration Application (UFRA). There is a requirement for a “consent of accountant (or a photocopy of the consent) to the use of the latest audit report in the Franchise Disclosure Document” to be included in the UFRA (refer to Form F – Consent of Accountant).

Given that the proposed SAS is applicable to both securities exempt from registration under the Securities Act of 1933 and franchise offerings regulated by the FTC, we recommend that the definition of *inclusion letter* in paragraph 5 be amended to strike the notion that such a letter “is not considered to be part of the offering document.”

We also recommend adding an example specific to franchise offerings in paragraph A5x, so as to address those situations where a letter from the auditor agreeing to the inclusion of the auditor’s report on the financial statements may actually be required when dealing with a franchise offering, as noted in the circumstances discussed above (UFRA Form F).

5. ...

Inclusion letter. A letter requested by the entity or franchisor, addressed to the entity or franchisor, as applicable, and signed and dated by the auditor indicating that the auditor agrees to the inclusion of the auditor’s report on financial statements (or the auditor’s review report on interim financial information) in the exempt offering document. ~~This letter is not considered to be part of the offering document.~~ (Ref: par. 5-A5x)

A5. For securities exempt from registration under the Securities Act of 1933, ~~a~~An inclusion letter may also be referred to as an *agree-to-include letter*, an *acknowledgement letter*, or an *awareness letter*. **This type of inclusion letter is not considered to be part of the exempt offering document.** Note that *awareness letter* is defined in AU-C section 925 with a different meaning in that context.

A5x. For franchise offerings regulated by the Federal Trade Commission, certain states may require that that a consent of accountant be obtained. This consent, also referred to as an acknowledgement letter, is a required disclosure form, and is considered part of the Franchise Disclosure Document.

Paragraphs 8, A5y A14 and A15

While D&T recognizes that in paragraph 7 the proposed SAS clarifies that the word "included" in an exempt offering document is to be read to also encompass an auditor's report that is "incorporated by reference" in an exempt offering document, we believe that it is important to further highlight that fact when reading the requirement in paragraph 8(a) given that understanding the requirements in paragraph 8 are crucial to the appropriate execution of the proposed SAS. Consequently, D&T believes that the phrase "incorporated by reference" should be added to paragraph 8(a). Further, we believe that application guidance should be added to clarify what is intended by "incorporated by reference" in the context of the proposed SAS, and the fact that in these circumstances, the auditor's report and the related financial statements should, at a minimum, be readily available to the investor or franchisee, as applicable.

D&T has also noted some inconsistencies in the use of phrases between the proposed SAS and the clarified Attestation Standards, and within certain of the sub-bullets of paragraph 8 and other paragraphs of the proposed SAS. To address these points, we recommend the following edits be made to paragraph 8 as well as adding an application guidance paragraph (paragraph A5y) to the proposed SAS immediately below the heading "Involvement":

8. The auditor should apply the requirements of this SAS in connection with an exempt offering when both of the following conditions exist:

a. The auditor's report is included **or incorporated by reference** in the exempt offering document. **(Ref: par. A5y)**

b. ...

iii. Issuing a comfort or similar letter in accordance with AU-C section 920, *Letters for Underwriters and Certain Other Requesting Parties*, or an ~~attestation engagement~~ **a practitioner's report on an attestation engagement** in lieu of a comfort or similar letter on information included in the **exempt** offering document (Ref: par. A10 – A12)

iv. ...

v. Issuing an ~~attestation~~ **a practitioner's report on an attestation engagement** on information relating to the offering (Ref: par. A14 – A15) ...

A5y. Incorporated by reference for the purposes of this proposed SAS, means the act of including the auditor's report and the related financial statements within the exempt offering document by only mentioning or referring to the auditor's report and the related financial statements. The

purpose or intention is to make the auditor's report and the related financial statements a part of the exempt offering document. The auditor's report and the related financial statements need to be readily available to the users of the exempt offering document in order to be considered incorporated by reference.

We also recommend that the phrase "an attestation engagement report" in paragraphs A14 (which is illustrated below) and A15 be revised to read "a practitioner's report on an attestation engagement" for consistency with the attestation standards.

Paragraphs 8x (inserted between paragraphs 8 and 9) and A6

For reasons expressed above in our response to issue 2, we believe that language should be inserted into the proposed SAS alerting the auditor as to the responsibility the auditor owes to the investees and franchisees to consider performing procedures on the other information included in the exempt offering document as well as procedures related to subsequent events when the auditor becomes aware of an exempt offering and there is no triggering event that would otherwise cause the auditor to be involved. We also believe that application guidance in paragraph A6 should be moved and cross-referenced to the proposed paragraph 8x, as it provides additional clarity as to our view. Our recommendations are as follows:

8x. When the auditor otherwise becomes aware that the auditor's report, and the related financial statements, are to be included in an exempt offering document, and the auditor is not involved with the exempt offering document, the auditor should consider performing the procedures in paragraphs 10-17. (Ref: par. A6)

A6. Auditors may become aware of an offering through a communication from an entity or through the receipt of a draft **exempt** offering document from an underwriter, placement agent, broker-dealer, or the entity. Awareness of an offering does not constitute involvement unless the auditor performs one or more of the activities in paragraph 8b. **In considering whether to perform the procedures in paragraphs 10-17 when the auditor is not otherwise involved with the exempt offering, the auditor may consider, where appropriate, obtaining legal advice.**

Paragraph 12

D&T recommends that there be an alignment between the minutes of those being read for the subsequent event procedures in paragraph 12(a) iii, and the minutes being referred to when obtaining the updated written representations in paragraph 12(b) iii. We also recommend that the language in paragraph 12(b) iii be consistent with certain of the application guidance in paragraph A9 of AU-C section 580, *Written Representations*. Further, we recommend adding a requirement for a written representation regarding communications from regulatory agencies as described in paragraph A9 of AU-C section 580. We believe that the phrase "entity's owner" may be more appropriate than "shareholder," given that the scope of the proposed SAS encompasses franchise offerings (and franchisees are neither stockholders nor shareholders) and, accordingly, we have included such language in our proposed edits.

12. When the auditor is involved with an **exempt** offering document, the auditor should perform the following procedures described in AU-C section 560, *Subsequent Events and Subsequently Discovered Facts*:

a. ...

iii. Reading minutes, if any, of the meetings of the entity's owners, management, and those charged with governance that have been held after the date of the financial statements and inquiring about matters discussed at any such meetings for which minutes are not yet available

b. ...

iii. That minutes of the meetings, **or summaries of actions of recent meetings for which minutes have not yet been prepared,** of shareholders, directors, and committees of directors **the entity's owners, management, and those charged with governance** are complete and authentic records of proceedings at all such meetings held since previous representations were provided (Ref: par. A24-A26)

iv. That communications received from regulatory agencies concerning noncompliance with, or deficiencies in, financial reporting practices since previous representations were provided

Paragraph 14

D&T believes that the following edits to the paragraph will enhance the clarity of the requirement.

14. When the **predecessor** auditor of an acquired entity is involved with the **exempt** offering document and ~~(a)~~ the acquirer's audited financial statements included in the **exempt** offering document reflect a period that includes the date of acquisition and ~~(b)~~ the auditor is not the continuing auditor of the acquiring entity, the **predecessor** auditor may be unable to perform all of the procedures in paragraph 12 of this SAS. In such circumstances, the auditor should obtain written representations from management **of the former client,** and **a representation letter from** the successor auditor as described in AU-C section 560.

Paragraph A11

The phrase "modified comfort letter" is not used elsewhere in the proposed SAS, nor in AU-C section 920, *Letters for Underwriters and Certain Other Requesting Parties* (AU-C section 920); accordingly, D&T recommends that the sentence in paragraph A11 be redrafted to reflect the language used in paragraph 12 of AU-C section 920.

A11. An auditor may issue a comfort letter that provides negative assurance to a requesting party (as defined in AU-C section 920) only if the requesting party provides the written opinion from external legal counsel or the required

representation letter described in AU-C section 920. If the requesting party does not provide the required written opinion from external legal counsel or a representation letter, the auditor may issue a ~~modified-comfort~~ letter that does not provide negative assurance, **but that instead includes certain statements required by AU-C section 920.** [fn 13]

Paragraph A13

D&T believes that the nature of the conversations between the underwriters and their counsel and the entity's auditors is more akin to a discussion (as used in the heading to the paragraph) than an interview; accordingly, we recommend revising the wording in paragraph A13 to reflect this understanding of the due diligence process.

A13. As part of their due diligence process on a specific exempt offering, underwriters and their counsel may ask to ~~interview~~**meet** the entity's auditors either formally or informally. The meetings at which ~~such interviews~~**the discussions** occur are often referred to as oral due diligence meetings. The ~~interview~~**discussion** typically focuses on the audit engagement, the entity's financial statements, and the entity's system of internal controls over financial reporting. Auditors use professional judgment in determining whether to participate in oral due diligence meetings if the underwriter has not provided the representation letter described in paragraph A11 or if external legal counsel has not provided the required written opinion. If the auditor agrees to participate, auditors use professional judgment in determining which questions in an oral due diligence meeting can be addressed.

Paragraph A14

The example given in paragraph A14 relating to the calculation of escrow account requirements for an advance refunding of debt securities uses language that is not acceptable when performing an agreed-upon procedures engagement in accordance with paragraph A21 of AT-C section 215, *Agreed-Upon Procedures Engagements*. We recommend the following edit be made to address the ambiguity of the word "verify" and to conform report language as we discussed in our comments related to paragraph 8.

A14. During the offering process, management or other involved parties may engage practitioners to perform an attestation engagement related to the offering. For example, in a debt offering, management or its legal advisors may engage a practitioner to perform procedures on the entity's compliance with the revenue coverage requirements on outstanding debt securities or to ~~verify~~**check the mathematical accuracy of** the calculation of escrow account requirements for an advance refunding of debt securities. If the auditor whose report accompanies the financial statements included in the **exempt** offering document also provides an **practitioner's report on an** attestation engagement ~~report~~ relating to that **exempt** offering, the auditor is deemed to be involved. If the practitioner engaged to perform the attestation engagement is not the financial statement auditor, the practitioner engaged to perform the attestation engagement is not deemed to be involved with the **exempt** offering document in the manner discussed in this proposed SAS.

Paragraphs A16, A16x and A16y

For reasons articulated in paragraphs 5 and A5 above and because it is also duplicative of application guidance already reflected in the proposed SAS, D&T recommends that the sentence indicating that the *inclusion letter* would “typically not be included in the offering document” be deleted from paragraph A16.

We also believe that the example, which is specific to securities exempt from registration under the Securities Act of 1933, should be reflected as a separate application guidance paragraph (see paragraph A16x) and amended to reflect the actual date of the exempt offering document in which the auditor is agreeing to include the auditor’s report. This is to ensure that the auditor’s report is not unknowingly included in multiple versions of, or amendments to, the exempt offering document over an extended timeframe. The date of the financial statements should be added to the example in paragraph A16x for clarity.

Further, we believe an additional example that is relevant to franchise offerings regulated by the FTC should be inserted (see paragraph A16y). This example should include illustrative wording relating to the *consent of accountant* or *acknowledgement letter* that would be required to be included in a Franchise Disclosure Document.

A16. When an auditor’s report is used in connection with an exempt offering, it is not usually necessary for the auditor to provide any type of written agreement, but some exceptions exist. If the auditor is asked to provide an inclusion letter, the auditor may provide a letter indicating that the auditor agrees to the inclusion of the auditor’s report in the **exempt** offering document. ~~This letter would typically not be included in the offering document.~~

A16x. The following example language may be used to indicate that the auditor agrees to inclusion **of the auditor’s report on financial statements in an offering document for which the securities are exempt from registration under the Securities Act of 1933:**

INDEPENDENT AUDITOR’S INCLUSION LETTER

We agree to the inclusion **[incorporation by reference]** in the **[Name of Offering Document] dated [insert issuance date of Offering Document]** of our report, dated February 5, 20X3, on our audit of the financial statements of **[Name of Entity] as of December 31, 20x2 [and 20x1] and for the year[s] then ended [for each of the three years in the period ended December 31, 20x2].**

A16y. The following example language may be used to indicate the **auditor’s acknowledgement to the inclusion of the auditor’s report on financial statements in a franchise offering document:**

INDEPENDENT AUDITOR’S ACKNOWLEDGMENT

We agree to the inclusion in the [name of Offering Document, for example the Franchise Disclosure Document] dated [insert issuance date of Offering Document] issued by [Blank Franchisor] (“the “Franchisor”) of our report, dated February 5, 20x3, relating **to the financial statements of the Franchisor as of December 31,**

20x2 [and 20x1] and for the year[s] then ended [for each of the three years in the period December 31, 20x2].

Paragraph A17

D&T concurs that when the auditor "signs" the auditor's report knowing that the entity intends to include it in an exempt offering document, as contemplated in paragraph 8(b) vii, then the auditor is required to perform the procedures in paragraphs 10-17.

However, we believe that it would be beneficial to provide the auditor with additional examples as to what constitutes the "signing of a copy of the auditor's report" as stated in paragraph 8(b) vii. An additional example which we believe does not constitute the signing of the auditor's report may include a situation where a "short-form" auditor's report is issued to be used in the exempt offering document (subsequent to a full-length auditor's report being issued relating to the comprehensive annual financial statements).

We recommend that the wording of paragraph A17 be amended to reflect our views as noted below.

- A17. Signing the auditor's report involves an original manual or electronic signature on the auditor's report, not a reproduction of an auditor's report that was previously manually or electronically signed. For example:
 - ~~Providing a copy of a previously signed the auditor's report, with an original~~ **regardless of whether the signature was** manual or electronic, signature at the underwriter or bond counsel's request to file with the official closing documents, **which include the original financial statements as they existed at the time the auditor's report was first issued,** for the offering does not constitute a ~~the~~ signing of the auditor's report.
 - **Issuing an auditor's report relating to the original financial statements, when a previously issued auditor's report has already been provided on the comprehensive annual financial statements, (the auditor's report on the comprehensive financial statements may have included additional paragraphs pertaining to, for example, the combining schedules and other statistical information), does not constitute the signing of the auditor's report.**
 - Signing an updated auditor's report when, for example, the financial statements are restated **revised** does constitute a signing of the auditor's report. **Examples of when financial statements may be revised include:**
 - **The occurrence of a subsequent event requiring disclosure in the financial statements**
 - **A change in accounting principle resulting in a retrospective change to previously issued financial statements**
 - **A correction of an error.**

Paragraph A21

D&T believes that the illustrative example should be amended to address the possibility that comparative financial statements may be presented. In addition, when the auditor is

not involved in the offering document, and the terms of the engagement require disclosure of this fact by the entity in the offering document, the onus is not on the auditor to consider whether or not to include the illustrative language similar to that in paragraph A3. This would be a contractual obligation that the entity would need to fulfill. We do not believe that the professional standards can set requirements or provide application guidance for the entity, and as such we recommend the deletion of the sentence that references paragraph A3.

A21. The following is an example of a typical description of the auditor's role when an entity wishes to make reference to the auditor in an exempt offering:

Independent Auditors

The financial statements of [~~A~~*name of Entity*] ~~×~~ as of December 31, 20X2 **[and 20x1]** and for the year[s] then ended **[for each of the three years in the period ended December 31, 20x2]**, included in this offering document, have been audited by [~~A~~*name of Firm*], independent auditors, as stated in their report appearing herein.

~~If the auditor is not involved with the offering document and the terms of the engagement require disclosure of this fact, additional disclosure similar to that illustrated in paragraph A3 may be considered.~~

Paragraph A23

The Office of Thrift Supervision is no longer in existence, having been merged with the Office of the Comptroller of the Currency (OCC) on July 21, 2011. We recommend that paragraph A23 be amended accordingly. We also recommend that the AICPA clarify that the exempt offering documents subject to the jurisdiction of the OCC, as contemplated in paragraph A23, continue to refer to auditors as "experts." We also recommend that, where appropriate, the auditor consider seeking legal advice when the auditor is being named as an expert.

A23. In situations in which the term *expert* is sufficiently defined the auditor may agree to be referred to as an expert outside the context of a registration statement filed under the Securities Act of 1933, as amended. For example, if the term *expert* is defined under applicable state law, the auditor may agree to be named as an expert in an **exempt** offering document in an intrastate offering. The auditor may also agree to be named as an expert, as that term is used by the Office of **the Comptroller of the Currency (OCC)** Thrift Supervision (~~OTS~~), in **exempt** offering documents that are subject to the jurisdiction of the ~~OTS~~**OCC**. An understanding of any auditor liability provisions that may be included in the applicable federal or state statutes is an important consideration. **In such circumstances, the auditor may consider it appropriate to obtain legal advice.**

Paragraph A26

When considering the structure of the government and the relevant component units in determining the extent of procedures to perform, we believe that similar considerations should be extended when determining which component units may provide additional

management representations as highlighted in paragraph 12. The following edit is recommended to provide further clarity.

A26. In determining the extent of procedures to perform in connection with a governmental debt offering, **and the related additional management representations to request,** the auditor may consider the structure of the government and which component units relate to the debt offering. A component unit not guaranteeing the repayment is ordinarily not a relevant entity to the users of the debt offering. Alternatively, if the debt is offered by a particular component unit, the scope of subsequent event procedures would likely be limited to the applicable component unit responsible for the repayment of the debt. However, if the full set of financial statements for the reporting entity were included, the scope of subsequent event procedures would likely also encompass the primary government.

Appendix A — Examples of Exempt Offerings, Paragraph 1

We believe that it may be beneficial to clarify that the example listed in paragraph 1(c) iii relating to Regulation A applies to both Tier 1 and 2 offerings.

* * *

We would be pleased to discuss our letter with you at your convenience. If you have any further questions, please contact Dora Burzenski at (206) 716-7881.

Sincerely,

Deloitte & Touche LLP