



Agenda Item 3A

PROPOSED STATEMENT ON AUDITING STANDARDS AUDITOR INVOLVEMENT WITH EXEMPT OFFERING DOCUMENTS

TABLE OF CONTENTS

	Paragraph
Introduction	
Scope of This Statement on Auditing Standards	1–2
Effective Date	3
Objective Objectives	4
Definitions	5–7
Requirements	
Involvement	8–9
Other Information Included in the Offering Document	10–11
Subsequent Events Procedures	12–17
Application and Other Explanatory Material	
Scope of This Statement on Auditing Standards	A1–A3
Effective Date	A4
Definitions	A5– <u>A7</u>
Involvement	<u>A6A8–A18A23</u>
Other Information Included in the Offering Document	<u>A19A24–A23A28</u>
Subsequent Events Procedures	<u>A24A29–A26A32</u>
Appendix A—Examples of Exempt Offerings	<u>A27A33</u>
Appendix B—Amendment to SAS No. 122 Section 560, <i>Subsequent Events and Subsequently Discovered Facts</i>	<u>A28A34</u>
<u>Appendix C—Amendments to Exhibits A and B of Section 925, <i>Filings With the U.S. Securities and Exchange Commission</i></u>	<u>A35</u>

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

Introduction

Scope of This Statement on Auditing Standards

1. This Statement on Auditing Standards (SAS) addresses the auditor's responsibilities when both of the following conditions exist:

- a. The auditor's report on financial statements or the auditor's review report on interim financial information of an entity is included or incorporated by reference in an offering document relating to
 - i. ~~securities~~^[LH1] security offerings exempt from registration under the Securities Act of 1933, as amended (Securities Act of 1933) or
 - ii. franchise offerings regulated by the Federal Trade Commission ~~or~~^[LH2] state franchise laws.

Hereafter, such offerings are referred to as "exempt offerings."

- b. The auditor ~~is engaged to perform, or otherwise~~^[LH3] performs, one or more of the activities in paragraph 8b with respect to the offering document.

In such situations, the auditor is deemed to be involved with the ~~exempt~~^[LH4] offering document. (Ref: par. A1–A3)

2. Exempt offerings are made pursuant to federal or state securities laws and regulations or pursuant to federal or state franchise laws and regulations, including, in each case, the antifraud provisions thereof. Exempt offerings include, but are not limited to, the following:

- Securities transactions that are exempt from the registration requirements of Section 5 of the Securities Act of 1933, such as private placement offerings, exempt public offerings, and municipal securities offerings
- Offerings of securities issued or backed by governmental, municipal, banking, tax-exempt, or other entities that are exempt from registration under the Securities Act of 1933
- Franchise offerings

Effective Date

3. This SAS is effective for exempt offering documents with which the auditor is involved that are initially distributed, circulated, or submitted on or after June 15, 2018. (Ref: par. A4)

Objective

Objectives

4. ~~The objective~~^[LH5] objectives of the auditor when involved with an exempt offering document ~~is~~^{are} to perform procedures specified in this SAS ~~to determine whether and respond appropriately:~~

a. ~~When the auditor becomes aware that~~ information included in the exempt offering document ~~could undermine the credibility of the financial statements and the auditor's report thereon;~~ and ~~respond appropriately~~

a.b. ~~To facts that become known to the auditor after the date of the auditor's report that, had they been known to the auditor at that date, may have caused the auditor to revise the auditor's report.~~

Definitions

5. For purposes of this SAS, the following terms have the meanings attributed as follows:

~~**Inclusion letter.** A letter requested by the entity, addressed to the entity, 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 offering document. This letter is not considered to be part of the offering document. (Ref: par. A5)~~

Exempt offering document. The disclosure document that provides financial and nonfinancial information related to the entity issuing the exempt offering (or in the case of a franchise offering, the franchisor) and the offering itself. (Ref: par. A5)

Inclusion letter. ~~A~~^[LH6] letter requested by ~~and~~^[LH7] addressed to the entity or franchisor, as applicable that is signed and dated by the auditor indicating that the auditor agrees to the inclusion ~~or~~^[LH8] incorporation by reference of the auditor's report on financial statements (or the auditor's review report on interim financial information) in the exempt offering document. ~~(Ref: par. A5A6-A7)~~^[LH9]

Security. *Security* has the meaning as defined in Section 2(a)(1) of the Securities Act of 1933, as amended.

6. References in this SAS to an auditor's report are to be read to encompass an auditor's report on financial statements¹ or an auditor's review report on interim financial information in accordance with AU-C section 930, *Interim Financial Information*.

7. References in the remainder of this SAS to an auditor's report that is *included* in an exempt offering document are to be read to also encompass an auditor's report that is *incorporated by reference* in an exempt offering document.

Requirements

Involvement

8. The auditor is^[LH10] involved with an exempt offering document and should apply the requirements of this SAS in connection with an exempt offering document when both of the following conditions exist:

- a. The auditor's report is included in the exempt offering document.
- b. The auditor ~~is engaged to perform, or otherwise~~^[LH11] performs, one or more of the following activities with respect to the exempt offering document: (Ref: par. A6A8)
 - i. Assisting the entity in preparing information included in the exempt offering document (Ref: par. A7A9—A8A11)
 - ii. Reading a draft of the exempt offering document at the entity's request (Ref: par. A9A12)
 - iii. Issuing^[LH12] a comfort or similar letter in accordance with AU-C section 920, *Letters for Underwriters and Certain Other Requesting Parties*, or a practitioner's report on an attestation engagement ~~report~~ in lieu of a comfort or similar letter on information included in the exempt offering document (Ref: par. A10A13—A15A12)
 - iv. Participating in due diligence discussions with underwriters, placement agents, broker-dealers, or other financial intermediaries in connection with an exempt offering document (Ref: par. A13A16)
 - v. Issuing^[LH13] a practitioner's report on an attestation ~~report~~engagement on information relating to the exempt offering (Ref: par. A14A17—A15A18)
 - vi. Providing written agreement (for example, an inclusion letter) for the use of the auditor's report in the exempt offering document (Ref: par. A16A19—A21)

¹ An auditor's report in accordance with AU-C section 700, *Forming an Opinion and Reporting on Financial Statements*, AU-C section 800, *Special Considerations—Audits of Financial Statements Prepared in Accordance With Special Purpose Frameworks*, or AU-C section 805, *Special Considerations—Audits of Single Financial Statements and Specific Elements, Accounts, or Items of a Financial Statement*.

vii. Signing a copy of the auditor's report for inclusion in the exempt offering document (Ref: par. A17A22)

9. When the auditor is involved with ~~the an~~ exempt offering document, the auditor should perform the procedures in paragraphs 10–17 at or shortly before the date of distribution, circulation, or submission of the exempt offering document, and as appropriate upon any subsequent distribution, circulation, or submission of the exempt offering document. (Ref: par. A18A23)

Other Information Included in the Exempt Offering Document

10. When the auditor is involved with ~~the an~~ exempt offering document, the auditor should perform the procedures described in paragraphs 6—18 of AU-C section 720, Other Information in Documents Containing Audited Financial Statements, on the exempt offering document.

11. When performing the procedures required by paragraph 10, the auditor should determine that the auditor's name is not being used in a way that indicates that the auditor's responsibility is greater than the auditor intends. (Ref: par. A19A24—A28A23)

Subsequent Events Procedures

12. When the auditor is involved with an exempt offering document, the auditor should perform the following procedures ~~described in~~ derived from AU-C section 560, *Subsequent Events and Subsequently Discovered Facts*: ²[LH14]

- a. Procedures designed to identify events occurring between the date of the auditor's report and the date of the distribution, circulation, or submission of the exempt offering document ~~that~~[LH15] require adjustment, had they been known to, or disclosure in, the financial statements auditor as of the date of issuance, would have required the auditor to revise their report. Such procedures should include the following:
 - i. Obtaining an understanding of any procedures that management may have performed to identify such events
 - ii. Inquiring of management and, when appropriate, those charged with governance about whether any such events have occurred that might affect the financial statements
 - 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~~ auditor's report and inquiring about matters discussed at any such meetings for which minutes are not yet available
 - iv. Reading the entity's most recent subsequent interim financial statements, if any

² ~~Paragraphs .09–.10 of section 560, Subsequent Events and Subsequently Discovered Facts.~~

- b. Obtain updated written representations from management about the following:
- i. Whether any information has come to management's attention that would cause management to believe that any of the previous representations should be modified
 - ii. Whether any events have occurred subsequent to the date of the financial statements auditor's report that would require adjustment to, or disclosure in, ~~those~~the financial statements
 - iii. That management provided complete minutes of the meetings of ~~shareholders, directors,~~the [LH16] entity's owners, management, and committees ~~those charged with governance, or summaries of directors are complete and authentic records~~actions of proceedings at all such recent meetings held for which minutes have not yet been prepared [LH17] since previous representations were provided
 - iii.iv. That management provided communications received from regulatory agencies concerning noncompliance with, or deficiencies in, financial reporting practices since previous representations were provided (Ref: par. A24A29—A26A32)

13. If a predecessor auditor's report on a prior period is included in the exempt offering document but the predecessor auditor did not audit the entity's separate financial statements for the most recent audited period for which the entity's audited financial statements are included in the exempt offering document, and the predecessor auditor is involved with the offering, then the predecessor auditor should perform the following procedures described in AU-C section 560:³

- a. Reading the financial statements of the subsequent period to be presented on a comparative basis
- b. Comparing the prior period financial statements that the predecessor auditor reported on with the financial statements of the subsequent period to be presented on a comparative basis
- c. Obtaining Inquiring [LH18] of and requesting written representations from management of the former client, at or near the date of, distribution, circulation, or submission about whether
 - i) Any information has come to management's attention that would cause management to believe that any of the previous representations should be modified
 - ii) Any events have occurred subsequent to the date of the latest prior period financial statements reported on by the predecessor auditor that, had they been known to the

³ Paragraph .19 of AU-C section 560.

auditor as of the date of issuance, would have required the auditor to revise their report

e.d. Obtaining a representation letter from the successor auditor stating whether the successor auditor's audit revealed any matters that, in the successor auditor's opinion, might have a material effect on, or require disclosure in, the financial statements reported on by the predecessor auditor.

14. ~~When the [LH19] a predecessor~~ auditor of an acquired entity is involved with ~~the an 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, the predecessor~~ auditor may be unable to perform all of the procedures in paragraph ~~12~~13 of this SAS. In such circumstances, the auditor should obtain written representations from management ~~and of the former client, and a representation letter from~~ the successor auditor as described in AU-C section 560.⁴

15. If the auditor identifies subsequent events that may require adjustment of, or disclosure in, the audited financial statements or reviewed interim financial information, the auditor should not agree to the inclusion of the auditor's report in the exempt offering document until the auditor's consideration of the subsequent events including the effect on the auditor's report has been satisfactorily evaluated in accordance with AU-C section 560.⁵

16. If the auditor becomes aware of subsequently discovered facts, the auditor should not agree to the inclusion of the auditor's report in the exempt offering document until the auditor's consideration of the subsequently discovered facts, including the effect on the auditor's report, has been satisfactorily evaluated in accordance with AU-C section 560.⁶

17. If management does not revise the financial statements in circumstances in which the auditor believes they need to be revised, in addition to following the requirements in AU-C section 560, the auditor should not agree to the inclusion of the auditor's report in the exempt offering document.⁷

⁴ Paragraph .19c-d of AU-C section 560.

⁵ Paragraph .11 of AU-C section 560.

⁶ Paragraphs .15-.18 of AU-C section 560.

⁷ Paragraphs .17-.18 of AU-C section 560.

Application and Other Explanatory Material

Scope of This Statement on Auditing Standards (Ref: par. 1)

A1. Securities and franchise offerings may be offered by means other than a registered offering through exemptions to registration afforded under federal or state laws and regulations based on the size and nature of the offering or the issuing entity or franchisor, as applicable. Securities offered through means other than a registration statement under the Securities Act of 1933 and franchise offerings are within the scope of this SAS. Appendix A, “Examples of Exempt Offerings,” provides examples of types of offerings within the scope of this SAS. AU-C section 925, *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*, addresses the auditor’s responsibilities when financial statements of a nonissuer are included or incorporated by reference in a registration statement under the Securities Act of 1933.

A2. ~~The auditor may~~^{LH20}Some auditors include a provision in the terms of the engagement requiring the entity to obtain permission from the auditor before using the auditor’s report in connection with an exempt offering document. The existence of such a provision in an engagement letter does not establish involvement unless the auditor ~~is engaged to perform or otherwise~~ performs one or more of the activities in paragraph 8b with respect to the exempt offering document. An example provision for an engagement letter may read as follows:

The Entity may wish to include our report on these financial statements in an exempt offering document. The Entity agrees that the aforementioned audit report, or reference to our Firm, will not be included in any such offering document without our prior permission or consent. Any agreement to perform work in connection with an exempt offering document, including an agreement to provide permission or consent, will be a separate engagement.

Clarification in the *Exempt Offering Document When There Is No Auditor Involvement*

A3. The auditor may include in the terms of the engagement a provision that any exempt offering document issued by the entity with which the auditor is not involved, other than as determined by paragraph 8, clearly indicates the auditor is not involved with the contents of such offering document. An example disclosure related to an exempt offering document may read as follows:

[Name of Firm], our independent auditor, has not been engaged to perform and has not performed, since the date of its report included herein, any procedures on the financial statements addressed in that report. [Name of Firm] also has not performed any procedures relating to this offering document.

Effective Date (Ref: par. 3)

A4^{LH21}. Exempt offerings may have multiple stages, for example distribution of a preliminary offering document and a final offering document. The effective date relates to the initial distribution, circulation, or submission of an exempt offering document on or after June 15, 2018.

Definitions (Ref: par. 5)

A5^[LH22]. ~~—~~ An. An. An exempt offering document may also be referred to as an offering statement, offering memorandum, or an offering circular.

A6^[LH23]. For securities exempt from registration under the Securities Act of 1933, 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.

A7^[LH24]. For franchise offerings regulated by the Federal Trade Commission, certain states may require 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.

Involvement (Ref: par. 8)

A8~~A6~~. Auditors may become aware of an offering such as 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.

Assisting in Preparing Information (Ref: par. 8bi)

A9~~A7~~^[LH25]. Information does not include the audited financial statements; or interim financial information covered by the auditor's report; ~~or the. Further, information does not include~~ required supplementary information, or ~~supplementary information~~ other than required supplementary information ~~accompanying that accompanied~~ those financial statements that the auditor already considered during the audit of the financial statements or review of interim financial information.

A10^[LH26]. The assistance in preparing information is predicated upon the auditor being reasonably aware that the information will be included in an exempt offering document. For example, if an auditor assists the entity with preparing a schedule for the entity's internal purposes that later is included in an exempt offering document, the auditor would not be deemed to be involved.

A11~~A8~~. Self-review, management participation, and advocacy threats to a covered member's compliance with the AICPA Code of Professional Conduct may exist when a member provides corporate finance consulting services to an entity.⁸ A member may assist the entity in

⁸ The "Independence Rule" (ET sec. 1.200.001) of the AICPA Code of Professional Conduct.

drafting its exempt offering document or memorandum without impairing independence⁹ so long as the member complies with the AICPA Code of Professional Conduct.^{10, 11}

⁹ The “Corporate Finance Consulting” interpretation (ET sec. 1.295.130.02f) of the “Nonattest Services” subtopic (ET sec. 1.295) under the “Independence Rule.”

¹⁰ The “General Requirements for Performing Nonattest Services” interpretation (ET sec. 1.295.040), of the “Nonattest Services” subtopic under the Independence Rule.

¹¹ The “Corporate Finance Consulting” interpretation (ET 1.295.130.03) of the “Nonattest Services” subtopic under the “Independence Rule” also lists examples of types of corporate finance consulting services that would impair a member’s independence in connection with an offering.

Reading^[LH27] a Draft of the Exempt Offering Document (Ref: par. 8bii)

A12A9. Reading a draft of the exempt offering document encompasses situations in which the auditor receives a request from the entity to read ~~and provide feedback on the exempt offering document. Paragraphs 10–11 discuss the auditor’s responsibility, regardless of whether or not the auditor provides feedback to read the entity on the exempt offering document as part of required procedures when the auditor is deemed to be involved.~~

Issuing a Comfort or Similar Letter or a Practitioner’s Report on an Attestation ReportEngagement (Ref: par. 8biii)

A13A10. Underwriting agreements between an entity and its underwriters may include a request for the entity’s auditor to prepare a comfort letter that will assist the underwriters with their due diligence in connection with the offering. Comfort letters may also be requested by parties other than the underwriters. AU-C section 920 provides guidance related to the issuance of comfort letters.

A14A11. 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 920.¹² 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^[LH28] comfort~~ similar letter that does not provide negative assurance, but that instead includes certain statements required by AU-C section 920.¹³

A15A12. When a comfort letter is requested by a party other than a requesting party (as defined in AU-C section 920), the auditor should not provide that party with a comfort letter or similar letter described in AU-C section 920.¹⁴ Instead, the auditor may perform procedures requested by that party and issue a report on agreed-upon procedures.¹⁵

Participating in Due Diligence Discussions (Ref: par. 8biv)

A16A13. As part of their due diligence process on a specific exempt offering, underwriters and their counsel may ask to ~~interview^[LH29] meet with~~ the entity’s auditors either formally or informally.¹⁶ The meetings at which such ~~interviews~~ discussions occur are often referred to as oral due diligence meetings, however other communication methods may be used. The ~~interview~~ discussion typically focuses on the audit engagement, the entity’s financial statements,

¹² Paragraphs .07, .11, and .A92 of AU-C section 920, *Letters for Underwriters and Certain Other Requesting Parties*.

¹³ Paragraph .12 and example Q, “Letter to a Requesting Party That Has Not Provided the Legal Opinion or the Representation Letter Required by Paragraph .11,” of exhibit B, “Examples of Comfort Letters,” of AU-C section 920.

¹⁴ Paragraph .13 of AU-C section 920.

¹⁵ AT section 201, *Agreed-Upon Procedures Engagements*.

¹⁶ The “Confidential Client Information Rule” (ET sec 1.700.001) of the AICPA Code of Professional Conduct states that the auditor should not disclose any confidential client information without the specific consent of the client.

and the entity's system of ~~internal controls~~^{control}_[LH30] over financial reporting. Auditors use professional judgment in determining whether to participate in ~~oral~~ due diligence ~~meetings~~_[LH31] discussions if the underwriter has not provided the ~~written~~_[LH31] opinion from external legal counsel or representation letter as described in paragraph A11 or if external legal counsel has not provided the required written opinion. AU-C section 920_[LH32].¹⁷ If the auditor agrees to participate, auditors use professional judgment in determining which questions in an oral due diligence meeting can be addressed.

Issuing_[LH33] ***a Practitioner's Report on an Attestation ~~Reports~~Engagement on Information Related to the Offering (Ref: par. 8bv)***

A17A14. 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~~_[LH34] ~~recompute~~ 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 ~~a~~_[LH35] ~~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.

A15A18. ~~—An~~ ~~A practitioner's report on an~~ attestation engagement ~~report~~ relating to an exempt offering need not be referred to or included in the ~~exempt~~ offering document to involve the auditor of the financial statements with the offering. Sometimes, the ~~practitioner's~~_[LH36] ~~report on an~~ attestation engagement ~~report~~ may only be included in the closing documents for the offering.

Providing a Written Agreement (Ref: par. 8bvi)

A16A19_[LH37]. 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~~_[LH38].¹⁸ 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 ~~offering document~~. ~~This letter would typically not be included in the offering document. The following example language may be used to indicate that the auditor agrees to inclusion:~~ ~~exempt offering document~~.

¹⁷ Paragraphs .07, .11, and .A92 of AU-C section 920.

¹⁸ Paragraphs ~~1918-20~~ of exhibit A, "Background," of AU-C section 925, *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*.

A20^[LH39]. The following example language may be used to indicate that the auditor agrees to inclusion:

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]-name of Entity] as of December 31, 20x2 [and 20x1] and for the year[s] then ended.

A21^[LH40]. 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.

Signing an Auditor's Report for Inclusion in the Exempt Offering Document (Ref: par. 8bvii)

A22A17. Signing^[LH41] the auditor's report involves, for example, signing 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, updated auditor's report when the financial statements are restated. Alternatively, providing a copy of the auditor's report with an original manual or electronic signature at the underwriter or bond counsel's request to file with the official closing documents for the offering does not constitute a signing of the auditor's report. Signing an updated auditor's report when, for example, the financial statements are restated does constitute a signing of the auditor's report.

Distribution, Circulation, or Submission (Ref: par. 9)

A18A23. As^[LH42] discussed in paragraph A4, exempt offerings often may have multiple stages. Thus, a single offering could involve multiple applications of this SAS. Requesting management to keep the auditor advised of the progress of the preparation of the exempt offering document proceedings through the final distribution, circulation, or submission of the final offering document is important so that the auditor's consideration of events occurring after the date of the auditor's report up to the distribution, circulation, or submission of the final offering document can be completed.

Other Information Included in the Exempt Offering Document (Ref: par. 10—11)

A19A24. When revision of the other information in the exempt offering document is necessary due to a material inconsistency or a material misstatement of fact that management refuses to correct, AU-C section 720 requires the auditor to notify those charged with governance of the auditor's concerns regarding the other information and take any further appropriate action.

With regard to exempt offerings, actions may also include determining whether to withhold the auditor's agreement to include the auditor's report. In such cases, the auditor may consider it appropriate to obtain legal advice.

References to the ~~A~~auditor as an “~~E~~expert”

A25A20. The term *expert* has a specific statutory meaning under the Securities Act of 1933. Outside the Securities Act of 1933 context, the term *expert* is typically undefined. Accordingly, except as described in paragraph A283, when an entity wishes to make reference to the auditor's role in connection with an exempt offering, the caption to that section of the document would generally be titled "Independent Auditors" (or something similar) rather than "Experts," with no reference to the auditor as an expert anywhere in the exempt offering document.

A26A21^[LH43]. 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 document:¹⁹

Independent Auditors

The financial statements of [~~Na~~mename of Entity] ~~X~~ as of December 31, 20X2 [and 20x1] and for the year [s] then ended, included in this offering document, have been audited by [~~Na~~mename of Firm], independent auditors, as stated in their report appearing herein.

If the auditor is not involved with the exempt 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.

A22A27. If the entity refuses to delete references to the auditor as an “expert,” the auditor may consider whether to permit inclusion of the auditor's report, based on the auditor's professional judgment and an evaluation of liabilities the auditor may be assuming. In such situations, the auditor may consider it appropriate to obtain legal advice.

A23A28. 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~~^[LH44] ~~auditor may also agree to be named as an expert, as that term is used by the Office of Thrift Supervision (OTS), in offering documents that are subject to the jurisdiction of the OTS.~~ An understanding of any auditor liability provisions that may be included in the applicable federal or state statutes is an important consideration.²⁰ In^[LH45] such circumstances, the auditor may consider it appropriate to obtain legal advice.

¹⁹ Exhibit B, “Illustrative Disclosures and Reports,” of AU-C section 925.

²⁰ Paragraph ~~18-17~~ of exhibit A of AU-C section 925.

Subsequent Events Procedures (Ref: par. 12)

A29. The general nature of the subsequent event procedures is to identify facts that become known to the auditor after the date of the auditor's report that, had they been known to the auditor at that date, may have caused the auditor to revise their report. Not to reopen the audit to determine if all amounts and disclosures are appropriate as of the offering date. For example, a discrete event which may cast substantial doubt about the entity's ability to continue as a going concern may require revision. However^{LH46}, omission of a disclosure of a debt offering subsequent to the date of the auditor's report would generally not require revision to the report.

A24A30. In addition to the procedures discussed in paragraph 12 of this SAS, the auditor may consider it necessary and appropriate to inquire of or extend previous oral or written inquiries to the entity's legal counsel concerning litigation, claims, and assessments, as described in AU-C section 501, *Audit Evidence—Specific Considerations for Selected Items*.

A25A31. An illustrative updating management representation letter is included in AU-C section 580, *Written Representations*.²¹

Considerations Specific to Governmental Entities

A26A32. In determining the extent of procedures to perform in connection with a governmental debt offering, and^{LH47} 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 solely 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 in the exempt offering document, the scope of subsequent event procedures would likely also encompass the primary government.

²¹ Exhibit C, "Illustrative Updating Management Representation Letter," of AU-C section 580, *Written Representations*.

A27A33.

Appendix A—Examples of Exempt Offerings (Ref: par. A1)

1. Sections 3 and 4 of the Securities Act of 1933, as amended, specify the classes of securities and classes of securities transactions that are exempt from registration under federal securities laws. Examples include the following:

- a. Municipal securities – Section 3(a)(2)
- b. Intrastate offerings – Section 3(a)(11)
- c. Small issues – Section 3(b)(1)
 - i. Regulation D Rule 504 exemption (“seed capital” exemption)
 - ii. Regulation D Rule 505 exemption
 - iii. Regulation A exemption
- d. Transactions by an entity not involving any public offering (for example, private placements, nonpublic offerings, private sales) –Section 4(a)(2)
 - i. Regulation D Rule 506 offering
 - ii. Resales of securities to Qualified Institutional Buyers (Rule 144A)
- e. Securities sold for employee benefit plans (Rule 701)
- f. Crowdfunding – allows for limited-size offerings to be sold in small amounts to a large number of investors (for example, over the Internet) – Section 4(a)(6)
- g. Private resales of securities – Section 4(a)(7)
- h. Offers and sales of securities outside the United States (Regulation S)
- i. Other classes of securities specifically exempted
 - i. Securities issued by religious, charitable, educational and other nonprofit organizations
 - ii. Securities issued or guaranteed by banks (Note however that issuances of bank securities may be subject to other regulators, for example, the Office of Thrift Supervision.)
 - iii. Miscellaneous other securities such as short-term notes, drafts and bills of exchange, insurance policies, certificates issued by a receiver or trustee in bankruptcy, and interests in a railroad equipment trust

2. Franchise offerings are regulated at the federal and state level. Federal regulation occurs through the Federal Trade Commission under the *Disclosure Requirements and Prohibitions Concerning Franchising* (the FTC rule). The FTC rule requires franchisors to provide a franchise disclosure document (FDD) to each prospective buyer, but does not require FDDs to be filed or registered with the FTC. At the state level, regulations vary widely. Some states have franchise statutes and regulations that are more stringent than the FTC requirements, and which may require a franchisor to file or register its offering with state franchise authorities.

A28A34.

Appendix B—Amendment to SAS No. 122 Section 560, *Subsequent Events and Subsequently Discovered Facts*

1. AU-C section 560, *Subsequent Events and Subsequently Discovered Facts*, states that the auditor is not required to perform any audit procedures regarding the financial statements after the date of the auditor's report. However, requirements exist in AU-C section 925, *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*, and the proposed SAS that would require, in certain circumstances, procedures to be performed after the date of the auditor's report. This proposed amendment highlights, through a footnote, that there may be instances in which the requirements of AU-C section 560 apply after the report date.

(*Boldface italics* denotes new language. Deleted text is shown in ~~strikethrough~~.)

[No proposed amendment to paragraphs .01–.11.]

Subsequently Discovered Facts That Become Known to the Auditor Before the Report Release Date

.12 The auditor is not required to perform any audit procedures regarding the financial statements after the date of the auditor's report. However, if a subsequently discovered fact becomes known to the auditor before the report release date,^{fn 3} the auditor should

- a. discuss the matter with management and, when appropriate, those charged with governance.
- b. determine whether the financial statements need revision and, if so, inquire how management intends to address the matter in the financial statements.^{fn 4}

^{fn 3} The term *report release date* is defined in paragraph .06 of section 230, *Audit Documentation*.

^{fn 4} ***There may be instances in which the auditor applies the requirements in this section after the date of the auditor's report as described in AU-C section 925, Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933, and AU-C section 945, Auditor Involvement With Exempt Offering Documents.***

.A1 **When audited financial statements are included in other documents subsequent to their issuance, the auditor may have additional responsibilities to consider, such as legal or regulatory requirements involving private placement offerings, exempt public offerings (including offerings pursuant to Securities and Exchange Commission [SEC] Rule 144A), or other offerings of securities to the public in jurisdictions outside the United States. Section 720, Other Information in Documents Containing Audited Financial Statements, may be applied, adapted as necessary in**

the circumstances, to such other documents. Section 925, *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*, addresses the auditor's responsibilities in connection with financial statements of a nonissuer included in a registration statement filed with the SEC under the Securities Act of 1933, as amended. **Section**^[LH48] **945, Auditor Involvement With Exempt Offering Documents**, *addresses the auditor's responsibilities when an auditor is involved with an exempt offering document.*

[Subsequent footnotes 4–14 renumbered. No further amendments to section 560.]

2. If issued as final, this proposed amendment will be effective for **exempt** offering documents with which the auditor is involved that are initially distributed, circulated, or submitted on or after June 15, 2018.

A35_[LH49].

Appendix C—Amendment to Exhibits A and B of Section 925, Filings With the U.S. Securities and Exchange Commission

Note that Exhibits to AU-Cs are nonauthoritative.

The Task Force proposes the following edits to Exhibit A (Par. .A14) and Exhibit B (Par. .A15) of AU-C section 925

Exhibit A — Background

.A14

Exhibit A is intended to provide limited background information only.

Exhibit A is not intended to be, and does not constitute, a comprehensive or complete discussion of the liability provisions of the Securities Act of 1933, as amended. Exhibit A is not legal advice and reading it as such is inappropriate. Auditors are advised to consult with their legal counsel regarding the information provided in Exhibit A and the entire content of Section 11 of the Securities Act of 1933.

1. When an auditor's report is included in a registration statement filed under the Securities Act of 1933, the auditor's responsibility, generally, is in substance no different from that involved in other types of reporting. However, the nature and extent of this responsibility are specified in some detail in the applicable statutes and the related rules and regulations.

Liability Provisions of Section 11 of the Securities Act of 1933

2. Liability under the Securities Act of 1933 is defined in several sections of that act. One important section for auditors is Section 11.

3. Section 11(a) imposes civil liability on a number of parties that are involved in a registration statement filed under the Securities Act of 1933. One of the parties specifically mentioned in Section 11(a) is an auditor who has consented to the use of the auditor's report on audited financial statements in connection with a registration statement filed under the Securities Act of 1933 (Section 11[a][4]).

4. Section 11(b)(3)(B) of the Securities Act of 1933 provides that the auditor is not liable under Section 11(a) if the auditor

sustain[s] the burden of proof . . . that . . . as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not

fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert.

5. Section 11(c) of the Securities Act of 1933 indicates that for the purpose of determining what constitutes reasonable investigation and reasonable ground to believe, "the standard of reasonableness shall be that required of a prudent man in the management of his own property."

Auditor's Consent and Awareness Letter

6. Section 7 of the Securities Act of 1933 requires an issuer to provide the consent of any auditor whose report on audited financial statements is included in a Securities Act of 1933 registration statement. The issuer's responsibility to file the auditor's consent is further discussed in Rule 436 of the Securities Act of 1933.

7. Rule 436(c) of the Securities Act of 1933 indicates that an auditor's report based on a review of interim financial information is not a report within the meaning of Section 11. Thus, the auditor does not have a similar statutory responsibility for such reports as of the effective date of the registration statement. Accordingly, the auditor's consent would not refer to the auditor's report on interim financial statements. However, the issuer is required to file an awareness letter from an auditor if the auditor's review report on interim financial information is included in a registration statement filed under the Securities Act of 1933.

Effective Date of the Registration Statement

8. The information in a registration statement filed under the Securities Act of 1933 is evaluated as of its effective date. Accordingly, the auditor who has consented to the inclusion of the auditor's report on audited financial statements in such a registration statement has a statutory responsibility that is determined in light of the circumstances on that date. The effective date for purposes of evaluating liability under Section 11 may be different for different parties. For instance, the effective date for determining liability under Section 11 for the issuer or for an underwriter may be later than the effective date for determining Section 11 liability for the auditor.

9. Certain Securities Act of 1933 rules and forms (for example, Rule 415 and Form S-3) permit issuers to register offerings of securities to be offered and sold on a delayed or continuous basis. This process is commonly referred to as *shelf registration*.

10. The prospectus included in a shelf registration statement at the time it becomes effective is commonly referred to as a base prospectus. Many issuers follow a "bare bones" approach to preparing the base prospectus by relying entirely on the documents incorporated by reference (for example, forms 10-K, 10-Q, and 8-K) to provide most, if not all, of the issuer-related disclosures. The base prospectus also generally omits information relating to the specific amount of each security to be offered and pricing information. That information is typically provided through a prospectus supplement filed pursuant to Rule 424(b) of the Securities Act of 1933 at the time the securities are sold (commonly referred to as *taken off the shelf* or a *shelf takedown*).

11. At the time of filing a shelf registration statement, the issuer undertakes to update the prospectus for a number of items. The issuer's undertakings are set forth in Item 512 of Regulation S-K. Information omitted from the base prospectus, as well as the information that the issuer has undertaken to provide at a later date, may be conveyed to investors

- by a posteffective amendment to the registration statement,

- by a prospectus supplement filed pursuant to Rule 424(b) of the Securities Act of 1933, or
- through the incorporation by reference of the information from a report filed under the Securities Exchange Act of 1934 (for example, Form 10-K or Form 8-K).

12. As previously discussed, liability under Section 11 of the Securities Act of 1933 is assessed based on the information included in the registration statement as of its effective date. As also previously noted, the effective date for purposes of evaluating liability under Section 11 as it relates to the auditor may differ from the effective date as it relates to other parties (for example, the issuer or any underwriters). From the auditor's perspective, the effective date in connection with a Securities Act of 1933 registration statement is the latest of the following:

- The date the original registration statement (for example, on Form S-3) becomes effective
- The effective date of any posteffective amendment
- The filing date of a prospectus supplement if the filing of the prospectus supplement creates a new effective date for the auditor (for example, the prospectus supplement may contain new or revised audited financial statements or other information about which the auditor is an expert and for which a new consent is required, as described in Rule 430B[f][3] of the Securities Act of 1933)
- The filing date of any report (for example, under the Securities Exchange Act of 1934) that includes or amends audited financial statements and is incorporated by reference into the already effective registration statement

For example, assume an issuer with an already effective shelf registration statement on Form S-3 acquires a private company, and the issuer is required to file the acquired company's audited financial statements pursuant to the requirements of Form 8-K. In this case, the issuer will be required to file an auditor's consent from the acquired company's auditor as an exhibit to Form 8-K. The guidance in this section is applicable to the acquired company's auditor in connection with providing the auditor's consent to the issuer.

References to the Auditor as an Expert in Connection With a Securities Act of 1933 Registration Statement

13. Although not required, most Securities Act of 1933 registration statements relating to underwritten offerings contain a section titled "Experts." This section can be defined as management's disclosure in a Securities Act of 1933 registration statement that states that audited financial statements are included in the registration statement in reliance upon the auditor's report on the audited financial statements. The "experts" section also typically indicates that the auditor's report on the audited financial statements has been given on the auditor's authority as an expert in accounting and auditing.

14. Exhibit B, "Illustrative Disclosures and Reports," provides an example of a typical "experts" section.

15. As with all sections of the registration statement, the disclosures in the "experts" section are the issuer's responsibility. However, Rule 436(b) of the Securities Act of 1933 requires the issuer to file an auditor's consent to being named as an expert.

References to the Auditor as an Expert in a Document Other Than a Securities Act of 1933 Registration Statement

16. The term expert has a specific statutory meaning under the Securities Act of 1933. Outside the Securities Act of 1933 context, the term expert is typically undefined. Accordingly, except as described in paragraph 18 of this exhibit, when an issuer wishes to make reference to the auditor's role in an offering document in connection with a securities offering that is not registered under the Securities Act of 1933, the caption to that section of the document would generally be titled "Independent Auditors" (or something similar) rather than "Experts," with no reference to the auditor as an expert anywhere in the document.

~~17.~~ Exhibit B provides an example of a typical description of the auditor's role when an issuer wishes to make reference to the auditor in an offering document in connection with a securities offering that is not registered under the Securities Act of 1933.

~~1817.~~ There may be situations in which the term expert is sufficiently defined such that 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. For example, if the term expert is defined under applicable state law, the auditor may agree to be named as an expert in an offering document in an intrastate securities offering. The auditor may also agree to be named as an expert, as that term is used by the Office of Thrift Supervision (OTS), in securities offering documents that are subject to the jurisdiction of the OTS. An understanding of any auditor liability provisions that may be included in the applicable federal or state statutes is an important consideration.

Letters Similar to Consents Prepared in Connection With a Document That Is Not a Securities Act of 1933 Registration Statement

~~1918.~~ When an auditor's report is used in connection with an offering transaction that is not registered under the Securities Act of 1933, it is not usually necessary for the auditor to provide any type of written consent. If the auditor is asked to provide a written consent for use in connection with a document other than a Securities Act of 1933 registration statement, then the auditor may provide a letter indicating that the auditor agrees to the inclusion of the auditor's report on the audited financial statements in the offering materials. ~~This letter would typically not be included in the offering materials.~~ Refer to Section 945 which provides guidance on auditor involvement with exempt offering documents.

~~20.~~ Exhibit B provides an example of language the auditor might use to indicate that the auditor agrees to the inclusion of the auditor's report on the audited financial statements in the offering materials when the auditor's report is used in connection with an offering transaction that is not registered under the Securities Act of 1933.

Exhibit B — Illustrative Disclosures and Reports

.A15

The following is an example of a typical "experts" section in a registration statement filed under the Securities Act of 1933:

Experts

The consolidated balance sheets of Company X as of December 31, 20X2 and 20X1, and the related consolidated statements of income and comprehensive income, changes in stockholders' equity, and cash flows for each of the three years in the period ended December 31, 20X2, included in this prospectus, have been so included in reliance on the report of ABC & Co, independent auditors, given on the authority of that firm as experts in auditing and accounting.

The following is an example of a disclosure for a registration statement filed under the Securities Act of 1933 that includes the auditor's review report on unaudited interim financial information when such disclosure is included in a separate section. This disclosure may also be included under a section titled "Experts":

Independent Auditors

With respect to the unaudited interim financial information of Company X for the three-month periods ended March 31, 20X3 and 20X2, included in this prospectus, ABC & Co. has reported that they have applied limited procedures in accordance with professional standards for a review of such information. However, their separate report dated May XX, 20X3, included herein, states that they did not audit and they do not express an opinion on that interim financial information. Accordingly, the degree of reliance on their report on such information should be restricted in light of the limited nature of the review procedures applied. ABC & Co. is not subject to the liability provisions of section 11 of the Securities Act of 1933 for their report on the unaudited interim financial information because that report is not a "report" or a "part" of the registration statement prepared or certified by the accountants within the meaning of Sections 7 and 11 of the Act.

The following is an example of a typical description of the auditor's role when an issuer wishes to make reference to the auditor in an offering document prepared in connection with a securities offering that is not registered under the Securities Act of 1933:

Independent Auditors

The financial statements of Company X as of December 31, 20X2 and for the year then ended, included in this offering circular, have been audited by ABC & Co., independent auditors, as stated in their report appearing herein.

Although generally not necessary, the following is an example of language the auditor might use indicating that the auditor agrees to the inclusion of the auditor's report on the audited financial statements in offering materials prepared in connection with a securities offering that is not registered under the Securities Act of 1933:

We agree to the inclusion in the offering circular of our report, dated February 5, 20X3, on our audit of the financial statements of Company X.