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File Reference No. 2013-310 Exposure Draft of a Proposed Accounting Standard Update -
Definition of a Public Business Entity - An Amendment to the Master Glossary

The Financial Reporting Executive Committee (FinREC) of the American Institute of Certified Public Accountants (AICPA) appreciates the opportunity to comment on the Financial Accounting Standards Board's (FASB) August 7, 2013, Proposed ASU, Definition of a Public Business Entity - An Amendment to the Master Glossary. We received input from members of the following AICPA Expert Panels: Depository Institutions, Not-For-Profit, Employee Benefit Plans, Investment Companies, and Stock Brokerage and Investment Banking.

FinREC agrees with the Board's objectives of amending the Master Glossary of the FASB Accounting Standards Codification to include one definition of public business entity for use in U.S. GAAP and identifying the types of business entities that would be excluded from the scope of the *Private Company Decision-Making Framework: A Guide for Evaluating Financial Accounting and Reporting for Private Companies*. We believe that it is important to move forward with this project and that the resulting final definition be as objective as possible to aid in consistent application of the definition and to help limit potential confusion in practice.

In order to arrive at an objective definition, we believe there are opportunities to clarify the meanings of various elements of the definition which, as currently written, could be subject to varying interpretations. In particular, we are concerned about the manner in which paragraph e could be interpreted and question whether the possible outcomes of this paragraph reflect what the Board had intended. For example, paragraph e has the potential to scope in numerous financial institutions, currently considered nonpublic, into the definition of a public entity. We question whether this was the Board's intention, particularly in light of the Board's conclusion in paragraph BC22, which indicates that while financial institutions are considered to be "public interest entities," that in and of itself is not cause for exempting them from guidance provided by the PCC. In addition to the potential impact on financial institutions, criterion e has the potential to impact various other entities with state regulatory and legal reporting requirements, like Franchisors and Utilities. We provide examples in the appendix to this letter.

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In addition to clarifications regarding the overall meaning and application of paragraph e, we further believe that greater clarity should be provided with regard to the meaning of "unrestricted" and "publicly available" as used in that paragraph. The appendix to this letter details additional requests for clarification with regard to the other elements of the definition.

Considering the due process that would most likely be required to reconsider and edit existing definitions, and appreciating the need to move forward for PCC purposes, we support the Board's approach of undertaking a second phase of this project. We strongly believe the Board should undertake a second phase of the project to analyze each of the historical definitions in an effort to align them with the new definition. We believe that ultimately aligning of the definitions will help reduce confusion and limit unnecessary complexities which may otherwise result from the existence of multiple definitions of the same term.

In addition to the matters highlighted above we are concerned that, if the definition is interpreted broadly, it will result in companies switching back and forth between nonpublic and public status and hence in and out of PCC applicability. As a result, we believe the Board should provide 'transitional' guidance for all entities that may apply guidance initiated by the PCC, that is, guidance for entities transitioning from nonpublic to public and from public to nonpublic.

Our answers to the specific questions in the Exposure Draft provide more detail on the views expressed above and are attached in Appendix A to this letter.

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Representatives of FinREC are available to discuss our comments with Board members or staff at their convenience.

Sincerely,

Richard Paul
Chairman
FinREC

APPENDIX

Responses to Questions for Respondents

Question 2: *Do you agree with the definition of a public business entity included in this proposed Update? Please explain why.*

While we generally agree with the definition of a public business entity we believe it is essential that greater clarity be provided to further enhance the definition. We believe that in many cases, determining whether an entity falls within the definition of a public entity would be straight forward. There are however various situations in which it would be more challenging to make this determination. This is particularly true in situations where current practice differs from the outcome suggested by the proposed definition. It is these grey areas which we have highlighted below with requests for further clarification.

With regard to proposed paragraph a. of the definition:
"*a. It is required by the U.S. Securities and Exchange Commission (SEC) to file or furnish financial statements, or does file or furnish financial statements, with the SEC (including other entities whose financial statements or financial information are required to be or are included in a filing).*"

- **Clarify what is meant by "or furnish" in proposed paragraph a.**
  We believe that the use of "or furnish" in proposed paragraph a. of the definition has the potential to scope into the definition of a public entity, numerous small companies currently considered nonpublic. Examples of such entities include the following:
  - Registered Investment Advisers (RIAs) that under certain circumstances are required to furnish an audited balance sheet with Form ADV filed with the SEC.
    Pursuant to Item 18 of Part 2 of Form ADV, an RIA is required to furnish an audited balance sheet, prepared in accordance with U.S. GAAP, if the RIA requires its clients to prepay fees of more than $1,200 per client, six months or more in advance. Is it the Board's intention that RIAs be considered public entities?
  - Depositors or sponsors that are required to file or furnish financial statements with the SEC pursuant to the Instructions to Item 23(b) of Form N-4, or the Instructions to Item 24(b) of Form N-6.
    The Instructions to Item 24(b) of Form N-6 states the following: "Include, in a separate section, the financial statements and schedules of the Depositor required by Regulation S-X. If the Depositor would not have to prepare financial statements in accordance with generally accepted accounting principles except for use in this registration statement or other registration statements filed on Forms N-3, N-4, or N-6, its financial statements may be prepared in accordance with statutory requirements. The Depositor's financial statements must be prepared in accordance with generally accepted accounting principles if the Depositor prepares financial information in accordance with generally accepted accounting principles for use by the Depositor's parent, as defined in Rule 1-02(p) of Regulation S-X [17 CFR 210.1-

02(p)], in any report under sections 13(a) and 15(d) of the Securities Exchange Act [15 U.S.C. 78m(a) and 78o(d)] or any registration statement filed under the Securities Act." Is it the Board's intention that such depositors or sponsors be considered public entities?

- **Clarify whether all SEC-registered broker-dealers should be considered public entities**
  Broker-dealers registered with the Securities and Exchange Commission are required to file audited financial statements with the SEC pursuant to Rule 17a-5 of the 1934 Act. Given this requirement and the provisions of proposed paragraph a. of the definition it appears that all SEC-registered broker-dealers would be considered public business entities (regardless of size, complexity, or ownership structure). Currently, the vast majority (over 90%) of broker-dealers registered with the SEC are non-issuers. Is it the Board's intention that all broker-dealers registered with the SEC (including small, privately owned broker-dealers) be considered public entities?

- **Clarify whether entities that file or furnish financial statements voluntarily or subject to a debt agreement fall within the scope of paragraph a.**
  Paragraph a. refers to an entity that "is required by the U.S. Securities and Exchange Commission (SEC) to file or furnish financial statements, or does file or furnish financial statements, with the SEC." Based on the use of "or does file or furnish financial statements, with the SEC" it appears that entities that file or furnish financial statements voluntarily or subject to debt agreements fall within the scope of paragraph a. Is this the Board's intention?

- **Clarify what "(including other entities whose financial statements or financial information are required to be or are included in a filing)" means**
  Since subsidiaries financial statements are *included* in the consolidated financial statements of parent companies, we believe this phrase could be read to mean that nonpublic companies that are subsidiaries of public companies are considered public entities. We understand, based on p3 bullet 2 of the Exposure Draft ("ED") that "the proposed amendments would specify that:…
    - 2. A consolidated subsidiary of a public company would not be considered a public business entity for purposes of its standalone financial statements other than those included in an SEC filing by its parent or by other registrants. Some of the existing definitions of a public entity in the Accounting Standards Codification consider a consolidated subsidiary of a public company to be public."

  However; since this wording does not appear in the definition or in the Consequential Amendments noted in BC37 and BC38 of the ED, it is unclear how this would be known. We recommend that this be clarified.

  Similarly, if a nonpublic subsidiary is reported on within a note to a public parent's consolidated financial statements under ASC 280 *Segment Reporting* the subsidiary's "financial information" will be "included in a filing". Does that mean that the nonpublic subsidiary would be considered a public entity for purposes of its standalone financial

statements? Additionally, if a parent company guarantor discloses condensed consolidating financial information that includes financial information of an issuer subsidiary in a note to its consolidated financial statements under Rule 3-10 of Regulation S-X, would that issuer subsidiary be considered a public entity for purposes of its standalone financial statements even though it is not required to file those standalone financial statements with the SEC? We recommend that the evaluation of whether an entity is nonpublic in these circumstances be clarified.

With regard to both paragraph a. (presented above) and proposed paragraph b. of the definition which states:
"b. It is required by the Securities Exchange Act of 1934, as amended, or rules or regulations promulgated under the Act, to file or furnish financial statements with a regulatory agency."

- **Clarify how entities should transition back and forth between nonpublic and public as they become scoped into and out of the definition as a result of the requirements of paragraph a and b**

  It appears that the requirements of paragraph a. and b. could have the effect of transitioning entities back and forth between being considered nonpublic and public. For example in each of the scenarios described below, nonpublic entities seemingly would be deemed public but could then subsequently revert back to being nonpublic once circumstances change. For example it seems that initially:

  a) a previously nonpublic entity (the acquiree) would be considered public when its financial statements are furnished to the SEC by an acquiror pursuant to S-X 3-05 or
  b) a nonpublic investee would be considered public when its parent files its separate financial statements with the SEC pursuant to S-X 3-09 or
  c) a nonpublic investee would be considered public due to its public parent including summarized financial information of the investee in the notes to the financial statements pursuant to S-X 4-08(g)

  And then, when the circumstances described above are no longer applicable, it seems those entities would revert back to being considered nonpublic. We recommend that transitional guidance be provided to assist entities in navigating between being considered public and nonpublic. We understand that transitional guidance for nonpublic to public transitions may have to be developed with input from the SEC. In addition to guidance on transitioning from nonpublic to public where SEC rules may prevail, we believe it is essential that guidance for transitioning from public to nonpublic also be provided.

With regard to proposed paragraph d. of the definition:
"d. It has (or is a conduit bond obligor for) unrestricted securities that are traded or can be traded on an exchange or an over-the-counter market."

- **Clarify what is meant by "unrestricted securities that are traded or can be traded" on "an over-the-counter market"**
  Based on the current codified definitions, community banks and thrifts with securities that are or can be traded over-the-counter have historically not considered themselves to be "public" if they do not file with the SEC or primary bank regulator under the '34 Act. As such, this would be a change in practice. This would result in a change in practice not only for community banks but also for any entities that trade on an exchange but do not file in accordance with the '34 Act. Is this what the Board had intended?

- **Define "over-the-counter market"**
  Various over-the-counter markets exist, for example, the OTC Bulletin Board and the OTC Markets. Without further clarification, we envision the possibility of a wide definition of what constitutes "an over-the-counter market." For example, would a small broker facilitating an exchange between two private parties be considered an over-the-counter market? Given the various markets which could be considered an "over-the-counter market" we recommend that this be defined.

- **Clarify what is meant by "can be traded"**
  It would be helpful to clarify the term "can be traded." It is unclear whether this means the stock is listed on some exchange and could be traded but perhaps is not traded or whether this means an entity has the ability to list its shares on some exchange which would enable shares to be traded.

With regard to proposed paragraph e of the definition:
"e. Its securities are unrestricted, and it is required to provide U.S. GAAP financial statements to be made publicly available on a periodic basis pursuant to a legal or regulatory requirement."

- **Clarify whether all banks and thrifts with unrestricted securities that file the annual report required by the FDIC Part 363 would be included in the definition of a public entity**
  Part 363 "Annual independent audits and reporting requirements" of the FDIC Rules and Regulations requires insured depository institutions with consolidated total assets of $500 million or more to file annual audited financial statements reports with the FDIC. Given that these U.S. GAAP financial statements are being filed on a periodic basis with a regulatory body, it appears that these financial institutions (i.e., banks and thrifts with unrestricted securities) would be included in the definition of a public entity. There are many institutions subject to Part 363 which today would not consider themselves to be public companies because they do not file with the SEC or primary regulator in accordance with the Securities Exchange Act of 1934. As proposed, we believe many of these institutions would be deemed a public business entity. We also observe that in paragraph BC22 of the proposed ASU the Board concludes that while financial institutions are

considered to be "public interest entities," that in and of itself is not cause for exempting them from guidance provided by the PCC. In paragraph BC22, the Board states:

> BC22. The Board discussed whether to include all financial institutions in the definition of a public business entity on the basis of public accountability because financial institutions hold and manage financial resources for a broad group of individuals for investment purposes and act in a fiduciary capacity. That notion of public accountability is consistent with the decision reached by the IASB when it finalized its IFRS for SMEs. The Board rejected that alternative because of its view that public accountability applies to many regulated industries and should not be a factor in determining whether an entity is considered public for financial reporting purposes.

Given that conclusion, it seems the Board did not intend to widely apply GAAP for public entities to financial institutions; however, with this proposal, that would be the outcome.
We also observe there are some institutions subject to Part 363 which would not be included in the scope. For example, mutually-owned institutions and institutions with no unrestricted shares would be excluded. Again, we ask the Board to clarify whether this is what was intended.

Furthermore, we note that such a requirement would result in disparity between banks and credit unions. Both credit unions and banks that have consolidated total assets of $500 million or more are required to file audited financial statements with the NCUA and FDIC respectively. As previously mentioned, it appears that banks with unrestricted securities that file with under Part 363 of the FDIC are considered public entities. Credit unions however do not have securities and as a result appear to be scoped out of the definition of a public entity – however both types of entities are insured depository institutions with the only difference being one entity has unrestricted shares while the other does not. Given the possible disparate outcome, we question if this criterion results in an outcome that the Board envisioned.

- **Clarify when State regulatory and legal reporting requirements would scope entities into the definition of a public entity**
  The States have various legal and regulatory reporting requirements which could result in companies that are currently considered private being scoped in the definition of a public entity – is it the intention that such entities be scoped into the definition of a public entity?

  For example, there are many states which have an audit requirement for financial institutions. As drafted, those entities would seemingly be considered public entities. We recommend the Board clarify whether this is what was intended, again in light of the preliminary conclusion reached by the Board that banks, which are public interest entities, should not be deemed "public" simply due to that designation. With the varying state requirements, this again broadens the scope significantly for financial institutions.

In addition to the impact on financial institutions, this criterion has the potential to impact various other entities with state regulatory and legal reporting requirements, like Franchisors and Utilities. Franchise Rule (CFR 436) requires franchise sellers to provide to prospective purchasers a Franchise Disclosure Document (FDD). The FDD requires U.S. GAAP financial statements. A total of 13 states keep these franchise offering circulars on file and most states provide access to these documents. Under the proposed paragraph e. it appears that such franchisors would be considered public entities. Currently, franchisors providing such information are not considered public by virtue of such filings. Is it the Board's intention that such entities be scoped into the definition of a public entity?

Similarly, in many cases, rate-regulated utilities are required to file U.S. GAAP financial statements with public utility commissions for rate-making purposes. The requirement to file depends on state specific requirements. In instances where there is a "rate" case this information can be made publicly available. In such instances, is it the Board's intention that such entities be scoped into the definition of a public entity?

- **Clarify what is meant by "publicly available"**
  Following on from the franchise and utility examples provided above. The U.S. GAAP financial statements provided as part of the Franchise Disclosure Document (FDD), pursuant to Franchise Rule (CFR 436), are available to those members of the public who request access to this information. Does the fact that these financial statements will be provided to a member of the public upon request constitute "publicly available"? Currently, franchisors providing such information are not considered public by virtue of such filings.

  What if U.S. GAAP financial statements included in regulatory filings are made publicly available only in certain circumstances or based upon certain conditions – would those financial statements be considered publicly available? If so, at what point would they be considered publicly available – when the condition is met, or by virtue of the fact that the condition may be met at a future date? For example, in many cases, rate-regulated utilities are required to file U.S. GAAP financial statements with public utility commissions for rate-making purposes. In instances where there is a "rate case" this information can be made publicly available. Are financial statements made publicly available under such circumstances considered publicly available? Currently, utilities providing such information are not considered public by virtue of their involvement in rate cases. It should be noted that rate cases are based on the jurisdiction in which the rates apply. As a result, it is often a subsidiary of an entity that is filing the rate case. It is even possible that the subsidiary might not be a separate legal entity (for example, in the telecommunications industry, it is possible to have two different tariff rates filed by the same entity in the same state, but in different geographic locations within the state). As a result, the proposal could result in a subsidiary or other component of an entity being considered a public filer, but not the entity itself. We question whether this is the Board's intention and request that clarity be provided around what is considered publicly available.

- **Clarify what is meant by "unrestricted"**
  We believe there are various scenarios where it may not be clear whether a security is considered "unrestricted". For example, what if the sale of securities is limited to qualifying investors, (as may be the case under Rule 144 or similar rules of the SEC)? In this scenario the sale of securities is not fully restricted, it is simply restricted to qualifying investors. Would such securities be considered restricted or unrestricted? Also, how would temporary restrictions or restrictions where sale is legally restricted for a specified period impact the assessment of whether securities are unrestricted? Furthermore, at what point in time would an entity be considered to have unrestricted securities? For example, is this determined at a point in time (e.g., having unrestricted securities at the beginning of the year or at the end of the year) or is it determined over a period of time (e.g., securities were unrestricted for the entire financial year)? We request that the Board provide greater clarity around the meaning of "unrestricted".

- **Clarify whether Call Reports are considered "U.S. GAAP financial statements"**
  All federal insured depository institutions are required to file Call Reports. These reports are prepared in accordance with U.S. GAAP. While they contain additional specific schedules for regulatory purposes, they do not contain all the required basic financial statements or the accompanying footnotes. Currently, depository institutions filing call reports are not considered public by virtue of such filings. We recommend that the definition be clarified to explain whether Call Reports filed for regulatory purposes are considered "U.S. GAAP financial statements".

With regard to the last sentence of the definition:
"*This excludes a not-for-profit entity or an employee benefit plan within the scope of Topics 960 through 965 on plan accounting.*"

- **Clarify what is meant by a not-for-profit entity**
  The proposed definition refers to "not-for-profit entity" but does not indicate which entities are considered to be not-for-profit entities ("NFPs"). Similar to the manner in which the definition specifies that it is referring to employee benefit plans "within the scope of Topics 960 through 965 on plan accounting"; we recommend that the definition specify which NFPs are being referred to i.e., NFPs within the scope of Topic 958. This could be achieved by adding the words "within the scope of Topic 958" to the definition i.e., "This excludes a not-for-profit entity *within the scope of Topic 958*…"

- **Clarify whether Employee Benefit plans that file with the SEC are excluded from the definition of a Public Entity**
  Although the definition explains that employee benefit plans are excluded from the definition of a public entity, the fact that some employee benefit plans file financial statements with the SEC may create confusion about whether such employee benefit plans are scoped into the definition of a public entity by virtue of the fact that they file financial statements with the SEC. In order to avoid any confusion, we recommend that the Board clarify whether the general exclusion of employee benefit plans from the

definition of a public entity extends to employee benefit plans that file financial statements with the SEC.

Question 3: *Do you agree that a business entity that has securities that are unrestricted and that is required to provide U.S. GAAP financial statements to be made publicly available on a periodic basis pursuant to a legal or regulatory requirement should be considered a public business entity? Please explain why. Can you identify a situation in which an entity would meet this criterion but would not meet any of the other criteria identified in the definition of a public business entity? In addition to what is discussed in paragraph BC18 of this proposed Update, do you think further clarification is needed to determine what an unrestricted security is?*

As explained in our comments provided in Question 2 above with regard to paragraph e, we envision several situations where an entity would be considered public but would not meet any of the other criteria.

Please also see our responses associated with Question 2 paragraph e above where we request further clarification of the meaning of "unrestricted" and "publicly available".

Question 4: *Do you agree that no public or nonpublic distinction should be made between NFPs for financial reporting purposes? Instead, the Board would consider whether all, none, or only some NFPs should be permitted to apply accounting and reporting alternatives within U.S. GAAP. Please explain why.*

Yes, since NFPs are neither public nor nonpublic and in many cases contain elements of both we believe that no public or nonpublic distinction should be made between NFPs for financial reporting purposes. We further believe that the proposed approach of considering factors on a standard-by-standard basis, when determining whether all, none, or only some NFPs will be eligible to apply accounting and reporting alternatives with U.S. GAAP is an appropriate approach. However, one concern with this approach is that there are no established criteria for making this determination. In order to promote consistency when determining whether (and which) NFPs will be eligible to apply accounting and reporting alternatives within U.S. GAAP, we recommend that the Board establish a list of criteria on which to base their assessments and decisions.

Question 5: *Should the Board consider whether to undertake a second phase of the project at a later stage to examine whether to amend existing U.S. GAAP with a new definition resulting from this proposed Update? In that second phase of the project, the Board would consider whether to (a) preserve the original scope of guidance in the Accounting Standards Codification or (b) change the scope of guidance in the Accounting Standards Codification to align with the new definition. Please explain why.*

Considering the due process that would most likely be required to reconsider and edit existing definitions, and appreciating the need to move forward for PCC purposes, we support the Board's approach of undertaking a phased approach to this project. We strongly believe the Board should undertake a second phase of the project to analyze each of the historical definitions in an effort to align them with the new definition. In instances where the definitions are aligned, additional guidance on how to transition to the revised definition should be provided. In instances where it is deemed inappropriate to align the definitions, the necessary exceptions should be granted. We believe that ultimately aligning the definitions will help reduce confusion and limit unnecessary complexities that may otherwise result.

Currently U.S. GAAP includes 3 definitions for a public entity, 3 definitions for a publicly traded entity and 5 definitions for a nonpublic entity, as well as some standards referring to requirements for SEC filers only, such as ASC 855, *Subsequent Events*, and the proposed exposure draft on *Presentation of Financial Statements (Topic 205): Disclosure of Uncertainties about an Entity's Going Concern Presumption*. As there are different accounting requirements for public and nonpublic entity financial statements, having various definitions can lead to overall confusion and inconsistency among similar entities. It is stated that one of the primary purposes of this proposed update is to "Amend the Master Glossary of the Accounting Standards Codification to include one definition of public business entity for use in U.S. GAAP." We believe that if the ASC is not changed to align with the new definition that the stated objective will not be achieved and instead create greater complexity by adding yet one more definition.

An example of the complexities that may arise by not aligning the definitions is provided below:

> Where a specific standard defines a public (or nonpublic) entity for applicability that is different than the overall definition, this could lead to confusion among financial statement preparers on whether the entity would be considered a public (or nonpublic) entity for all disclosures or just for the specific disclosures. For example, ASC 820, *Fair Value Measurement*, uses the first master glossary definition of a nonpublic entity to indirectly define a public entity. This definition states:
>
> A nonpublic entity is any entity that does not meet any of the following conditions:
>
> a. Its debt or equity securities trade in a public market either on a stock exchange (domestic or foreign) or in an over-the-counter market, including securities quoted only locally or regionally.
> b. It is a conduit bond obligor for conduit debt securities that are traded in a public market (a domestic or foreign stock exchange or an over-the-counter market, including local or regional markets).
> c. It files with a regulatory agency in preparation for the sale of any class of debt or equity securities in a public market.
> d. It is required to file or furnish financial statements with the Securities and Exchange Commission.
> e. It is controlled by an entity covered by criteria (a) through (d).

> This definition, for fair value measurement disclosures, considers that an entity controlled by a "public entity" should also be considered a public entity; however, the proposed definition of a public business entity does not include this condition. This difference could cause confusion and inconsistent application in the financial reporting for employee benefit plans, for example, which can be sponsored by both public and private companies. Additionally, a financial statement preparer could conclude that a plan is a public entity for fair value measurement disclosures, but a nonpublic entity for all other disclosures, resulting in a piecemeal set of disclosures.

A further example highlighting complexities that may arise, follows, (for purposes of the following example , please note that entities classified as "public" under existing public entity definitions within the codification are referred to as 'legacy' public entities, while previously nonpublic entities which will be considered "public" as a result of the proposed definition are referred to as 'new' public entities):

> 'Legacy' public entities are required to provide segment disclosures. However, since the revised definition of a public entity will only apply to future standards, 'new' public entities which result from the proposed definition would not be required to provide segment disclosures. Such discrepancies between what 'legacy' and 'new' public entities are reporting on may result in confusion and unnecessary complexity. Additional complications may arise if, for example, the segment disclosure standard were to be updated. At that time would only the 'legacy' public entities be required to apply the updated standard or would 'new' public entities then also need to start complying with segment disclosures? For the purposes of simplicity and comparability it is suggested that the codification be updated to reflect the revised definition as part of this Accounting Standards Update.

Besides avoiding unnecessary complexities, we further believe that adjusting the existing ASC would help provide relief to NFPs and Employee Benefits Plans (currently considered public under existing standards) from the public entity disclosure requirements that they are currently subject to.