

## AU-C Section 925

# *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*

Source: SAS No. 122.

Effective for filings under the Securities Act of 1933 that include audited financial statements for periods ending on or after December 15, 2012.

## Introduction

### Scope of This Section (Ref: par. .A1)

.01 This section addresses the auditor's responsibilities in connection with financial statements of a nonissuer included or incorporated by reference in a registration statement filed with the U.S. Securities and Exchange Commission (SEC) under the Securities Act of 1933, as amended. Exhibit A, "Background," provides background information on certain liability provisions of Section 11 of the Securities Act of 1933, including Section 11(b)(3)(B).

### Effective Date

.02 This section is effective for filings under the Securities Act of 1933 that include audited financial statements for periods ending on or after December 15, 2012.

### Objective

.03 The objective of the auditor, in connection with audited financial statements of a nonissuer that are separately included or incorporated by reference in a registration statement filed under the Securities Act of 1933, is to perform specified procedures at or shortly before the effective date of the registration statement to sustain the burden of proof that the auditor has performed a reasonable investigation, as referred to in Section 11(b)(3)(B) of the Securities Act of 1933.

### Definitions

.04 For purposes of this section, the following terms have the meanings attributed as follows:

**Auditor's consent.** A statement signed and dated by the auditor that indicates that the auditor consents to the use of the auditor's report, and other references to the auditor, in a registration statement filed under the Securities Act of 1933.

**Awareness letter.** A letter signed and dated by the auditor to acknowledge the auditor's awareness that the auditor's review report on unaudited interim financial information is being used in a registration statement filed under the Securities Act of 1933. This letter is not considered to be part of the registration statement and is also commonly referred to as an *acknowledgment letter*.

**Effective date of the registration statement.** The date on which the registration statement filed under the Securities Act of 1933 becomes effective for purposes of evaluating the auditor's liability under Section 11 of the Securities Act of 1933. (Ref: par. .A2 and .A14)

.05 References to *included* or *the inclusion of* in a registration statement in this section means *included* or *incorporated by reference* in a registration statement filed under the Securities Act of 1933.

## Requirements

### Effective Date of the Registration Statement (Ref: par. .A3)

.06 Because the effective date of a registration statement filed under the Securities Act of 1933 may not necessarily coincide with the filing date, the auditor should request management to keep the auditor advised of the progress of the registration proceedings through the effective date of the registration statement.

### The Prospectus and Other Information (Ref: par. .A4–.A8)

.07 When the auditor's report on audited financial statements is included in a registration statement filed under the Securities Act of 1933, the auditor should perform the procedures described in section 720, *Other Information in Documents Containing Audited Financial Statements*, on the prospectus and pertinent portions of the registration statement (including material that is incorporated by reference).

.08 In connection with the procedures required by paragraph .07, 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.

### Subsequent Events Procedures (Ref: par. .A9–.A11)

.09 When the most recent separate financial statements of the entity and related auditor's report are included in the registration statement, the auditor should perform the following procedures described in section 560, *Subsequent Events and Subsequently Discovered Facts*, at or shortly before the effective date of the registration statement:<sup>1</sup>

- a. Audit procedures designed to identify events occurring between the date of the auditor's report and the effective date of the registration statement that require adjustment to, or disclosure in, the financial statements. Such procedures, which take into account the auditor's risk assessment in determining the nature and extent of such audit procedures, should include
  - i. obtaining an understanding of any procedures that management has established to ensure that such events are identified.
  - ii. inquiring of management and, when appropriate, those charged with governance about whether any such events have occurred that might affect the financial statements.

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<sup>1</sup> Paragraphs .09–.10 of section 560, *Subsequent Events and Subsequently Discovered Facts*.

- 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.
  - iv. reading the entity's latest subsequent interim financial statements, if any.
- b. Obtain updated written representations from management at or shortly before the effective date of the registration statement, 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 financial statements that would require adjustment to, or disclosure in, those financial statements.

**.10** When the auditor has audited the most recent period for which separate audited financial statements of the entity are included in the registration statement and

- a. the entity has been acquired by another entity,
- b. the acquirer's audited financial statements included in the registration statement reflect a period that includes the date of acquisition, and
- c. the auditor is a predecessor auditor because the auditor is not the continuing auditor of the entity,

the auditor may be unable to perform all of the procedures in paragraph .09. In such circumstances, the auditor should obtain written representations from management and the successor auditor as described in section 560 at or shortly before the effective date of the registration statement.<sup>2</sup>

**.11** If a predecessor auditor audited the entity's separate financial statements for a prior period included in the registration statement but has not audited the entity's separate financial statements for the most recent audited period for which the entity's audited financial statements are included in the registration statement, then the predecessor auditor should perform the following procedures described in section 560 through a date at or shortly before the effective date of the registration statement:<sup>3</sup>

- a. Read the financial statements of the subsequent period to be presented on a comparative basis
- b. Compare 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. Obtain written representations from management at or shortly before the effective date
- d. Obtain 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

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<sup>2</sup> Paragraph .19c–d of section 560.

<sup>3</sup> Paragraph .19 of section 560.

on, or require disclosure in, the financial statements reported on by the predecessor auditor

**.12** If the auditor becomes aware of subsequently discovered facts, the auditor should not provide the auditor's consent until the auditor's consideration of subsequently discovered facts, including the effect on the auditor's report on the financial statements, has been satisfactorily completed in accordance with section 560.<sup>4</sup> If management does not revise the audited financial statements in circumstances in which the auditor believes they need to be revised, then the auditor should determine whether to withhold the auditor's consent (and the awareness letter, if applicable). (Ref: par. .A11)

## Unaudited Annual Financial Statements or Unaudited Interim Financial Information

**.13** If the auditor concludes, based on known facts, that unaudited annual financial statements or unaudited interim financial information included in a registration statement filed under the Securities Act of 1933 is not in conformity with the requirements of the applicable financial reporting framework, then the auditor should request that management revise the unaudited annual financial statements or unaudited interim financial information appropriately.

**.14** If management does not revise the unaudited annual financial statements or unaudited interim financial information appropriately and

- a. the auditor has reported on a review of the unaudited annual financial statements or unaudited interim financial information,
- b. the auditor's review report is included in the registration statement, and
- c. the subsequently discovered facts are such that they would have affected the report had they been known to the auditor at the date of the report,

the auditor should perform the applicable procedures described in section 560.<sup>5</sup>

**.15** If management does not revise the unaudited annual financial statements or unaudited interim financial information appropriately and

- a. the auditor has not reported on a review of the unaudited annual financial statements or unaudited interim financial information or
- b. the auditor's review report is not included in the registration statement,

the auditor should modify the report on the audited financial statements to describe the departure from the requirements of the applicable financial reporting framework contained in the unaudited annual financial statements or unaudited interim financial information, as described in section 930, *Interim Financial Information*.<sup>6</sup>

**.16** Additionally, the auditor should determine whether to withhold the auditor's consent (and the awareness letter, if applicable). (Ref: par. .A11)

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<sup>4</sup> Paragraphs .15–.18 of section 560.

<sup>5</sup> Paragraphs .14 and .17–.18 of section 560.

<sup>6</sup> Paragraph .35 of section 930, *Interim Financial Information*.

## Application and Other Explanatory Material

### Scope of This Section (Ref: par. .01)

.A1 This section is written from the perspective of a registration statement filed under the Securities Act of 1933. The liability provisions under the Securities Act of 1933 differ from those (Section 10[b] and Rule 10[b][5], in particular) under the Securities Exchange Act of 1934.

### Definitions

#### *Effective Date of the Registration Statement (Ref: par. .04)*

.A2 Exhibit A describes the process commonly referred to as *shelf registration*. Exhibit A also provides additional guidance about the effective date of a registration statement, including situations in which a posteffective amendment is made or a prospectus supplement is filed.<sup>7</sup> Both of these situations may create a new effective date. Exhibit A also discusses the auditor's liability under Section 11 of the Securities Act of 1933 with regard to these situations.

#### *Effective Date of the Registration Statement (Ref: par. .06)*

.A3 Requesting management to keep the auditor advised of the progress of the registration proceedings through the effective date is important so that the auditor's consideration of events occurring after the date of the auditor's report up to the effective date, or as close thereto as reasonable and practicable, can be completed by the effective date of the registration statement. Generally, the filing date of a registration statement will precede the effective date. In addition to performing the procedures required by this section at or shortly before the effective date, the auditor may also perform some or all of the procedures in this section at or shortly before the filing date.

#### *The Prospectus and Other Information (Ref: par. .07–.08)*

.A4 The reading of the entire prospectus (including any supplemental prospectuses and documents incorporated by reference—such as forms 10-K, 10-Q, and 8-K) assists the auditor in fulfilling the auditor's statutory responsibilities to perform a reasonable investigation, as described in Section 11(c) of the Securities Act of 1933.

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

.A5 The requirements in paragraphs .07–.08 assist the auditor in determining that the references to the auditor in the Securities Act of 1933 registration statement are appropriate. For example, management's disclosure in the "experts" section cannot imply that the financial statements have been prepared by the auditor or that the financial statements are not the direct representations of management.

.A6 The SEC does not require an entity to include an auditor's review report on unaudited interim financial information in the registration statement unless the registration statement states that the unaudited interim financial information has been reviewed by an independent auditor. If the registration

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<sup>7</sup> Paragraphs 8–12 of exhibit A, "Background."

statement includes the auditor's review report on interim financial information, then the requirements in paragraphs .07–.08 assist the auditor in determining that the issuer discloses the fact that an interim review report is not a report on, or a part of, the registration statement prepared or certified by the auditor, within the meaning of Section 7 and Section 11 of the Securities Act of 1933, and that the auditor's liability under Section 11 does not extend to the auditor's review report.

**.A7** The auditor is not considered an expert with respect to the auditor's review report on interim financial information and, therefore, it is important that this fact is clearly described. For example, the disclosures relating to the auditor's report on the audited financial statements may be included under a heading titled "Experts," and the disclosures in paragraph .A6 would then be included under a heading titled "Independent Auditors." Alternatively, the disclosures described in paragraph .A6 may be included under an "experts" section together with language stating the fact that an interim review report is not a report on, or a part of, the registration statement prepared or certified by the auditor, within the meaning of Section 7 and Section 11 of the Securities Act of 1933, and that the auditor's liability under Section 11 does not extend to the auditor's review report.

**.A8** Exhibit A describes the disclosures relating to the auditor's report on the audited financial statements. Exhibit B, "Illustrative Disclosures and Reports," provides an illustration of this disclosure.

### Subsequent Events Procedures (Ref: par. .09–.12)

**.A9** An example of the conditions described in paragraphs .09–.11 would be a situation in which an issuer recently acquired a nonissuer that is considered significant to the issuer based on quantitative thresholds specified in the SEC's rules and regulations. In this case, the issuer's registration statement may need to include the separate audited financial statements of the acquired nonissuer for one or more periods.

**.A10** In addition to the procedures required by paragraph .09, 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 section 501, *Audit Evidence—Specific Considerations for Selected Items*.

**.A11** In making the determination whether to withhold the auditor's consent, the auditor may consider it appropriate to obtain legal advice. (Ref: par. .12 and .16)

### Exhibits

**.A12** Exhibit A provides detailed background guidance on the following: (Ref: par. .04)

- The liability provisions of Section 11 of the Securities Act of 1933
- The auditor's consent and awareness letter
- The effective date of the registration statement
- References to the auditor as an expert in connection with a Securities Act of 1933 registration statement
- References to the auditor as an expert in a document other than a Securities Act of 1933 registration statement

- Letters similar to a consent prepared in connection with a document that is not a Securities Act of 1933 registration statement

**.A13** Exhibit B provides illustrative disclosures and reports.

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## Exhibit A—Background

*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.

18. 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**

19. 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.

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.

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## Exhibit B—Illustrative Disclosures and Reports

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.

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