Agenda Item 2C

Listing of Offerings Included in Scope of Proposed SAS

This paper is included for reference to provide a sense of the scope of the proposed SAS. It is an evolving document used by the Task Force and compiled from a variety of sources.

1. Securities offerings

a. Overview

i. Definition of "security"

"The term 'security' means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." (Securities Act, Section 2(a)(1))

a. Certain forms of real estate syndications are considered to involve issuance of "securities." In those situations, the syndication is subject to the laws governing issuance of securities. Limited partnership interests are the most common form of interest in real estate syndicates.

ii. Sellers of securities must comply with at least two separate sets of securities laws:

a. Federal law (as administered and enforced by the SEC) and

b. Law of the state(s) in which the securities are sold (as administered and enforced by state securities administrators/ commissioners), subject to federal preemption.

a. State securities statutes (often referred to as "Blue Sky" laws) govern registration of securities offerings at the state level, as well as exemptions from the state registration requirements. State law requirements for exemption and registration vary by state.

iii. Sales of securities must be registered unless an exemption from registration (under applicable federal/state securities laws) applies.

iv. All offerings (registered and exempt) are subject to the antifraud provisions of the applicable securities laws (federal and state). State antifraud provisions generally conform to the federal rules.

v. When registering an offering (or as a condition to establishing an exemption), a seller of securities will generally be required to either prepare and deliver certain disclosures to prospective investors, or "make available" such information. The breadth and content of the disclosures varies depending upon the particular requirements for registration or exemption imposed by the applicable securities authority. In non-registered offerings where disclosure content is not specified by the SEC or another regulator, a company must take into consideration what level of disclosure is necessary to avoid liability under antifraud provisions of securities laws.

b. **Federal exemptions from registration – 1933 Act**

i. Muni bond offerings

ii. Intrastate offerings §3(a)(11)

No registration of disclosure documents with the SEC is required for securities offered entirely within a single state; however, state regulators may require registration of such offerings.

iii. "Small issue" exemptions §3(b)(1)

Exempts from registration issuances of up to $5 million. Regulation D Rules 504 and 505 and Regulation A provide implementing guidance. Under Reg D, the types of investors and size of an offering will dictate the disclosures (including financial statement disclosures) required. Reg A offerings must be filed with the SEC using Form 1-A.

a. *"Seed capital" exemption (Reg D Rule 504)*

Registration is not required when a privately-held company sells up to $1 million of its securities in any 12-month period to an unlimited number of persons (regardless of investor sophistication or net worth). No specific information is required to be disclosed to investors. Normally, general solicitation is prohibited, and purchasers receive "restricted securities" that cannot be transferred or resold. However, under certain circumstances (for

example, if preparation and registration of disclosure documents is required under state securities laws), companies can use general solicitation and securities are freely transferable.

b. *Regulation D Rule 505 exemption*

Registration is not required when a privately-held company sells up to $5 million of its securities in any 12-month period to an unlimited number of "accredited investors" plus up to 35 "non-accredited investors." General solicitation is prohibited. Purchasers receive "restricted securities" that cannot be transferred or resold. If all potential investors are accredited, does not require that any specific information be disclosed to investors. If any are non-accredited, potential investors must receive an offering document must be provided which generally contains the same information as would be included in a prospectus for a registered offering (including audited financial statements).

c. *Regulation A exemption*

Tier 1: Exempts from registration small *public* offerings of up to $20 million within 12 month period. Issuers must file with the SEC an offering circular on Form 1-A (a simpler version of the prospectus required in a registered offering) but, unlike registered offerings, financial statements do not need to be audited (unless audited financial statements are otherwise available). Because the offering is public, general solicitation is permitted, and securities are not restricted. Form 1-A requires an accountant's consent. Offerings under Tier 1 must be filed and fees paid in every state in which they're selling pursuant to state "blue sky laws."

Tier 2 (approved March 25, 2015): Creates new rules that increase the limit on the capital that can be raised to $50 million in a 12 month period without having to comply with the SEC's general registration requirements. For Tier 2 offerings, issuers will have to provide audited financials with their offering circular, and will have to file annual and semi-annual financial reports with certain scaled disclosure. In addition, Tier 2 offerings will be required to provide certain current event reporting. The Tier 2 rules preempt state blue sky laws.

The rules adopted by the SEC provide additional provisions applicable to all offerings under both tiers of Regulation A, including required electronic filing of offering circulars, the ability to file draft offering circulars with the SEC for review before going public, and the ability to use certain "test the waters" communications.

iv. Transactions by an issuer not involving any public offering §4(a)(2)

(a/k/a "private placement" exemption, "nonpublic offering" exemption, "private sale" exemption, "Section 4(a)(2) exemption)

These are private offerings involving a limited group of sophisticated investors. No formal offering document (e.g., prospectus or private placement

memorandum) is required, but prospective investors must be "granted access to" the type of information normally provided in a prospectus (which presumably would include audited financial statements and auditor's report). In practice, some issuers will voluntarily prepare a private placement memorandum or offering memorandum. Securities are restricted and cannot be resold or distributed to the public.

a. *Regulation D Rule 506 offering*

Rule 506 provides conditions that an issuer may rely on to meet the requirements of the §4(a)(2) private offering exemption. A company may sell its securities to an unlimited number of "accredited investors" and up to 35 non-accredited investors who must meet a "sophistication" requirement. There are no limitations on the amount that can be raised. Companies may decide what information to give to accredited investors, but non-accredited investors must receive disclosure documents that are generally comparable to Form A-1 for a Regulation A offering. If the offering only involves accredited investors and the company takes reasonable steps to verify that, the company can broadly solicit potential investors and yet still be deemed to be undertaking a "private offering." If non-accredited investors are involved, general solicitation is not permitted.

b. *Rule 144A offering exemption*

Rule 144A offerings have become popular among foreign issuers because they provide a vehicle to raise capital in the US capital markets without being subject to the registration and reporting requirements of a public offering with the SEC. The Rule 144A exemption applies to resales of certain privately-placed securities. The offering transaction involves two steps: (1) a private placement of securities with investment banks or broker-dealers under Section 4(a)(2) or Reg D rule 506; (2) concurrent resale of those securities to` qualified institutional buyers (QIBs). In these transactions, the broker dealers/investment banks act in a similar role to underwriters in an SEC-registered offering. The level of disclosures and content of an offering document under Rule 144A is determined by the company. As a general rule, general solicitation cannot be used; however, a recent amendment permits use of general solicitation in situations where purchasers are known QIBs or "the seller reasonably believes the purchasers are QIBs."

v. *Offerings made outside the United States by both U.S. and Foreign issuers* (Rule 901-905 – Regulation S)

Regulation S provides an exclusion from the Section 5 registration requirements of the 1933 Act for offerings made outside the United States by both U.S. and foreign issuers. There are two general conditions 1) • the offer or sale must be made in an offshore transaction; and no directed selling efforts may be made by the issuer, a distributor, any of their respective

affiliates, or any person acting on their behalf, or 2) a standalone Regulation S offering solely in one or more non-U.S. countries. There are various types of Regulation S offerings including a combined Regulation S offering outside the United States and Rule 144A offering inside the United States.

vi. Securities sold for employee benefit plans (Rule 701)

An exemption is provided for certain sales of securities issued to compensate a private company's employees. If a company sells more than $5 million during a 12 month period, it must provide disclosure to employees that includes certain financial and other information. Employees receive restricted securities that cannot be traded or resold.

vii. Other exempt classes of securities

a. Securities issued by religious, charitable, educational and other nonprofit organizations

b. 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.

c. Miscellaneous other securities such as short-term notes, drafts and bills of exchange; insurance policies; certificates issued by a receiver or trustee in bankruptcy; interests in a railroad equipment trust

d. Crowdfunding – will allow for limited-size offerings to be sold in small amounts to a large number of investors (*e.g.*, over the Internet)

2. Franchise offerings

a. Franchise offerings are regulated at the federal and state level.

b. Federal regulation occurs through the Federal Trade Commission under the FTC's *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.

c. 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.

d. Under the FTC Rule, audited financial statements are required to be included in the FDD only after the 3rd year of the franchisor's operations. However, some states have more stringent rules requiring that all financials included in the FDD be audited. Some states also require the franchisor to obtain the auditor's consent to include his/her report in the FDD.