February 14, 2005

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006

Subject: PCAOB Rulemaking Docket Matter No. 017

We are pleased to comment on proposed ethics and independence rules concerning independence, tax services, and contingent fees, as contained in PCAOB Release No. 2004-015.

We support the PCAOB's proposal to continue to allow auditors to provide most tax services to public company audit clients. In performing an audit of financial statements, the auditor must understand and test the company's tax calculations, tax-related account balances, and tax-related disclosures that apply to transactions the company has engaged in. unless the scope of a financial statement audit were to exclude auditing all matters related to taxes.

Most reasoned observers understand that it is widely accepted for an auditor to "know taxes", and many people expect auditors and other CPAs to be knowledgeable in tax and understand that their profession involves preparing tax returns and providing tax advice. We submit that the public expects CPAs to provide tax services. If a CPA meets someone at an event and they find out they are meeting a CPA, the first comment is likely to be "I have a tax question for you." The public is not wary of CPAs providing tax services. They don't like CPAs selling abusive tax shelters, but as for performing tax return preparation services, that is what the public expects CPAs to do.

We provide specific comments on the proposed rules as follows.

Proposed Rule 3501 Definitions (a)(iii)

Proposed Rule 3501 (a)(iii) defines when the professional engagement begins and ends. The engagement is defined to begin when the registered firm signs an engagement letter or begins audit/review procedures, whichever is earlier. Since the audit committee must pre-approve the audit, we suggest that the engagement does not start until the audit committee approves it, rather than when the firm signs the engagement letter prior to presenting it to the audit committee.

The engagement is defined to end when the Commission is notified by the audit client or the audit firm. Some entities, such as registered employee benefit plans, do not notify the Securities and Exchange Commission that there is a change in auditor as they are not required to file a Form 8-K. Hence we suggest a different definition as to when the professional engagement period ends is needed to cover these registrants.

Rule 3502 Responsibility Not to Cause Violations

It appears that this proposed rule may be a very broad extension of liability to "associated persons" that was not contained in the Sarbanes-Oxley Act of 2002. This extension of liability would, in our view, best be provided by legislation rather than by rulemaking.

The proposed rule states that a person shall not cause a violation due to an act or omission the person knew or should have known would contribute to the violation. Professional auditing standards include over 2,000 uses of the terms "must", "should/shall" and "is required", and this thus represents multiple instances where a violation might occur in an audit. We are uncertain as to the position that the PCAOB will take on future alleged violations of professional standards, and thus are uncertain as to how the proposed rule will be wielded in practice.

We are also unclear how "would contribute to" would be viewed by the PCAOB, or as to how "omission" would be viewed. For example, an audit firm normally provides training for its staff. At what point would a lack of coverage of some auditing topic, that the PCAOB internally decided to focus on, be viewed as "an omission" that the person in the firm doing the staff training, or planning the staff training, "should have known would contribute to" a later violation by one of the persons in the training class?

Proposed Rule 3520. Auditor Independence

The proposed rule states that an audit firm must be independent of its audit client throughout the audit engagement period, which is defined in Rule 3501(a)(iii) to include "the period covered by any financial statements being audited…". This definition may cause some problems.

Here is a common fact pattern that illustrates one problem with this definition. Assume a partner in an audit firm owns a share of stock in a public company that is not an audit client. The firm becomes engaged in the current year to perform the audit of that company for the current year and the partner then promptly sells the stock. However, the partner held the stock for a portion of the year to be audited and thus, under the proposed rule that includes the "period covered by the financial statements", the firm would not be independent of the company for the entire year "covered by the financial statements being audited" and thus could not do the audit. If this rule is to be interpreted in the way it reads, it then might be very difficult for a company that is widely-held to find a new audit firm during a given year because of the likelihood that someone in the new audit firm would own stock in the company, disqualifying the firm for that year even if that stock is sold immediately upon the company becoming an audit client.

We understand that some independence impairments, such as performing bookkeeping in the period covered by the financial statements under audit, might not be capable of being cured within that period because the auditor might be auditing its own work. However, we believe some independence impairments during the period covered by the financial statements should be allowed to be curable. Owning stock during a portion of the period covered by the financial statements being audited, that is prior to being engaged as the auditor, should be allowed to be cured. Thus, we believe the proposed rule should provide that some specified independence impairments "during the period covered by the financial statements" may be cured.

Proposed Rule 3522 Tax Transactions

We do not think providing planning advice or an opinion regarding a transaction that is not a "listed" transaction at the time such services are provided should adversely affect auditor independence if the transaction subsequently becomes "listed." It quite simply is not fair for either the auditor or the company to require an auditor change should a transaction, for which planning advice or an opinion were provided in good faith, later become a listed transaction. As a further consideration, a transaction that becomes listed will presumably have been one that, when the services were provided, was assessed as to whether it was an "aggressive" tax position under section (c) of the proposed rule and was in good faith determined not to be an "aggressive" transaction.

The proposed rule, as it reads now, is unclear whether it applies to a service provided for a transaction that becomes listed after the service is provided. We suggest the rule be clarified by stating in (a) that it applies to "a listed transaction within….. at the time such services are provided", as well as making a similar clarification regarding the timing as to when services are provided in the other portions of the rule.

We also suggest that some planning advice be allowed even if the auditor believes that a proposed transaction would be a listed, confidential, or aggressive transaction. Specifically, the auditor should be allowed to say "I don't think you should do it" without that affecting auditor independence.

We note that the proposed rule refers to a "listed" transaction whereas the commentary in the release also discusses transactions that are "substantially similar" to a listed transaction. If the latter interpretation is intended, we suggest the rule be revised to indicate its broader applicability, and if the former interpretation is intended, we suggest the commentary in the release be revised to conform to the wording of the rule.

The release discusses the need to ascertain whether an aggressive tax transaction was "initially recommended" by the audit firm or another tax advisor, and states that management representation as to who initiated the transaction would not be sufficient to rely on. It might be difficult to determine how a transaction originates, as the "initial recommendation" could have come to a company officer by that officer reading an article, talking with a colleague, or some other way, prior to "another tax adviser" becoming involved. We suggest that the restriction be applied only to aggressive tax positions recommended by the audit firm itself. We suggest that a management representation be considered sufficient evidence as to who initiated a

transaction, as it may be impossible otherwise to determine exactly how a transaction started if one is not present at all meetings, phone calls, and so on that occur.

Proposed Rule 3523 Tax Services for Senior Officers of Audit Client

We agree that selling abusive tax shelters to a public company audit client, or to its officers, is something that should not be done. Most reasoned criticisms of auditors providing tax services to officers appears to focus on the selling of such tax shelters to those individuals and, as the PCAOB notes in the release, this criticism is not focused on the preparation of the income tax return as such. We note, in reading the recent articles in the press regarding abusive tax shelters sold by audit firms to companies and to corporate officers, that the concerns expressed deal with the tax shelter and not with the preparation of the tax return. It is difficult in reading any of these articles to determine who actually prepared the tax return involved, as the concern is over selling the tax shelter and the identity of the tax return preparer is not relevant to the concern set forth in the articles or considered particularly newsworthy.

We believe that most people believe that preparing tax returns and giving tax advice are a normal part of a CPAs role and that it is "natural" for CPAs to prepare tax returns for people without affecting independence. Therefore, we do not agree with this proposed rule as we do not believe that providing a tax compliance service to an officer of a public company audit client creates a mutuality of interest with that company. The auditor does not become an advocate for the individual when preparing a personal tax return, but instead is helping the individual comply with tax law and rules. Tax preparation services are governed by voluminous rules and regulations established by governmental agencies.

We also suggest that preparing a tax return for an officer of a company during a "period covered by the financial statements" should not affect independence if the services were provided before the company became a public company audit client. A nonpublic company faces a variety of situations under which it could become a public company, including an increase in the number of its shareholders, a desire or need to raise capital in a public offering, or an acquisition by a public company. In these cases, the proposed PCAOB rule would prevent the existing auditor from being independent, with no cure possible, and the financial statements would need to be reaudited. An unfortunate consequence of the proposed rule is that a nonpublic company may often find that it needs an expensive reaudit of its financial statements because an officer of the nonpublic company used the company's audit firm for a tax service. This factor might deter officers of private companies from using their audit firm for tax services, and any cost-benefit analysis by the PCAOB of the effect of its proposal should consider the total cost involved, including the cost for non-public companies.

To limit the ripple effect of this rule on non-public companies over which PCAOB does not have oversight, we suggest the PCAOB simply provide that its rule prohibiting tax services for the specified officers state that it is effective for dates following the date at which a non-public company initially becomes subject to SEC registration, or is involved in a Form 8-K filing for an acquisition, and is not effective for financial statements for the periods preceding this date. Said another way, the PCAOB rule should allow an audit firm to prepare the tax return of a CEO for a non-public company and still be considered independent for that period, even if those financial statements are later included in an initial filing.

One of the effects of the proposed rule will be to limit that ability of a registrant to change auditors. As an illustration of how this would happen, assume a company has 8 officers as listed in the proposed rule, and that the existing audit firm is prohibited from providing tax return preparation work for any of these officers. These officers may not be personally able to, or may not want as an officer of a public company to risk preparing, their own return, and thus they may seek out the services of an accounting firm other than their current audit firm to prepare their income tax return. Assume each of 8 officers engages a different audit firm for this tax service. Then, if the company desires to change audit firms, a firm that prepared an officer's 2005 tax return would be precluded from being able to provide audit services for the company for 2005 (if any work was done on 2005 estimated payment calculations) or for 2006 (when the 2005 return would be prepared.) Thus, 8 firms may not be available as alternatives to the current auditor.

An officer in a financial reporting oversight role at an audit client may be a partner or owner in various entities and may be an investor in other entities. An audit firm may prepare the tax returns for these entities and the officer may receive a Form K-1 as a partner or other tax information depending on the form of the ownership involved. We suggest the PCAOB clarify how far the prohibition against providing tax services "to an officer" applies, specifically whether it is only to the individual's personal taxes or whether it may also apply to entities in which the individual is an active or passive participant (a partnership, a REIT, a public investment vehicle, a multi-party trust, etc.)

Proposed Rule 3524 Audit Committee Pre-Approval of Certain Tax Services

To receive audit committee pre-approval of tax services, we believe it is not needed to have the audit firm provide a listing of each tax return and each jurisdiction involved. Companies continually open additional locations, or otherwise become subject to taxation, in a variety of locations, both domestic and internationally. Governments may also establish new taxes or new forms. We do appreciate the need to communicate clearly with audit committees about the scope and nature of services to be provided. However, for a larger entity with many locations, and with changing and evolving operations at a company (as well as changing state and local tax rules), it may not be possible early in the year, when arrangements would normally be made as to services, to specify each state and locality for which an income tax, franchise tax, property tax, sales tax, estimated tax, or other return may be needed. It also may not be especially meaningful to the audit committee to be given such a detailed listing, although an audit committee that wanted it could always make its interest known.

We believe most audit committees will find it sufficient for their approval responsibility to be provided a general description of the tax services, rather than a detailed listing of each state and locality and form number involved. This will allow flexibility if another state tax return needs to be added or if it is determined estimated returns are now needed in a jurisdiction. As one example of the complexity that is involved if "each return" needs to be described, payment of 4 estimated payments during the year is done by filing 4 separate forms, followed up by the final return for the year: do all 5 forms have to be individually listed?

The Commission staff letter that is referred to in the proposal is not easy to locate on the Commission web site, and we do not know how many have seen it or could locate it. Even if available, some might question whether this letter approaches the level of an "SEC rule" as is referred to in the proposal as support.

It often is the case that an auditor brings to the attention of a company the need or requirement to file a tax return in a specific locale, whether because the company begins doing business (as that locale may define it) in that locale during the year or because the locale has newly adopted (or revised) its taxation regulations. It would also be helpful if the PCAOB would note that it is not a violation of its rules for an auditor to advise a public company audit client that, based on something the auditor notes, the company should consider whether it has a tax filing or reporting obligation to a specific jurisdiction, even if the audit committee has not approved this form of advice as a specific tax service.

We do not agree with the comment made in the proposed release that appears to require "a competent internal tax department" to be present to avoid the risk that tax compliance services performed by an auditor would place the firm at risk of making management decisions. Many smaller public companies do not have "an internal tax department" because they are small, but these companies will have someone who has responsibility for ensuring that tax matters are handled and who can exercise sound judgment in the best interests of the company.

If you have any questions, please contact Jim Brown.

Very truly yours,

Crowe Chizek and Company LLC