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Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

PCAOB Rulemaking Docket Matter No. 039
Proposed Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications

Dear Ms. Secretary:

We appreciate the opportunity to comment on the Public Company Accounting Oversight Board's (the "PCAOB" or the "Board") Release No. 2012-002, *Proposed Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications* (the "Release" or the "Proposed Amendments"). We support the Board's efforts in the Release to tailor certain of its rules and forms to the audits and auditors of brokers and dealers and certain other amendments in light of the Board's administrative experience to date. We believe that certain elements of the Proposed Amendments require further clarification and guidance, and have summarized our observations and recommendations for your consideration below. Our comments and observations relate to the following areas:

- Overall Applicability
- General Provisions
- Professional Standards
- Investigations and Adjudications
- Registration and Reporting Forms
- Effective Date

Overall Applicability

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank amendments") amended various provisions of the Sarbanes-Oxley Act of 2002 (the "Act"). Specifically, the Dodd-Frank amendments provided the Board with authority to carry out the same oversight responsibilities it has carried out with respect to issuer audits – standards-setting, inspections, and investigations and disciplinary proceedings – in connection with registered public accounting firms' audits of brokers and dealers.

Consistent with our comment letter on the Board's interim inspection program for brokers and dealers in securities[1], we encourage the Board to consider the potential costs and benefits of adopting amendments to its rules that scope in all types of brokers and dealers. We continue to believe that the interests of the investing public would be best served by limiting the applicability of the Board's rules and the related Proposed Amendments to only those brokers and dealers that carry customer accounts and maintain customer cash and securities. These "clearing" or "carrying" brokers and dealers are typically considered to represent greater significance to the markets and investors than "introducing" brokers and dealers, whose customer accounts and transactions are cleared and carried on the books and records of a clearing or carrying broker and dealer.

In addition, we suggest that the Board consider the observations below to enhance and clarify its Proposed Amendments.

General Provisions

The Board has requested comment on its Proposed Amendments to the defined terms in Rule 1001 in Section 1 of the Board's rules. We note that the proposed changes to Rule 1001(p)(i), "Person Associated with a Public Accounting Firm (and Related Terms)," include requirements related to persons "seeking to become associated" with a public accounting firm. We suggest the Board clarify the meaning of this term and provide guidance regarding when a person would qualify as "seeking to become associated."

Professional Standards

Interim Quality Control Standards

The proposed change to Rule 3400T(b) deletes "(1)" in regard to Section 1000.08(n) of the AICPA SEC Practice Section (SECPS) Manual. The interim standard adopted by the PCAOB is limited to Section (n)(1) and does not include section (n)(2). Since the existing rule refers to the SECPS Requirements of Membership as in existence on April 16, 2003 in the SECPS Manual, removing the "(1)" appears to remove that limitation, causing the PCAOB's proposed rule to now include all of SECPS Section 1000.08 (n). This adds section (2) which was not originally adopted by the PCAOB and reads, "report annually, pursuant to SECPS Section 1000.08(g), the name and the country of the foreign associated firms, if any, for which the SECPS member firm has been advised by written representation from its international organization or the individual foreign associated firms that such policies and procedures have been established." We note that SECPS Section 1000.08(g) was not adopted by the PCAOB and understand that the intent of the PCAOB was to maintain the rule as originally adopted. Accordingly, we recommend the proposed change to Rule 3400T(b) be corrected to maintain the "(1)" proposed to be deleted with respect to Section 1000.08(n).

[1] *See* KPMG LLP's comment letter on the Board's Rulemaking Docket Matter No. 32, *Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers*, dated February 10, 2011.

Definitional Matters

The Release proposes to add a definition of "audit committee" to Rule 3501 in order to facilitate the application of Rule 3526, *Communications with Audit Committees Concerning Independence*, to brokers and dealers. The Board acknowledges that some brokers and dealers may not have governance structures that include boards of directors or audit committees, and therefore, proposes that the definition include a phrase indicating that for non-issuers, if no audit committee or board of directors (or equivalent body) exists, the term would mean those persons designated to oversee the accounting and financial reporting processes of the entity and the audits of entity's financial statements. The Release indicates that "[t]he Board proposed *essentially the same definition* [emphasis added] of 'audit committee' in its recent audit committee communications proposal"[2]. We suggest that the Board consider using the same definition as used in its audit committee communications proposal for consistency.[3]

Auditor Independence Matters

Rule 3523, *Tax Services for Persons in Financial Reporting Oversight Roles*, generally prohibits auditors from providing tax services to most persons who perform in a financial reporting oversight role at an audit client. The Board has requested comment on whether this rule should apply to audits of all brokers and dealers. We believe that the rule only should apply to issuer brokers and dealers, and brokers and dealers that are subsidiaries of issuers. We believe that application of this rule beyond the aforementioned brokers and dealers could result in additional costs in excess of any related benefits, consistent with our views about limiting the overall applicability of the Proposed Amendments.

The financial statements of non-issuer brokers and dealers are not used by investors to the same extent as the financial statements of issuers, and therefore audits of non-issuers should not be subject to the same set of independence standards as the audits of issuers. The Proposed Amendments with respect to Rule 3523 could result in increased costs to smaller, non-issuer brokers and dealers by requiring them to engage another professional or firm to perform certain tax-related services.

Separately, many smaller brokers and dealers are also organized as a smaller component of a larger non-public parent company. Auditors of the non-public parent company may provide tax services to the parent, including tax compliance services on behalf of individuals in a financial reporting oversight role at the parent, in accordance with AICPA independence standards. Should the Board proceed in applying Rule 3523 to smaller, non-public brokers and dealers, we suggest that it clarify that the rule be applied only to individuals in a financial reporting oversight role at the broker or dealer and not extend the rule to individuals in a financial reporting oversight role at the non-public parent company level.

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[2] *See* footnote 43 of the Proposed Amendments.

[3] *See Proposed Auditing Standard Related to Communications with Audit Committees*, PCAOB Release No. 2011-008.

As noted below under "Effective Date", we suggest that the Board provide a transition period for any rule changes related to tax services and auditor independence matters as they relate to audits of brokers and dealers in securities.

Investigations and Adjudications

We support the changes to the Board's rules to reflect its jurisdiction over the auditors of brokers and dealers. We note, however, that the Proposed Amendments include a number of changes, particularly regarding investigations and adjudications, which are unrelated to the Dodd-Frank amendments. The Board has requested comment on whether these Proposed Amendments are clear and has also asked whether additional changes should be made to the rules in Section 5. We believe that some of the Proposed Amendments are not clear, and in the interests of transparency and due process, we suggest that the Board consider a separate rulemaking effort, which could also include suggestions for changes to the rules in Section 5 based on the experience of persons that have been the subject of informal inquiries and investigations.

The Release proposes amendments to Rule 5422(b)(1)(i), which describes the documents that may be withheld from inspection and copying. Rule 5422(b)(1)(i) as currently written only excludes from production those documents that are "prepared by a member of the Board or of the Board's staff". The Proposed Amendments would expand this exclusion significantly to also include documents prepared by persons retained by the Board or the Board staff, as well as any document "obtained from" the Board or Board's staff, or persons retained by the Board or its staff.[4] The Proposed Amendments go well beyond the analogous SEC Rule.[5] We also note that to the extent that documents prepared by those retained by the Board or the Board's staff would include documents also subject to the privilege or work product exclusions described in Rule 5422(b)(1)(iii), the Proposed Amendments could relieve the staff of its logging obligations pursuant to Rule 5422(c), if those documents are deemed to be withheld on the basis of a newly-expanded Rule 5422(b)(1)(i). The only explanation provided in the Release for these proposed amendments is that they are intended to "clarify" the scope of the current exclusion.

Moreover, the addition of Rule 5422(b)(1)(ii), which would permit the withholding of documents accessed from generally available public sources, could similarly affect the ability of a respondent to obtain documents which are relevant in a proceeding and which might, for example, either bear on the basis for claims being asserted against the respondent or be exculpatory of the respondent.

[4] *See* page 34 of the Proposed Amendments.
[5] *See* SEC Rule of Practice 230.

We note that these proposed changes could substantively expand the universe of documents which would not be available to a respondent for inspection and copying, as well as the conditions under which they could be withheld, and thus warrant a more thorough explanation of the intended purpose and discussion of the potential impact of the changes.

The Board has proposed to supplement Rule 5109(d) concerning statements of position of firms or persons involved in an investigation with a note that the Board "will take into account the extent to which the assertions are supported by evidence in the investigative record or by affidavit, declaration, or similar statement signed by an individual who claims to have knowledge of the asserted facts"[6]. The Release does not provide a clear rationale why this addition is necessary or advisable, and we submit that it may result in submissions by those subject to possible enforcement proceedings being improperly discounted or ignored. Further, we submit that requiring the subject of an investigation to prove facts, prior to commencement of any Board proceeding, improperly shifts the investigator's burden of proof to the subject. Such a shift in the burden of proof, particularly when coupled with (i) the staff's practice of not making available to subjects the information in the staff's investigative file obtained from third parties (such as issuers and management personnel), and (ii) lack of a discovery process that would permit a subject to secure evidence from relevant third-party witnesses, would raise legitimate concerns about the fundamental fairness of the Rule 5109 process, and could disproportionately prejudice consideration of submissions by subjects who lack the significant economic resources required to submit comprehensive declarations of witnesses and experts to support their Rule 5109 statements. The SEC "Wells" procedures do not follow such guidance, and we respectfully suggest that the Board withdraw this proposal.

The Board requested comment on whether other changes to Section 5, *Investigations and Adjudications*, are warranted. We request that the Board consider revising Rule 5102(c)(3) to clarify that witnesses' counsel be permitted the assistance of a technical consultant during the taking of testimony, except in circumstances in which PCAOB Investigations staff determine that it would obstruct the investigation. The rule as promulgated places complete discretion in the staff to determine if "other persons" than counsel may be present during testimony.

The Board observed in its Adopting Release on Rules on Investigations and Adjudications[7] that the rules permitted the staff "to permit a technical consultant to be present during investigative testimony" and indicated its expectation that the staff would allow the consultant's presence "in appropriate circumstances and on appropriate terms", and expected the staff "to be accommodating".[8] We believe that this language would have led a reader to expect that technical consultants would be regularly permitted to attend to assist the counsel for accounting witnesses. We also believe that the SEC, whose own

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[6] *See* Appendix 1 of the Proposed Amendments, page A1-21.

[7] *See* PCAOB Release No. 2003-015, September 29, 2003, Rulemaking Docket Matter No. 005, *Rules on Investigations and Adjudications*.

[8] *Id*. at A2-18 to A2-19.

procedures have long permitted this form of assistance, would have had the same expectation when it gave its approval to the promulgation of the Rules. However, it is our understanding that in the eight years since Rule 5102(c)(3) became effective, technical consultants rarely, if ever, have been permitted to assist counsel in testimony.

During the comment process preceding the Rules' adoption, KPMG and other major accounting firms observed that the proposed rules were unclear whether technical assistance would be permitted, and noted that the SEC Enforcement staff, since at least 1985, had permitted technical consultants to assist counsel during testimony with no apparent interference in the SEC staff's fact-finding process. We submit that the Board should consider if the functional ban on technical assistance, in light of experience in the intervening years and in view of the inconsistency with SEC procedure, serves a legitimate purpose that outweighs (i) the possible prejudice to counsel and witnesses during questioning, (ii) the inhibiting effect on the Investigations staff's fullest exposition and consideration of the issues because of the limitation on counsel's ability to provide competent legal representation to the witness during questioning on technical issues, and (iii) the appearance that exclusion of such consultants provides the staff (which include both lawyers and accountants) an unfair tactical advantage over the witnesses in the investigative process.

Registration and Reporting Forms

The Board is proposing to amend the Board's registration, withdrawal and reporting forms to incorporate information relating to a registered public accounting firm's audits of brokers and dealers. We are generally supportive of the amendments, but provide the following observations for the Board's consideration.

Application for Registration on Form 1

The Note to Part III, Item 3.3 states "an applicant may presume…"[9] while the Notes to Items 2.4 and 3.4d use the term "conclude" in the same context.[10] We suggest that the Board align the language in these three Notes to Form 1.

[9] *See* Appendix 2 of the Proposed Amendments, page A2-9.
[10] *See* Appendix 2 of the Proposed Amendments, pages A2-7 and A2-10, respectively.

Registered Foreign Firm Filings on Form 2

The Release proposes to amend Item 3 of Form 2 to require a registered foreign accounting firm that performs services identified in Section 106(d)(2) of the Act to indicate if such firm has designated to "the Commission or Board an agent in the United States upon whom the Commission or the Board may serve any request to the Firm under Section 106 of the Act or any process, pleading, or other papers in any action against the Firm to enforce Section 106 of the Act" and, if so, to enter the name and address of the designated agent. We respectfully submit that the proposed identification of the name and address of the designated agent does not fairly reflect the Dodd-Frank amendments to Section 106 of the Act, and would serve no legitimate purpose of the Commission, the Board or the public readers of Form 2. The agent's responsibilities, pursuant to Section 106(d)(2), are limited to receipt of service of requests or subpoenas issued by the Commission or Board, or receipt of other process to enforce Section 106, which confers no rights on persons or entities beyond the SEC and PCAOB. We believe requiring foreign public accounting firms to publicly identify such agents could result in confusion, and in efforts by persons or entities other than the SEC or PCAOB to serve subpoenas or process on the designated agent. Accordingly, we suggest that the proposed additions to Item 3 be revised to omit such a requirement.

Fee Information on Form 2

The Board requested comment on whether registered public accounting firms should be required to report audit fee information for broker and dealer audit clients on an ongoing basis on Form 2. As the PCAOB currently has access to fee information for registered public accounting firms, we do not believe that fee information should be included in future Form 2 requirements. In addition, we do not believe that fee information included in Form 2 would serve the public interest by being made publicly available.

General Filing Matters with Respect to Form 3

The Proposed Amendments require that a registered public accounting firm file a Form 3 with the PCAOB in connection with the withdrawal of its audit report on a non-issuer broker or dealer. Although we believe that it is important for financial statement users to be aware of instances in which an audit report has been withdrawn, we however do not believe that filing a Form 3 is an appropriate mechanism for such reporting, as it would differ from comparable reporting requirements under SEC regulations. Under those regulations, an issuer reports the withdrawal of the audit report, and the registered public accounting firm's obligation under PCAOB Form 3 rules is to report only on an exception basis (i.e., a timely Form 8-K is not filed by the issuer). We believe that a similar approach for reporting withdrawn broker and dealer audit reports would be appropriate. We suggest that the SEC and the Board collaborate in the development of a mechanism whereby a broker or dealer would report the withdrawal of an audit report, and supplemented by Form 3 reporting by the registered public accounting firm only in those instances where timely notification was not made by the broker or dealer.

In the interim, we believe that PCAOB Interim Standard AU 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report*, provides a framework for registered public accounting firms to notify users if an audit report is withdrawn.

Issuer Auditor Change Notifications on Form 3

The Release indicates that "[t]he Board believes a risk is posed when an issuer *(including the issuer's significant subsidiaries)* [emphasis added] decides to change auditors and the issuer does not comply with the Commission's reporting requirements concerning the change in auditors."[11] As a result, the Board has proposed to amend Form 3 to require registered public accounting firms to file a special report with the Board if the firm resigns, declines to stand for re-appointment, or is dismissed from an issuer audit engagement and the issuer fails to file a required report with the SEC.

The Board also requested comment on whether it is appropriate to amend the SECPS membership requirement that registered public accounting firms (that are former members of the SECPS) notify the SEC's Office of the Chief Accountant ("OCA") of the cessation of an auditor's relationship with an issuer audit client by the end of the fifth business day after the firm determines that the client-auditor relationship has ended, irrespective of whether or not the issuer has reported the change in auditor in a timely filed SEC Form 8-K (a "five-day letter").[12]

Effectively, when combining the proposed addition to Form 3 for a registered public accounting firm to report, on an exception basis, when issuers fail to file the required Item 4.01 Form 8-K, and the questions relative to the existing requirement to file the five-day letter with the SEC OCA, there appears to be redundant reporting by the registered public accounting firm. We suggest that the SEC and the Board work collaboratively to address the significance of this issue in practice and remedy a single reporting solution. In that regard, we would suggest the elimination of the five-day letter requirement in its entirety, and rely on the proposed Form 3 exception basis reporting. In that regard, if a concern is the timeliness of the Form 3 reporting, we would support a fifteen-day deadline for the Form 3 reporting responsive to an Item 2.1-C event.

SEC Regulation S-K requires that when an independent accountant who was previously engaged as the principal accountant to audit the issuer's financial statements, or an independent accountant who was previously engaged to audit a *significant subsidiary and on whom the principal accountant expressed reliance in its report* [emphasis added], has resigned, declined to stand for re-appointment or was dismissed, then the issuer must file a report with the SEC.[13]As currently drafted, the proposed language for Items 2.1-C and 3.3 is broader than the requirements in SEC Regulation S-K (i.e., applies to the

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[11] *See* page 44 of the Proposed Amendments; *see* also Appendix 2 of the Proposed Amendments, pages A2-47 and A2-51.
[12] *See* page 45 of the Proposed Amendments.
[13] *See* SEC Regulation S-K, Item 304, *Changes in and Disagreements with Accountants on Accounting and Financial Disclosure.*

auditors of all significant subsidiaries, not just the auditors of significant subsidiaries on whom the principal accountant expressed reliance in its report). In order for the Form 3 reporting to function properly as an exception-based mechanism, the PCAOB's rules and regulations need to be conformed with SEC Regulation S-K.

Finally, the Proposed Amendments also would require that a registered public accounting firm state in Item 3.3c of Form 3 whether or not an audit committee recommended or approved a change in a registered public accounting firm in instances where the firm has resigned, declined to stand for re-appointment, or been dismissed from an audit engagement, and the former client is an issuer who has failed to file a Form 8-K. We believe that the Board should clarify that this requirement is limited to situations in which the auditor is dismissed, as an audit committee is not required to approve or disapprove an auditor's decision to resign or not stand for re-appointment.

Effective Date

The Board has indicated it will delay the date of required compliance with the Proposed Amendments to Rules 3521 through 3526 until the SEC determines that the PCAOB's auditing, attestation, and related professional practice standards should govern the preparation and issuance of audit reports to be included in broker and dealer filings with the SEC. We believe a delayed effective date is appropriate under the circumstances, and encourage the Board to consider a sufficient transition period to minimize the implementation challenges of applying PCOAB rules and standards to 2012 audits of brokers and dealers. We understand that the SEC staff has indicated that they intend to implement their proposed amendments to Rule 17a-5 for December 31, 2012 year-end audits. Should the proposed amendments to Rule 17a-5 not be released until the latter half of 2012, we suggest that the Board consider a 2013 effective date with respect to the Proposed Amendments to Rules 3521 through 3526 related to audits of brokers and dealers. We also suggest that the Board provide a sufficient transition period for any rule changes related to auditor independence. Specifically, we believe that the transition period utilized when Rule 3523 was originally adopted for issuers would be appropriate for audits of brokers and dealers.

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We appreciate the Board's careful consideration of our comments, and support the Board's efforts. We would be pleased to answer any questions regarding this comment letter.

Very truly yours,

KPMG LLP

cc:

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