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Ms. Phoebe W. Brown, Secretary
Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

30 April 2012

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. Brown:

Ernst & Young LLP (EY) is pleased to comment on the Public Company Accounting Oversight Board's (PCAOB or Board) proposed amendments to conform the Board's rules and forms to the Dodd-Frank Act and make certain updates and clarifications (Proposal).

While we generally support the Proposal, we urge consideration of the following points:

Rule 1001(p)(i) Definition of Person Associated With a Public Accounting Firm (and Related Terms)

The Proposal would add terms to the definition of a "person associated with a public accounting firm." In particular, it would add the words "or entity" to the list of persons included in the definition, and it would add the words "or otherwise" to the existing subsection "participates as agent on behalf of such accounting firm in any activity of that firm." (at A1-3)

These additional words are presumably derived from Section 2 of the Sarbanes-Oxley Act, which includes these words in the definition of "person associated with a public accounting firm." But the release accompanying the Proposal (Proposing Release) does not explain why, at this time, these additional words are necessary. The "person associated" definition is the foundation for much of the regulatory regime, determining who is subject to the PCAOB's regulatory jurisdiction. If these words are intended to expand the existing reach of the PCAOB's jurisdiction, it would be helpful if the PCAOB were to describe why and how that might happen.

We believe the expanded definition may sweep in persons or entities that the Board may not intend to be deemed associated persons. For example, an accounting firm may on occasion consult with an outside law firm about a legal issue in connection with the issuance of an audit opinion. The addition of the words "or otherwise," which results in extending the PCAOB's jurisdiction over non-agency relationships, might mean that the law firm in such a circumstance could be considered an associated person. Accordingly, we urge the Board to provide more clarity on the purpose and potential effect of the proposed change.

Rule 3501 Definitions

The Proposing Release states that the definition of "audit committee" proposed in the amendments to Rule 3501 is consistent with the Board's recent *Proposed Auditing Standard Related to Communications with Audit Committees*.[1] In our letter to the Board related to that proposal, we suggested a revised audit committee definition to better reflect considerations for broker and dealer (broker-dealer) governance. We agree that the definitions should be aligned and believe that the same suggestion applies for the amendments to the definition of audit committee in Rule 3501.[2]

Rule 3523 Tax Services for Persons in Financial Reporting Oversight Roles

The Board is proposing that PCAOB Rule 3523, which generally prohibits auditors from providing tax services to any person who performs a financial reporting oversight role at an audit client, apply to the audits of all broker-dealers. Because of the definition of "audit client" under Securities and Exchange Commission (SEC) Rule 2-01(f)(6), which includes "affiliates" of the audit client, proposed Rule 3523 would presumably mean that the firm could not provide tax compliance services to persons in a financial reporting oversight role at a *nonpublic* parent of the broker-dealer, even where the broker-dealer might be a small component of the *nonpublic* entity. We recommend that Rule 3523 apply only to individuals in a financial reporting oversight role at the broker or dealer and not to persons at a nonpublic-company level. (If the parent company were an issuer, Rule 3523 would already apply.)

Rule 5422 Availability of Documents for Inspection and Copying

The Proposal would significantly expand the discretion of the Division of Enforcement and Investigations (Division) under Rule 5422(b) to withhold documents from persons or entities who are respondents in a PCAOB enforcement proceeding. The Proposal would allow the Division to withhold the following: (1) any document "obtained from" a Board member or staff person, or any document "obtained from" a person who has been retained by the Board or the Board staff in connection with the investigation or enforcement proceeding, unless the document has been previously disclosed and (2) any document "accessed from generally available public sources, such as legal research or other subscription databases, databases of securities filings, databases of periodicals, and public web sites, except to the extent that the interested division intends to introduce such documents as evidence."

We are concerned about the "obtained from" change described above. We are not sure what the purpose of this change is – the Proposing Release does not contain an explanation for the rationale or purpose for the amendment. It would seem that the change would allow the Division to withhold any documents obtained by the staff through the inspection or the investigative process, except for exculpatory documents (see Rule 5422(b)(2)). This would be a significant change from the current version of Rule 5422(b), which is much narrower, designed to protect documents from discovery if they are deliberative in nature (see Rule 5422(b)(1)(i)), privileged (see Rule 5422(b)(1)(ii)), obtained from a confidential source (see Rule 5422(b)(1)(iii)) or irrelevant (see Rule 5422(b)(1)(iv)).

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[1] PCAOB Release No. 2011-008 (20 December 2011)

[2] See our comment letter dated 29 February 2012, in which we suggest that "the final standard be aligned with the definition of an audit committee in ISA 260 and AICPA AU Section 260. That definition refers to 'the person(s) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity.' Under that definition, the communication would likely be made to the Chief Executive Officer or another officer of the broker or dealer."

Form 2: Annual Report

The Proposing Release states (at 43) that the Board is not requiring disclosure of fee information for services provided to broker-dealers as part of its Form 2 annual report "at least until the Board determines the elements of its permanent inspections program." We recommend that the Board not determine that fee information for broker-dealer auditors should be included in annual reporting requirements. The broker-dealer regulatory framework is different from the issuer framework. Investors do not make direct investments in broker-dealers, and broker-dealer customers are principally concerned with the question of whether a broker-dealer is maintaining sufficient capital to satisfy its obligations. We do not believe that disclosure of the fees paid by the broker-dealer to its auditor provides any relevant or useful information to broker-dealer customers, but the compilation of fee information on an annual basis would be a considerable burden.

Form 3: Special Report Form

The Board is proposing to amend Form 3 to require a registered firm to file a report on Form 3 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 on Form 8-K with the SEC in compliance with Item 4.01. This Form 3 would be filed with the Board no later than 30 days after the occurrence of the event reported. We agree with the proposed reporting requirement.

We do, however, have a comment on the Proposal. We suggest that the Board make clear that the specific terms included in the proposed Item 3.3 ("Issuer auditor changes") (at A2-51) be interpreted in the same fashion as the terms in Item 4.01 of SEC Form 8-K. For instance, the word "disagreement" has a defined meaning under the SEC rules; we suggest that the PCAOB state that the word "disagreement," and other words included in the proposed Item 3.3, have the same meaning as has been established under the SEC rules.

In addition, the Board asks whether the SEC Practice Section (SECPS) — Requirements of Membership, Section 1000.08(m), should be amended.[3] Given the proposed amendment to Form 3 and issuers' required Item 4.01 8-K reporting to the SEC, we recommend that the SECPS — Requirements of Membership, Section 1000.08(m), be amended to require reporting to the SEC staff only if the issuer fails to file the required report on Form 8-K. We believe that this streamlined reporting would provide appropriate notification to regulators while at the same time removing duplicative reporting.

[3] Currently, SECPS Section 1000.08(m) requires that a member firm that has been the auditor for an SEC registrant and has resigned, declined to stand for re-election or been dismissed, report the fact that the client-auditor relationship has ceased directly in writing to the former SEC client, with a simultaneous copy to the Office of the Chief Accountant of the SEC. Such report shall be sent to the former SEC client and to the Office of the Chief Accountant by the end of the fifth business day following the member firm's determination that the client-auditor relationship has ended, irrespective of whether the registrant has reported the change in auditors in a timely filed Form 8-K.

Disciplinary Proceedings Generally

The Proposing Release includes (at 35) an open-ended question about the PCAOB's rules relating to investigations and adjudications: "Should additional changes be made to the rules in Section 5?" We appreciate this invitation and have one comment.

When the PCAOB proposed and then adopted its Section 5 rules in 2003, our firm, and the profession more generally, expressed concern about one aspect of the proposals, namely, Rule 5102(c)(3). The rule provides that the persons who are allowed to be present during PCAOB investigative testimony are the witness, the witness's counsel, any member of the Board or the Board's staff, the reporter and any other person whom the Board or the staff designated in the order of formal investigation determined to be appropriate. The rule did not specify that an accountant could attend the testimony in order to assist the witness's counsel in representation of the witness, contrary to a well-established practice at the SEC. In response to comments on this point, the Adopting Release[4] stated (at A2-18-19):

> "The rule provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony, and we expect the staff to allow that presence in appropriate circumstances and on appropriate terms, including, for example, that the consultant not be a partner or employee of the firm with which the witness is associated. We expect the staff to be accommodating, but we also expect the staff to be vigilant about not permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel."

Consistent with this statement, the staff has never permitted counsel for an EY witness to be assisted by an accountant where the accountant is an EY partner or employee. Our understanding is that the staff has taken a consistent approach with respect to testimony involving other accounting firms.

With due respect, we continue to believe that this rule is unfair, contrary to relevant case law (see *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985)) and inconsistent with the fact-finding purpose of the investigative process. The rationale given in the Adopting Release[5] – that the staff needs to protect against a firm's internal personnel "monitoring" the witness's testimony – does not ring true. We are not sure of the underpinnings for concern about "monitoring;" it would seem that the PCAOB would think it a *good* idea for relevant persons in a firm (such as supervisors) to know about a witness's attributes as an auditor, as described and discovered during his or her PCAOB testimony, in order to determine whether the firm should adjust the witness's work assignments, provide training or take other steps to address any shortcomings. But in any event, the firm's in-house counsel *is* permitted to represent the witness, so the sought-to-be-avoided "monitoring" can presumably be undertaken by that person.

Accordingly, we suggest that the Board, now having nearly a decade of experience under this rule, reconsider and amend it.

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[4] PCAOB Release No. 2003-015 (29 September 2003)

[5] PCAOB Release No. 2003-015 (29 September 2003)

Additional Comments

We also have the following minor or technical comments:

1. The Proposal would require disclosure in Form 1 and Form 3 of whether a person or firm is subject to a "court-ordered injunction prohibiting appearance or practice before the Commission." We are not aware of any precedent or any authority in the securities laws or elsewhere for a court to enter an injunction that would enjoin a person or firm from appearing or practicing before the Commission; an injunction is typically entered to prohibit a person from violating a particular law or laws.

2. The Board might consider a rewording of the proposed Note to Rule 3500T (at A1-12). The Note states that the Board's interim independence standards "do not supersede" the SEC's independence rules and, accordingly, "to the extent that a provision of the Commission's rule is more restrictive — or less restrictive — than the Board's Interim Independence Standards, a registered public accounting firm must comply with the more restrictive rule."

   If the Board's standards "do not supersede" the SEC's standards, then it seems that the SEC's standards would always be applicable in situations where there are overlapping rules, even where the SEC's rule is *less* restrictive. It might therefore be better to state that the Board's standards "supplement" the SEC's independence rules and that persons are required to comply with the strictest set of rules.

3. The Proposal (at 15-16) states that "the Board would apply the SECPS member requirements to the auditors of broker[s] and dealers that were members of the SECPS in 2003." Proposed Rule 3400T, however (at A1-11), does not so state. We suggest this be made clear in the rule itself.

4. The Board is proposing an amendment to Rule 5300 so that the civil penalties set forth in Section 105(c)(4)(D)(i) and (ii) would be periodically adjusted for inflation based on adjustments made by the SEC pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. We do not have a particular objection to this proposal, but we note that these federal laws apply only to "agencies" of the federal government. The SEC is, of course, such an agency, but it is not apparent to us how the SEC can, through rulemaking, amend the civil penalties established by Congress in the Sarbanes-Oxley Act for the PCAOB, which is not a federal agency.

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We would be pleased to discuss our comments with the Board or its staff at your convenience.

Very truly yours,

Ernst & Young LLP