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

Re: PCAOB Rulemaking Docket Matter No. 005, Proposed Rules Relating to Investigations and Adjudications

Dear Mr. Secretary:

PricewaterhouseCoopers LLP appreciates the opportunity to comment on the Proposed Rules establishing procedures for investigations and adjudications. The following are our comments.

The Privileged and Confidential Nature of Investigatory Material

The Scope of the Privilege and Confidential Treatment

Proposed Rule 5108 provides for confidentiality of investigatory material. The first note to Proposed Rule 5108 sets forth the language provided under section 105(b)(5)(A) of the Sarbanes-Oxley Act (the "Act") with respect to the confidential and privileged nature of investigatory material. Unlike the Act and the note, the Proposed Rule provides that investigatory material -- documents, testimony, or other information -- is confidential "in the hands of the Board." That language implies that confidentiality would not extend to the same material in the hands of the member firms and associated persons or counsel for the member firms or associated persons. The insertion of the "in the hands of the Board" language blurs whether the Board intends to afford confidential treatment to other investigatory material that is apparently protected by the statute -- for example (i) documents in the possession of a member firm or associated person that were prepared by that member firm or associated person and were transmitted to the Board; and (ii) documents shared by the Board or its staff with a member firm or associated person.

The potential limitation of confidentiality to material "in the hands of the Board" under the Proposed Rule creates a distinction between confidential material and privileged material that is not found in the Act. Under the Act, "any information gathered in the course of the investigation is to be confidential and privileged for all purposes (including civil discovery), unless and until particular information is presented in connection with a public proceeding."[1] The Act -- and specifically, the key confidentiality provision, section 105(b)(5) -- does not distinguish between material that is "confidential" and material that is "privileged." Both terms refer to the same universe of documents and information enumerated in the Act. (Section 105(b)(5) ("documents and information prepared or received by or specifically for the Board . . . in connection with an investigation . . . shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process).") Although the scope of the privilege is ultimately defined by the Act, Rule 5108 seeks to redefine the scope of the confidentiality clause in a way that departs from the Act's definition of confidentiality as well as its definition of privilege.

To eliminate any confusion and unnecessary litigation as to the scope of the protection provided under the Proposed Rule, to further Congress's intent that investigatory material not be available to "outsiders," and to foster the sharing of information between the Board and its staff and the member firms, we propose that the language of the Proposed Rule conform to the Act by striking "in the hands of the Board." Alternatively, we would propose amending Proposed Rule 5108 to read as follows: "shall be confidential in the hands of (1) the Board; (2) the member firm being investigated and its associated persons; (3) the associated person being investigated and the member firm to which that associated person belongs; (4) the issuer whose audit forms the basis for an investigation; (5) any witness who provides testimony or documents in connection with an inquiry or investigation, and (6) counsel for any of the foregoing."

The Materials To Be Afforded Privileged and Confidential Treatment

Proposed Rule 5108 affords confidential treatment to "any documents, testimony, or other information prepared or received by or specifically for the Board or the staff of the Board" in connection with an inquiry or investigation. To clarify the type of documents and information that is confidential, we believe it would be helpful to insert the following language after "in connection with such inquiries and investigations":

> including originals and/or copies of transcripts procured by a witness pursuant to Rule 5109(c), Statements of Position submitted pursuant to Rule 5109(d), materials made available to

[1] Senate Rep. No. 107-205 (Jul. 3, 2002).

> parties pursuant to Rules 5422 and 5423, offers of settlement pursuant to Rule 5205, and motions or other work product submitted to or filed with the Board or the staff of the Board,

The additional clarification will serve to remove any doubt created by either the Act or the Proposed Rule about the type of documents and information that is to be treated as confidential. For instance, any argument that audit working papers submitted to the Board or its staff become confidential simply because those documents have been "received by" the Board would be negated by the type of information listed in the language proposed above.

The Loss of the Privilege and Confidential Treatment

Under the Act, confidential and privileged investigatory material loses its protection only if such material is presented in connection with a public hearing or is released in accordance with section 105(c). The Proposed Rule nevertheless provides that confidential protection will also be lost if "otherwise ordered by the Board or the Commission." The Act expressly enumerates the circumstances under which investigatory material loses its protections, which does not include the discretion of the Board or the Commission. We would, therefore, recommend that the phrase "Unless otherwise ordered by the Board or the Commission" be deleted from the Proposed Rule.

Informal Investigations

Proposed Rule 5100(b) provides that the Director of Enforcement and Investigation can request documents, information, or testimony from any person in connection with an informal inquiry. At the start of an informal inquiry, requests for broad categories of documents – such as all documents relating to an audit, which might include drafts, e-mails, and desk files of individual auditors – could create an unnecessary burden for the enforcement staff. For the member firms, such requests are not only burdensome, but very costly. In many instances, however, the matter can be expeditiously and efficiently resolved without propounding a broad request and instead requesting readily available documents and/or an interview of a knowledgeable person. We believe that the information gained by reviewing the available documents – i.e., documents retained by the member firm pursuant to 17 C.F.R. § 210.2.06 – and interviewing the knowledgeable person would sometimes eliminate the need for a broad request and thereby resolve the matter at a lesser cost to the Board and the responding firm. We, therefore, suggest that the following Note be added to Proposed Rule 5100(b):

> Note: The Board is cognizant of the expense to the Board and the responding persons of any request for information or documents made pursuant to this Rule, and therefore encourages the Director of Enforcement and Investigations and the Director's staff to

commence informal inquiries with a request for relevant documents retained by the registered public accounting firm pursuant to 17 C.F.R. § 210.2-06 and/or an interview of a knowledgeable person and seek discrete reviews of readily available documents, before propounding broad requests for all relevant documents and testimony.

A Witness's Right to Testimony and Other Evidence

Proposed Rule 5109(c) allows a witness who has provided testimony or other evidence in connection with an inquiry or investigation to obtain a copy of such testimony or evidence, "except that prior to such evidence or testimony being presented in connection with a proceeding or released in accordance with Section 105(c) of the Act, and the Board's rules thereunder, the Director of Enforcement and Investigations may for good cause deny such request." The reference to "released in accordance with section 105(c) of the Act" is confusing and unnecessary. The Director of Enforcement and Investigations may also deny a request for good cause if that language is omitted. Thus, for the sake of clarity, the reference to section 105(c) should be stricken so that the exception reads "except that prior to such evidence or testimony being presented in connection with a proceeding, the Director of Enforcement and Investigations may for good cause deny such request."

In addition, the Proposed Rule does not provide a mechanism for determining "good cause." We would suggest adding at the end of Proposed Rule 5109(c) the following language: "Any decision by the Director of Enforcement and Investigations to withhold the testimony or evidence of a witness from that witness is reviewable."

Grounds for Instituting Proceedings for Noncooperation

Proposed Rule 5110(a) provides that a disciplinary proceeding can be instituted if it appears that a member firm or associated person "may have given testimony that is false or misleading or omits material information." We agree that by providing false and misleading testimony a witness is not cooperating with the Board's investigation. However, we think that, if, as seems likely, the inclusion of the phrase "or omits material information" is intended to track the language of the securities laws pertaining to fraud violation, it would be helpful to insert the phrase "necessary in order to make the statement made not misleading" after "omits material information". Otherwise, the phrase might mean the omission of any information that may turn out to be material, which would impose an unusual and unfair duty on the witness because it would require the witness to volunteer all information that the witness believes might be material. Normal practice is for the witness to answer the questions asked, and for the investigator to formulate questions that will further the inquiry.

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We appreciate the opportunity to express our views and would be pleased to discuss our comments or answer any questions that the staff may have. Please do not hesitate to contact Walter Ricciardi at (646) 471 1125 or Ted Senger at (415) 498 7135 regarding our submission.

Sincerely,

PricewaterhouseCoopers LLP