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PROPOSED RULE ON PROCEDURES) PCAOB Release No. 2004-013
RELATING TO SUBPOENA REQUESTS) October 26, 2004
IN DISCIPLINARY PROCEEDINGS)
) PCAOB Rulemaking
) Docket Matter No. 015
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Summary: The Public Company Accounting Oversight Board ("Board" or "PCAOB") has proposed a rule governing procedures related to subpoena requests in disciplinary proceedings conducted under Section 105(c) of the Sarbanes-Oxley Act of 2002 ("Act"). The proposal consists of a single rule (PCAOB Rule 5424(c)). The Board invites public comment on the proposed rule and will consider all comments received, modify its proposal as it deems appropriate, and submit a final rule to the Securities and Exchange Commission ("Commission") for approval pursuant to Section 107 of the Act. The Board's rule will not take effect unless approved by the Commission.

Public Comment: Interested persons may submit written comments to the Board. Such comments should be sent to Office of the Secretary, PCAOB, 1666 K Street, N.W., Washington, D.C. 20006-2803. Comments may also be submitted by e-mail to comments@pcaobus.org or through the Board's Web site at www.pcaobus.org. All comments should refer to PCAOB Rulemaking Docket Matter No. 015 and should be received by the Board no later than 5:00 p.m. (EST) on November 29, 2004.

RELEASE

Board

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I. Background

Section 105 of the Act governs Board investigations and disciplinary proceedings. Under the Act and the Board's rules, the Board may compel registered public accounting firms and their associated persons to provide testimony and documents as required by the Board in furtherance of the Board's authority and responsibilities under the Act. The Act gives the Board no such independent authority to compel any other person to provide testimony or documents. The Act does, however, provide that the Board may seek issuance by the Commission of a subpoena to require any other person to provide to the Board testimony or documents that the Board considers relevant or material to a Board investigation.^{1/}

The Board has previously adopted rules implementing the Act's provisions for compelling testimony and the production of documents. Specifically, the Board has adopted (1) rules providing for an "Accounting Board Demand" to be served on a registered public accounting firm or an associated person to compel testimony or the production of documents in an investigation or a disciplinary proceeding, and (2) rules providing for the Board to seek Commission issuance of a subpoena to compel testimony or the production of documents from any other person in an investigation or a disciplinary proceeding.^{2/} The Commission approved these rules, while noting its understanding that the Board would adopt additional rules governing procedures for seeking issuance of subpoenas in disciplinary proceedings.^{3/} The Board has now proposed, and seeks comment on, a rule to establish those procedures.

^{1/} See section 105(b)(2)(D) of the Act, 15 U.S.C. § 7215(b)(2)(D).

^{2/} See PCAOB Rules 5102-5105, 5111, and 5424.

^{3/} See SEC Release No. 34-49704 (May 14, 2004).

RELEASE

The elements of the proposed rule are discussed below. Appendix I to this release contains the text of the proposed rule. Appendix II provides a section-by-section analysis of the proposed rule.

II. The Proposed Rule

The proposed rule sets out procedures pursuant to which the Board may seek issuance by the Commission of a subpoena for testimony or documents that any party seeks to present in a disciplinary proceeding. Under the proposed rule, only the Board could request that the Commission issue a subpoena, but the Board would do so based on the recommendation of a hearing officer who has considered any party's request for a subpoena and any opposition to that request. The proposed rule does not allow for a party to petition the Commission directly for issuance of a subpoena.

The proposed rule requires a hearing officer, at the first prehearing conference, to determine whether any party contemplates the possibility of applying to have the Board seek issuance of a subpoena. In many cases, it may be clear at the outset that no party anticipates seeking any subpoenas. In cases where possible subpoena requests are contemplated, however, the hearing officer should, at the initial prehearing conference, set a deadline for the submission of such requests. In setting that deadline, the hearing officer should take into account the time reasonably necessary, in light of the nature of the case, for a respondent to review documents made available by the Division of Enforcement and Investigations pursuant to Rule 5422. Under the proposed rule, applications not submitted in accordance with the deadline will be disfavored and will only be granted in unusual circumstances. The objective of this paragraph of the rule is to provide for parties to have a reasonable time to ascertain whether they consider it necessary to seek any subpoenas, but also to ensure that all applications for subpoena requests in a given case are dealt with at one time, rather than seriatim throughout the course of the proceeding.

The proposed rule provides that an application to have the Board seek issuance of a subpoena must include descriptions of the evidence sought, the party's basis for believing that the evidence exists, the grounds for considering the evidence to be relevant or material to the resolution of the charges, and the feasibility of obtaining functionally equivalent evidence by other means. The proposed rule also requires that the application include a completed form of subpoena. While it is not an element of the rule, the Board anticipates that parties, acting in their own self-interest, will routinely

RELEASE

seek to secure relevant documents and testimony on a voluntary basis, since there is no assurance in any case of obtaining a subpoena. The Board does not intend that the rule be used in circumstances where the evidence is reasonably available without being compelled by a subpoena, and the Board expects hearing officers to bear this point in mind when exercising the discretion they retain to deny any application.

Under the proposed rule, the hearing officer may, in his or her discretion, deny any application.^{4/} The hearing officer also may determine to recommend that the Board seek issuance of the requested subpoena or seek issuance of a subpoena for a narrower scope of evidence than that described in the party's application. To recommend seeking issuance of any subpoena, however, the hearing officer must determine that two conditions are satisfied.

First, the hearing officer must determine that there is a reasonable basis for believing that the general nature and substance of the documents or testimony encompassed by the subpoena are not merely a matter of speculation. The purpose of the proposed rule is not to facilitate any type of discovery process, but solely to secure the availability in the disciplinary proceeding of evidence that there is a reasonable basis to believe exists.

Second, the hearing officer must determine that there is a reasonable basis for believing that the unavailability of the evidence will bear on the interested division's ability to present relevant or material evidence or will bear on the Board's ability to provide a respondent with an opportunity to defend. The rule is not intended to afford any party an opportunity to present any evidence that is not relevant or material to establishing or defending against the charges actually made against the respondent.

Both conditions must be satisfied in order for the hearing officer to recommend that the Board seek the requested subpoena. The presence of both conditions does not, however, mean that the hearing officer must make that recommendation. Even if both conditions are satisfied, the hearing officer retains the discretion to deny a

^{4/} The proposed rule provides no special mechanism for review of a hearing officer's denial of an application. Review of that denial would be available on the same terms, and at the same time, as review of any other hearing officer decisions, including the possibility of interlocutory review if the criteria of PCAOB Rule 5461 are satisfied.

RELEASE

subpoena application, in light of his or her judgment about how best to manage the case toward a fair resolution with minimal delay.

Under the proposed rule, if the hearing officer recommends that the Board seek issuance of a subpoena, the hearing officer shall transmit the recommendation to the Board Secretary. The Secretary, on behalf of the Board, would then transmit a written subpoena request to the Commission unless the Board, on its own motion, determines not to request the subpoena. The proposed rule does not afford the parties an opportunity to make any submissions or argument to the Board on that point (unless the Board, on its own motion, requests them), but leaves the matter solely to the Board's discretion, to be determined on the Board's own motion.^{5/}

If the hearing officer recommends seeking issuance of a subpoena, the proposed rule provides that the hearing officer may take that pending recommendation into account in setting a hearing schedule. The proposed rule also provides, however, that in the absence of any Commission action on a subpoena request within 30 days of the Board making the request to the Commission, and in the absence of unusual circumstances warranting delay, the hearing officer shall proceed as if the Commission had denied the request. The hearing process will not be indefinitely put on hold because of uncertainty about whether the Commission will issue a requested subpoena. The hearing officer retains the discretion to accept the evidence at a later point if the Commission eventually issues the requested subpoena.

The procedures described in the proposed rule apply only with respect to seeking issuance of subpoenas to persons who cannot be required to provide the evidence pursuant to an Accounting Board Demand. By its terms, the proposed rule excludes the possibility of seeking issuance of a subpoena to a registered public accounting firm or an associated person, since those firms and persons must comply with Accounting

^{5/} A Board request that the Commission issue a subpoena sought by a respondent would not depend upon, and should not be understood to imply, a determination that the availability of the evidence in question is strictly necessary to providing a respondent with an opportunity to defend. Rather, a Board request for issuance of a subpoena reflects only a judgment that, under the circumstances, the party's request is reasonable and the Board sees no reason to stand in the way of the party's ability to present the evidence if the Commission agrees to issue the subpoena.

RELEASE

Board Demands, which are provided for elsewhere in the Board's rules on disciplinary proceedings.^{6/}

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On the 26th day of October, in the year 2004, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/

J. Gordon Seymour
Acting Secretary

October 26, 2004

APPENDICES –

1. Proposed Rule on Procedures Relating to Subpoena Requests in Disciplinary Proceedings
2. Section-by-Section Analysis of Proposed Rule on Procedures Relating to Subpoena Requests in Disciplinary Proceedings

^{6/} See PCAOB Rule 5424(a).

RELEASE

Appendix 1 – Proposed Rule on Procedures Relating to Subpoena Requests in Disciplinary Proceedings

RULES OF THE BOARD

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SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

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Part 4 – Rules of Board Procedure

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Rule 5424. Accounting Board Demands and Commission Subpoenas

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(c) Procedures Relating to Subpoena Requests

(1) The procedures described in this paragraph (c) shall govern a party's application to have the Board seek issuance by the Commission of a subpoena for the purposes described in paragraph (b).

(2) At the initial pre-hearing conference in any disciplinary proceeding instituted pursuant to Rule 5200(a), the hearing officer shall determine whether any party contemplates the possibility of applying to have the Board seek issuance by the Commission of a subpoena for testimony or documents. If the possibility of applications is contemplated, the hearing officer shall set a schedule for the parties to submit applications in accordance with subparagraph (3) and to submit a written opposition to an application. In setting the schedule, the hearing officer shall take into account the time reasonably necessary for the respondent to review documents made available by the Division of Enforcement and Investigations pursuant to Rule 5422. Applications not

RELEASE

made in accordance with the schedule shall be disfavored and shall not be granted except in unusual circumstances.

(3) An application to have the Board seek issuance by the Commission of a subpoena for testimony or documents shall be made in writing, shall be submitted to the hearing officer, and shall –

(i) identify and describe the testimony or documents in question;

(ii) describe the basis for the party's belief about what the substance of the testimony or documents would be;

(iii) describe why the evidence would be relevant or material to the resolution of the charges at issue in the proceeding;

(iv) address the feasibility of the party securing functionally equivalent evidence through other means; and

(v) include a completed form of subpoena, with attachments describing any documents sought.

(4) With respect to any application made pursuant to subparagraph (3), the hearing officer may deny the application, may recommend that the Board seek issuance of the subpoena, or may recommend that the Board seek issuance of a subpoena for a narrower scope of evidence than that described in the application. The hearing officer may recommend that the Board seek issuance of a subpoena only if he or she determines that there is a reasonable basis for believing that –

(i) the general nature and substance of the documents or testimony encompassed by the subpoena is not merely a matter of speculation; and

(ii) the unavailability of the evidence encompassed by the subpoena may bear on the interested division's ability to present relevant or material evidence or may bear on the Board's ability to provide a respondent with an opportunity to defend.

RELEASE

(5) If the hearing officer denies a party's application to have the Board seek issuance of a subpoena, the hearing officer shall issue a written denial of the application. If the hearing officer recommends that the Board seek issuance of a subpoena, the hearing officer shall do so in writing, shall include a written description of the reasons for seeking the subpoena, and shall provide each party with a copy of the recommendation. Along with the recommendation, the hearing officer shall transmit to the Secretary a copy of the application made pursuant to subparagraph (3), any previously submitted written opposition to that application, and a completed form of request to the Commission that conforms to the requirements of subparagraph (7).

Note: Unless the Board has directed otherwise, the Board expects hearing officers to issue a written denial of a subpoena application, or to make a written recommendation to seek a subpoena, no later than 14 days after the deadline for submitting an opposition to the application. A hearing officer may, in his or her discretion, allow the submission of a reply to an opposition, but the Board would still expect the hearing officer to act on the application within 14 days after the deadline for submitting an opposition.

(6) Upon receipt of a hearing officer's recommendation as described in subparagraph (5), the Secretary, on behalf of the Board, shall transmit to the Commission a request for issuance of the subpoena unless the Board, solely on its own motion and without submission or argument by any party unless the Board on its own motion so requests, determines not to request the subpoena. The Secretary shall provide a copy of any such request, or any Board determination not to make the recommended request, to the hearing officer, who shall provide copies to the parties.

(7) Any request transmitted to the Commission pursuant to subparagraph (6) shall be in writing and shall –

(i) identify the Board disciplinary proceeding and the parties to the proceeding, describe the reasons for the Board's determination to seek issuance of a subpoena, and provide a completed form of subpoena, with attachments describing any documents sought; and

(ii) provide any other information that the Commission, by rule or order, requires.

RELEASE

(8) If the hearing officer makes a recommendation to the Board to seek issuance of a subpoena, the hearing officer may set an appropriate hearing schedule leaving a reasonable amount of time for a subpoena request to the Commission and a response from the Commission, provided, however, that in the absence of any action by the Commission on a subpoena request within 30 days of the Board making the request to the Commission, and in the absence of unusual circumstances warranting further delay, the hearing officer shall proceed with the matter as if the Commission had denied the request. In the event that the Commission later grants the request, the hearing officer may, in his or her discretion, modify the schedule to allow for obtaining evidence through the subpoena process.

(9) Notwithstanding any other provision of this rule, a party may not apply for, and a hearing officer shall not recommend that the Board seek, issuance of, a subpoena directed to a registered public accounting firm, or an associated person of a registered public accounting firm.

RELEASE

Appendix 2 – Section-by-Section Analysis of Proposed Rule on Procedures Relating to Subpoena Requests in Disciplinary Proceedings

The Board has proposed a rule relating to subpoena requests in disciplinary proceedings. The rule is discussed below.

Rule 5424(c) – Procedures Relating to Subpoena Requests

Proposed Rule 5424(c)(1) provides that the procedures set forth in Rule 5424(c) govern applications, by a party to a Board disciplinary proceeding, to have the Board seek issuance of a Securities and Exchange Commission ("Commission") subpoena for the purposes described in PCAOB Rule 5424(b). The procedures described in the proposed rule apply only in the circumstances encompassed by Rule 5424(b) (*i.e.*, when a party to a Board disciplinary proceeding seeks to require another person to produce documents or testimony in connection with a hearing in the proceeding).

Proposed Rule 5424(c)(2) requires the hearing officer to determine, at the first pre-hearing conference in any disciplinary proceeding, whether any of the parties contemplates making an application to have the Board seek a subpoena. The Board expects that in many cases it will be evident at the outset that no subpoena applications will be necessary. In cases where that is not clear at the outset, however, the proposed rule provides that the hearing officer should set a schedule that imposes a deadline for

RELEASE

the submission of any such applications. Under the proposed rule, the hearing officer should set the schedule in light of the nature of the case and the circumstances at the time of the pre-hearing conference. In setting this schedule, the hearing officer should take into account the time it would reasonably take for the respondent to review materials made available by the Division of Enforcement and Investigations ("Division") pursuant to Rule 5422 in order to determine whether it sees any need to apply for a subpoena. If an application for the Board to seek a subpoena is not made in accordance with the schedule set by the hearing officer, the application will be disfavored and will only be granted in unusual circumstances.

The Board intends that hearing officers, in addressing this issue in the initial pre-hearing conference, should attempt to make sure that counsel for the respondent (or the respondent, if not represented) understands the subpoena request option, understands that applications must be made according to the schedule set by the hearing officer, and understands that applications later in the process will not be granted except in unusual circumstances.

Proposed Rule 5424(c)(3) requires that an application for the Board to seek subpoenas from the Commission be in writing and that they be submitted to the hearing officer. The proposed rule also requires that an application describe the testimony or documents sought, the foundation for the party's belief as to the substance of the

RELEASE

testimony or documents, and the relevance or materiality of the testimony or documents to the proceeding. Further, an application must speak to the relative ability of the party making the application to obtain functionally equivalent evidence by other means. Finally, the application must include a completed form of subpoena, with attachments describing any documents being sought.

In preparing an application under proposed rule 5424(c)(3), a party should provide sufficient detail so that a hearing officer will, from the face of the submission, have an adequate basis for making the determinations described in proposed rule 5424(c)(4) (discussed below). A party should describe in detail the substance of the evidence it believes the requested subpoena would elicit and should describe in detail how that evidence relates to the party's efforts to establish or defend against the charges in the proceeding. A party should also provide detailed information that would support a determination that the existence or substance of the evidence is not merely speculative. Finally, a party should address in detail the feasibility of securing functionally equivalent evidence through other means. A party should address this point from the perspective of trying to show that, in the absence of a subpoena for the particular evidence, the party will be unable to put on sufficient probative evidence on a particular issue. As part of the submission on this point, a party should also provide information to support the conclusion that the party has made efforts that are

RELEASE

reasonable under the circumstances to obtain the evidence on a voluntary basis. The Board recognizes that there may be circumstances in which there are reasons for a party to seek a subpoena without first attempting to obtain the evidence on a voluntary basis, or to seek a subpoena even though a witness has informally said that he or she will testify. An application for a subpoena in those circumstances, however, should include a detailed explanation of the reasons the Board should request a subpoena without the party first seeking the evidence on a voluntary basis, or the reasons the Board should request a subpoena for a person who has voluntarily agreed to testify.

Under proposed rule 5424(c)(4), a hearing officer who receives a completed application may deny the request, or may recommend that the Board seek either the requested subpoena or a subpoena for a more limited scope of documents or testimony. The hearing officer may not recommend that the Board seek a subpoena unless the hearing officer determines two things. First, the hearing officer must determine that the nature and substance of the evidence that the party seeks to have subpoenaed is more than a matter of speculation. The proposed rule is not intended as a vehicle for any type of discovery, but is intended only to assist in securing and introducing evidence that otherwise might not be introduced.

Second, the hearing officer must determine that the unavailability of the evidence may bear on a party's ability to establish or defend against the charges in the

RELEASE

proceeding. This standard does not require a hearing officer to determine that the evidence is, in any sense, essential or indispensable to a fair proceeding. A hearing officer need only determine that the purported evidence may have sufficient relevance that the hearing officer believes it is worth considering the evidence if the Commission is willing to issue the subpoena. Accordingly, in any case in which the Commission declines to issue a subpoena sought by a respondent and requested by the Board, it does not follow that the proceeding will necessarily be lacking in fundamental fairness. In other words, the mere fact that a hearing officer recommends that the Board seek a subpoena requested by a respondent is not tantamount to a determination by the hearing officer that a respondent cannot get a fair hearing without that evidence.

The proposed rule requires that a hearing officer must determine that the two conditions described above are present before recommending that the Board seek a subpoena. The proposed rule does not, however, require that a hearing officer recommend seeking a subpoena in every case where both conditions are present. Even if both conditions are present, the hearing officer retains the discretion to deny a subpoena application, in light of his or her judgment about how best to manage the case toward a fair resolution with minimal delay.

Under proposed Rule 5424(c)(5), a hearing officer shall issue either a written denial of an application or a written recommendation to the Board that it seek issuance

RELEASE

of a subpoena. A note to proposed rule 5424(c)(5) provides that the Board expects hearing officers to make their written denials or written recommendations no later than 14 days after the deadline for submitting an opposition to the application.

In the case of a denial, the proposed rule provides no special mechanism for review of the hearing officer's decision. Review is available according to the same procedures, and at the same time, as any other hearing officer decision including, in appropriate circumstances, the possibility of interlocutory review in the circumstances specified in PCAOB Rule 5461.

If a hearing officer recommends that the Board seek a subpoena, proposed Rule 5424(c)(5) provides that the hearing officer transmit that recommendation in writing to the Secretary and that the hearing officer provide a copy of that recommendation to the parties. The proposed rule requires that the hearing officer's written recommendation include a description of the reasons for seeking the subpoena. The proposed rule also requires the hearing officer to transmit to the Secretary any previously filed opposition to the application for a subpoena and a completed form of the recommended subpoena.

Proposed Rule 5424(c)(6) provides that after the Secretary receives a hearing officer recommendation that the Board seek a subpoena, the Secretary shall, on behalf of the Board, transmit a request for such a subpoena to the Commission unless the Board, with respect to a particular subpoena, directs the Secretary not to do so. The

RELEASE

proposed rule does not afford the parties an opportunity to argue the point to the Board at this stage unless the Board expressly requests input from the parties. The proposed rule requires the Secretary to provide the parties with a copy of any subpoena request sent to the Commission and to provide written notice to the parties of any Board determination not to request a subpoena. As with a hearing officer determination to recommend seeking a subpoena, the fact that the Board seeks Commission issuance of a subpoena requested by a respondent is not tantamount to a determination by the Board that a respondent cannot get a fair hearing without that evidence.

Proposed Rule 5424(c)(7) describes the contents of a Board request to the Commission for a subpoena. The proposed rule provides that the request will be made in writing, will identify the disciplinary proceeding and the parties, will describe the reasons for seeking the subpoena, will include a completed form of subpoena and any attachments, and will provide any other information that the Commission, by rule or order, requires.

Proposed Rule 5424(c)(8) addresses the relationship between the process of seeking a subpoena from the Commission while at the same time keeping a disciplinary proceeding moving toward resolution with appropriate speed. The Board cannot control, in any particular case, whether, when, or how the Commission may act on a subpoena request. Proposed Rule 5424(c)(8) provides that in the absence of any

RELEASE

Commission action on a request within 30 days, the hearing officer should proceed with the matter as if the Commission had denied the request. The proposed rule allows for some flexibility on this point in unusual circumstances. For example, if the Commission has indicated that it is actively considering a particular request and intends to act within a reasonably certain period longer than 30 days, the proposed rule allows the hearing officer, in his or her discretion, to delay proceeding. In any event, the proposed rule provides that even if the proceeding does move forward as if the Commission had denied the request, the hearing officer may, in his or her discretion, modify the schedule to allow for obtaining the evidence if the Commission later grants the request and issues the subpoena.

Proposed Rule 5424(c)(9) provides that a party may not apply for, and a hearing officer shall not recommend that the Board seek, issuance of a subpoena directed to a registered public accounting firm or an associated person of a registered public accounting firm. The Board can lawfully compel registered firms and their associated persons to provide testimony or produce documents without the need for a subpoena. Existing PCAOB Rule 5424(a) provides procedures for parties to a Board hearing to seek to obtain documents or testimony from registered firms and associated persons.