



August 19, 2003

Via E-mail

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005

Members and Staff of the Public Company Accounting Oversight Board:

We are pleased to provide our comments regarding the Board's proposed rules on investigations and adjudications. Generally, we believe the proposal reasonably reflects the provisions of the Sarbanes-Oxley Act of 2002. However, there are various provisions of the proposed rules that we believe should be clarified or which should be otherwise modified to reflect our concerns. Our comments are as follows:

1. Proposed Rule 1001(c)(ii). Definition of "Counsel"

Proposed Rule 1001(c)(ii) defines the term "counsel" as "an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state." We believe that this definition is unclear. We suggest a definition of counsel that explicitly includes an attorney who is admitted to the bar of any state or province of the United States as long as he or she is a member in good standing.

2. Proposed Rule 1001(h)(i). Definition of "Hearing Officer"

Proposed Rule 1001(h)(i) defines the term "hearing officer" to include "a panel of Board members constituting less than a quorum of the Board" as well as "an individual Board member." We believe that allowing individuals to serve as both Board members and hearing officers would create a conflict of interest for several reasons. First, the proposed rules require Board members to review evidence in order to determine whether to initiate an investigation or a disciplinary proceeding. Because of this review process, if a Board member were to serve as a hearing officer, he or she necessarily would have prior knowledge of the facts relating to a proceeding. We believe that, in order to ensure the absence of any prejudgment or bias, a hearing officer should have no prior knowledge of the facts of a proceeding. In addition, Proposed Rule 5460 provides for Board review of initial decisions by hearing officers and Proposed Rule 5461 allows the Board to grant interlocutory review of initial decisions. We believe that allowing a Board member to review his or her own decision would be inappropriate. In addition, a conflict of interest would still exist



Public Company Accounting Oversight Board
August 19, 2003
Page 2

even if a Board member who also has served as the hearing officer on a proceeding recused him/herself from the review process because the remaining Board members would be required to review the decision of a fellow Board member. For these reasons, we propose that the definition of hearing officer be limited to an appointed independent person who is not on the Board, but who is authorized by the Board to serve in that capacity.

3. Proposed Rule 5106. Assertion of Claim of Privilege

Proposed Rule 5106(a)(1) provides that upon asserting a claim of privilege in response to a demand for information, the person asserting the privilege must, among other things, indicate the relevant jurisdiction's privilege rule that is being invoked. This appears to raise a question regarding whether relevant state law privileges that do not have federal counterparts (e.g., state accountant-client privileges) will be applicable in these proceedings. We request that the Board provide further clarification as to whether state or federal law will apply in these proceedings.

4. Proposed Rule 5108. Confidentiality of Investigatory Records

Proposed Rule 5108 provides “[u]nless otherwise ordered by the Board or the Commission, informal inquiries and formal investigations, and any documents, testimony or other information prepared or received by the Board or the staff of the Board in connection with such inquiries and investigations, shall be confidential in the hands of the Board, ... provided, however, that the Board may make information available ...” to various entities, including “any appropriate State regulatory authority.” We propose that a more specific description of state regulatory agencies be included. In that regard, we suggest that the language utilized in Proposed Rule 4004(a)(2) of the PCAOB’s Proposed Rules on Inspections of Registered Public Accounting Firms which provides, in relevant part, that information on inspections may be shared with “each state, agency, board, or other authority that has issued a license or certification number to the firm or person ... authorizing such firm or person to engage in the business of auditing or accounting” would be appropriate to use here as well.

5. Proposed Rule 5110. Non-cooperation with an Investigation

Proposed Rule 5110(a) purports to set forth the grounds upon which the Board could institute a proceeding based on a registered public accounting firm, or a person associated with such a firm, failing to cooperate in connection with an investigation. As an initial matter, we request some clarification as to what would be considered non-



cooperation by the Board. Further, we propose that a procedure for objecting to demands from the Board be instituted. As written, the Proposed Rules are unclear as to whether there is any legitimate reason for withholding documents or testimony absent a claim of privilege. However, we believe that there may be situations in which it would be appropriate for a firm to utilize an objection other than privilege when responding to a demand. Without an objection procedure in place a firm that believes it has a legitimate reason for withholding documents or testimony could be considered by the Board as having failed to cooperate and would be subject to severe sanctions. We believe such a result would be unjust.

6. Proposed Rule 5200. Commencement of Disciplinary Proceedings

Proposed Rule 5200(d) provides that “[b]y order of the Board or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings.” It further provides that “[t]he Board or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay.” While this Proposed Rule provides a mechanism for the Board or hearing officer to consolidate a proceeding, it does not provide any procedure by which a registered accounting firm could object to consolidation. We believe that there are situations where consolidation would not be warranted even if the requisite conditions are met. Firms should have an opportunity to be heard on whether a matter should be consolidated. Although the Proposed Rule provides that “[c]onsolidation shall not prejudice any rights under these Rules of Procedure and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred,” there may be instances where the act of consolidation itself would be prejudicial and firms should have a process by which they could object.

7. Proposed Rule 5201. Notification of Commencement of Disciplinary Proceedings

Proposed Rule 5201(a) provides that “[w]hen an order instituting proceedings is issued by the Board, the Secretary shall give each firm or person charged appropriate notice of the order within a time reasonable in light of the circumstances.” We believe that “a time reasonable in light of the circumstances” is too vague a timeframe and could result in delays in notification. We believe that there should be a deadline by which notification must occur and propose that the following italicized language be added to the Proposed Rule. “Whenever an order instituting proceedings is issued by the Board ... within a time reasonable in light of the circumstances, *but in any event not later than 30 days from the date of issuance of such order.*”



Public Company Accounting Oversight Board
August 19, 2003
Page 4

8. Proposed Rule 5203. Public and Private Hearings

Proposed Rule 5203 provides that “[n]o hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.” We believe it is unclear as to what will occur if one of the parties does not consent to a hearing being public. It appears that absence of one party’s consent would be sufficient to result in a hearing remaining private; however, we think it would be helpful if the Board could provide some clarification on this point.

9. Proposed Rule 5300. Sanctions

Proposed Rule 5300 sets forth the sanctions the Board might impose as a result of a disciplinary proceeding. There is not, however, a clear articulation of which sanctions might be imposed for any particular conduct. Specifically, Proposed Rule 5300(a) provides that the imposition of sanctions would be made “subject to the applicable limitations under Section 105(c)(5) of the Act.” Section 105(c)(5) of the Act makes clear that certain sanctions may be imposed only in cases of intentional conduct or repeated instances of negligent conduct. We would request that the Board provide clarification in the Proposed Rule as to which sanctions will be applicable to certain conduct.

We also do not believe that there is enough specificity in Proposed Rule 5300(b) as to which sanctions might be imposed in connection with a proceeding instituted pursuant to Rule 5200(a)(3). Proposed Rule 5300(b)(1) provides that “the sanctions described in subparagraphs (1) – (5) of paragraph (a) of this Rule” may be imposed in connection with a proceeding instituted pursuant to Rule 5200(a)(3). It is unclear which monetary penalties might be assessed in this situation since it appears that paragraphs (1) – (5) encompass penalties for both intentional and unintentional conduct. We do not understand if there is meant to be a distinction between intentional and unintentional conduct, as we believe there is meant to be in part (a) of the Proposed Rule, however, if there is to be a distinction, we are unclear as to how such a distinction might be made.

Finally, Proposed Rule 5301(a) and (b) would prohibit any person who is suspended or barred from being associated with a registered public accounting firm without the consent of the Board. The note accompanying this Proposed Rule specifies that such a person “may not, in connection with the preparation of or issuance of any audit report, (i) share in the profits of, or receive compensation in any other form from, any registered public accounting firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm.” The note goes on to provide that “[t]his prohibition includes



Public Company Accounting Oversight Board
August 19, 2003
Page 5

receiving any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that might have been earned during the period of the suspension or bar.” It appears that a suspended or barred person may continue to work for a firm as long as such work does not involve “the issuance of any audit report.” It is unclear, however, how a firm would compensate such person for that work, as it would be impracticable if not impossible to segregate money that results directly or indirectly from audit fees. Therefore, it appears that this Proposed Rule would have the perhaps unintended consequence of requiring that a registered public accounting firm terminate its relationship with a suspended or barred person. We request that the Board provide some clarification in the Proposed Rule on this point.

10. Proposed Rule 5401. Appearance and Practice Before the Board

Our comment on this Proposed Rule concerns the process of withdrawal that is contained in Rule 5401(c)(4). The Proposed Rule indicates that withdrawal may be permitted, however, it does not enumerate any grounds that the Board would consider adequate for withdrawal. We believe that it would be of assistance if the Board could provide some guidance on this point.

* * *

An effective investigation and disciplinary process is a critical element of the Board’s oversight role. We appreciate the efforts that have been undertaken by the Board in addressing this important area and stand ready to work with the Board in developing the final rules. We also appreciate this opportunity to express our views to the Board. We would be pleased to answer any questions the Board or its staff might have about our comments. In that regard, please contact Barbara Taylor at 212-885-8322 or via electronic mail at btaylor@bdo.com.

Very truly yours,

/s/ BDO Seidman, LLP

BDO Seidman, LLP