Deloitte & Touche LLP

July 1, 2003

Office of the Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Securities and Exchange Commission (Release No. 34-47990; File No. PCAOB -2003-03); Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating To Registration System

Deloitte & Touche LLP is pleased to respond to the request for comments from the United States Securities and Exchange Commission (the "Commission" or the "SEC") regarding the filing by the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") of its proposed rules relating to its registration system for public accounting firms.

INTRODUCTION

We support the goals of the Sarbanes-Oxley Act of 2002 (the "Act") in restoring investor confidence as well as the PCAOB's and the Commission's efforts to implement faithfully the Act. The Act requires that all public accounting firms that will prepare or issue an audit report for an "issuer" register with the Board.[1] The act of registering with the PCAOB is thus critically important to the Board, the public markets, and the accounting profession, and we support the effort to create the most rational, efficient, and effective registration system possible. We believe that it is vital that the Board be successful in developing and executing its programs.

We joined in sending a comment letter to the Board on its *Proposal of Registration System for Public Accounting Firms*, PCAOB Rulemaking Docket Matter No. 001 (March 7, 2003), on March 31, 2003.[2] During that comment process, many commenters raised concerns regarding the proposed rules, and the Board modified its rules in ways that addressed many of those concerns. Still, we continue to believe that aspects of the Board's rules submitted to the Commission should be clarified or modified, to enable the Board to carry out its duties and responsibilities in an efficient and effective manner, to ensure that applicants for registration better understand and are in a position to comply with their reporting responsibilities, and to reduce the burden on the Board and the public accounting firms-without in any way hindering the Board's ability to discharge its responsibilities to the investing public.

By submitting this comment letter, we seek to identify those issues that are the most significant and that we believe should be addressed to ensure a successful registration process. We urge the Commission to consider these comments and to act swiftly in issuing the final rule. Our comments generally follow the order in which the Commission's June 11, 2003 Release presents the registration system proposal. We first set forth general comments. We then provide comments on specific proposed rules, including proposed definitions. Finally, we offer our comments with respect to certain parts of the proposed application form ("Form 1").

GENERAL COMMENTS

I. Good Faith Efforts and Provisional Registration

In recognition of the significant volume of information demanded by these registration rules, we suggested in our comment letter to the Board that the Board allow for the provisional registration of firms.[3] Without explicitly addressing the issue, the Board did not include procedures for provisional registration in the rule that it has sent to the Commission. This issue is of crucial importance, and we believe that the Commission should modify the Board's rule to permit provisional registration.

An applicant's efforts to comply with the registration requirements must occur on an exceedingly expedited basis. Although the Board does not yet have final rules governing the requirements for registration, the Commission certified that the Board was "organized and ha[d] the capacity to carry out the requirements of this [Act]" on April 25, 2003.[4] As a result of this certification, a public accounting firm must be registered by October 22, 2003, or immediately cease any activities with respect to the audit reports of public companies.[5] Even if the Commission approves the Board's rules on an expedited basis, the final rules governing the registration application will have been effective for only slightly more than three months before the registration deadline.[6] More importantly, in order to be assured that the Board will address a registration application before the deadline, an applicant must have submitted its application by 45 days before the deadline, which may well be less than two months after the date on which the registration rules and final application forms are determined.[7]

The registration process constitutes a critical aspect of the Board's authority. For that reason, the Commission should remain cognizant of the burdens imposed by the registration process, including the sheer volume of information requested, the highly technical nature of the requests in the Board's proposed rule, the need for applicants to understand their new registration obligations in the context of existing (and in many cases actually or potentially conflicting) legal obligations in other jurisdictions, and the extremely truncated time period for initial registration. To be clear, the information required to be submitted for registration is quite substantial, in many significant areas is not readily available, and will require significant effort to collect. Unanticipated data integration and functionality problems with the web-based system could seriously hamper the registration process. In short, the registration process will be burdensome and, given its complexity, could very possibly be hampered by unforeseen problems. It will be extremely difficult for applicants to complete this wholly novel process in a timely way.

Moreover, completing and submitting the application 45 days before the October 22 deadline does not guarantee that an applicant will receive a decision from the Board by the registration deadline. The Board may request more information from the applicant, in which case the Board will have an additional 45 days from the date on which the requested information is received to make a registration decision.[8] Because of this authority, unless an applicant is able to gather all information required and to comply with the technical requirements of the Board's registration rules, the Board need not make a registration decision before the deadline.

Because of the compressed time table for registration, the penalty for *de minimis* or inadvertent mistakes or omissions could be severe: essentially the cessation of operations as a public accounting firm, at least until the Board is required to make a registration decision. Congress did not intend for such dramatic economic displacement, including the potential cessation of operations by large nationwide firms and the imposition of costs on public companies and their shareholders, to result from such oversights and omissions.

These avoidable risks and the burdens associated with the registration process require explicit provisions in the final rule, assuring applicants-and the issuers they audit-that good

faith efforts at compliance will be deemed sufficient to satisfy the registration requirements during this initial period despite any inadvertent omissions or difficulties that might arise during the registration process.

Similarly, the Commission should adopt a rule that allows for an initial, provisional registration in the event the Board requests that an accounting firm supplement its application, a firm is responding to such a supplemental request, or the Board is still considering an application, at the time the October 22, 2003 deadline for registration comes to pass.

If the Commission is concerned about the consequences of permitting applicant firms to perform audits without the Board having made a final decision on the merits of their registration applications, the Commission could institute a backstop date-perhaps April 19, 2004, the deadline for the registration of non-U.S. public accounting firms-on which any provisional registration would expire. Alternatively, the Commission could leave the details of the provisional registration process to the Board. The compressed timetable on which the registration process must proceed, however, demands that the Commission take the preventive steps of accepting "good faith" compliance and establishing provisional registration procedures. The consequences of non-registration of a firm due to a rejected application or delayed acceptance (for other than substantive reasons) would not serve the public interest and would cause severe hardship for issuers.

II. Several Privacy Concerns Should Be Addressed

During the Board's comment process, commenters raised concerns about the Board's proposed procedures for protecting the confidentiality of information submitted to the Board. The Board took several important steps to address those concerns. There are, however, lingering confidentiality issues that the Commission should address in issuing the final rule. We address these confidentiality concerns throughout our comment as they pertain to the specific rules or information requests. In addition, we address two general confidentiality issues below.

First, the Board's final rule should clarify its procedures for requesting confidential treatment when the Board provides information to the Commission. According to the Board's proposed rule, its confidential treatment insures that covered information "will not be made available to the public *by the Board*."[9] The Board also reserves the authority, notwithstanding its decision to treat information confidentially, to disclose such information to the Commission.[10] Nothing in the current rule suggests that the Commission would be bound by the Board's confidentiality determination.

Indeed, the Commission has its own procedures for affording information confidential treatment.[11] The Commission should clarify whether: (1) the Board will automatically request confidential treatment by the Commission; or (2) the Board will notify the applicant that it has disclosed information to the Commission, permitting the applicant itself to request confidential treatment from the Commission directly. In the event of a request under the Freedom of Information Act ("FOIA") for information already given to the Commission, the final rule should also require the Board to assist the Commission in determining how to respond to the FOIA request. At a minimum, the Commission should clarify that an applicant or registrant will be provided with notice that a FOIA request has been made so that it may challenge the request.

Second, the Commission should clarify that data submitted to the Board during the application process will be afforded automatic confidential treatment. The Board modified its rule to state that it would make an application "public" after it had made a final decision

on the application.[12] This change, although helpful, is still subject to ambiguity, and the rule should explicitly state that application information and data will *remain confidential* in its entirety until the Board makes such a final decision. Such a change would confirm that the Board will not release application information before a final decision, and that pending applications will be insulated from public requests for information.

RULES OF THE BOARD

Rule 1001. Definitions of Terms Employed In Rules

We recommend that the Commission revisit the use throughout the proposal of the terms set forth below. We are concerned that, if adopted as proposed, these terms may dramatically expand the reach of the Board's rules beyond the scope envisioned by Congress, impose unnecessary burdens on accounting firms that must register with the Board, and create other harmful, unintended consequences.

A. "Accountant"

Proposed Rule 1001(a) contains an extremely expansive definition of the term "accountant" that includes individuals simply with an undergraduate or higher degree in accounting (whether or not they participate in audits and whether or not they are licensed), as well as individuals with at least a college degree, in any field, who "participate" in audits (whether or not they are licensed).[13]

We expressed concern to the Board regarding the breadth of this definition.[14] The Board clarified that the definition, while covering all individuals with college-level degrees participating in an audit, did not cover those who performed only "clerical or ministerial tasks."[15] While this clarification represents an improvement, significant concerns remain as a result of the overly broad definition. Without revision, the definition would threaten to cover a significant number of individuals and to include personnel in whom the Board has no interest.

The meaning of the term "accountant" is critical to determining the scope of the applicant's reporting obligations with respect to Parts V and VII of the proposed Form 1. In order to limit the burdens on applicants in collecting this information, and the concomitant burdens on the Board in processing it, the definition of "accountant" should be limited to certified public accountants (and accountants in non-U.S. jurisdictions holding licenses equivalent to that of a certified public accountant in the United States). By adopting that modification, the Board would ensure that the term "accountant" includes those licensed professional accountants who are involved with audit reports, while simultaneously providing firms with a reasonably identifiable basis for determining which personnel are covered by the definition. In contrast, bringing other individuals within the definition of "accountant" on the basis of education would obligate accounting firms to engage in fact-specific determinations about whether individual employees-who for larger applicants may number in the tens of thousands-possess the requisite background to meet the Board's definition. It is not clear that Congress intended the Board's authority to extend so far.[16]

B. "Person Associated with a Public Accounting Firm"

In our comment letter to the Board, we discussed several concerns regarding the breadth of the definition of "person associated with a public accounting firm." The Board modified the definition, clarifying that persons performing only "clerical or ministerial tasks" will not be deemed "associated persons."[17] Even as modified, however, the definition is overly broad and would cause great difficulties for firms, especially in connection with their obligations

under Parts V and VIII of the proposed Form 1. Aggravating problems with the definition, the Board confirmed that "an employment or an independent contractor relationship with a public accounting firm is not required for a person to be covered by the definition."[18]

The proposed definition is very expansive and potentially could be interpreted to include individuals at non-U.S. associated accounting firms who may be deemed "independent contractors" within the meaning of the "associated person" definition.[19] In some cases, the affiliated firm for which these accountants work will not have registered with the Board. Despite providing only a small amount of advice regarding an audit, these accountants potentially could be considered associated persons and, accordingly, could be subject to the U.S. firm's reporting requirements under the current definition. The Commission should clarify that individuals at non-U.S. associated accounting firms will not be deemed "independent contractors" and therefore are not "associated persons."

The proposed definition could also implicate outside legal counsel for the firm, and other professional advisors who are only tangentially related to an audit (and who would be very surprised to learn that they are "associated with a public accounting firm" and subject to the Board's authority). After all, outside legal counsel often provide advice to applicant firms "in connection with an audit" and "receive compensation," namely their attorneys' fees from that firm-potentially triggering the definition as currently drafted. There is no indication that Congress intended for the Board to regulate outside lawyers who provide advice to registered public accounting firms. Indeed, the inclusion of outside legal counsel would present serious conflicts with attorney rules of professional responsibility, especially with regard to Part VIII requiring consents. The Board evidently has not considered whether those conflicts are reconcilable, and the Commission should develop a more targeted definition to insure that these conflicts do not arise in the first instance.

Therefore, we urge the Commission to specify that the term "person associated with a public accounting firm" extends only to individual proprietors, partners, shareholders, principals, accountants, professional employees, and independent contractors, whose work for the accounting firm has some meaningful and material relationship to auditing, accounting, and reporting issues that affect financial statement audits.[20] We recognize the somewhat imprecise nature of that guideline, but we would propose that the Commission interpret it to mean the following:

- For those individuals who are *employees* of, or otherwise considered *personnel* of, the applicant, the term "persons associated" with an applicant should be interpreted only to include *managers*, *senior managers*, *directors*, *principals*, and *partners*. That interpretation of the definition would capture those individuals with supervisory responsibilities over staff members in connection with the audit of a public company listed or traded in the United States. Such an interpretation would thus ensure that the Board receives the information that is relevant and necessary to its task.

- With respect to independent contractors, we suggest that the definition encompass only those independent contractors who are natural persons (that is, not firms that are independent contractors and all of their personnel) and who received payments from the applicant in connection with the preparation or issuance of an audit report to the extent that such payments exceed 10% of the fees paid to the firm for that audit.

It is important to emphasize that the Board's modification of the definition to exempt "a person who the public accounting firm reasonably believes is a person primarily associated with another registered accounting firm" is not a sufficient response to these concerns.[21] Even with the exemption, it is still unclear whether a U.S. applicant would be required, for example, to list personnel in a non-U.S. associated firm that is not registered because such

individuals could arguably be viewed as independent contractors. In addition, the exception does not cure the uncertainty with respect to outside counsel and other advisors because outside counsel and other advisors would often not be associated with another public accounting firm.

Rule 2105. Conflicting Non-U.S. Laws

Rule 2105 permits applicants to withhold otherwise required information if the disclosure of that information would violate non-U.S. laws. We agree with the Board's decision not to require information from applicants, the submission of which would place applicants in legal jeopardy in other jurisdictions. [22] Indeed, in our comment letter to the Board, we pointed out the many ways in which the requirements conflict with non-U.S. laws. We believe, therefore, that one of the procedural requirements for triggering the exception needs clarification. In order for the Rule to apply, the applicant is required, among other things, to submit to the Board "a legal opinion that submitting the information *would* cause the applicant to violate [a] conflicting non-U.S. law."[23] In its current form, the legal opinion standard of *would* requires excessive certainty about a submission's potential for conflict with non-U.S. law and, as a result, exposes non-U.S. firms to significant legal risk. Law firms may be reluctant to issue legal opinions that a submission "would" violate non-U.S. law. As a practical matter, therefore, applicants may not be able to obtain these legal opinion letters required for an exemption, even when a substantial likelihood of legal liability is posed by a submission. Accordingly, we suggest that Rule 2105 should be modified to require a legal opinion that the submission of information "could likely" violate non-U.S. law.

APPLICATION FORM

Set forth below are specific comments on the proposed Form 1.

Part II. Listing Of Applicant's Public Company Audit Clients And Related Fees

The proposed fee disclosures about audit clients should be harmonized with the Commission's fee disclosure rules. In its section-by-section analysis, the Board states that, "to the extent possible," it has used concepts from the fee disclosures required of issuers under the Commission's existing proxy disclosure rules until the revised proxy disclosure rules recently adopted by the Commission become effective.[24] The Commission recently adopted changes to its fee disclosure requirements that: (1) increased the number of categories of professional fees that issuers must disclose in the proxy statement; (2) redefined those categories to encompass "Audit Fees," "Audit-Related Fees," "Tax Fees," and "All Other Fees"; and (3) increased the years of service covered by the disclosure from the most recent fiscal year to the two most recent fiscal years. These changes were intended to "clarify the categorization of services provided by the audit firm in order to provide increased transparency for investors."[25] The Commission's new fee categories reflect carefully considered policy determinations about the types of disclosures that would be most useful and transparent for investors and other market participants.

The fee disclosures proposed by the Board, however, differ significantly from those required under both the Commission's old and new rules. Indeed, for purposes of the initial registration process, firms will be required to create new fee information based on fees billed to issuers using bits and pieces of the Commission's old and new rules. For example, the Board explains in its proposal that "other accounting services" would include fees for "audit-related" services (as now understood under the Commission's new fee disclosure rules) as well as those "audit fees" that would not have been reported in the Commission's 2000 "audit fees" category but that would be included in that category as recently

reconfigured in the Commission's new fee disclosure rules.[26] These differences will lead to unnecessary confusion for investors as well as firms by imposing an additional, and different, set of disclosure requirements on firms at a time when issuers and accounting firms are attempting to adjust to new fee disclosures recently implemented by the Commission. While firms are proceeding to collect fee information based on the fused categories set forth in the proposal, to minimize confusion, the Commission should clarify that once the initial registration process has been completed, the Board's fee disclosure requirements will be harmonized with the fee disclosures required under the Commission's revised fee disclosure rules. Specifically, applicants should be required to report information using fee categories that mirror those applicable to issuers under the Commission's fee disclosure rules, including the use of identical captions for the various fee categories.

Part V. Listing Of Certain Proceedings Involving The Applicant's Audit Practice

The Act provides that an applicant for registration with the Board shall submit "information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report."[27] The Senate Committee Report further explains that this information is intended to capture "pending" actions "relating to the firm's audits of public companies."[28] Although the mere existence of a pending proceeding against a firm or a person currently associated with the firm that relates to the preparation or issuance of an audit report should not result in an applicant's automatic disqualification, the Board certainly should be made aware of current proceedings against an applicant that may raise questions about the applicant's performance in its role as auditor for public company clients.

As the Board acknowledges, its proposal would go beyond Congress's approach. The Board's proposal seeks to expand upon the Act by requiring applicants to provide information about proceedings that are no longer pending and about proceedings not related to the firm's audits of issuers.[29] The proposal also seeks information that the applicant may have no reasonable basis for having and no reasonable ability to obtain. We are concerned that in its desire to seek all information that could conceivably assist it, the Board has imposed obligations on applicants that are extraordinarily burdensome and impractical-indeed, in some cases potentially impossible-for applicants to meet.

To be sure, in response to comments, the Board somewhat narrowed the legal history information that would be required to be disclosed.[30] Despite these modifications, the Board's rule remains sweeping. We provide below a number of specific recommendations with respect to Part V of the proposed Form 1 that we believe will satisfy the Board's needs under this part and allow the Board to perform its duties effectively.

A. Certain Criminal Proceedings

Congress provided that firms should report information concerning proceedings against the firm or its associated persons "in connection with any *audit report*."[31] As the language in the Act makes clear, Congress did not envision that accounting firms would be required to furnish to the Board information about proceedings that were not related to audits.[32]

We believe that Congress struck the proper balance by tying the reporting requirement directly to the activity that the Board is charged with overseeing. The Board's rule, however, would go beyond Congress's approach. While the Board took some steps in restoring the balance that Congress struck by limiting the civil, alternative dispute resolution, administrative, and disciplinary proceedings that must be reported to those that

arose in connection with an audit report,[33] the Board's rule still requires the reporting of criminal proceedings, including even traffic infractions, entirely unrelated to the issuance of audit reports.[34]

The breadth of the proposed reporting requirement would impose a substantial burden on the applicant to collect the necessary information, and the resulting benefit to the Board that would come from disclosing this information would appear to be negligible. Requiring the provision of information about past proceedings that involve conduct that is unrelated to the preparation or issuance of an audit report goes beyond the scope of the Board's intended mission.

The proposal also seeks information about proceedings that involve conduct unrelated to issuers.[35] Again, that information is not required to be provided by the Act, and is of questionable relevance given that the Board has no responsibilities with respect to audits of non-public companies.[36] Information about proceedings that involved conduct that was not directly related to the preparation or issuance of an audit report for an issuer should not be required.

At a minimum, the Commission should modify the rule so it does not require the reporting of minor offenses, such as traffic violations. The Commission itself has excluded such information from the reporting requirements regarding the directors of publicly traded companies, realizing that this information is not material to the purposes of the reporting rule.[37]

B. Information About Proceedings That Involved Non-U.S. Personnel

As currently defined in the proposal, the phrase "person associated with a public accounting firm" arguably could encompass non-U.S. partners and professional employees who may be deemed to be serving indirectly as independent contractors to a firm. As discussed previously, that construction of the definition is unnecessarily broad as a general matter, and, in the particular context of providing information about prior and pending proceedings, it will be exceedingly difficult for firms to compile and to submit the requested information. The Commission therefore should revise the Board's reporting requirements so as not to include this information.[38] Such a revision would enhance an applicant's ability to comply with the reporting requirements and would be consistent with the Board's approach in Items 7.2 and 8.1 of the proposed Form 1, wherein it has proposed more modest reporting requirements for non-U.S. applicants.

C. Confidentiality

We are concerned that in some instances providing information about pending or prior proceedings may waive certain privileges against third parties. Although some of the information requested in connection with proceedings would be publicly available, such as the name of the court in which the proceeding is pending, providing other information may reveal otherwise privileged attorney-client communications or attorney-work product. The Commission should consider allowing applicants to protect certain confidences that may be implicated by the Board's information requests by withholding certain information on privilege grounds in appropriate instances. In this regard, the Commission could add a parallel treatment of privileged information under Rule 2105, which permits applicant firms, after following specified procedures, to withhold certain information if the submission of that information to the Board would violate non-U.S. law. As such, if parallel treatment is afforded, applicants would be able to withhold privileged information in appropriate circumstances.

Additionally, whatever non-public information is provided concerning proceedings should be given automatic confidential treatment by the Board. The Board's proposal states that "[t]he Board will normally grant confidential treatment requests for information concerning non-public disciplinary proceedings."[39] We believe that the same principles that underlie the Board's proposal to treat those proceedings confidentially equally support according confidential treatment to all non-public information concerning other pending or past proceedings. We recommended this to the Board,[40] and the Board neither modified its release in this regard nor explained why it did not. The Commission should clarify that the Board will give automatic confidential treatment to non-public information provided by applicants concerning pending or prior proceedings.

In light of individuals' legitimate privacy concerns, the Commission should also extend this treatment to all information regarding criminal proceedings-whether or not the information is in some sense "publicly available." Information that is "publicly available" only after hand-searches in local courthouses, for example, is "public" in a fundamentally different way from information collected and centralized by the Board. So long as the Board has available to it the information it needs to perform its regulatory function, there appears little purpose in exposing individuals to embarrassment by making their private law enforcement records more widely and readily available.

Part VII. Roster of Associated Accountants

The Board responded to some concerns about the treatment of confidential information requested on the Part VII roster by removing the requirement that an applicant include the social security number of each person on the roster.[41] We support the Board's modification, but continue to believe that the Board should afford confidential treatment, without a request from the applicant, to all of the information requested in Part VII.

Little benefit would come from publicly listing the names of individual accountants associated with accounting firms, and we are troubled by the potential issues involved in such a public posting. Publicizing the names of professional accountants associated with a larger firm that may perform audit services for a multitude of different types of public companies, could put those individuals at risk of harassment or worse. Some members of society may take exception to the manner in which particular public companies conduct their business or take positions on controversial issues. We are sensitive to this reality and strive to protect our personnel from needless harassment that might stem from our relationship with particular clients.[42] Affording the roster reporting information automatic confidential treatment would help to ensure the safety of individual employees, without depriving the Board of information it needs to fulfill its statutory obligations.

Part VIII. Consents of Applicant

Pursuant to § 102(b)(3) of the Act, Item 8.1 requires each application for registration to include the applicant firm's signed, written consent to cooperate with any request by the Board for testimony or document production. The Act also requires applicants for registration to agree to secure similar consents from their "associated persons." As defined by the Board, the persons from whom a firm would be required to secure consents include what would appear to be virtually every professional employed by or contracting with an applicant firm.

We recommend that the Commission adopt safeguards to avoid unintended consequences of the consents requirement. We set forth our recommendations below.

A. Firms And Individuals Should Not Forfeit All Otherwise Available Protections As A Result Of Signing A Consent

Under the Board's rule, registered firms are required to state that the firm consents, and will seek consent from its associated persons, to comply with "*any request* for testimony or the production of documents made by the . . . Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002."[43] Such a blanket consent raises some concerns, particularly with respect to legally recognized protections that would otherwise be available for assertion against particular requests for documents or testimony, and we encourage the Commission to reconsider elements of the Board's consent requirement.

The consent regime incorporated in the Board's proposal is substantially broader in scope, and would have harsher consequences to applicants, than we believe was intended by Congress. The consent provision appears to have been included in the Act as an alternative to providing the Board with subpoena powers. By requiring firms to consent to cooperate with future Board requests for documents or testimony as a condition of their registration, Congress provided the Board with a mechanism through which the Board could secure necessary evidence to assist it in its oversight responsibilities. However, as drafted, the consent requirement may impose considerably more severe restrictions on applicants than would be the case if the applicant were served with a subpoena. For example, the consent mechanism in Item 8.1 may require applicants to relinquish various constitutional rights in advance, before being confronted with a request for specific documents or testimony. In contrast, a recipient of a subpoena has an opportunity to consider the request and to determine whether to resist the production of documents or testimony on constitutional grounds (e.g., the right against self-incrimination) or to negotiate. Without clarification, the proposed consent requirement could be read as forcing applicants to provide a blanket waiver of all such rights.[44]

Similarly, while a common-law legal privilege, such as the attorney-client privilege, might otherwise preclude a governmental body from obtaining documents or testimony pursuant to a subpoena, the proposal's consent procedure contains no safeguard to ensure that an applicant can assert such privileges once confronted with an actual request from the Board for documents or testimony. In this regard, the proposal is also considerably less protective than the regime established in § 105(b)(5) of the Act, which provides that information received by the Board in the course of an inspection or investigation retains its privileged status and would not be admissible, or subject to civil discovery, in proceedings before federal and state courts and administrative agencies. Section 105(b)(5) might have obviated certain concerns about the scope of the consent requirement imposed by Item 8.1, but Item 8.1 is broader, covering requests made "in furtherance of [the Board's] authority and responsibilities under the [Act]," whereas § 105(b)(5) applies only "in connection with an inspection under section 104 or with an investigation under this section."[45]

To avoid the dramatic consequences that would result from the proposed consent requirement, we recommend that the Commission amend the Board's rule and expressly include a reservation in the consent form. Applicants and their associated persons should be able to maintain their rights to assert any legally recognized grounds for resisting compliance with a specific request for documents or testimony. The reservation also should provide that before any applicants or associated persons are required to turn over any information to the Board they will have an opportunity to be heard with respect to any legal grounds they may have for not producing information to the Board.

B. The Commission Should Clarify That Associated Persons Need Not Provide *Written* Consent

We encourage the Commission to determine that firms need not assemble the *written* consents of each and every one of their associated persons within the 45-day period during which their applications are pending. The requirement to obtain written consent should apply only to the signatory for the applicant and not to each and every associated person.

Requiring physical signatures from each and every associated person would be a qualitatively different and infinitely more burdensome undertaking than requiring a physical signature from a single partner on behalf of the firm. Securing, gathering, and maintaining the physical, original signature of every associated person who joins any larger firm would be a significant undertaking. But the *initial* registration process-already on an exceedingly expedited schedule-will require firms to secure consents from each and every one of their associated personnel within an extremely short time period. The Board's suggestion that applicants could begin obtaining the signatures well in advance of the 45-day deadline is of little comfort given the speed with which this process now must proceed.[46]

Consistent with the Board's proposed web-based registration system, electronic signatures can be just as effective as pen and ink to authenticate documents. Congress has directed federal agencies to afford electronic authentication the same recognition for most purposes and has expressly provided that transactions between private parties may be memorialized in electronic form, and that an electronic signature is to be considered just as effective as a physical signature to consummate such transactions.[47] In addition, tax returns are now submitted electronically with electronic signatures. Consequently, the Commission should make clear that applicants need not secure written consents from their employees, and instead can utilize an electronic method of obtaining the necessary consent.

At a minimum, the Commission should clarify that copies, including faxed copies, of the consents from associated persons will satisfy the requirement.

C. The Board Should Extend The 45-Day Period In Which To Obtain Associated Persons' Consents

Whether or not the Commission agrees that the requisite consents need not be obtained from associated persons in writing, we encourage the Commission also to extend the 45-day deadline that Item 8.1 imposes for the gathering of consents from all associated persons. We note in particular that the 45-day deadline is *not* imposed by the Act, which does not specify a time period during which the consents are to be assembled. Indeed, the Act appears to require only that firms undertake good-faith cooperation with the Board to secure the necessary consents from, for example, its associated personnel.[48] Securing such consents within 45 days will be particularly difficult with regard to personnel on medical or maternity leave. A firm that, despite its reasonable efforts, is unable to secure the consents within 45 days should not be penalized, particularly during this initial registration process. We encourage the Commission either to eliminate the 45-day restriction, at least for the initial registration process, or to extend it sufficiently to permit the requisite consents to be assembled with reasonable diligence.

D. Reasonable Efforts Are Required

The Commission should make clear that it expects an applicant to make reasonable, good-faith efforts to secure the Item 8.1 consents from its associated persons. So long as an applicant undertakes its responsibility to obtain those consents in good faith, however, a firm's registration application should not be denied as a result of an inadvertent, or *de minimis*, failure to obtain each and every associated person's consent. Imposing a standard akin to strict liability would not be appropriate in this context.

E. The Commission Should Clarify How Long A Consent Remains In Effect

The Commission should also clarify how long a consent of an associated person remains in effect, particularly after that person ceases to be associated with an applicant. Specifically, it should be made clear that an associated person's consent to cooperate in and comply with a request for testimony or production of documents made by the Board is limited to events that occurred while the person was associated with the applicant.

CONCLUSION

The effective registration of public accounting firms is critical to the mission of the Board to oversee the audits of issuers, and we appreciate the opportunity to provide comments concerning the Board's proposed system of registration. Given the novelty of the reporting requirements, the breadth of some parts of the proposal, and the short time period in which firms will have to digest the final rules and submit their applications, we believe that the adoption of the recommendations and revisions suggested herein would greatly enhance the proposed requirements, and help to ensure that the Board's registration process succeeds.

We have attempted to provide comprehensive recommendations and revisions. The issues presented are very complex and may warrant further discussion. We would be pleased to discuss these issues with you further. If you have any questions or would like to discuss these issues further, please contact Robert J. Kueppers at (203) 761-3579.

Very truly yours,

/s/ Deloitte & Touche LLP

cc: Hon. William H. Donaldson, Chairman of the SEC
Hon. Paul S. Atkins, Commissioner
Hon. Roel C. Campos, Commissioner
Hon. Cynthia A. Glassman, Commissioner
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Charles D. Niemeier, Member

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1 *See* Act, § 102(a); S. Rep. No. 107-205, at 7 (2002) ("Conditioning eligibility to audit public companies on registration with the Board is the linchpin of the Board's authority."); *see also* Act, § 2(a)(7) (defining "issuer").

2 Comment Letter on Behalf of Deloitte & Touche LLP, The Non-U.S. Member Firms of Deloitte Touche Tohmatsu, and Deloitte Touche Tohmatsu on the PCAOB Proposed Registration System for Public Accounting Firms (Mar. 31, 2003) ("Deloitte & Touche Letter").

3 Deloitte & Touche Letter at 13.

4 Act, § 101(d).

5 Act, § 102(a). The Act is unforgiving in this regard: After October 22, 2003, "it shall be unlawful for any person that is not a registered public accounting firm to prepare or

issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer." *Id.*

6 The Commission could take up to ninety days from the date of publication in the Federal Register-that is, until September 10, 2003-to consider the Board's rules. *See* 68 Fed. Reg. at 35030.

7 Act, § 102(c)(1).

8 Rule 2106(c), PCAOB Release No. 2003-007 at A1-xi (May 6, 2003).

9 Rule 2300(g), PCAOB Release No. 2003-007 at A1-xiii (emphasis added).

10 Rule 2300(g)(1), PCAOB Release No. 2003-007 at A1-xiii.

11 *See* 17 C.F.R. § 200.83.

12 Rule 2300(a), PCAOB Release No. 2003-007 at A1-A1-xii; *Public Accounting Oversight Board; Notice of Filing Proposed Rules Relating to Registration System*, 68 Fed. Reg. 35016, 35022-23 (June 11, 2003).

13 PCAOB Release No. 2003-007 at A1-i.

14 Deloitte & Touche Letter at 14-17.

15 Rule 1001(a)(ii), PCAOB Release No. 2003-007 at A1-i.

16 *See* Act, §§ 101(a), 102.

17 Rule 1001(p)(i), PCAOB Release No. 2003-007 at A1-v; 68 Fed. Reg. at 35019.

18 68 Fed. Reg. at 35019.

19 Non-U.S. associated firms include individual firms that are members of international organizations or members of international associations of firms.

20 This limited definition still is problematic because applicants would not have the authority to compel employees of non-applicants or other applicants to execute consents. As a result, registration issues still could arise, and we therefore are concerned that even the limited definition could disrupt the orderly function of the capital markets. We urge the Commission and the Board to work with the profession to identify a solution to this problem.

21 68 Fed. Reg. at 35019.

22 Deloitte & Touche Letter at 7-12.

23 Rule 2105(b)(2)(ii), PCAOB Release No. 2003-007 at A1-x (emphasis added).

24 PCAOB Release No. 2003-007 at A3-xliv.

25 ***Strengthening the Commission's Requirements Regarding Auditor Independence; Final Rule*, 68 Fed. Reg. 6006, 6030 (Feb. 5, 2003).**

26 PCAOB Release No. 2003-007 at A3-xliv and A3-xlv.

27 Act, § 102(b)(2)(F).

28 S. Rep. No. 107-205, at 46 (2002).

29 *See* PCAOB Release No. 2003-007 at A3-l ("While the Act only requires applicants to submit information about pending proceedings related to audit reports, the Form requires information about certain additional proceedings that may reflect on the applicant's fitness for registration, even though the proceedings may no longer be pending or do not relate to audit reports[.]").

30 68 Fed Reg. at 35026.

31 Act, § 102(b)(2)(F) (emphasis added).

32 Indeed, as explained in the Senate Committee Report, the Act requires firms to provide information about proceedings "relating to the firm's audits of public companies." S. Rep. No. 107-205, at 46.

33 68 Fed. Reg. at 35026.

34 Item 5.1(a)(1), PCAOB Release 2003-007 at A2-viii.

35 *See*, *e.g.*, *id.*, Items 5.1(a)(2)-(3), 5.2 (requiring information about proceedings "involving conduct in connection with an audit report *or a comparable report prepared for a client that is not an issuer*" (emphasis added)); PCAOB Release 2003-001 at A3-xxviii (explaining that the form "asks about certain criminal proceedings, *whether related to audit reports or not*" (emphasis added)).

36 For example, firms that do not audit public companies are not required to register with the Board. *See* Act, § 102(a).

37 *See* 17 C.F.R. § 401(f)(2) (requiring registrants to report whether any director had been "convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)").

38 This class of persons has been, to some degree, exempted from the reporting requirement by the Board's modification of the definition of "associated persons" to exclude those who are "primarily associated with another registered accounting firm." Rule 1001(p)(i). However, foreign associated persons who are personnel of non-registered accounting firms could arguably continue to be subject to the Part V reporting requirement even with this modification.

39 PCAOB Release No. 2003-007 at A2-ii.

40 Deloitte & Touche Letter at 54.

41 68 Fed. Reg. at 35027.

42 *See*, *e.g.*, "Audit Firm Staff Details Leaked to Lab Activists," The Times of London, at 9 (Feb. 20, 2003) (describing an animal rights group's intention to harass Deloitte & Touche employees because of the firm's audit work conducted on behalf of a client).

43 Item 8.1(b), PCAOB Release 2003-007 (emphasis added).

44 Such blanket, advance waivers of constitutional rights would likely be deemed invalid as unconstitutional conditions. *See*, *e.g.*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

45 Act, § 105(b)(5)(A).

46 68 Fed. Reg. at 35027.

47 *See* Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, §§ 101(a), (d), 104(b)(2), 114 Stat. 464, 464-69 (2000); *see also id.* § 104(a), 114 Stat. at 469 (allowing limited exceptions for records that, unlike the consents of associated persons, are required by law to be *filed* with Federal agencies).

48 *See* Act, § 102(b)(3)(B) (requiring firms to acknowledge that obtaining consents of employees is a condition of registration, but not placing any constraints on the method or timing for accomplishing the task).