KPMG

July 1, 2003

Mr. Jonathan G. Katz, Secretary
U. S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

File No. PCAOB-2003-03
Public Company Accounting Oversight Board
Proposed Rules Relating to Registration System

Dear Mr. Katz:

KPMG appreciates the opportunity to comment on the Commission's consideration of the Public Company Accounting Oversight Board's (Board) *Proposed Rules Relating to Registration System*, which was filed for the approval of the Commission and published on the Federal Register on June 11, 2003 pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).

The overarching objective of the provisions of Sarbanes-Oxley is one of furthering the public interest through improving financial reporting, governance, and audit quality. KPMG wholeheartedly supports the efforts of the Board in striving to achieve this objective.

We set out for your consideration in the attached memorandum our comments on the proposed rules. Our principal comments are summarized below.

General comments on the Proposed Rules

- We believe that under controlling legal authority the Board is a quasi-governmental entity subject to the requirements of constitutional due process, and moreover that it is in the best interests of the Board and the public to ensure that the Board's rules and conduct, including its procedures governing registration, provide a clear, fair and efficient process for carrying out the Board's statutory mandate. We believe that result will ultimately enhance the effectiveness and integrity of the Board and its processes. We have provided suggestions to improve the transparency of the application process, and we urge that the Commission evaluate the provisions of the rules at issue here under the requirements of constitutional due process.

- The interpretation of who qualifies as a "person associated with an accounting firm" is critically important to how applicants for registration carry out their responsibilities to provide full and accurate information concerning legal proceedings and consents to cooperate. The definition of "associated persons" drafted by the Board is ambiguous in its meaning, and we have proposed ways in which the definition should be clarified.

- KPMG and other commenters have expressed concern about the legality of the requirement that associated persons provide an open-ended "consent to cooperate" with the Board as a condition of their continued employment with any firm auditing public companies. We propose that the proposed rule be revised to make clear that providing a consent to cooperate with the Board in carrying out its responsibilities will not be deemed to be a waiver of constitutional rights or attorney-client or other privileges.

- We believe that the Board's procedures for conferring confidential treatment on information provided in the registration application is unnecessarily cumbersome, and we propose that it follow instead the Freedom of Information Act-type procedures utilized by the Commission for granting confidential treatment.

- The Board appears to have exceeded its statutory authority by requiring that applicants for registration, and their associated persons, provide information about non-audit related criminal proceedings, and for completed criminal and other proceedings. Accordingly, we believe that the rules in Part V are subject to legal challenge to the extent that they require such information. In addition, the gathering and submission of information about the involvement of professionals in minor "criminal" proceedings such as traffic violations will threaten the legitimate privacy interests of the individual while providing information that is of no value to the Board. In view of growing public concern about invasions of individual privacy, we hope that the Board or the Commission will amend proposed Rule 5.1 to conform to the language of Sarbanes-Oxley.

- The proposed rules require applicants to provide a large amount of information that is already available in the public domain. We believe that the Commission should consider whether multiple-reporting of such information is necessary for the Board's purposes or simply a duplication of publicly available information.

- We believe that the Board should promulgate rules to provide for provisional registration of public company accounting firms, to avoid interruption of auditors' services for their public clients in the event that data systems, requests for additional information or difficulties faced by the Board staff in processing an immense volume of information in a 45 day time frame makes timely completion of the registration process impractical.

Issues unique to foreign firms

- US and foreign regulators need further time to co-operate and explore how they can best address legal issues associated with registration as well as practical concerns associated with registration, oversight and discipline. Further, to obtain the requested information, most foreign public accounting firms will need to develop new systems and processes, all of which will take time. The registration process will be further complicated by the need for foreign public accounting firms to identify possible conflicts with local laws and regulations. Consequently, we believe that an extension of at least one year from the required registration date of U.S. firms should be granted to foreign public accounting firms before registration is required.

Finally, we would emphasize that we believe that all of our suggestions can be implemented in a manner which would improve the functioning of the Board whilst remaining faithful to the overall objectives of Sarbanes-Oxley.

KPMG International is a Swiss non-operating association which functions as an umbrella organization to approximately 100 KPMG member firms in countries around the world, to whom it licenses the KPMG name. Each KPMG member firm is autonomous, with its own separate ownership and governance structure. The KPMG member firms do not share profits amongst themselves, and they are not subject to control by any other member firm or by KPMG International.

The observations set forth in this letter reflect the assessment by KPMG LLP (the US member firm of KPMG International) and other member firms of KPMG International (collectively, KPMG) of the proposed rules' potential effect on US as well as non-US firms.

Many of the KPMG member firms outside the United States have a direct interest in the new rules because of the number of issuers and affiliates of issuers domiciled outside the United States that they audit.

If you have any questions regarding any of the information included in this letter, then please call or write to Neil Lerner + (44) 207 311 8620, neil.lerner@kpmg.co.uk. with regard to the matters affecting non-U.S. firms, and Michael J. Baum, (212) 909-5604, mjbaum@kpmg.com, with regard to matters affecting the U.S. firm.

Yours sincerely,

KPMG

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Page locations for our detailed comments are given in the abbreviated table of contents below.

PART 1 - GENERAL COMMENTS

The Constitutional Requirements of Administrative Due Process

The Board is domiciled in and the creation of statute of the United States. U.S. constitutional privileges and due process protections, including Fourth, Fifth, and Fourteenth Amendment rights, provide important protections against potentially arbitrary or erroneous governmental action. To be sure, Sarbanes-Oxley explicitly states that the Board is not a government agency. *See* Sections 101(a) and (b). However, these statements are not determinative of whether the Board is subject to constitutional restraints. Courts have held that a statutory pronouncement that an entity is a private corporation and not a government actor will not prevent that entity from being deemed to be a government actor if it is otherwise sufficiently governmental in character. *See Lebron v. National R.R. Passenger*

Corp., 513 U.S. 374, 392-93, 397 (1995). Further, we believe that the factors set forth in *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982), in fact demonstrate that the actions of the Board are "fairly attributable" to the government.

Consequently, KPMG believes that it is in the best interests of the Board and the public to ensure that the Board's rules and conduct comport with the standards of constitutional due process, including its procedures governing the registration process. We believe that result will ultimately enhance the effectiveness and integrity of the Board and its processes. We urge that the Commission evaluate the provisions of the proposed rules at issue here under the requirements of constitutional due process.

Person Associated With A Public Accounting Firm (And Related Terms)

Rule 1001(p) defines the terms "person associated with a public accounting firm" and "associated person of a public accounting firm."[1] The primary importance of this definition is in connection with identifying the individuals who must provide consents to cooperate under Part VIII, and about whom information concerning legal proceedings must be included in Part V. We believe that the definition is ambiguous and, dependent upon the Board's interpretation of it, potentially overbroad. While the Board made one change to the definition when it released the proposed rules to the Commission,[2] its intended reach remains unclear.

The definition of "person associated with a public accounting firm" [Rule 1001(p)(i)] includes two categories of individuals: a "proprietor, partner, shareholder, principal, accountant, or professional employee" of the applicant, and any "independent contractor". We believe that the logical, and only workable, reading of the definition is that both categories of individuals are included only if, *in connection with the preparation or issuance of any audit report*, they receive profits or compensation [subpart (1)] or participate as an agent [subpart (2)]. We suggest that the Commission remedy the definition's ambiguity by clarifying the definition to make this reading clear.

Second, the Board's staff has confirmed that "associated person" is intended to mean only natural persons. In connection with the "independent contractor" category, we read the "person associated" definition to include an "independent contractor" who is *directly* engaged by the applicant in that capacity, and not individuals who are partners or staff of independent contractors of the applicant but who have no direct contractual relationship with the applicant. Again, while this is the logical construction of the definition, it is important that the definition not leave its construction ambiguous.

The statutory language and legislative history of Sarbanes-Oxley do not suggest that Congress intended, for example, that a person employed by an accounting firm in a wholly internal capacity but who possesses a professional degree should be required to have personal information about criminal proceedings disclosed under Part V, or that the applicant be required to obtain consents to cooperate from individuals who work at another firm or company which the applicant has used in connection with a prior audit. We also cannot conceive of any significant threat to the Board's performance of its responsibilities if the consent of such persons were not required.

Consents of Employees

Proposed Rule 8.1(b) of proposed Form 1 requires that the applicant agree to "secure and enforce" from each of its associated persons a consent to "cooperate in and comply with any request for testimony or the production of documents made by the [Board]" as a "condition of continued employment by or other association with" the applicant. The

proposed rule presents three significant issues concerning the interests of individual employees and partners of the applicant.

As the Board does not have the legal authority to compel the production of information or testimony, we appreciate the need for cooperation by applicants to permit the Board to perform its oversight functions effectively. At the same time, individuals have a substantial personal interest to not waive constitutional protections or privileges in Board investigations, especially in connection with testimony that could be used against them in collateral proceedings pursuant to Section 105(c) of the Sarbanes-Oxley Act of 2002.

A second concern is whether the Board can impose this condition on professionals as, effectively, a condition of the continuation of their careers as auditors of public companies. Legal standards require that actions with significant impact on individuals' liberty interests cannot be imposed by governmental bodies without procedures permitting a meaningful opportunity for comment and review. In addition, procedural concerns are implicated by the potential collateral effects, such as legal or professional liability, that are certain to follow the waiver of rights imposed by proposed Rule 8.1(b).

Finally, the applicant's practical ability to compel consents from an "independent contractor" as included in the definition of "associated persons" is even more limited and, as discussed above, to the extent that the term incorporates individuals or entities with only a tangential relationship to the audit would appear to be of marginal utility to the Board's investigative responsibilities.

For these reasons, we propose that the Commission confirm that provision of a consent to cooperate cannot be deemed to represent a waiver of constitutional or attorney-client or other applicable privilege. We also suggest that proposed Rule 8.1(b) be rewritten to require that the applicant "use its best efforts to secure and enforce" the consents of cooperation from independent contractors who are associated persons.

We also suggest that proposed Rule 2104 be changed to permit applicants the option to gather the consents of their partners and employees through an electronically-generated response, similar to the method of certain firms for confirming individuals' compliance with independence rules, as opposed to requiring the gathering of manual signatures of many thousands of partners and employees. The Electronic Signatures Act of 2000, 15 U.S.C. § 7001, insures that electronic signatures are valid:

> "[W]ith respect to any transaction in or affecting interstate or foreign commerce - (1) a signature, contract or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and (2) a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation."

We have been successful in using the electronic gathering of responses from our partners and employees in similar circumstances for several years. Given the administrative costs and burdens associated with gathering and maintaining manual signatures, we believe that the Commission should require that proposed Rule 2104 be revised to accept electronic signatures by individuals of consents to cooperate.

Protection of Confidential Information

Proposed Rule 2300 identifies a procedure for guarding certain confidential information provided in the registration application. The procedure is burdensome to the applicant and, apart from the Board's comment in its rulemaking release[3] that the Board is not an agency

of the government and thus not bound by laws restricting disclosure of information, there is no rationale advanced why the Board nonetheless should not follow the familiar and effective Freedom of Information Act (FOIA) procedures instead. The procedures under proposed Rule 2300, especially those of Rule 2300(c)(2) requiring in connection with each request an individualized and detailed explanation of how the requirements for granting confidentiality are satisfied, are unwieldy; compliance by applicants will be unnecessarily time-consuming, and resolution of these confidentiality issues will saddle the Board with a significant burden as well. A FOIA-type approach is preferable, permitting the applicant in good faith to designate information as confidential under the general terms provided by proposed Rule 2300, and honouring the presumption of confidentiality unless challenged, at which point the applicant will be required to support its claim.

In addition, the Board has set no criteria or standard of proof for its resolution of confidentiality requests, and has provided no opportunity to be heard and no form of review of its decisions, contrary to the standards of administrative due process. As we discuss below, certain information that must be provided in Part V of the registration application could prove professionally and personally damaging to individuals, and its public dissemination would not be consistent with any expressed Congressional intent and would serve no interest of the Board. To require that applicants submit their registration application containing such information with no understanding of the criteria to be employed or proof required in connection with requests for confidential treatment is profoundly unfair to the individuals' legitimate privacy rights.

Criminal Proceedings Involving Applicants and Associated Persons

The Board proposes to require information about civil, alternative dispute resolution, administrative, and disciplinary proceedings *only* to the extent that they "arise out of" or "involve" "conduct in connection with an audit report."[4] Proposed Rule 5.1.a.1, however, calls for information about *any* criminal proceeding against an applicant or any of its associated persons that is pending or that resulted in an adverse judgment during the last five years. The expansive disclosure that the Board seeks to impose regarding criminal proceedings goes beyond the requirements of Sarbanes-Oxley. Moreover, the unlimited scope of information required relating to criminal proceedings is far broader than that necessary for the Board's registration approval decision, because the vast majority of this information will bear no rational relationship to an applicant's fitness to perform audits of public companies.

Sarbanes-Oxley expressly limits the information about proceedings that must be included in registration applications to "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."[5] The legislative history to Sarbanes-Oxley also states that an application for registration with the Board must include "information about pending civil, criminal, or disciplinary actions . . . relating to the firm's audits of public companies."[6] By extending the scope of the required disclosure about criminal proceedings beyond those related to an audit, the Board proposals capture conduct that has no relationship to the issuance of audit reports and conduct that has no relationship to issuers. The Board itself acknowledges that its proposals go beyond the statutory requirements.[7] This expansion is not justified or necessary to carry out the Board's responsibility for overseeing audits of public companies. We also can find no basis in the statute or its legislative history for treating criminal proceedings differently from other proceedings and mandating the disclosure of a panoply of criminal proceedings involving conduct with respect to which the Board has no oversight responsibilities.

In addition, we do not believe that information about all criminal proceedings involving an applicant or its associated persons is necessary for the Board to make decisions about whether to approve applications for registration. The Board explains that Part V of proposed Form 1 is structured to "require[] information about certain additional proceedings that may reflect on the applicant's fitness for registration"[8] and that it has been revised from the original proposal to "preserve the information necessary to decide whether to approve or disapprove registration applications."[9] Because the proposed disclosure about criminal proceedings is overinclusive, Item 5.1 would result in applicants being forced to disclose information that has no relevance to the conduct of an audit, including information about unusual or de minimis offenses. For example, applicants would have to furnish information under Item 5.1 if an associated person were involved in a criminal proceeding because he or she ate or drank while riding on public transportation,[10] littered,[11] "scalped" tickets to a performance,[12] bought fireworks,[13] went hunting or played cards on a Sunday,[14] or attended a boxing match and directed "insulting or abusive remarks" at the contestants.[15] Having to disclose information about these and other, similar types of ostensibly or technically "criminal" activities could also be embarrassing to applicants' associated persons, particularly when it remains unclear whether and to what extent information furnished under Part V will be treated as confidential. Moreover, it is difficult to see how the Board could deem an applicant unfit for registration by virtue of the applicant's relationship with an associated person who had committed, or allegedly committed, a "social behavior" type offense which has no association with audit-related conduct.

The process of gathering information required by proposed Rule 5.1 also has the unintended consequence of conflicting with a number of state laws protecting the interests of employees. As an example, Massachusetts law makes it an unlawful practice for an employer to "request any information, to make or keep a record of such information" of any employee relating to his or her "arrest, detention, or disposition regarding any violation of law in which no conviction resulted".[16] It also is declared unlawful to inquire concerning a first conviction for misdemeanors involving drunkenness, simple assault or disturbance of the peace.[17] Similar prohibitions exist under the law of California (gathering information of employee's marijuana conviction more than two years old)[18] and Michigan (make or retain a record of employee's arrest, detention or disposition where conviction did not result).[19] Finally, many states make it unlawful to seek information of an employee's criminal conviction if such records have been sealed.[20] Proposed Rule 5.1 potentially would cause an applicant to violate its employees' rights under such laws when it gathered and maintained such information.

A second state law concern results from the gathering of information related to pending criminal proceedings. Under the laws of most states, the records of proceedings involving misdemeanor charges are sealed if the defendant is acquitted or the charges are otherwise dismissed. The purpose of such laws is to free the defendant from lingering suspicions when he or she has been exonerated. If the criminal information required under proposed Rule 5.1 is made public, all persons who are employees of registered public accounting firms will be treated differently than other individuals and deprived of this important right.

Accordingly, we believe that the final disclosure provision approved by the Commission should reflect the approach that the Board followed in its original version of proposed Item 5.1, which would have called for information limited to criminal proceedings involving conduct in connection with an audit report.[21] This approach would be consistent with the language and legislative history of Sarbanes-Oxley. It also would be appropriately tailored

to elicit information that is germane to the conduct of an audit and the Board's mission of overseeing the auditing of public companies.

Completed Legal Proceedings

The Sarbanes-Oxley Act of 2002 permits the Board to require applicants to include information concerning certain *pending* civil, criminal, administrative or disciplinary proceedings.[22] Proposed Rule 5.1, however, requires that the application not be limited to information concerning pending proceedings, but include all such matters in which a judgment, award, sanction or finding of violation was entered *in the past five years*. It is conceded by the Board that to the extent that these items cover proceedings that are no longer pending they are broader than permitted by Section 102(b)(2)(F) of Sarbanes-Oxley.[23] While Sarbanes-Oxley allows the Board to gather "other information"[24] in addition to that specifically identified in Section 102, as discussed above it is not legally sound construction to rely on the provision as permitting the Board to ignore the express restriction included in Sarbanes-Oxley: "Information relating to . . . proceedings pending against the firm . . .." Consequently, we believe proposed Rule 5.1 should be redrawn to remain within the powers provided to the Board by Sarbanes-Oxley.

Multiple Reporting Obligations

Multiple reporting obligations exist for non-U.S. member firms of KPMG registering with the Board and equivalent non-U.S. regulators. Multiple reporting of the same or substantially similar information is needlessly burdensome to the applicants, its partners and employees and the Board. We recommend that the Board work with foreign regulatory bodies to ensure that any overlapping reporting requirements be limited (to minimize inefficiencies and unnecessary costs.

A separate concern is that the proposed rules require reporting of information that is already filed with and publicly available from the Commission. For example, lists of issuers, fees of each issuer, and reports of disagreements with issuers are all available through the EDGAR system maintained by the Commission. We believe that a more cost efficient and effective method for the Board to obtain this information is to have the Board incorporate into its electronic data system, a direct link to the SEC EDGAR database in which it can access the pertinent information on a real-time basis. Such a process would provide data that is more current, eliminate a significant duplication of efforts, and reduce the possibility of inconsistencies in reporting.

Rules for Provisional Registration

Next month the Board staff will begin to process applications for registration from accounting firms expected to be over 700 in number. The process will utilize a format for electronic data accumulation and transmission that will not have had prior use on a large-scale basis. The staff will require time to review each application, determine whether additional information is necessary before the application is deemed complete, provide more time to compile and submit the new information, and then to consider the supplemental submission. It is likely that there will be interpretational issues that will arise once the detailed information is subject to scrutiny by the staff. Finally, it is not an overstatement to predict that the volume of information that will be submitted largely over a period of two or three weeks - rosters of tens of thousands of accountants and public clients (and their respective fee information), and identification of the firms' offices and associated entities, quality control procedures and legal proceedings - will be massive.

We recognize the necessity of the Board to hold to the timetable provided by Sarbanes-Oxley. However, the failure to provide a procedure for provisional registration of a firm which has submitted its application but whose application, because of technical difficulties or lack of resources available to the Board, has not been accepted could have serious disruptive consequences for the firm's clients and indirectly the US capital markets. We submit that the Board should provide by rule for this eventuality.

PART II - ISSUES UNIQUE TO FOREIGN FIRM REGISTRATION

Introduction

The proposed rules provide certain unique provisions to address specific issues associated with the registration of foreign firms.

These provisions include:

- Providing foreign firms with an additional 180 days to register. This makes the compliance date for such firms April 19, 2004.
- Allowing an applicant to withhold information where disclosure of such information would violate a conflicting non-US law.
- Narrowing the scope of information to be provided by foreign firms. The focus is only on proprietors, partners, principals, shareholders, officers or managers of the applicant that provide at least 10 hours of audit services to issuers.

We set out for your consideration below several further recommendations.

Further Extension of Time For Initial Registration of Foreign Firms

We continue to believe that an extension of at least one year should be granted to foreign firms before initial registration is required.

There are three main reasons for our belief, each of which is set out below.

(a) Dialogue between the US regulators and foreign accounting regulatory bodies

The Commission is well aware of the ongoing dialogue between foreign accounting regulatory bodies (in particular the European Commission (EC and Canada)) and US regulators concerning registration.

Against the background of this ongoing dialogue, we continue to believe that an extension of at least one year should be granted to foreign firms before initial registration is required.

We note the Board's comment that the proposed 180 day deferral is intended to afford the Board the opportunity to explore ways to accomplish the goals of Sarbanes-Oxley without subjecting foreign firms to unnecessary burdens or conflicting requirements.[25] However, in our view this will be insufficient time for US and foreign regulatory bodies to finalise the discussions required to achieve this objective.

In particular, the Board and the Commission are aware that the EU and several countries have either adopted or proposed regulatory reforms in relation to audit firms. In many cases these reforms include new rules relating to registration, inspection and discipline of accounting firms.

US and foreign market regulators need further time to co-operate and explore how they can best address the legal issues associated with registration as well as practical concerns associated with registration, oversight and discipline. This will enable regulators to ensure that the system provides for robust investor protection, but does not create a disproportionate impact in terms of the cost of regulation compared to the investor protection afforded by it. This is especially so in certain countries where there are a relatively small number of issuers.

(b) Information requirements

This is the first time this much information (both in terms of volume and detail) has ever been requested from foreign public accounting firms by any national regulator. Many firms will not be sufficiently prepared to produce this level of detail within the short time frame. For many firms, international co-ordination will also be required in respect of fee disclosure.

Obtaining reliable and complete information of this nature for a very large number of individual practices (we currently believe that KPMG would be required to register in at least 40 countries) would involve the development of new systems and processes in many jurisdictions (all of which must be rigorously tested).

(c) Legal issues

There are considerable legal impediments involved in the registration. Further time is required for firms to consider these issues and for the Board to consider the appropriate way in which to respond.

The major legal issue concerns conflicts of laws. These conflicts are centred around issues of client and third party confidentiality, data protection and employment law. These issues were dealt with in some detail in our submission to the Board on the initially proposed rule.[26]

In response to our submission and concerns on legal issues raised in other submissions, the Board added Rule 2105 and corresponding instructions in Form 1 to the Proposed Rule. Specifically, General Instruction 7 of Form 1 allows an applicant to withhold information from its application where disclosure of the information would cause the applicant to violate foreign laws. It specifies that an applicant claiming that submitting information would cause it to violate foreign laws must make a notation under the relevant item number of the Web-based registration form and furnish as exhibits:

1. A copy of the relevant portion of the conflicting foreign law,

2. A legal opinion supporting the applicant's position, and

3. An explanation of the applicant's efforts to seek consents or waivers to eliminate the conflict, if applicable, and a representation that the applicant was unable to obtain such consents or waivers to eliminate the conflict.

We support the first two limbs of this test. However, we believe that the third limb adds no value and will result in firms having to unnecessarily seek and document attempts to seek consents or waivers.

For example, subject to issuer's prior approval, there is nothing to stop employers in Germany and England asking their employees (and prospective employees) to give consent to disclose information. However, employees (and prospective employees) in both countries

may seek to exercise the right to refuse such disclosure on the grounds of privilege against self-incrimination. Employees might also make claims for unfair dismissal and/or breach of contract in the event of attempts to unilaterally vary the terms of their contracts of employment to make such consents a condition of their continued employment.

A literal interpretation of the third limb of the above test would appear to require an explanation of the process of trying to get these consents or waivers. This would be extremely time-consuming, ineffectual (as employees would in many cases refuse) and may result in litigation or even industrial disputation.

In other cases, the law may provide some scope for an accountant to provide the Board issuer confidential information with the issuer's consent (for example, Japan). However, issuer consent would not totally resolve issues, since the client's consent would not extend to any third party confidential information obtained during the audit.

In addition, under Part V of Form 1, it is highly unlikely that individuals in foreign public accounting firms required to disclose information concerning certain proceedings will provide consent. Without obtaining such consent, notification to the Board will be illegal.

We believe that a better approach is to omit the third limb and rely on the legal opinion supporting the applicant's position. This should provide sufficient comfort for the Board. If the Board considers this unsatisfactory, for abundant caution, it could insert a requirement in the second limb of the test requiring that the legal opinion contain a statement to the effect that no consent or waiver provision could be relied upon by the applicant.

Should the Commission wish to consider further issues concerning conflict of laws issues, we refer you to legal advice commissioned by the major accounting firms (Ernst & Young, KPMG, PricewaterhouseCoopers and Deloitte Touche Tohmatsu) from Linklaters and Alliance on key countries available on the Board's website under Rulemaking Docket Number 001, Comment #25 at pcaobus.org/pcaob_rulemaking.htm.

Retrospective Registration

It is likely that in a number of smaller countries there will be no registered public company accounting firm, and consequently a registrant will be unable to have audit procedures performed there if, for example, a public company client acquires a significant subsidiary or operations located in such a country. Neither the Board nor the Commission's releases provide instruction on how firms can accept new engagements for issuers if they are not already registered. We believe that retrospective registration requirements should be introduced for these `first time' auditors.

Confidentiality

In connection with the discussion of confidential treatment above, there also should be a general presumption for non-US applicants that if the registration information provided is not publicly available in the foreign country it will not be made public in the United States.

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1 As used herein, "proposed Rule" refers to the proposed rules promulgated in PCAOB Release No. 2003-007, Registration System for Public Accounting Firms.

2 The Board removed from the definition contained in the initially proposed rules the italicised words "participates as an agent *or otherwise* on behalf of such accounting firm."

3 PCAOB Release No. 2003-007, p. 9, n 15.

4 Proposed Rules 5.1.a.2 & 3, 5.2.a.

5 Sarbanes-Oxley Act of 2002, § 102(b)(2)(F) (emphasis added).

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

7 Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating to Registration System, Release No. 34-47990, 68 Fed. Reg. 35016, 35026 (June 11, 2003) ("SEC Release"); PCAOB Release No. 2003-007, at A3-l.

8 SEC Release, 68 Fed. Reg. at 35026; PCAOB Release No. 2003-007, at A3-l.

9 SEC Release, 68 Fed. Reg. at 35026; PCAOB Release No. 2003-007, at A3-li.

10 In California, it is a crime to smoke, eat, or drink on public transportation or to expectorate upon any facility or vehicle that is part of a public transportation system. Cal. Penal Code §§ 640(b)(4) & (5) (2003).

11 In Pennsylvania, a person is guilty of the crime of "scattering rubbish" if that person "causes any waste paper, sweepings, ashes, household waste, glass, metal, refuse or rubbish, or any dangerous or detrimental substance to be deposited into or upon any road, street, highway, alley or railroad right-of-way, or upon the land of another or into the waters of this Commonwealth." 18 Pa. Cons. Stat. § 6501(a)(1).

12 In Massachusetts, it is a crime to engage in the business of reselling a ticket to any theatrical exhibition, public show or public amusement or exhibition without a license. Mass. Gen. Laws ch. 140 § 185A (2003). Massachusetts courts have upheld convictions under this law where a defendant made only a single sale of tickets. *See Commonwealth v. Sovrensky*, 169 N.E. 418 (1929).

13 In Ohio, it is a crime to purchase certain categories of fireworks without completing a form indicating the destination to which the fireworks will be transported and transporting the fireworks directly from the state within 48 hours of purchase. Ohio Rev. Code Ann. § 3743.63(c) (Anderson 2002); Ohio Rev. Code Ann. § 3743.45(A) (Anderson 2002).

14 In Alabama, it is a crime to engage "in shooting, hunting, gaming, card playing or racing" on Sunday. Ala. Code § 13A-12-1 (2003).

15 In Louisiana, it is a crime for spectators at a boxing match to make "insulting or abusive remarks" directed at the contestants. La. Rev. Stat. § 4:81 (2003).

16 Mass. Gen. Laws Ann. ch. 151B § 4(9) (West 2003).

17 Id.

18 Cal. Labor Code § 432.8 (West 2003).

19 Mich. Comp. Laws Ann. § 37.2205a (West 2003).

20 See, e.g., Colo. Rev. Stat. Ann. § 24-72-308; Ill. Ann. Stat. Ch. 775, ¶ 5/2-103 (Smith-Hurd 2003); Ohio Rev. Code Ann. § 2151.358 (Baldwin 2003). Certain of these and similar laws indicate that the employer may not gather or maintain the information in connection with terms of employment, making it unlawful for an applicant to take any action against an employee for refusing to respond to the request.

21 Proposal of Registration System for Public Accounting Firms, PCAOB Release No. 2003-001, proposed Form 1, Item 5.1.a (Mar. 7, 2003).

22 Sarbanes-Oxley Act of 2002, § 102(b)(2)(F).

23 *See* SEC Release; PCAOB Release No. 2003-007, at A3-l.

24 Sarbanes-Oxley Act of 2002, § 102(b)(2)(H).

25 PCAOB Release No. 2003-007, p. 20.

26 KPMG submission to the Board on Rulemaking Docket Matter No.001 dated March 28, 2003.