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September 8, 2015

VIA EMAIL
Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N. E.
Washington, D.C. 20549

Re: File No.: S7-13-15 Possible Revisions to Audit Committee Disclosures Rule Release Nos. 33-9862 and 34-75344 (July 1, 2015)

Dear Mr. Fields:

I am an attorney practicing in Washington, D.C., in the fields of securities regulation and professional liability. Over the years, I have represented a number of auditors and audit committees. I respectfully submit these comments on my own behalf and not on behalf of any current or former client.

I have limited my comments to certain discrete issues suggested by parts of three of the Commission's Requests for Comments.

Request for Comment: 17. Could these potential disclosures chill communications between the audit committee and the auditor? If so, how? ***

Free and open communications between the audit committee and the auditor will not be fostered by a requirement that the substance or details of such communications be disclosed. In some states, accountant client communications are protected by an evidentiary privilege.[1] Such a privilege might be considered valuable by the client and could be waived by a required disclosure. Also, the more specific a required disclosure the more likely that the work of the audit committee and the auditor might be second guessed in expensive litigation. Corporate decisions are frequently contested in litigation.[2] Even worse from the perspective of an agency whose core mission is disclosure would be a required disclosure widely ignored by investors.[3]

Request for Comment: 34. Would disclosure of the name of the engagement partner be useful to investors? ***

The disclosure of the identity of the engagement partner or other participants in the audit process will not serve to protect the interests of investors or further the public interest in the preparation of informative, accurate, and independent audit reports. The value of an audit report to the investing public resides in confidence that a defined process has been applied by a professional organization with the staff, know-how, and resources to discharge that process in a professional manner. No individual should be singled out either to add or detract from the imprimatur of the audit firm.

The PCAOB has noted: "The manner in which the audit is conducted lies primarily under the surface, and the strengths and weaknesses of the process are opaque." CONCEPT RELEASE ON AUDIT QUALITY INDICATORS at p. 6, PCAOB Release No. 2015-005, PCAOB

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[1] See, e.g., Fla. Stat. § 90.5055 (2015).

[2] When an up or down, either/or decision is made by a corporation, litigation frequently follows, as found in the so-called "deal tax" for mergers and acquisitions in Delaware. See The Trial Lawyers' New Merger Tax: Corporate Mergers and the Mega Million-Dollar Litigation Toll on Our Economy http://www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.

[3] Disclosure does not always advance its laudable goals. As part of its "plain English" initiative, data gathered for the SEC indicated: "Most participants said they do not utilize annual reports as a tool in their investment decision-making." Abt SRBI Final Report for the SEC, Focus Groups about Plain English Documents at p. 7 (May 2008) http://www.sec.gov/pdf/finalrptplainenglish052008.pdf . In another context, the Federal Reserve Board has been examining the desirability of reducing and simplifying disclosure in the face of information overload. "While additional content helps comprehension in some cases, sometimes less is more. Too much information can overwhelm consumers or distract their attention from key content. It may be better to focus on a handful of elements rather than 'full disclosure.' " Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned from Consumer Testing, 97 Federal Reserve Bulletin No. 3 at p. 21 (August 2011). http://www.federalreserve.gov/pubs/bulletin/2011/pdf/designingdisclosures2011.pdf .

Rulemaking Docket Matter No. 041 (July 1, 2015). An audit may require the deployment of numerous professionals in addition to an engagement partner. The disclosure of the identity of the engagement partner fails to communicate the importance of the entire team to the "opaque" audit process. Apart from any potential liability or litigation issues created, the publication of the name of the engagement partner invites the creation of a celebrity culture that should have no part in the audit process.

An audit firm is not marketing a pair of blue jeans where a star's signature adds to the perceived value of such a product. Having George Washington or a former high government official identified as the engagement partner will not promote the protection of investors. What happens when a registrant's investor relations department touts the fact that a former high government official serves as the audit engagement partner? I would think that fact irrelevant to audit quality. No one, however, will be able to convince the public that a George Washington audit report doesn't have a special added luster.

Request for Comment: 42. Are there any liability implications (e.g., for engagement partners, audit committee members, the company or other participants) with respect to disclosure of participants in the audit? If so, what are these implications? * * *

Identifying the engagement partner may expose that individual to a lawsuit. The Supreme Court in <u>Janus Capital Group, Inc. v. First Derivative Traders,</u> 131 S.Ct. 2296, 2302 (2011), held that "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Whether or not the <u>Janus</u> decision would eventually limit liability of disclosed audit engagement personnel, the essential point is that such disclosure would generate litigation to test the <u>Janus</u> issue with its attendant costs and uncertainties. Where the ultimate benefit for investors, if any, is uncertain, and the litigation costs are sure, the brief against disclosure of the identity of audit engagement personnel is strong.

Moreover, refraining from regulation that would encourage additional litigation would be consistent with the dominant legislative and judicial trends in securities law. The Supreme Court in <u>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit</u>, 547 U.S. 71, 80 (2006) reiterated the lesson of the risks it identified in <u>Blue Chip Stamps v. Manor Drug Stores</u>, 421 U.S. 723, 739 (1975), that "[e]ven weak cases brought under the Rule [10b-5] may have substantial settlement value . . ." The same policy considerations generated the Private Securities Litigation Reform Act of 1995. "[N]uisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years. [H. R. Conf. Rep. No. 104-369, p. 31 (1995)]. Proponents of the Reform Act argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors. [H. R. Conf. Rep. No. 104-369, pp. 31-32 (1995)]." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. at 81. Consistent with these policy considerations, the Commission should avoid creating additional litigation exposure for individual auditors by requiring disclosure of the identity of such individuals.

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I thank you for the opportunity to submit the foregoing comments, reflecting my personal views on Possible Revisions to Audit Committee Disclosures Rule.

Respectfully submitted,

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