

April 15, 2004

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

Re: Securities and Exchange Commission (Release No. 34-49454; File No. PCAOB-2003-07); Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating to Investigations and Adjudications

Dear Mr. Secretary:

KPMG LLP is pleased to respond to the request for comments from the United States Securities and Exchange Commission (the "Commission" or "SEC") regarding the filing by the Public Company Accounting Oversight Board ("PCAOB" or "Board") of its Proposed Rules Relating to Investigations and Adjudications. We appreciated the opportunity to submit comments on the Board's initial proposed rules on August 18, 2003, as well as the Board's thoughtful consideration of those comments. However, we have a significant concern regarding the fairness of the investigatory process we strongly believe merits consideration by the Commission in issuing the final rule.

Specifically, Board Rule 5102 (c) (3) imposes restrictions on who may be present during an examination of a witness under Rule 5102. Under that section, such persons are limited to the person being examined and his or her counsel; any Board member or member of the staff of the Board; the reporter; and such other persons as the Board or the staff of the Board designated in the order of formal investigation determine are appropriate to permit to be present. We believe the rule may be unduly restrictive as written insofar as it may prohibit counsel for the witness from being accompanied by a technical expert consultant. Certainly it is so if, as apparently interpreted by the Board, the rule prohibits any such technical expert consultant from being a partner or employee of the firm with which the witness is associated.

The Section by Section Analysis to the rules included as Appendix 2 to Release No. 34-49454, page A2-18, notes that several commentators suggested that the rules allow a witness and his or her counsel to be accompanied by a technical expert consultant during testimony as a matter of right—a right that has long been recognized in practice by the staff of the Commission and upheld by the Second Circuit in S.E.C. v. Whitman, 613 F. Supp.48 (D.D.C. 1985). The PCAOB has declined to modify the rule expressly to permit attendance by a technical consultant as of right, stating it need not do so because the rule "provides sufficient flexibility for the staff to permit a technical consultant to be present." The right to be properly represented, however, should not be the

subject of the staff's discretion. This is particularly true as the PCAOB strongly suggests that in the exercise of such discretion, a consultant will be "approved" only if "the consultant not be a partner or employee of the firm with which the witness is associated." We strongly urge the Commission to reconsider that position.

First, as Whitman notes, given the "extraordinary complexity" of matters raised in SEC investigations—the same types of matters that will typically be the focus of PCAOB testimony—counsel, in order to fully and adequately represent his client, may require the expertise of a technical advisor by his side. Not allowing counsel to receive substantive guidance from an expert technician when counsel has determined, in his professional judgment, that such guidance is essential to his ability to represent his client, substantially compromises the client's right to counsel in SEC testimony, according to Whitman. While the PCAOB may argue that the Administrative Procedure Act is not applicable to Board proceedings—which we do not concede—basic fairness says that when the Board is questioning a witness whose license and livelihood could well depend on the outcome of that testimony, that witness is entitled to effective and adequate counsel, including utilization of the technical consultant expertise counsel needs to be effective.¹ That is particularly the case where it is likely, if the SEC model is followed, that much of the questioning at the examination will in fact be done by, or at the least questions provided by, the PCAOB technical expert consultants who will undoubtedly be accompanying the PCAOB attorney to the examination.

Second, experience with SEC examinations suggests that the presence of such technical expert consultants at testimony can in fact lead to a much more productive exam and a clearer investigative record. Given that such persons "talk the same language" as the SEC's technical consultants, misunderstandings, ambiguities and unnecessary detours can be and frequently are avoided.

Third, there does not appear to be any logical reason to exclude technical expert consultants from the firm with which the witness is associated. KPMG, like other major accounting firms, has a dedicated staff of experienced audit partners who work solely for its Office of General Counsel to assist both in-house and external counsel who represent KPMG personnel and the firm with technical issues, and who have routinely attended SEC examinations of witnesses for thirty years. In addition to technical expertise in auditing and accounting, such persons have a close knowledge of the firm's own policies and procedures, which will likely be implicated in most PCAOB examinations. Should the Board adopt the practice suggested by the commentary to the rule, the result would be the banning of this internal technical resource. Each firm or witness then would be required to retain outside experts, leading not only to substantial costs but to inevitable delay as the outside expert would need time to familiarize him or herself with the firm's

¹ Rule 5108 expressly authorizes the Board to provide investigatory information, including testimony, to the Commission and, in the discretion of the Board, to other federal and state regulators

internal guidance. The rule would not only be unfair, but would be counterproductive to the PCAOB's goals.

The Section by Section Analysis, Page A2-19, suggests that a firm's "internal personnel" –i.e., the internal technical expert consultant--should not be permitted to "monitor" an investigation by sitting in on all testimony of firm personnel, a statement we find puzzling. The firm's in-house counsel—also members or employees of the firm—will, as they do today with the SEC, routinely attend such testimony for the purpose of protecting the rights of the witnesses and the firm. And surely any outside counsel and outside technical experts will, consistent with their ethical obligations generally, report to their clients what goes on in each examination. If a witness or a firm may, as a result of an investigation, become the subject of a disciplinary proceeding, surely it is not inappropriate that they in fact educate themselves as to what the testimony of firm personnel is. Excluding internal consultants would seem to serve no purpose other than to make the investigatory process far more cumbersome and expensive, and we strongly urge the Commission to reconsider that position in issuing the final rule.

If you have questions regarding this issue, please contact Michael J. Baum, (212) 909-5604, mjbaum@kpmg.com.

Very truly yours,

KPMG LLP