

File No. PCAOB-2004-02

Consists of 40 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

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Form 19b-4

Proposed Rules

By

Public Company Accounting Oversight Board

In accordance with Rule 19b-4 under the  
Securities Exchange Act of 1934

1. Text of the Proposed Rule

(a) Pursuant to the provisions of Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") is filing with the Securities and Exchange Commission (the "SEC" or "Commission") amendments to the PCAOB's bylaws. The Board adopted its initial bylaws at its first open meeting on January 9, 2003, adopted certain amendments on April 25, 2003, and adopted additional amendments on March 9, 2004. The amendments proposed herein are those amendments adopted by the Board on March 9, 2004. The proposed bylaws amendments are attached as Exhibit A to this rule filing.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Board

(a) The Board approved the proposed bylaws amendments, and authorized them for filing with the SEC, at its Open Meeting on March 9, 2004. No other action by the Board is necessary for the filing of these proposed amendments.

(b) Questions regarding this rule filing may be directed to Lewis H. Ferguson, III, General Counsel (202-207-9150; [fergusonl@pcaobus.org](mailto:fergusonl@pcaobus.org)), or Kathleen Peters, Assistant General Counsel (202-207-9190; [petersk@pcaobus.org](mailto:petersk@pcaobus.org)).

3. Board's Statement of the Purpose of, and the Statutory Basis for, the Proposed Amendments to Its Bylaws

(a) Purpose

The purpose of the amendments is to clarify existing bylaws provisions and to cause the PCAOB's bylaws to address the following internal operational and administrative PCAOB matters in the manner best suited to the organization:

Sections 2.2 and 2.3 would be added, which would specify that the PCAOB's purposes, activities and uses of earnings comport with the requirements of the Internal Revenue Service for exemption from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.

Section 3.3 would be added, which would identify the PCAOB's agent and office for purposes of the receipt of service of process, demands and notices.

Section 4.4 would be modified to reflect that the PCAOB may directly pay for (rather than only reimburse) reasonable expenses of the Board members incurred in the discharge of their duties.

Section 5.1 would be amended to include modified provisions regarding the frequency, scheduling and notice requirements of public Board meetings. As amended, the Bylaws would require the Board to hold at least one public meeting per calendar quarter and, absent exigent circumstances, to ensure that public notice thereof is provided at least five days prior to the meeting. Section 5.1 would also clarify that Board action may be taken in any manner permitted by law, including by meeting or, where appropriate, by other means.

Further, the Board has established an Office of Internal Oversight and Performance Assurance in order to provide internal examination of the programs and operations of the Board to help ensure the efficiency, integrity and effectiveness of those programs and operations. Pursuant to the proposed amendments, Section 6.3(c) would be added, and would specify that the Director of this office reports directly to the Board, and that the Board has the exclusive authority to hire, fire and establish the compensation and other terms of employment of this Director.

If amended, Article VII would both be condensed and include substantive modifications relating to indemnification. The substantive modifications are as follows:

- The Board would only be required to provide indemnification of those expenses that are reasonable.
- The Board would only be required to indemnify those costs and expenses that are incurred in the recipient's defense efforts.
- Indemnification of amounts paid in settlement would be subject to Board approval.
- A potential indemnitee would be given notice if the Board were going to consider whether the indemnitee acted in a manner that would ultimately preclude indemnification, and would be given a right to submit materials to the Board prior to any such determination.
- The misconduct bar to indemnification would only apply to material misconduct that was the basis for the proceeding for which indemnification is sought.

- In lieu of providing indemnification or advancements to an individual, the Board would generally be able to undertake the defense of the indemnitee.
- If requested, the Board would be required to indemnify a potential indemnitee for costs and expenses as they are incurred (in advance of the final disposition of the proceeding for which indemnification is sought) unless the Board has determined that the recipient would not ultimately be entitled to indemnification.
- Payments of indemnification and advancements would generally be required to be made within fifteen business days of the Board's receipt of the request for payment.
- Prior to receiving any advancement of expenses, the recipient would be required to provide an undertaking to repay the advancements in the event it were determined that he or she was not entitled to indemnification.
- An individual seeking indemnification or advancements would be required to have given the PCAOB written notice of the respective proceeding as soon as practicable and, except in the case of a proceeding by the PCAOB, would be required to provide the PCAOB with reasonably requested cooperation.

As amended, the Bylaws would also include a new provision that addresses the delegation of Board functions. This provision would be inserted as a new Article VIII, with the former Article VIII and subsequent Articles retained and renumbered. Section 101(g) of the Act mandates that the rules of the Board, (which include its bylaws) permit

the delegation specified in Article VIII of the Bylaws. The language of the new Article VIII largely tracks this federal statute.

(b) Statutory Basis

The statutory basis for the proposed amendments to the Bylaws is Title I of the Act.

4. Board's Statement on Burden on Competition

The Board does not believe that the proposed bylaws amendments will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. Board's Statement on Comments on the Proposed Rules Received from Members, Participants or Others

The Board has not solicited or received comment on the proposed rules.

6. Extension of Time Period for Commission Action

The Board does not consent to an extension of the time period specified in Section 19(b)(2) of the Securities Exchange Act of 1934.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rules Based on Rules of Another Board or of the Commission

The proposed rules are not based on the rules of another board or of the Commission.

9. Exhibits

Exhibit A – Text of the Proposed Rule

Exhibit 1 – Form of Notice of Proposed Rule for Publication in the Federal Register.

10. Signatures

Pursuant to the requirements of the Act and the Securities Exchange Act of 1934, as amended, the Board has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Public Company Accounting Oversight Board

By: \_\_\_\_\_  
William J. McDonough, Chairman

Date: March 17, 2004

Exhibit A – Text of the Proposed Rule

**BYLAWS**

**OF THE**

**PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD[, INC.]**

[A Nonprofit Membership Corporation]

Pursuant to the Provisions of  
Title I  
of the  
Sarbanes-Oxley Act of 2002



**BYLAWS OF THE  
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD[, INC.]  
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## ARTICLE I

### NAME

1. The name of the [Corporation] body corporate shall be the Public Company Accounting Oversight Board[, Inc] (the "Corporation").

## ARTICLE II

### OBJECT

2.1. Organization. The Corporation is organized pursuant to, and shall be operated for such purposes as are set forth in, Title I of the Sarbanes-Oxley Act of 2002 (the "Act").

2.2. Exempt Organization Purposes. The Corporation is organized exclusively for charitable, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.

2.3. Exempt Organization Uses of Earnings and Activities. No part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, members or trustees of the Corporation, if any, or to officers of the Corporation, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in the purpose hereof. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for

public office. Notwithstanding any other provision of this document, the Corporation shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or (b) by an organization, contributions to which are deductible under section 170 (c)(2) of the Internal Revenue Code, or corresponding section of any future federal tax code.

### **ARTICLE III**

#### **OFFICES**

3.1. Principal Office. The principal office of the Corporation shall be in the City of Washington, District of Columbia.

3.2. Other Offices. The Governing Board of the Corporation (the "Governing Board") may designate other office locations, [outside of] within or without the District of Columbia, as the Governing Board may determine are necessary or appropriate to meet the [Corporation's] Governing Board's objectives.

3.3. Agent and Office for Service of Process. The Secretary (or Acting Secretary, as applicable) of the Corporation shall serve as the agent of the Corporation upon whom any process, notice or demand required or permitted by law to be served upon the Corporation may be served. The office of the Corporation for purposes of such service of process, notice or demand shall initially be the office located at 1666 K Street, NW, Washington, DC 20006.

## ARTICLE IV

### GOVERNING BOARD

4.1. Composition. The Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act.

4.2. Powers and Duties. The Governing Board shall have such powers and duties as are provided in Title I of the Act.

4.3. Quorum and Majority. A majority of the members of the Governing Board shall constitute a quorum. [An] Any act approved by majority vote of the members of the Governing Board present at a meeting of the Governing Board at which a quorum is present, or approved by the Governing Board in accordance with any other procedure permitted by law, shall be [the] an act of the Governing Board. If a Governing Board member has recused himself or herself from a decision, and a quorum of otherwise qualified Governing Board members cannot reasonably be assembled in time to meet the exigencies of that particular situation, the recused Governing Board member may be counted for quorum purposes only. As used in this section, “the exigencies of that particular situation” shall be defined to require circumstances in which the Governing Board is required to act within a limited period of time or in which the public interest or the protection of investors otherwise [prevent] prevents the deferral of action until a quorum of non-recused Governing Board members is available.

4.4. Compensation and Expenses. The Governing Board shall set the compensation for its [Members] members. The Corporation shall pay or reimburse Members of the Governing Board [shall be reimbursed by the Board] for reasonable expenses incurred in the discharge of their duties.

## ARTICLE V

### GOVERNING BOARD MEETINGS

[5.1. General. As soon as practical after the adoption of these bylaws, the Governing Board shall adopt a written policy defining the circumstances under which meetings of the Board will be open to the public (the "Open Meeting Policy").]

5.1. [Regular Public] Governing Board Meetings. The Governing Board shall hold at least one (1) public meeting each [month, which meeting shall take place on the first Tuesday of each month (the "Regular Public Meeting"), or at] calendar quarter, and such other [time] meetings, which may be either public or non-public (in accordance with the Open Meeting Policy of the Governing Board), as the Chair [shall determine. The Board shall ensure that, under procedures defined in its Open Meeting Policy] (as defined below) deems necessary or appropriate to further the purposes of the Act. The Governing Board shall ensure that, absent exigent circumstances as determined by the Governing Board, the public is informed, at least five (5) calendar days in advance, of the time, location, and general topics scheduled for discussion of each [Regular Public Meeting.] public meeting, and, in the event of such exigent circumstances, shall ensure that notice of a public meeting is provided as soon as practicable.

[5.3. Special Meetings. The Governing Board may hold additional meetings ("Special Meetings"), which may be public or non-public (in accordance with the Open Meeting Policy) as it deems necessary or appropriate to further the purposes of the Act. The Open Meeting Policy shall set forth procedures for providing the public with reasonable notice of public Special Meetings.]

5. [4]2. Telephonic Participation. [The Governing Board] Provided that all Governing Board members are able to hear each other (and, in the case of public meetings, the public located at the location specified in the meeting notice is able to hear all of the participating members of the Governing Board), the Governing Board may meet via telephone or teleconference, and any member thereof may participate in a meeting by telephone, provided that, in the case of a meeting that

is open to the public, at least one Governing Board member shall be present at the location specified in the meeting notice.

## **ARTICLE VI**

### **OFFICERS**

6.1. General. The [Chair] Chairman of the Governing Board (the “Chair”) shall also be the President and Chief Executive Officer of the Corporation. All other Governing Board members shall also be Vice Presidents of the Corporation. Governing Board members shall serve as officers of the Corporation without additional compensation.

6.2. Other Officers. The other officers of the Corporation shall include a Secretary, Treasurer, General Counsel, Chief Auditor, Chief Administrative Officer, Director of Inspections and Registration, Director of Investigations and Enforcement, and such other officers as the Governing Board may establish in accordance with such rules of the Governing Board as may be adopted for establishing officers.

6.3. Powers of the Chief Executive Officer.

(a) The Chief Executive Officer is responsible for, and has authority over, the management and administration of the Corporation, including responsibility and authority for the appointment, dismissal, and supervision of personnel (other than Governing Board members and personnel employed regularly and full-time within the immediate offices of the Governing Board members), the distribution of business among such personnel and among organizational units of the Corporation, the use and expenditure of funds (including the procurement of goods and services), and the development (for Governing Board review) of strategic policy initiatives.

(b) (1) In carrying out any of the responsibilities under the provisions of this section 6.3, the Chief Executive Officer shall be governed by the general policies of the Governing Board and by such rules and decisions as the Governing Board may lawfully make.

(2) The appointment by the Chief Executive Officer of the officers of the Corporation designated in and established under section 6.2 shall be subject to the approval of, and made in consultation with, the Governing Board, and the dismissal of the officers of the Corporation designated in and established under section 6.2 shall be made in consultation with the Governing Board, except that when the Governing Board determines that the dismissal arises out of a conflict regarding the general policies of the Governing Board, it is also subject to the approval of the Governing Board.

(3) Each Governing Board member has responsibility and authority for the appointment, dismissal, and supervision of personnel employed regularly and full-time within the immediate office of the Governing Board member, subject to the Governing Board's overall personnel policies.

(4) The Chief Executive Officer has the responsibility and authority to develop, and present to the Governing Board for approval, an annual budget as well as mid-year adjustments, if any. There is reserved to the Governing Board its responsibility and authority with respect to determining the distribution of funds according to major programs and purposes, including those related to salary schedules and other conditions of employment.

(c) Notwithstanding any other provision of these bylaws, however, the Director of the Office of Internal Oversight and Performance Assurance shall report directly to the Governing Board and the Governing Board shall have exclusive authority to hire, fire, and establish the compensation and other terms of employment of the Director.

## ARTICLE VII

### LIABILITY AND INDEMNIFICATION

7.1 No Personal Liability. No contract entered into by or on behalf of the Corporation shall personally obligate any employee, officer, or Governing Board member of the Corporation, including the employee, officer or Governing Board member authorizing such contract or executing same.



## 7.2 Indemnification.

(a) Unless and to the extent otherwise prohibited by law and as otherwise provided in this section 7.2[(b)], the Corporation shall indemnify any employee, officer, or Governing Board member, or any former employee, officer, or Governing Board member (each, a "Potential Indemnitee"), against any and all [expenses and] liabilities (including without limitation judgments, fines, and penalties against such Potential Indemnitee) and reasonable expenses (including without limitation reasonable counsel fees and other reasonable related fees) actually and necessarily incurred by [him or her,] or imposed on him or her, in connection with such Potential Indemnitee's defense against any claim, action, suit, or proceeding (whether actual or threatened, civil, criminal, administrative, or investigative, including appeals)[,] (each, a "Proceeding") to which he or she may be or is made a party by reason of being or having been such [employee, officer, or Board member.] a Potential Indemnitee (such liabilities and expenses, collectively, "Indemnifiable Amounts"). Notwithstanding the foregoing, Indemnifiable Amounts shall include amounts paid in settlement by a Potential Indemnitee only if such amounts are approved by the Governing Board.

(b) [Notwithstanding section 7.2(a), there] There shall be no indemnification in relation to matters as to which the Governing Board finds (i) that the [employee, officer, or Board member] Potential Indemnitee acted or omitted to act, in either case in bad faith, or engaged in willful misconduct in the performance of a duty to the Corporation, (ii) that such action, omission or misconduct was material, and (iii) that such action, omission or misconduct constitutes a material part of the facts on which the Proceeding is based. Prior to making any such finding, the Governing Board shall provide the Potential Indemnitee with at least ten (10) business days written notice of its intent to

consider the matter, within which time the Potential Indemnitee shall have the right to submit relevant written materials to the Governing Board for its consideration.

[(c) Amounts paid in indemnification of expenses and liabilities may include, but shall not be limited to, counsel and other related fees; costs and disbursements; and judgments, fines, and penalties against, and amounts paid in settlement by, such employee, officer, or Board member.]

[(d) The Corporation may advance expenses to, or where appropriate may itself, at its expense, undertake the defense of any employee, officer, or Board member; provided, however, that such employee, officer, or Board member shall undertake to repay or to reimburse such expense if it should be ultimately determined that he or she is not entitled to indemnification under this Article.]

(c) In lieu of providing the advancements or indemnification provided for herein, the Corporation may, at its own expense not to be reimbursed by the Potential Indemnitee, undertake the defense of any such Potential Indemnitee, in which case the Governing Board in its discretion may determine whether the Corporation shall reimburse such Potential Indemnitee for any fees and expenses incurred as a result of his or her engagement of separate counsel, whether through advancements or indemnification. The provisions of this subsection 7.2(c) shall not apply to any Proceeding by or in the right of the Corporation.

(d) Except as otherwise provided herein, within fifteen (15) business days after the Corporation's receipt of a request therefore, and of a written undertaking by the Potential Indemnitee to repay or to reimburse all such amounts if it is determined that such Potential Indemnitee is not entitled to

indemnification under this Article, the Corporation shall advance Indemnifiable Amounts to a Potential Indemnitee.

(e) The provisions of this Article shall be applicable to [claims, actions, suits, or proceedings] Proceedings made or commenced after the adoption hereof, whether arising from acts or omissions to act occurring before or after adoption hereof.

(f) The indemnification and advancements provided by this Article shall not be deemed exclusive of any other rights to which [such employee, officer, or Board member] any Potential Indemnitee may be entitled under any applicable law.

(g) The indemnification and advancements provided by this Article shall not restrict the power of the Governing Board to provide any additional indemnification and advancements permitted by law.

(h) As a condition precedent to a Potential Indemnitee's right to be indemnified or receive advancements hereunder, he or she shall (i) give to the Corporation notice in writing directed to the Secretary of the Corporation (or to such other individual as the Corporation may designate) as soon as practicable of any Proceeding made against such Potential Indemnitee for which indemnity will or could be sought, and (ii) other than in connection with a Proceeding by or in the right of the Corporation, provide the Corporation with such information and cooperation as it may reasonably request.

7.3. Insurance. The Governing Board may purchase insurance on behalf of any [employee, officer, or Governing Board member] Potential Indemnitee against any liability which may be asserted against or incurred by him or her [which] that arises out of such person's status as [an employee, officer, or Board member] a Potential Indemnitee or out of acts taken in such capacity, whether or

not the Corporation would have the power to indemnify such person against that liability under law. To the extent that any applicable insurance is available to respond to any [claim] Proceeding addressed in this Article, such insurance shall be exhausted before any payment is made pursuant to the advancement and indemnification provisions in this Article.

[7.4. Severability. If any part of this Article shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.]

## **ARTICLE VIII**

### **DELEGATION**

8. The Governing Board is permitted, as it determines necessary or appropriate, to delegate any of its functions to an individual member of the Governing Board or employee of the Corporation, or to a division of the Governing Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter except that:

(a) the Governing Board retains a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(b) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Governing Board upon such review shall be deemed to be the action of the Governing Board for all purposes (including appeal or review thereof); and

(c) if the right to exercise a review described in subparagraph (a) is declined, or if no such review is sought within the time stated in the rules

of the Governing Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Governing Board.

The Governing Board shall establish, with respect to any such delegation, reporting requirements and procedures pursuant to which the delegate shall inform the Governing Board of his or her activities.

### **ARTICLE [VIII] IX**

#### **BYLAW AMENDMENTS AND RULES OF THE GOVERNING BOARD**

#### **[CORPORATION]**

[8]9.1. Amendments to Bylaws. Subject to the approval of the U.S. Securities and Exchange Commission as provided in the Act, the [The] Governing Board may from time to time amend, repeal, or supplement these bylaws.

[8]9.2. Rules. In addition to, and separate from, these bylaws, the Governing Board may adopt such rules of the Governing Board [Corporation] as it deems necessary or appropriate to discharge its responsibilities under the Act.

### **ARTICLE [I]X**

#### **MISCELLANEOUS PROVISIONS**

[9]10.1. Fiscal Year. The Corporation's fiscal year shall be the calendar year.

[9]10.2. Capital Expenditures. Except as expressly delegated by the Governing Board, no capital expenditure or investment shall be made without the approval of the Governing Board.

[9]10.3. Selection of Auditor. The Governing Board shall retain an accounting firm to annually audit the Corporation's financial records, which firm shall not perform any other services, except tax services, for the Corporation.

10.4 Headings. Section and other headings contained herein are for reference purposes only, and are not intended to describe, interpret, define, or limit the scope, extent, or intent of any of the provisions hereof.

10.5 Variation of Terms. All terms and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, singular or plural, as the identity of the respective person or persons may require.

10.6 Severability. If any part of these bylaws shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. PCAOB-2004-02)

[Date]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule Amending Bylaws

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on March 17, 2004, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rule described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On March 9, 2004, the Board adopted a rule concerning amendments to its bylaws. The portions of its bylaws that the Board has amended are set out below, with italics indicating the text that is added, and brackets surrounding text that has been deleted, by the amendments adopted by the Board.

**BYLAWS**  
**OF THE**  
**PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD[, INC.]**  
[A Nonprofit Membership Corporation]

Pursuant to the Provisions of  
Title I  
of the  
Sarbanes-Oxley Act of 2002

**BYLAWS OF THE**  
**PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD[, INC.]**  
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**ARTICLE I**

## NAME

1. The name of the [Corporation] *body corporate* shall be the Public Company Accounting Oversight Board[, Inc] (*the "Corporation"*).

**ARTICLE II**

## OBJECT

2.1. *Organization.* The Corporation is organized pursuant to, and shall be operated for such purposes as are set forth in, Title I of the Sarbanes-Oxley Act of 2002 (the "Act").

2.2. *Exempt Organization Purposes.* *The Corporation is organized exclusively for charitable, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.*

2.3. *Exempt Organization Uses of Earnings and Activities.* *No part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, members or trustees of the Corporation, if any, or to officers of the Corporation, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in the purpose hereof. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for*

*public office. Notwithstanding any other provision of this document, the Corporation shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or (b) by an organization, contributions to which are deductible under section 170 (c)(2) of the Internal Revenue Code, or corresponding section of any future federal tax code.*

### **ARTICLE III**

#### **OFFICES**

3.1. **Principal Office.** The principal office of the Corporation shall be in the City of Washington, District of Columbia.

3.2. **Other Offices.** The Governing Board of the Corporation (*the* “Governing Board”) may designate other office locations, [outside of] *within or without* the District of Columbia, as the Governing Board may determine are necessary or appropriate to meet the [Corporation’s] *Governing Board’s* objectives.

3.3. **Agent and Office for Service of Process.** *The Secretary (or Acting Secretary, as applicable) of the Corporation shall serve as the agent of the Corporation upon whom any process, notice or demand required or permitted by law to be served upon the Corporation may be served. The office of the Corporation for purposes of such service of process, notice or demand shall initially be the office located at 1666 K Street, NW, Washington, DC 20006.*

## ARTICLE IV

### GOVERNING BOARD

4.1. Composition. The Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act.

4.2. Powers and Duties. The Governing Board shall have such powers and duties as are provided in Title I of the Act.

4.3. Quorum and Majority. A majority of the members of the Governing Board shall constitute a quorum. [An] *Any* act approved by majority vote of the members of the Governing Board present at a meeting of the *Governing* Board at which a quorum is present, *or approved by the Governing Board in accordance with any other procedure permitted by law*, shall be [the] *an* act of the *Governing* Board. If a *Governing* Board member has recused himself or herself from a decision, and a quorum of otherwise qualified *Governing* Board members cannot reasonably be assembled in time to meet the exigencies of that particular situation, the recused *Governing* Board member may be counted for quorum purposes only. As used in this section, “the exigencies of that particular situation” shall be defined to require circumstances in which the *Governing* Board is required to act within a limited period of time or in which the public interest or the protection of investors otherwise [prevent] *prevents* the deferral of action until a quorum of non-recused *Governing* Board members is available.

4.4. Compensation and Expenses. The Governing Board shall set the compensation for its [Members] *members*. *The Corporation shall pay or reimburse* Members of the Governing Board [shall be reimbursed by the Board] for reasonable expenses incurred in the discharge of their duties.

## ARTICLE V

### GOVERNING BOARD MEETINGS

[5.1. *General.* As soon as practical after the adoption of these bylaws, the Governing Board shall adopt a written policy defining the circumstances under which meetings of the Board will be open to the public (the “Open Meeting Policy”).]

5.1. [Regular Public] *Governing Board Meetings.* The Governing Board shall hold at least one (1) public meeting each [month, which meeting shall take place on the first Tuesday of each month (the “Regular Public Meeting”), or at] *calendar quarter, and such other [time] meetings, which may be either public or non-public (in accordance with the Open Meeting Policy of the Governing Board), as the Chair [shall determine. The Board shall ensure that, under procedures defined in its Open Meeting Policy] (as defined below) deems necessary or appropriate to further the purposes of the Act. The Governing Board shall ensure that, absent exigent circumstances as determined by the Governing Board, the public is informed, at least five (5) calendar days in advance, of the time, location, and general topics scheduled for discussion of each [Regular Public Meeting.] public meeting, and, in the event of such exigent circumstances, shall ensure that notice of a public meeting is provided as soon as practicable.*

[5.3. *Special Meetings.* The Governing Board may hold additional meetings (“Special Meetings”), which may be public or non-public (in accordance with the Open Meeting Policy) as it deems necessary or appropriate to further the purposes of the Act. The Open Meeting Policy shall set forth procedures for providing the public with reasonable notice of public Special Meetings.]

5. [4]2. *Telephonic Participation.* [The Governing Board] *Provided that all Governing Board members are able to hear each other (and, in the case of public meetings, the public located at the location specified in the meeting notice is able to hear all of the participating members of the Governing Board), the Governing Board may meet via telephone or teleconference, and any member thereof may*

participate in a meeting by telephone, provided that, in the case of a meeting that is open to the public, at least one *Governing* Board member shall be present at the location specified in the meeting notice.

## ARTICLE VI

### OFFICERS

6.1. General. The [Chair] *Chairman* of the Governing Board (*the "Chair"*) shall also be the President and Chief Executive Officer of the Corporation. All other Governing Board members shall also be Vice Presidents of the Corporation. *Governing* Board members shall serve as officers of the Corporation without additional compensation.

6.2. Other Officers. The other officers of the Corporation shall include a Secretary, Treasurer, General Counsel, Chief Auditor, Chief Administrative Officer, Director of Inspections and Registration, Director of Investigations and Enforcement, and such other officers as the Governing Board may establish in accordance with such rules of the *Governing* Board as may be adopted for establishing officers.

6.3. Powers of the Chief Executive Officer.

(a) The Chief Executive Officer is responsible for, and has authority over, the management and administration of the Corporation, including responsibility and authority for the appointment, dismissal, and supervision of personnel (other than *Governing* Board members and personnel employed regularly and full-time within the immediate offices of the *Governing* Board members), the distribution of business among such personnel and among organizational units of the Corporation, the use and expenditure of funds (including the procurement of goods and services), and the development (for *Governing* Board review) of strategic policy initiatives.

(b) (1) In carrying out any of the responsibilities under the provisions of this section 6.3, the Chief Executive Officer shall be governed by the general policies of the Governing Board and by such rules and decisions as the Governing Board may lawfully make.

(2) The appointment by the Chief Executive Officer of the officers of the Corporation designated in and established under section 6.2 shall be subject to the approval of, and made in consultation with, the Governing Board, and the dismissal of the officers of the Corporation designated in and established under section 6.2 shall be made in consultation with the Governing Board, except that when the *Governing Board* determines that the dismissal arises out of a conflict regarding the general policies of the Governing Board, it is also subject to the approval of the Governing Board.

(3) Each Governing Board member has responsibility and authority for the appointment, dismissal, and supervision of personnel employed regularly and full-time within the immediate office of the *Governing Board* member, subject to the Governing Board's overall personnel policies.

(4) The Chief Executive Officer has the responsibility and authority to develop, and present to the *Governing Board* for approval, an annual budget as well as mid-year adjustments, if any. There is reserved to the Governing Board its responsibility and authority with respect to determining the distribution of funds according to major programs and purposes, including those related to salary schedules and other conditions of employment.

*(c) Notwithstanding any other provision of these bylaws, however, the Director of the Office of Internal Oversight and Performance Assurance shall report directly to the Governing Board and the Governing Board shall have exclusive authority to hire, fire, and establish the compensation and other terms of employment of the Director.*

## **ARTICLE VII**

### **LIABILITY AND INDEMNIFICATION**

7.1 No Personal Liability. No contract entered into by or on behalf of the Corporation shall personally obligate any employee, officer, or Governing Board member of the Corporation, including the employee, officer or Governing Board member authorizing such contract or executing same.

## 7.2 Indemnification.

(a) Unless *and to the extent* otherwise prohibited by law and as *otherwise* provided in *this* section 7.2[(b)], the Corporation shall indemnify any employee, officer, or Governing Board member, or any former employee, officer, or Governing Board member (*each, a "Potential Indemnitee"*), against any and all [expenses and] liabilities (*including without limitation judgments, fines, and penalties against such Potential Indemnitee*) and reasonable expenses (*including without limitation reasonable counsel fees and other reasonable related fees*) actually and necessarily incurred by [him or her,] or imposed on him or her, in connection with *such Potential Indemnitee's defense against* any claim, action, suit, or proceeding (whether actual or threatened, civil, criminal, administrative, or investigative, including appeals)[,] (*each, a "Proceeding"*) to which he or she may be or is made a party by reason of being or having been such [employee, officer, or Board member.] *a Potential Indemnitee (such liabilities and expenses, collectively, "Indemnifiable Amounts"). Notwithstanding the foregoing, Indemnifiable Amounts shall include amounts paid in settlement by a Potential Indemnitee only if such amounts are approved by the Governing Board.*

(b) [Notwithstanding section 7.2(a), there] *There shall be no indemnification in relation to matters as to which the Governing Board finds (i) that the [employee, officer, or Board member] Potential Indemnitee acted or omitted to act, in either case in bad faith, or engaged in willful misconduct in the performance of a duty to the Corporation, (ii) that such action, omission or misconduct was material, and (iii) that such action, omission or misconduct constitutes a material part of the facts on which the Proceeding is based. Prior to making any such finding, the Governing Board shall provide the Potential Indemnitee with at least ten (10) business days written notice of its intent to consider the matter, within which time the Potential Indemnitee shall have the*



*right to submit relevant written materials to the Governing Board for its consideration.*

[(c) Amounts paid in indemnification of expenses and liabilities may include, but shall not be limited to, counsel and other related fees; costs and disbursements; and judgments, fines, and penalties against, and amounts paid in settlement by, such employee, officer, or Board member.]

[(d) The Corporation may advance expenses to, or where appropriate may itself, at its expense, undertake the defense of any employee, officer, or Board member; provided, however, that such employee, officer, or Board member shall undertake to repay or to reimburse such expense if it should be ultimately determined that he or she is not entitled to indemnification under this Article.]

*(c) In lieu of providing the advancements or indemnification provided for herein, the Corporation may, at its own expense not to be reimbursed by the Potential Indemnitee, undertake the defense of any such Potential Indemnitee, in which case the Governing Board in its discretion may determine whether the Corporation shall reimburse such Potential Indemnitee for any fees and expenses incurred as a result of his or her engagement of separate counsel, whether through advancements or indemnification. The provisions of this subsection 7.2(c) shall not apply to any Proceeding by or in the right of the Corporation.*

*(d) Except as otherwise provided herein, within fifteen (15) business days after the Corporation's receipt of a request therefore, and of a written undertaking by the Potential Indemnitee to repay or to reimburse all such amounts if it is determined that such Potential Indemnitee is not entitled to indemnification under this Article, the Corporation shall advance Indemnifiable Amounts to a Potential Indemnitee.*

(e) The provisions of this Article shall be applicable to [claims, actions, suits, or proceedings] *Proceedings* made or commenced after the adoption hereof, whether arising from acts or omissions to act occurring before or after adoption hereof.

(f) The indemnification *and advancements* provided by this Article shall not be deemed exclusive of any other rights to which [such employee, officer, or Board member] *any Potential Indemnitee* may be entitled under any applicable law.

(g) The indemnification *and advancements* provided by this Article shall not restrict the power of the Governing Board to provide any additional indemnification *and advancements* permitted by law.

(h) *As a condition precedent to a Potential Indemnitee's right to be indemnified or receive advancements hereunder, he or she shall (i) give to the Corporation notice in writing directed to the Secretary of the Corporation (or to such other individual as the Corporation may designate) as soon as practicable of any Proceeding made against such Potential Indemnitee for which indemnity will or could be sought, and (ii) other than in connection with a Proceeding by or in the right of the Corporation, provide the Corporation with such information and cooperation as it may reasonably request.*

7.3. Insurance. The Governing Board may purchase insurance on behalf of any [employee, officer, or Governing Board member] *Potential Indemnitee* against any liability which may be asserted against or incurred by him or her [which] *that* arises out of such person's status as [an employee, officer, or Board member] *a Potential Indemnitee* or out of acts taken in such capacity, whether or not the Corporation would have the power to indemnify such person against that liability under law. To the extent that any applicable insurance is available to respond to any [claim] *Proceeding* addressed in this Article, such insurance shall

be exhausted before any payment is made pursuant to the *advancement and indemnification* provisions in this Article.

[7.4. Severability. If any part of this Article shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.]

## ARTICLE VIII

### DELEGATION

8. *The Governing Board is permitted, as it determines necessary or appropriate, to delegate any of its functions to an individual member of the Governing Board or employee of the Corporation, or to a division of the Governing Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter except that:*

*(a) the Governing Board retains a discretionary right to review any action pursuant to any such delegated function, upon its own motion;*

*(b) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Governing Board upon such review shall be deemed to be the action of the Governing Board for all purposes (including appeal or review thereof); and*

*(c) if the right to exercise a review described in subparagraph (a) is declined, or if no such review is sought within the time stated in the rules of the Governing Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Governing Board.*

*The Governing Board shall establish, with respect to any such delegation, reporting requirements and procedures pursuant to which the delegate shall inform the Governing Board of his or her activities.*

## **ARTICLE [VIII] IX**

### **BYLAW AMENDMENTS AND RULES OF THE GOVERNING BOARD**

#### **[CORPORATION]**

[8]9.1. Amendments to Bylaws. *Subject to the approval of the U.S. Securities and Exchange Commission as provided in the Act, the [The] Governing Board may from time to time amend, repeal, or supplement these bylaws.*

[8]9.2. Rules. In addition to, and separate from, these bylaws, the Governing Board may adopt such rules of the *Governing Board* [Corporation] as it deems necessary or appropriate to discharge its responsibilities under the Act.

## **ARTICLE [I] X**

### **MISCELLANEOUS PROVISIONS**

[9]10.1. Fiscal Year. The Corporation's fiscal year shall be the calendar year.

[9]10.2. Capital Expenditures. Except as expressly delegated by the Governing Board, no capital expenditure or investment shall be made without the approval of the *Governing Board*.

[9]10.3. Selection of Auditor. The Governing Board shall retain an accounting firm to annually audit the Corporation's financial records, which firm shall not perform any other services, except tax services, for the Corporation.

*10.4 Headings. Section and other headings contained herein are for reference purposes only, and are not intended to describe, interpret, define, or limit the scope, extent, or intent of any of the provisions hereof.*

*10.5 Variation of Terms. All terms and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, singular or plural, as the identity of the respective person or persons may require.*

*10.6. Severability. If any part of these bylaws shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.*

\* \* \*

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

A. Board's Statement of the Purpose of, and the Statutory Basis for, the Proposed Amendments to Its Bylaws

(a) Purpose

The purpose of the amendments is to clarify existing bylaws provisions, and to cause the bylaws of the PCAOB to address the following internal operational and administrative PCAOB matters in the manner best suited to the organization:

The PCAOB's Status as a Tax-Exempt Organization.

The amendments specify that the PCAOB's purposes, activities and uses of earnings comport with the requirements of the Internal Revenue Service for exemption from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.

Agent and Office for Service of Process, Notices and Demands.

The amendments identify the office and agent of the PCAOB for purposes of service of process, notices, and demands.

#### Board Meetings and Action.

The amendments modify the prior provisions regarding the frequency, scheduling and notice requirements of public Board meetings. The amendments require the Board to hold at least one public meeting per calendar quarter and, absent exigent circumstances, to ensure that public notice thereof is provided at least five days prior to the meeting. The amendments also clarify that Board action may be taken in any manner permitted by law.

#### Director of the Office of Internal Oversight and Performance Assurance.

The Board has established an Office of Internal Oversight and Performance Assurance in order to provide internal examination of the programs and operations of the PCAOB to help ensure the efficiency, integrity and effectiveness of those programs and operations. The amendments specify that the Director of this office reports directly to the Board, and that the Board has the exclusive authority to hire, fire and establish the compensation and other terms of employment of this Director.

#### Indemnification.

The amendments condense portions of the indemnification provisions of the prior bylaws and include substantive modifications. These substantive modifications clarify (i) the types of costs and expenses for which the PCAOB will provide indemnification; (ii) the manner in which the Board may determine whether indemnification is to be provided; (iii) the right of the Board to undertake an individual's defense in lieu of payment of indemnification; (iv) the availability of payment of indemnifiable amounts in advance of the final disposition of a

proceeding; and (v) basic conditions a potential indemnitee must satisfy in order to receive payment from the PCAOB.

Delegation.

The amendments include a new provision that addresses the delegation of Board functions. Section 101(g) of the Sarbanes-Oxley Act of 2002 mandates that the rules of the Board, of which its bylaws is one, permit the delegation specified in this new provision, the language of which largely tracks this federal statute.

#### Statutory Basis

The statutory basis for the proposed amendments to the Bylaws is Title I of the Act.

#### B. Board's Statement on Burden on Competition

The Board does not believe that the proposed bylaws amendments will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### C. Board's Statement on Comments on the Proposed Rules Received from Members, Participants or Others

Not applicable.

#### III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes

its reasons for so finding or (ii) as to which the Board consents the Commission will:

- (a) by order approve such proposed rule; or
- (b) institute proceedings to determine whether the proposed rule should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All submissions should refer to File No. PCAOB-2004-02 and should be submitted within [ ] days.

By the Commission.

Secretary