KPMG

280 Park Avenue
New York, N.Y. 10017
8th Floor

Telephone 212-909-5600
Fax 212-909-5699

November 29, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

**PCAOB Rulemaking Docket Matter No. 015:**
**Proposed Rule on Procedures Relating to Subpoena Requests**
**In Disciplinary Proceedings**

Dear Mr. Secretary:

KPMG LLP appreciates this opportunity to comment on the Public Company Accounting Oversight Board's ("PCAOB" or the "Board") proposed rule on procedures relating to subpoena requests in disciplinary proceedings (the "Proposed Rule").

## Background

Section 105 of the Sarbanes-Oxley Act of 2002 (the "Act") governs Board investigations and disciplinary proceedings. Under the Act and the Board's rules, the Board has broad authority to compel registered public accounting firms and their associated persons to provide testimony and documents as required by the Board in furtherance of the Board's authority and responsibilities under the Act. The Act also provides that the Board may seek issuance by the Securities and Exchange Commission ("Commission") of a subpoena to require any other person to provide the Board testimony or documents that the Board considers relevant or material to a Board investigation. Previous rules have been adopted providing for the Board to seek Commission issuance of a subpoena to compel testimony or the production of documents from persons other than the registered public accounting firm in an investigation or disciplinary proceeding. The Proposed Rule sets forth governing procedures pursuant to which the Board may seek the issuance of a Commission subpoena in connection with a PCAOB disciplinary proceeding.

Under the Proposed Rule, the Board would only seek a Commission subpoena based upon the recommendation of a hearing officer. In particular, the Proposed Rule (1) provides that the hearing officer determine at the first prehearing conference whether any party contemplates the possibility of applying to have the Board seek issuance of a subpoena, (2) requires that the party's application include specific and detailed information regarding the substance of the testimony or documents sought, the basis for the party's belief about what

the substance of the testimony or documents would be, and why it would be material and relevant to resolving the proceeding, and (3) provides that the hearing officer may recommend the subpoena be sought only if he or she determines both that the general nature and substance of the documents or testimony is not a matter of speculation, and that the unavailability of the evidence may bear on the Board's ability to provide respondent with an "opportunity to defend." Even if those criteria are met, the hearing officer retains the ability to deny the application, and is not required to set forth in writing the specific basis for the denial.

**General Comments**

KPMG is concerned that several aspects of the Proposed Rule unfairly prejudice potential respondents in their ability to defend in disciplinary proceedings. In particular, the Proposed Rule imposes unfairly high hurdles for respondents to overcome to secure the issuance of a Commission subpoena, using criteria that do not find analogs elsewhere in, for example, the SEC's Rules of Practice, the Federal Rules of Civil Procedure, or the rules of other self-regulatory organizations. The impact of those obstacles is magnified when one takes into account the Board's broad ability to enlist Commission assistance to obtain evidence not available to respondents in the investigatory process. Accordingly, KPMG respectfully urges that several aspects of the Proposed Rule be reconsidered and modified in the interests of fundamental fairness.

**Specific Comments**

1. In requiring that the respondent identify and describe the evidence sought, describe the basis for the respondent's belief about its substance, and explain the relevance and materiality of the evidence, the Proposed Rule places an extremely high burden on the party seeking the issuance of a Commission subpoena. That is particularly so given that, under the process currently contemplated by the rules, such application must be made very early in the proceedings, when facts are still being developed, and, obviously, the party has not even seen the evidence sought. Moreover, the showing required by the Proposed Rule is stricter than comparable provisions in the SEC's Rules of Practice, the Federal Rules of Civil Procedure, and the rules of other self-regulatory bodies. We believe the showing required of respondents is unfairly onerous and burdensome. At the least, the Proposed Rule should be modified to be consistent with Section 105(b)(2)(D) of the Act, which provides that the Board may request issuance of a Commission subpoena for testimony or documents which the Board considers "relevant or material," and (consistent with the SEC Rules of Practice and the Federal Rules of Civil Procedure) place more affirmative burdens on respondents

only where reasonably necessary to avoid subpoenas that are oppressive, excessive in scope, or unduly burdensome.

2. The Proposed Rule requires the application to "address the feasibility of the party securing functionally equivalent evidence through other means." What "functionally equivalent" means is not defined or readily understandable, nor is the level of effort that would be required to demonstrate compliance with this provision, and we suggest that it be dropped.

3. The Proposed Rule provides that before allowing an application, the hearing officer determine not only that the nature and substance of the evidence sought is not a matter of speculation, but that the unavailability of the evidence "may bear on the Board's ability to provide respondent with an opportunity to defend." Even then, the hearing officer retains the discretion to deny the application. We believe that the "opportunity to defend" standard, vague as it is, does not provide the level playing field and necessary fairness that should be inherent in the disciplinary proceeding process—and, when coupled with the ability of the hearing officer to deny the application even if he or she determines the evidence does bear on the "opportunity to defend", presents serious potential issues regarding the fundamental fairness of disciplinary proceedings. We respectfully suggest serious reconsideration be given to the Proposed Rule in light of these considerations.

4. The Proposed Rule does not require the hearing officer to set forth in writing the basis for denying a party's subpoena application. We believe that given the importance of these rulings and their potential impact on the fairness of the proceeding, it is appropriate and necessary that the rules require there be a written record of the basis of such ruling.

* * * * *

If you have questions regarding the information included in this letter, please contact Michael J. Baum, (212) 909-5604, mjbaum@kpmg.com, or Claudia L. Taft, (212) 909-5522, ctaft@kpmg.com.

Yours sincerely,

KPMG LLP