

May 18, 2007

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

Re: PCAOB Release No. 2007-002, Rulemaking Docket Matter No. 017
Conceptual Release Concerning Scope of Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles

Dear Members and Staff of the Public Company Accounting Oversight Board:

Deloitte & Touche LLP is pleased to respond to the request for comments from the Public Company Accounting Oversight Board (“PCAOB” or the “Board”) on its *Conceptual Release Concerning Scope of Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles* (“Rule 3523”), PCAOB Release No. 2007-002, PCAOB Rulemaking Docket Matter No. 017 (April 3, 2007) (the “Release”)¹. We hope that this submission will be useful to the Board as it considers the scope of Rule 3523.

Introduction

We strongly support the goals of the Sarbanes-Oxley Act of 2002 (the “Act”) and the efforts of the Board to achieve those goals through rulemaking. Recognizing that the Board faced difficult and sensitive judgments in drafting and implementing Rule 3523, we applaud the Board’s efforts to fully consider the issues described in the Release. Accordingly, we strongly support the Board’s solicitation of comments as set forth in the Release.

With that support in mind, we offer the following comments for consideration. These comments are aimed at achieving effective and efficient implementation of Rule 3523. We believe that all of the parties affected (e.g., issuers, audit committees and practitioners) must have a clear understanding of the scope of Rule 3523 in order to effectively apply it. Without a clear understanding of the scope of the Rule, affected parties will likely find it necessary to seek guidance regarding application of the Rule on a case-by-case basis directly from the staff of the Board, which does little to benefit investors and places an unnecessary burden on the already limited resources of the Board. For that reason, while our comments respond to the specific questions posed by the Board in the Release, they also address areas where we believe further

¹ http://www.pcaob.org/Rules/Docket_017/2007-04-03_Release_%202007-002.pdf

clarification of Rule 3523 would enhance compliance and, additionally, address common issues regarding the Rule's application in today's complex global business environment.

Comments

Rule 3523, as adopted, prevents a registered public accounting firm from being independent of a new registrant audit client when the firm, or any affiliate of the firm, provided any tax service to persons in financial reporting oversight roles, or immediate family members of such persons, at the new registrant audit client during the period covered by the financial statements to be audited or reviewed. The Release acknowledges that in situations where the audit period predates the professional engagement period the practical consequence of applying Rule 3523 is to limit, perhaps unreasonably so, the registered firms that can be engaged by a registrant audit client. Accordingly, the Release seeks comments on the unintended effects of prohibiting tax services provided to persons covered by Rule 3523 during the portion of the audit period that precedes the beginning of the professional engagement period.

As further explained below, we believe that providing tax services to persons covered by Rule 3523 at the new registrant audit client during the portion of the audit period that precedes the beginning of the professional engagement period does not impact the auditor's independence and, consequently, it is both appropriate and imperative that Rule 3523 be amended to eliminate the prohibition on tax services provided to persons covered by Rule 3523 during this portion of the audit period. This change can be effected by striking the words "audit and" from the current text of Rule 3523. We also believe that this change and the recommendations below provide a proper and sensible means of addressing the transitional issues associated with Rule 3523 and could also serve as a model for other transitional issues that might arise with respect to application of the independence rules.

1. An audit firm's independence should not be affected by tax services provided to persons covered by Rule 3523 during the portion of the audit period that precedes the professional engagement period.

The Board has specifically requested comments regarding the impact on an auditor's independence when tax services are provided to a person covered by Rule 3523 during the portion of the audit period that precedes the professional engagement period. Specifically, the Board asks:

To what extent, if any, is a firm's independence affected when the firm, or an affiliate of the firm, has provided tax services to a person covered by Rule 3523 during the portion of the audit period that precedes the professional engagement period?

In response to the Board's request, we believe that a firm's independence would not be affected by the provision of tax services to a person covered by Rule 3523 during the portion of the audit period that precedes the professional engagement period.

We note that tax services are afforded a unique status under the Act and the related securities laws. The provision of tax services by accounting firms to their registrant audit clients, and their affiliates and officers, was carefully considered by Congress and determined not to create an independence issue requiring regulatory prohibition. Additionally, it should be noted that the Act and the rules adopted by the Commission and the Board to implement the Act do not prohibit providing tax services to an entity that is not an “audit client” as that term is defined by the Commission and the Board. Consequently, independence concerns with respect to any prohibited service or prohibited investment or other relationship with an entity (including the provision of prohibited tax services to persons covered by Rule 3523) do not and should not arise until the entity becomes an audit client.

The Board noted in footnote 9 of the Release that, “[i]f the Board determined to amend Rule 3523 to not apply to the audit period, it might effect this change by striking the words “audit and” from the current text of Rule 3523.” We agree with this approach and believe that it is consistent with the disclosures required by the Commission as set forth in Form 8-K, regarding changes in the registrant’s auditor. From an investor’s perspective, until a Form 8-K is filed disclosing that the auditor has been dismissed, a reasonable investor would expect that the incumbent auditor would continue in the performance of its obligations under the Commission’s, the Board’s and other applicable professional standards. Once a Form 8-K is filed announcing the appointment of the new auditor, a reasonable investor would expect that the new auditor would undertake the performance of its obligations under the Commission’s, the Board’s and other applicable professional standards from the date that the Form 8-K discloses that the new auditor will be engaged. Consequently, from an independence perspective, it is reasonable that an investor would not expect an auditor to be independent until such time as the auditor begins its professional engagement period and the beginning of that professional engagement period is disclosed to the investors in a Form 8-K. More precisely, an investor would expect that any independence concerns with respect to any prohibited service or prohibited investment or other relationship with an entity (including the provision of prohibited tax services to persons covered by Rule 3523) will have been addressed by the time the new auditor begins its professional engagement period or the beginning of that professional engagement period is disclosed to the investors by a registrant audit client in its Form 8-K, whichever is later.

We also note that the proposed approach to strike the words “audit and” from the current text of Rule 3523 in order to address transitional issues is also consistent with views recently expressed by the staff of the Commission. A recent speech by Mr. Michael W. Husich, Associate Chief Accountant of the Commission, set forth certain criteria that the staff of the Commission would consider in concluding that an auditor’s independence was not impaired by the provision of certain prohibited services during the audit period. Mr. Husich stated:

“The Staff’s position is that a successor auditor’s independence would not be impaired if the successor auditor provided prohibited non-audit services in the current audit period and these services (i) relate solely to the prior period

which is audited by a predecessor auditor, (ii) will not be subject to audit procedures by the successor auditor, and (iii) are not management functions.”²

We believe that the proposed approach is consistent with the analysis set forth by the staff of the Commission in Mr. Husich’s speech because tax services provided to a covered person by Rule 3523 are not services provided to an audit client, and therefore, are not subject to audit procedures by either the predecessor or successor auditor and such tax services are not regarded as management functions as that term is defined by the Commission.

Accordingly, we believe that independence concerns with respect to any prohibited service or prohibited investment or other relationship with an entity (including the provision of prohibited tax services to persons covered by Rule 3523) should not arise until the auditor begins its professional engagement period or the beginning of that professional engagement period is disclosed to the investors in a Form 8-K, whichever is later.

2. Effect on Auditor Changes

The Board has also specifically requested comments on what impact the application of Rule 3523 to the audit period may have on a company’s ability to change its auditor. Specifically, the Board asks:

What effect, if any, would application of Rule 3523 to the audit period have on a company's ability to make scheduled or unscheduled changes in auditors? Could any such effect be minimized or managed through advanced planning or otherwise?

In response to the Board’s request, we believe that while that the proposal that limits the application of Rule 3523 to the professional engagement period may reduce the difficulties encountered by a public company with respect to a scheduled or unscheduled change in auditors, the Board should consider additional guidance. Corporate transactions such as initial public offerings, corporate acquisitions, corporate mergers and similar transactions are driven by the business environment, by business initiatives and by market conditions, the optimal timing of which usually will not allow for advanced planning for auditor changes. Consequently, a public company usually will not be able to minimize or manage scheduled or unscheduled changes in auditors. The ability to minimize or manage scheduled or unscheduled changes in auditors is made even more difficult because Rule 3523 applies not only to the registrant audit client but to most affiliates of the audit client. Moreover, failure to modify the rule to address corporate transactions or corporate “life events” may impose an undue hardship on an audit client and its investors by requiring an unscheduled auditor change on a public company while dramatically limiting the field of firms that could serve as the independent auditor for the audit client.

In addition, consistent with our previous comments submitted to the Commission³, we continue to believe that additional clarification is necessary to ensure that Rule 3523 permits companies to

² <http://www.sec.gov/news/speech/2006/spch121106mwh.htm>.

³ See Letter from Deloitte & Touche LLP to the PCAOB dated April 3, 2006.

navigate independence issues that arise from the application of the rule as a result of other “corporate life” events. We note that the change-of-auditor situation addressed in the Release is conceptually similar to the transition issue related to the hiring or promoting of a person to a position subject to Rule 3523. There, the Board adopted a transition period to address commenters’ concerns that Rule 3523 could impose an undue hardship on persons who become subject to the rule because they are hired or promoted into a financial reporting oversight role at an audit client. The Board stated:

“Specifically, the Board has determined to add a new exception to the rule that applies to a person who was not in a financial reporting oversight role at the audit client before a hiring, promotion, or other change in employment event, when the tax services are both: (1) provided pursuant to an engagement that was in process before the hiring, promotion, or other change in employment event; and (2) completed on or before 180 days after the hiring or promotion event.”⁴

We are concerned that the contemplated amendments to Rule 3523 will apply only to changes in auditors where the audit period precedes the professional engagement period. The change in auditor scenario is just one of many “corporate life” events which can, unexpectedly, impose an unwarranted hardship on a public company and its investors. We believe the Rule should articulate a transition policy for registrants and persons that first become subject to the Rule and registrants that might be brought into conflict with the Rule due to other “corporate life” events such as initial public offerings, mergers and acquisitions, or by other scenarios that may require an entity to re-evaluate the independence of its auditor under Rule 3523. To address these very real and recurring issues, we recommend that the Board adopt the following transition policy:

“Providing tax services to a person defined in Rule 3523 will not impair the independence of an audit firm if the tax services are: (1) performed pursuant to an engagement that is in process before the company or person becomes subject to Rule 3523; and (2) completed in accordance with the guidance and under the oversight of the audit committee on or before 180 days after the occurrence of the event that subjects the company or person to Rule 3523.”

We believe that such a transition policy is critical for two reasons: first, it minimizes undue hardship on companies, their investors and persons that become subject to Rule 3523 due to various “corporate life” events; and second, it minimizes the risk of an inadvertent violation of Rule 3523 and the hardship such matters can impose on the investors of registrant audit clients.

For example, an inadvertent violation of Rule 3523 could arise when owners and officers of a private company become subject to Rule 3523 because the company undertakes an initial public offering. Such a scenario would create potential hardships on companies attempting to access the public capital markets. This is particularly problematic when the company’s audit firm has served as auditor for multiple years and provided tax services to a person covered by Rule 3523

⁴ Rule 3523(c), PCAOB; Notice of Filing of Proposed Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees; Notices; 71 Fed. Reg. 12722 (Mar. 7, 2006) (citations omitted).

at the audit client or one of its affiliates prior to the company's determination that it would seek to become a public company. In such situations, where a company became subject to Rule 3523 as a result of an initial public offering, the company might be required to undertake an unplanned change in auditors that would be harmful to the company and investors.

Furthermore, a private company attempting to go public through an initial public offering may have limited options when selecting an outside auditor where the persons covered by Rule 3523 that work at the company have received tax services from several accounting firms within the period covered by its initial public financial statements. This hardship is further compounded because Rule 3523 prohibits tax services to persons covered by Rule 3523 at most of the affiliates of the audit client.

Companies undertaking mergers or related corporate acquisitions face similar issues. For example, assume that at the beginning of the audit period, the acquirer's audit firm provided prohibited tax services to a person employed by the target company and such person by virtue of continued employment at the target company, now a material subsidiary of the acquirer, is then covered by Rule 3523. The acquirer's audit firm may be determined not to be independent following the merger or acquisition and the company may have difficulties finding a replacement auditor because several firms, having provided services to various persons covered by Rule 3523 at the acquirer and/or target, may not be able to accept the audit engagement.

The transition provision that currently exists in the Rule for those hired or promoted into such positions is important because it recognizes that individuals may be inadvertently subjected to Rule 3523. However, it appears to be inconsistent that persons who become subject to Rule 3523 by reason of an initial public offering, merger or acquisition face greater potential for undue hardships than individuals who might be hired or promoted into such positions even though many companies may commence an initial public offering or a merger or acquisition only to later abandon such a transaction.

We further believe that a transition policy for such "corporate life" events would also fit under the criteria provided by the staff of the Commission in Mr. Husich's speech referenced above whereby an auditor's independence would not be impaired. Specifically, tax services provided to a person covered by Rule 3523 prior to an initial public offering, a merger or acquisition, or other "corporate life" event are not services provided to an audit client and therefore are not subject to audit procedures by either the predecessor or successor auditor and such tax services are not regarded as management functions as that term is defined by the Commission. In such situations, we believe that the Board should permit the 180-day transition period to begin no earlier than with the filing of an initial public offering or the closing date of the merger or acquisition because until such time, the transaction could be abandoned for any number of reasons prior to that time and, as a result, the Board's Rule 3523 would not apply.

Similarly, a public company could be viewed as violating Rule 3523 if its auditing firm hired an individual who has been providing tax services to persons covered by Rule 3523 at the audit client during the audit period. Such services should also qualify for transitional relief since the tax services provided by the newly hired individual were also not services provided to an audit

client and, therefore, are not subject to audit procedures by either the predecessor or successor auditor and such tax services are not regarded as management functions as that term is defined by the Commission. In such situations, we believe that the Board should permit the 180-day transition to begin not earlier than the first day the newly hired individual begins work with the audit firm because at any time prior to that date, the individual might not join the audit firm for a number of reasons, and as a result, Rule 3523 would not apply.

Based on the concerns set forth above, we respectfully request transition relief that would apply to all situations in which a company becomes subject to Rule 3523, whether due to selecting a new auditor, or as described above, an initial public offering, merger or acquisition or other “corporate life” event or the employment by the audit firm of an individual who has been providing tax services to persons covered by Rule 3523.

3. Reliance on the Audit Committee

As noted above, we have described a transition policy for the application of Rule 3523 that would be applicable to new audit clients, initial public offerings, mergers or acquisitions and other “corporate life” events and to situations where tax providers are hired by audit firms. The most important element of our proposal is that the audit committee should evaluate any transition issues in the application of Rule 3523, including, but not limited to the items discussed above, to ensure that its auditor is independent. We believe that the Board should emphasize that any determination as to the impact on auditor independence of transition issues, including but not limited to the application of Rule 3523 as described above, should rest exclusively with the audit committee. The Act, the Commission and the Board have all emphasized the importance of the audit committee in overseeing the independence of the auditor. Where an auditor has provided services (including tax services) to a person covered by Rule 3523 either during the audit period, or during the professional engagement period, we believe that the Board should require that the audit committee evaluate all the facts and circumstances, and make the ultimate determination whether independence is impaired pursuant to Rule 3523, the Board’s other rules and the SEC’s independence rules.

Conclusion

We strongly support the efforts of the Board to further the goals of the Act, and believe that the Board’s request for comments demonstrates a thoughtful approach to furthering those goals. We firmly believe that to be effective, all of the parties affected by the Rule must have a clear understanding of the scope of the Rule in order to effectively apply it and monitor compliance. Accordingly, we respectfully request that you give full consideration to our comments which are largely aimed at ensuring both clear understanding and effective application of the Rule.

We appreciate your consideration of the recommendations and views set forth herein, and look forward to working with the Board to achieve clarity in any final rules. We would welcome the

Office of the Secretary
May 18, 2007
Page 8

opportunity to further discuss these matters with the Board and the staff. If you have any questions or would like to discuss these matters, please contact Robert Kueppers at (212) 492-4241, Roger Page at (202) 879-5630, or James Curry at (203) 761-3689.

Sincerely,

/s/ Deloitte & Touche LLP

cc: Mark W. Olson, Chairman
Kayla J. Gillan, Member
Daniel L. Goelzer, Member
Bill Gradison, Member
Charles D. Niemeier, Member
Tom Ray, Chief Auditor and Director of Professional Standards

Chairman Christopher Cox, Securities and Exchange Commission
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