Deloitte & Touche LLP
1633 Broadway
New York, New York 10019-6754
USA

www.deloitte.com

April 26, 2012

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

Re: *Proposed Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications*
PCAOB Rulemaking Docket Matter No. 039

Deloitte & Touche LLP ("D&T") is pleased to respond to the request for comments from the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") on its *Proposed Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications*, PCAOB Release No. 2012-002; PCAOB Rulemaking Docket Matter No. 039 (February 28, 2012).

DODD-FRANK ACT CONFORMING AMENDMENTS

We support amending the Board's rules to conform them to the requirements of the Dodd-Frank Act. In responding to the Board's request for comments on the proposed amendments, we offer the following observations:

1. **Applicability of PCAOB rules to encompass audits of brokers and dealers.** Based on the Board's new authority under the Dodd-Frank Act to oversee the audits of brokers and dealers that are registered with the U.S. Securities and Exchange Commission ("SEC"), we support the proposed changes to the Board's rules that are intended to incorporate the audits of such brokers and dealers under the umbrella of the authority of the PCAOB.

2. **Timing of effective date.** Both the PCAOB and the SEC have issued proposed rules that would modify the audit requirements for brokers and dealers. We encourage the PCAOB to coordinate the timing of the effective date of this proposal with the effective date of the related PCAOB and SEC proposals.[1]

3. **Transition to new rules.** Certain of the proposed amendments to the Board's rules, if adopted, will require transition periods. Specifically, the proposed change to apply Rule 3523 (which prohibits auditors of issuers from providing tax services to those in a financial reporting oversight role at the issuer) to the auditors of brokers and dealers would necessitate similar transition provisions as those used when the rule was initially approved for issuers.[2] An appropriate transition will allow for in process engagements to be completed and will provide time for those in a financial reporting oversight role at brokers and dealers to complete their calendar year income tax return filings and make arrangements for alternative service providers going forward. To that end, in order to allow for as smooth a transition as possible, we recommend that in process engagements be allowed to continue provided that the services are completed on or before the later of October 31 of the calendar

year in which the SEC approves the Board's rules, or 10 days after the date that the SEC approves the rules.

4. **Confidential information.** We are supportive of the Board's proposal to designate two additional entities that may receive confidential information, but, as discussed below, would propose additional steps to safeguard confidential information disclosed to self-regulatory organizations (SROs).

    a. Because SROs are private entities, and thus operate under different constraints than government entities, we recommend that the Board take additional steps to help ensure that SROs preserve the confidentiality and privilege of any information that is transmitted to SROs.[3] One option would be for the Board to require, by rule, that SROs enter into a protective memorandum of understanding with the Board before receiving confidential and privileged information. The same issue is raised by the Board's proposed changes to Rule 5112 and Rule 5420.[4]

    b. The Board's proposed rule with respect to foreign auditor oversight authorities includes safeguards to protect against a breach of confidentiality by the foreign authority, including requirements that the foreign authority make assurances of confidentiality to the Board as the Board may request, and describe its system of controls to ensure such confidentiality. We support the inclusion of these safeguards in Rule 5108(f).

OTHER PROPOSED CHANGES

We also support efforts to update and clarify the Board's rules as practices have evolved since the Board's inception. We offer the following observations regarding these aspects of the proposal:

1. **Definition of "person associated with a public accounting firm."**
    a. The extension of subpart (2) of the definition of the term "person associated with a public accounting firm" to include those who are not "agents" raises questions whether all persons that do business with registered firms would be viewed as "associated persons." The use of the phrase "or otherwise" in that subpart with the phrase "in any activity of that firm" could give rise to difficult interpretive and implementation questions that the Board could eliminate by clarifying the language now.

    b. With respect to the proposed note stating that the terms defined by Rule 1001(p)(i), including the term "person associated with a public accounting firm," include (with certain specified exceptions) "any person associated, seeking to become associated, or formerly associated with a public accounting firm," we have some concerns regarding how a firm would comply with the proposed language as written"[5] For example:

        i. What conduct is sufficient to establish that a person is "seeking" to become associated with a public accounting firm?

        ii. What conduct is sufficient to establish that a person is no longer "seeking" to become associated with a public accounting firm?

    We recommend the Board provide guidance regarding the meaning of "seeking to become associated" by clarifying, in objective terms, how firms and individuals are to apply this concept;

in doing so, we recommend that the Board clarify how considerations of timing may be relevant to the concept.

2. **Investigations and adjudications.** The proposal includes amendments to a number of existing rules.

   a. **Requirement for affidavits.** The Board proposes the addition of a note to Rule 5109(d) relating to Statements of Position submitted by persons involved in an informal inquiry or formal investigation, which states that the Board will "take into account the extent to which the assertions [in the Statements of Position] are supported by evidence in the investigative record or by affidavit, declaration, or similar statements . . . ."[6]

   The substantive change in the proposed note—suggesting that arguments not supported by affidavits will be discounted—is not required by the text of the Dodd-Frank Act. The Board's proposed note raises several concerns that we believe warrant further consideration.

      i. The Board has made clear that "[t]he Rule 5109(d) process . . . is based on the Commission's so-called 'Wells' Process."[7] We observe that the Wells Process imposes no such requirement upon firms or individuals to provide affidavits or declarations at this early stage of an inquiry or investigation.[8]

      ii. The Rule 5109(d) process "provides a meaningful opportunity for a prospective respondent to focus the Board's attention on significant issues concerning the prospective respondent's characterization of its own conduct, and on legal and policy issues implicated by the staff's recommendation."[9] To fulfill that purpose, we do not believe that it is necessary for the Board to place disproportionate weight on formal evidentiary submissions, particularly at this early stage of an inquiry or investigation.

      iii. It could become burdensome for individuals and firms to provide this type of evidence; we believe this emphasis on certain types of evidentiary submissions could limit their ability to present fact-based arguments to the Board and may slow the Rule 5109(d) process.

   Accordingly, we recommend that the note not be added to the current text of Rule 5109(d).

   b. **Production of documents.** The Board's proposal would amend Rule 5422(b), which governs the disclosure of documents by the Division of Enforcement and Investigations, in two significant respects.

      i. Documents "obtained from" the Board, the Board's Staff, or persons retained by the Board or its Staff may be withheld from production to a firm in the context of a proceeding. However, the phrase "obtained from" is not defined and may be ambiguous; by expanding the scope of documents withheld, we believe the amended Rule could have implications on the efficiency and fairness of Board proceedings. In addition, this exemption from production is not included in the parallel SEC Rule. We observe that the comparable portions of that Rule allow the SEC to withhold only a document that "is an

internal memorandum, note or writing prepared by a Commission employee" or "is otherwise attorney work product and will not be offered in evidence."[10]

ii. The Board also proposes allowing the Division of Enforcement and Investigations to withhold documents "accessed from generally available public sources. . . except to the extent that the interested division intends to introduce such documents as evidence."[11] We are concerned that this could result in relevant materials not being produced, including documents that the Division may consider supportive of its claims or that are exculpatory of a respondent.

3. **Reporting to the PCAOB regarding withdrawn reports and issuer auditor changes.**

a. **Withdrawn reports.** The proposal suggests a new PCAOB reporting requirement (on PCAOB Form 3) when the auditor has withdrawn an audit report on a broker's or dealer's financial report, compliance report, or exemption report, filed pursuant to proposed SEC Rule 17a-5(d), or withdrawn its consent to the use of its name in one of these reports. We believe that a better approach would be for the Board to coordinate its efforts with the SEC in this area. We recommend that (i) the SEC establish a process, comparable to that currently in place for registrants, which would require a broker or dealer to report to the SEC when an auditor has withdrawn an applicable audit report or consent, and (ii) the PCAOB require reporting by the auditor only where the broker or dealer has not notified the SEC in accordance with its reporting obligations.

b. **Issuer auditor changes.** Under the proposal auditors would also be required to report to the PCAOB on an exception basis when issuers change auditors but do not file the required Form 8-K with the SEC. The Board has also asked for input on whether the SECPS requirement to provide a letter to the SEC within 5 days of the cessation of the auditor relationship, regardless of whether the issuer filed the Form 8-K, should be reconsidered. We have the following observations on these proposed changes:

i. We believe the current SECPS requirement to report the cessation of auditor relationships to the SEC is working, helpful, and appropriate.

ii. We are concerned that requiring auditors to file a Form 3 would put the auditor in the position of publicly reporting information that has not yet been reported by the issuer. While we support the concept of notifying the PCAOB, we believe it would be inappropriate for the auditor to make public information that the issuer has not made public. As an alternative, we recommend that the PCAOB be copied, on a confidential basis, on the 5-day SECPS letter so that the Board could be timely informed of issuer auditor changes. This copy could be addressed to the Division of Registration and Inspections.

* * *

D&T appreciates this opportunity to provide our perspectives on this important topic. Our comments are intended to assist the PCAOB in analyzing the relevant issues and potential impacts. We encourage the PCAOB to engage in active and transparent dialogue with commenters as the proposal is evaluated

and changes are considered. If you have any questions or would like to discuss these issues further, please contact Robert Kueppers at 212-492-4241 or William Platt at 203-761-3755.

Very truly yours,

Deloitte & Touche LLP

cc: James R. Doty, PCAOB Chairman
Lewis H. Ferguson, PCAOB Member
Jeannette Franzel, PCAOB Member
Jay D. Hanson, PCAOB Member
Steven B. Harris, PCAOB Member
Martin Baumann, PCAOB Chief Auditor and Director of Professional Standards

Mary L. Schapiro, SEC Chairman
Luis A. Aguilar, SEC Commissioner
Daniel M. Gallagher, SEC Commissioner
Troy A. Paredes, SEC Commissioner
Elisse B. Walter, SEC Commissioner
James L. Kroeker, SEC Chief Accountant
Brian T. Croteau, SEC Deputy Chief Accountant

ENDNOTES

[1] See PCAOB *Proposed Standards for Attestation Engagements Related to Broker and Dealer Compliance or Exemption Reports Required by the SEC and Related Amendments to PCAOB Standards* and SEC Release No. 34-64676; File No. S7-23-11 to amend existing requirements of Exchange Act Rule 17a-5.

[2] When Rule 3523 was initially approved, the Board stated the following regarding transition: "The Board understands that Rule 3523 will, in practical effect, lead to some registered firms terminating recurring engagements to provide tax services and may require certain members of public companies' senior management to find other tax preparers. Accordingly, the Board has determined that it will not apply Rule 3523 to tax services being provided pursuant to an engagement in process at the time the SEC approves the rules, provided that such services are completed on or before the later of June 30, 2006 or 10 days after the date that the SEC approves the rules. As discussed above, the Board will treat engagements as "in process" if an engagement letter has been executed and work of substance has commenced; the Board will not treat engagements as "in process" during negotiations on the scope and fee for a service." *See* PCAOB Release No. 2005-014. That transition rule was subsequently amended to provide that "the Board will not apply Rule 3523 to tax services being provided pursuant to an engagement in process at the time the SEC approves the rules, provided that such services are completed on or before the later of October 31, 2006, or 10 days after the date that the SEC approves the rules." *See* PCAOB Release No. 2006-001. We would recommend a similar transition in applying Rule 3523 to auditors of brokers and dealers.

[3] *See* Sarbanes-Oxley § 105(b)(5).

[4] *See* PCAOB Release No. 2012-002 at A1-22, A1-26 to A1-27.

[5] *See* PCAOB Release No. 2012-002 at 9, A1-3 to A1-4.

[6] *See* PCAOB Release No. 2012-002 at 31, A1-21.

[7] *Rules on Investigations and Adjudications*, PCAOB Release No. 2003-015, at A2-49 (Sept. 29, 2003).

[8] SEC Division of Enforcement, Enforcement Manual at 23 (Mar. 9, 2012).

[9] PCAOB Release No. 2003-015 at A2-49.

[10] SEC Rule of Practice 230(b)(1)(ii).

[11] PCAOB Release No. 2012-002 at 34.