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March 31, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW, 9th Floor
Washington, DC 20006

PCAOB Release No. 2003-1

Dear Mr. Secretary,

PricewaterhouseCoopers appreciates the opportunity to comment on the Public Company Accounting Oversight Board's proposed rules, *Proposed Registration for Public Accounting Firms, PCAOB Rulemaking Docket Matter No. 001*. We support the efforts of the PCAOB to restore investor confidence. We have reviewed the proposed rules of the Board and have a number of observations and proposals that we feel will help support the overall objectives of the Board. In connection with the rulemaking process, it is important to understand the impact of registration not only on the US firm of PricewaterhouseCoopers, but on each of our foreign member firms as well.

PricewaterhouseCoopers is a multinational organization that serves as independent auditors for many of the largest companies listed and traded on the US securities markets. Our organization consists of a network of distinct individual member firms located in countries across the world. Because we are a global network with issuer clients located around the world, we believe there need to be regulations and standards relating to public accounting firms that create consistent levels of protection for investors.

Foreign Public Accounting Firms

Similar to the recent creation of the PCAOB, many other foreign territories have already, or are currently examining their own regulatory structures and assessing their current effectiveness. We believe that effective auditor regulation on a global basis will be achieved best when the regulators from different territories, including the PCAOB, start working together down the path toward a strong and consistent regulatory environment.

Further, as described in our comment letter, we propose that registration of foreign accounting firms be delayed until the Board has had an opportunity to explore the regulation of public accounting firms on a more consistent, global basis with foreign regulators. Many of the local regulatory environments and conflicting local laws (*e.g.*, data protection, secrecy) of the foreign territories create substantial difficulties in complying with the requirements of registration.

Operational Issues

In addition to the significant legal issues surrounding foreign public accounting firm registration addressed above, complying with the detailed information requirements of registration proposed by the Board will create significant operational issues for the foreign firms and the US firm. We support the Board's objectives in developing a compliance environment for public accounting firms that will ensure the protection of investors and we believe it is critical that we work together to create a registration process that is successful and will build trust and confidence with the investing public. In working together, however, we need to address these operational concerns and develop rules that are practical in approach and that still allow the Board to achieve its objectives.

For example, the Board has proposed certain rules that go beyond what the language of the Act requires and, we believe in some cases, what is necessary for the Board to execute its mandate (examples of where we believe this to be the case are set out in some detail in the body of our comment letter). We believe that in light of the time constraints and pressure on our internal systems from these requirements, the Board not go beyond what the Act requires, particularly in this inaugural year.

Further, the Board is asking firms to generate information from prior periods that is not easily obtainable (*e.g.*, compilation and disclosure of issuer fee information sorted into the newly created proxy categories). Where this type of prior period information is going to be extraordinarily costly to collect and disclose, we ask the Board to consider implementing the transition period and other proposed alternatives that we have suggested in our comment letter.

It is clear there are many issues from both a legal and operational perspective related to the proposed registration requirements. We hope that our commentary will assist the Board in striking the right balance of making sure that the Board receives the relevant information that it needs while allowing the firms to meet, successfully and without undue hardship, the requirements of registration.

We will be pleased to discuss any of our comments or answer any questions that you may have. Please do not hesitate to contact Richard R. Kilgust at 646-471-6110 regarding our comment letter.

Very truly yours,

PricewaterhouseCoopers

PricewaterhouseCoopers Comment Letter Dated March 31, 2003

PROPOSAL OF REGISTRATION SYSTEM FOR PUBLIC ACCOUNTING FIRMS, PCAOB Release No. 2003-1, March 7, 2003; PCAOB Rulemaking Docket No. 001

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PROPOSAL OF REGISTRATION SYSTEM FOR PUBLIC ACCOUNTING FIRMS, PCAOB Release No. 2003-1, March 7, 2003; PCAOB Rulemaking Docket No. 001

PricewaterhouseCoopers appreciates the opportunity to comment on the Public Company Accounting Oversight Board's (the Board or PCAOB) rulemaking proposal relating to registration of public accounting firms under the Sarbanes-Oxley Act (the Act).[1] Our comment letter is divided into three sections:

(i) General Approach to Registration

We propose a general approach that we recommend the Board adopt as part of this rulemaking to guide accounting firms through the registration this first year and beyond. These principles will then be applied to the specific registration requirements in Part III of this letter.

(ii) Issues Relating to Foreign Firms

As a threshold matter, before applying these principles to the specific requirements of registration, we address generally the issues raised by foreign accounting firm registration and potential solutions for certain of those issues. In the timeframe available it has not been possible to conduct a survey of all potentially affected territories. We have, however, targeted a cross section of countries in which PricewaterhouseCoopers member firms' practice in order to provide the Board with an understanding of some of the real legal conflicts that will be faced by the foreign accounting firms in meeting the proposed registration requirements. The more detailed results of our research (which was commissioned by the Big 4 accounting firms) is being filed separately in a submission by the law firm of Linklaters & Alliance (Linklaters Submission). Also attached as an appendix are answers to certain of the questions posed by the Board relating to foreign firm registration

(iii) Requirements for Registration

Finally in the last section, we apply the general principles to the proposed rules, the instructions for registration, and the issues raised both legally and operationally by the proposed requirements of registration. We also have suggested a transitional approach to accommodate certain of the difficulties the accounting firms will face in complying with the proposed registration requirements.

[1] PricewaterhouseCoopers refers to the network of member firms of PricewaterhouseCoopers International, Ltd., each of which is a separate and independent legal entity.

I. GENERAL APPROACH TO REGISTRATION

We understand and support the Board's need to obtain information from the public accounting firms in connection with the SEC issuer clients that they audit. We view this process as part of a broader effort that will lead to the restoration of investor confidence in the markets and in the accounting profession and we intend to contribute to that restoration.

We also believe, however, that this first-year registration will be an enormous undertaking. Registration will require firms to compile information that generally has never been gathered or requested before, and sort it in ways that have never been done. We suspect that, in many cases, the existing information systems at most firms do not have the capability to generate the requested information (in the short-term). Therefore, firms will have to rely on manual processes to initially comply with the registration requirements. That raises cost-benefit issues that we believe need to be considered in finalizing the registration requirements.

Further, in light of the ongoing rulemaking process, both the Board and the firms must act under significant time constraints on compliance with the requirements of registration. Our recommendations, particularly as they relate to the first-year registration process, are aimed at providing the Board with the information it needs, while doing so in a manner that imposes realistic requirements on the firms.

A. The Board Should Approach This Rulemaking In A Manner Consistent With The Specific Requirements Of The Sarbanes-Oxley Act And Should Take Additional Time To Consider Any Registration Requirements That Go Beyond The Statutory Mandate.

Recognizing the time constraints that both the Board and we are under to complete the registration process by the statutorily mandated deadline, we believe it is important that the initial registration requirements reflect only that which is necessary to meet the requirements of the Act. We encourage the Board to approach the finalization of the registration rules in this fashion. The Board has continuing rulemaking authority to revise the requirements for applicants going forward. The Board can do so at any time and could presumably make the additional requirements applicable to firms that have already registered. In our view, this flexibility would enable the Board to focus its current efforts on establishing rules that fulfill the express goals of the statute and meet the immediate needs of the Board, leaving any requirements that go beyond those required by the Act for consideration at a later date, after the registration system is fully functioning.

Following are some of the proposed requirements implicated by our suggestions:

- Requiring firms that play a substantial role in an audit to register

- Requiring production of information relating to past legal proceedings with respect to former associated persons of the firm
- Requiring information on applicant firm total revenues in mandated categories
- Requiring disclosure of legal proceedings unrelated to audits

B. The Board Should Consider The Timing Issues And Possible Impact If The Stated Deadlines Prove To Be Unworkable Under The Current Proposal.

Under the proposal, it appears possible that a firm's registration status could remain undetermined during a potentially open-ended application review process if the Board requests additional information and the firm's application is withdrawn from the queue. If this is the case, we believe it will create a great deal of uncertainty for both the applicant firm and for its issuer audit clients that expect to have an audit opinion signed by their firm in the months immediately following the initial registration period.

We are concerned that, in light of the short time frames involved, the timing issues combined with the potentially open-ended review process could cause market uncertainty, impair the auditing process and, if an issuer is left without a registered accounting firm to sign its opinion when needed, could disrupt the issuer's business and access to capital markets. To avoid this, we propose that the Board consider providing that firms that file applications that are complete on their face will be provisionally registered until the Board either disapproves of the application or grants the firm permanent registration status. Further, audit opinions issued between the time of provisional registration and either disapproval or granting of registration should not be disqualified.

C. The Board Should Recognize A Transition Period.

The Board's proposal asks for a number of categories of information that neither our member firms, nor in some cases our clients, have the ability to generate quickly. We suspect that other firms and their clients will face the same issue. It will take a substantial manual effort to develop the information processes and the resulting information will be subject to an inherent margin of error. Although this information can be developed on a going-forward basis once appropriate systems are in place, it will be very difficult for firms to compile and disclose information into new formats this year. Accordingly, we recommend that the Board allow a period of transition before implementing certain requirements and accept from the applicant firms information in forms that currently exist.

The following information categories are a few examples of items that are implicated:

- Requiring issuer fee information for prior years based on the new proxy categories
- Requiring disclosure of total applicant firm revenues by the new proxy categories

D. Firms Can Only Comply To The Extent That Such Compliance Does Not Conflict With Any Existing Local Laws Or Regulations.

Where the requirements of registration would require the applicant to violate the law of another country, the Board should pay due regard to these impediments and engage in dialogue with foreign regulators to explore alternative ways to achieve the Act's objectives. In the event that no such solution can be achieved, the Board should permit registration in a manner that will avoid such violations being committed. Data protection, client confidentiality, privacy and other laws may prevent foreign firms from providing certain information to the Board and from securing blanket consents from its employees and associated persons to comply with requests for testimony and documents. Even where the registering firm is a domestic firm, laws outside of the United States present obstacles to the provision of certain information related to foreign firms and their personnel. Moreover, the provisions of the rulemaking may be inconsistent with the laws of certain states (*e.g.*, certain US state laws relating to background searches only allow a seven-year look-back period).

E. The Board Should Create Clear And Realistic Benchmarks For Compliance.

We have set out below a number of areas where firms would benefit from realistic benchmarks set at levels designed to facilitate compliance. This is particularly important this year. Much of the information that will be gathered for this inaugural registration will be gathered manually. Although we intend to quality test the information as best we can under the circumstances, the Board should recognize that this will not be a fail-safe information gathering process.

Beyond the breadth of the information requested, the application requires compliance by a large number of staff members of an applicant firm. In the case of PricewaterhouseCoopers, we will do our best to obtain the consents of all of those for whom consent will be required. However, we do not currently have a process in place to obtain such consents nor do we require them for initial employment. Moreover, depending on the final rulemaking, our compliance may be dependent on persons and entities that are not within the firm's control (*e.g.*, subcontractors, independent contractors, foreign firms both affiliated and not affiliated with the firm) and, in the case of foreign firms, the permissibility of requiring consents as a matter of local law. We ask that the Board be mindful of these inherent limitations when reviewing applications.

In addition, we recommend that the Board establish a date at which the information submitted by an applicant is deemed current. Much of the information (*e.g.*, the list of accountants, list of current year audits) will be for the current period and will be subject to change. Therefore, an appropriate cut-off date after which the information does not have to be updated would greatly ease the burden for firms making a good faith effort to comply with the registration requirements.

Other examples where the Board should create a pragmatic approach include:

- Updates to personnel licensing and qualification information
- List of SEC issuers for which the applicant expects to issue an opinion
- Disclosures related to legal proceedings
- Disclosure of client fee information

F. The Board Should Limit Duplicate Filing Of Information Across Associated Firms And Eliminate Unnecessary Volume From The Application.

There are a number of areas where the Board can clarify the rules to reduce the duplication of information provided. Many of the foreign firms required to register are associated entities of one of the other firms that are also required to register. Where appropriate, the Board could eliminate duplicative filing requirements or allow cross-referencing of information among the applications of associated firms. For example, the Board could eliminate duplicate listings of personnel (through associated persons), and listings of associated entities.

Second, there are a number of provisions that require the production of information that could potentially swell the size of an applicant's registration form without providing corresponding value. Particularly since the Board is planning on a web-enabled registration system, we encourage the Board to seek ways to reduce the size of an application. For example, to require collection and disclosure of extensive clerical information about issuer audit clients that is already publicly available (*e.g.*, business address of issuer, SIC code of issuer) creates unnecessary volume.

G. Implementation Of Web-Based Filing And Other Technical Requirements Should Be Delayed Until After The Board Has Had Suitable Time For System Testing.

We understand the Board's desire to have a web-based system for filing of registration applications. We are concerned, however, about using an untested system that will have to process large volumes of data in compressed time frames. In this first year, with so much uncertainty as to the system and to the size and format of applications, we believe it makes sense to allow firms the option of delivering their applications to the Board on CD-ROMs. We encourage the Board to consider this as an alternative to web-based registration in the first year. Once the web-based system has been found to be fully operational and secure (see our comments below), that system could then become the preferred way that firms register and update their registrations each period.

If the Board decides to move forward with a web-based registration this first year, then in light of the large amount of data that will be required to satisfy the registration application, we ask that the Board design a system that is capable of supporting

information transfer through the attachment of standardized files. We also believe that it is critical that the designers of the web-based system collaborate with the larger applicants to ensure an efficient and successful data transfer process. It is also important that the designers of the system make available the accepted format of the registration files in a timely manner to ensure adequate time to prepare the application.

In addition to concerns about the operability of the system, we have significant concerns about system security. For example, with the high incidence of identity theft, we are extremely concerned about sending the social security numbers of our personnel over the internet to a new system, the security of which may not have been fully tested.

II. ISSUES RELATING TO FOREIGN FIRMS

A. Registration Of Foreign Firms Should Be Delayed Until (1) The Scope Of The Board's Functions Are Fully Developed And (2) The Board And Foreign Regulators Have Had An Opportunity To Explore The Regulation Of Accounting Firms On A More Uniform, Global Basis.

The Board acknowledged in the rulemaking release that there are special considerations with respect to the registration of foreign firms. (Release at 13.) The Board further announced that it intends, over the next several months, to consider the appropriate scope of its authority with respect to accounting firms located outside of the United States. (*Id.*) We suggest that the Board delay the registration requirement for foreign firms until it has had time to fully address the scope of oversight that it will have over foreign firms.

Specifically, the Board should consider allowing more time for a dialogue between the Board and other regional and national regulators working towards other means of achieving the Act's objectives, but which do not conflict with local laws and professional regulations or incur considerable additional time and expense for both accounting firms and issuers. Avenues that could be explored include (where appropriate) systems of reciprocity or mutual recognition.

1. Compliance both with certain of the information requirements of registration and with the proposed oversight could place some major firms in conflict with local law.

The Linklaters Submission provides the Board with some detailed and specific examples of where this is the case. However, it is worth summarizing some of the key issues to come out of our independent legal review.

a. Data privacy laws in a number of territories are problematic.

First, it is apparent that the data privacy laws in a number of territories place potent restrictions on the right of foreign accounting firms to supply "personal data" (both with respect to employees of applicant firms as well as individuals working for the client) to the Board without the provision of informed and freely given consents and satisfactory proof that the receiving body has an equivalence of established data protection safeguards. By way of illustration, certain of the information required by the Board would amount to "personal data" under European Commission (EC) directive 95\46\EC (data protection) (Directive).

Such data includes the details of all accountants associated with an applicant firm together with their social security number, or equivalent identifier, and information relating to criminal, civil or administrative actions or disciplinary proceedings pending against individuals of that firm (the latter being "sensitive personal data" subject to greater restrictions under the Directive). The ability of foreign accounting firms to obtain the requisite consents of employees, associated persons and clients to provide this

information will vary from territory to territory (it being questionable in some territories whether employee consent can ever be freely obtained). No official determination has been made that the Board at present has the necessary data protection safeguards to satisfy the requirements of the Directive for transmission of the data to it. (*See* Linklaters Submission for further discussion of this issue.)

This is an issue for foreign accounting firms operating in the EC and is also likely to arise in other jurisdictions. We understand that, by way of example, similar principles apply to the transmission of data outside of Switzerland and Israel and that data privacy legislation is under consideration by the Japanese Diet. The consequences of non-compliance with these laws can be serious. Sanctions for breach of the EC legislation include exposure to regulatory fines and individual claims for damages and distress.

b. Professional confidentiality obligations may also impair compliance.

It is apparent that the auditor's foreign law obligations of confidentiality (whether expressed as a general principle of professional practice or specified in statutes related for example, to banking secrecy) may present real barriers to compliance with the registration regime. In each of the territories surveyed the requirement to maintain client confidentiality and/or business secrecy was a key area of concern. In some territories, such as France and Switzerland, the statutory prohibitions are such that the issue simply cannot be overcome by client consent. Even in territories where consent may, in principle, solve the problem (*e.g.*, Japan, Germany, Mexico, Israel and the UK) that consent must be express and informed. Although the consent of SEC issuers is likely to be forthcoming, the task of obtaining consents to disclosure of confidential information from other companies, from third parties whose information the auditor becomes privy to as part of the audit process (e.g. client customers), and from associated persons will present obvious and real practical difficulties. The sanctions imposed on foreign firms for breaches of confidentiality are severe (in Germany, France, Switzerland and Japan they may be criminal).

c. It may be difficult for firms, as a matter of law, to obtain consents from individuals.

We are similarly concerned about the ability of foreign firms in a number of jurisdictions to require employees and associated persons to provide their blanket consent to submitting to testimony and producing documents where required to do so. Foreign firms may be required to amend the contractual employment terms of their existing employees to give effect to this requirement and could violate local labor laws should they seek to penalize those who fail to comply. This has been identified as a problem in most of the territories we have researched, including Germany, the UK and Japan. There is also a clear tension here with recognized foreign law principles that entitle an accountant to refuse to testify to protect him or herself from self-incrimination.

d. Inspections in certain territories may trigger local legal concerns.

Finally, it is apparent that certain countries' regulatory and legal systems may not presently permit foreign entities to conduct inspections of local audit firms on their national territory (*e.g.*, France, Germany, Italy, Switzerland and Japan). Even where this is not the case, the very nature of the inspection and investigative processes will once again give rise to the data privacy, client confidentiality and consent issues already outlined.

Proposal:

- In light of the issues relating to foreign firm registration raised above, the Board should delay the requirement that foreign firms register to give the Board more time to work with other regulators to find ways to achieve the Act's objectives, without creating conflicts with local laws and professional standards.

B. The Board Should Only Require At the Outset Registration Of Firms That Issue Opinions On SEC Registrant Clients.

If the Board nevertheless decides to require foreign firms to register, we recommend that the Board initially limit the category of firms that will be required to register in the first year. In the few months that the Board and firms have this year to create, implement, and comply with a registration system, the inclusion of firms that do not issue opinions as the principal auditor on any SEC issuer's financial statements is an unnecessary burden on both the Board and those firms. We suggest that the Board allow the registration process to begin this year for firms that issue the opinion as principal auditor on an issuer's financial statements and evaluate during the next year whether registration of additional firms is necessary.

The Board may delay the registration of foreign firms because the language of the Act does not require firms that merely play a "substantial role" to register. Therefore, the Board does not need to expand the registration requirements to these firms in order to carry out its statutory mandate.

Requiring only the registration of signing firms is sufficient for investor protection in light of the fact that Section 106 of the Act already requires production of information from firms that play a material role in an audit. Section 106(b) contains separate provisions regarding production of audit workpapers by foreign firms that issue subsidiary opinions or otherwise perform "material services" upon which a registered firm relies in issuing all or part of an audit report. Such firms are deemed to consent to production of their workpapers. Domestic firms that rely on such opinions are further deemed to have consented to production of the foreign firm's workpapers and to have secured the agreement of the foreign firm to production of the workpapers.

Proposal:

- The Board should delay for now registration for firms that play a "substantial role" in the audits of SEC issuers but do not themselves issue principal audit

reports for SEC issuers. We recommend that the Board reconsider at a later time whether registration of these firms is necessary.

C. Providing "Material Services" Should Not Be Equated With A Firm Having A "Substantial Role" In Audits.

Even if the Board elects to require registration of firms that play a substantial role, it should require more than simply providing material services in connection with an audit. This is consistent with Section 106(a)(2) of the Act, which provides that the Board may, by rule, determine that a foreign firm must register if (i) it is "a public accounting firm (or a class of such firms)", and (ii) it plays a substantial role in the preparation and furnishing of audit reports "for particular issuers." This provision requires specific determinations as to what firms or class of firms should be covered, based on their roles in audits of specific issuers.

The Board appears to have adapted Section 106(b)(1) of the Act to form the basis of its definition of "substantial role." Section 106(b)(1) provides that a foreign firm is deemed to consent to production of workpapers if it provides an opinion or "performs material services" on which the registered firm relies. Since Section 106(b)(1) only requires a foreign firm that provides material services to consent to production of workpapers, Congress must have intended that a "substantial role" meant something more than providing material services.[2]

If the Board does want to adopt an objective percentage test to determine whether a firm plays a substantial role, the proposal as currently contemplated will lead to a great deal of uncertainty. The Board itself has stated that it would like to achieve an objective test in this area (*see* Release at A3-x), but the current formulation will not do that. The fees and hours test leads to uncertainty from year to year – depending on the nature of the audit, a firm could go above or below the 20% mark from one year to the next and often the firm will not know in advance of the audit work whether or not it met the test.

We believe that the standard adopted for "substantial role" should be a workable standard based upon a measure that already exists. The second prong in Rule 1001(n)(2) is a workable test. The standard test adopted for affiliates by the SEC in its independence rules dealing with partner rotation requirements, which looks to subsidiaries whose assets or revenues constitute 20% or more of the issuer's consolidated revenues or assets, makes sense as a clear and appropriate standard.

Proposal:

- The definition of "substantial role" should eliminate the test based on hours and fees and include the 20% measure of the issuer's consolidated revenues or assets.

[2] The Board also cites Section 102(a) of the Act to support requiring registration of firms that "play a substantial role." (Release at A3-xii to xiii.) Section 102(a) requires registration of public accounting firms that "participate in the preparation or issuance of" audit reports. Section 106, which permits registration of foreign firms that do not issue audit reports only if the Board finds that regulation is appropriate due to the "substantial role" played by the foreign firm or class of firms in the audits or particular issuers, overrides the looser standard in Section 102(a).

III. REQUIREMENTS FOR REGISTRATION

Below is commentary related to requirements for registration as proposed by the Board. Where we have not commented, we are supportive of the Board's proposal.

A. Definitions

1. The Definition Of "Associated Entities" Should Be Clarified To Include Only Those Entities That Carry Out Audits For Issuers.

Many firms have related entities pursuant to local regulatory requirements in the countries in which they practice. The majority of these entities do not perform audit services or other services for SEC issuers. To require disclosure of these entities on a global basis is not likely to provide information relevant to the Board's functions.

Proposal:

- In light of the large number of associated entities of these firms and the fact that many do not provide services to SEC issuers, only the associated entities that perform services for SEC issuers should be disclosed.

2. The Definition Of "Person Associated With A Public Accounting Firm" Will Be Unmanageable For The Board And The Firms.

Proposed Rule 1001(m) incorporates the Act's definition of "person associated with a public accounting firm" and "associated person of a public accounting firm," as set forth in Section 2(a)(9) of the Act, with one change. The principal impact of this definition for the registration rules is in the requirements for disclosure of information about legal proceedings involving past and present associated persons of the registering form (Form 1, Part V) and for obtaining consents from all present and future associated persons of the applicant (Form 1, Part VIII). However, the term also appears repeatedly in the Act in connection with the various compliance powers of the Board, and so the definition is likely to be relevant to determining which associated persons are subject to those rules. If interpreted broadly, it could have far-ranging impact on the disclosure obligations of firms.

a. Congress included "associated persons" in the Act principally because it concluded that firms should have to provide disclosures about, and be responsible for the actions of, their owners and employees.

The term "associated person" should be given a meaning that is consistent with that overall purpose of the Act and should not be applied to persons whose relationship with the registering firm is such that they neither play an instrumental role in the conduct of audits, participate in profits from the firm's audits, or have the authority to act on behalf of the firm.[3]

[3] In explaining Section 102, the Senate report stated that the section required "an agreement to obtain and if necessary to enforce similar consents from the firm's partners and employees who participate in public

b. We recommend that this term not be extended farther than reasonably necessary to enable the Board to carry out its responsibilities.

The Board should not feel a need to reach beyond a firm's accountants in order to exercise full oversight over an accounting firm. If it does so, it will require the registering firm to engage in an extended review of the many relationships they have with personnel outside of the registering firm (*e.g.*, staff of PricewaterhouseCoopers foreign firms who may already be listed in their own territory's registration, outside contractors, etc.) in order to determine whether they are "associated persons" within the meaning of the rule.

This creates not only an almost insurmountable task for the registering firm, it also creates both the risk of uncertainty as to who is covered and the duplication of effort among the different registering firms. The benefits of including such persons within the definition are marginal, because they are unlikely to be engaged in parts of an audit that are not being conducted or supervised by firm employees.

Proposal:

- ***Exclude from the definition (i) other public accounting firms that are themselves registering; and (ii) employees or contractors of other registered public accounting firms.***

  Because each registering firm will be providing disclosure and consents with respect to itself and its own associated persons, it is unnecessary for another firm that is associated with the registering firm to provide the same information.

- ***Amend the definition to read, "any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of the public accounting firm which is registering or making a report under these Rules, or any other independent contractor or entity that . . .."***

  The proposed rule deletes the word "other," which appeared in the definition in the Act before "professional employee" and "independent contractor." This deletion unnecessarily expands the scope of the term, to the extent it appears to be designed to capture persons who are neither employees nor contractors of the applicant.[4] (*See* Release at A3-viii).

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company audits." S. REP. NO. 205, 107TH CONG., 2D SESS., at 46. Although the bill used the term "associated persons," Congress' reference to partners and employees indicates that these persons were the primary focus of the registration provisions.

[4] Although we realize that Congress also included a limited class of contractors or other entities who shared in profits or received compensation from, or acted as agent or on behalf of the firm, we believe the term should be pragmatically applied to minimize the burden on registering firms, especially where a person's relationship with an applicant firm is attenuated.

- ***Require information about and consents from natural persons (as opposed to entities) only if they are owners or employees of the firm itself.***

  If an individual is only an "independent contractor," not an employee, then he or she should not be defined as an "associated person."

  As a transitional matter, if the Board determines that an applicant should include these types of individuals as associated persons, it should apply this only prospectively – it will be impossible to force those with whom the registering firm has no ongoing relationship to agree to consent to jurisdiction of the Board. Going forward, the registering firms can put systems in place to obtain such consent upon the initiation of the relationship and make it a condition of engagement.

- ***Clarify the term "participates as agent or otherwise on behalf of."***

  We suggest that the rule provide that a contractor is not deemed to be an associated person unless the contractor operates under an explicit authorization to act for or bind the registered firm. This clarification is consistent with the statute but means that a contractor is an associated person only where the registering firm has affirmatively delegated a matter to the contractor and therefore can fairly be held accountable for the contractor's conduct.

- ***Exclude persons who perform only clerical or ministerial tasks.***

  The exclusion of clerical and ministerial staff from the definition of associated person is expressly permitted by Section 2(a)(9)(B) of the Act. The identification of these individuals is not needed for the protection of investors because of the nature of the function they perform.

B. Instructions for Registration

1. The Board should not require manual signatures for the required consents. (Rule 2104)

It appears that the rules require manual signatures for all consents. The requirement that we obtain and maintain manual signatures will be extremely burdensome. For example, the US firm of PricewaterhouseCoopers alone will have approximately 25,000 professionals that may be required to consent to cooperation with the Board.

We question the necessity of these requirements in light of the Electronic Signatures Act of 2000, which makes clear that electronic signatures are valid. It provides in part: "Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce – (1) a signature, contract or other record relating to such transaction may not be denied legal effect, validity, or

enforceability solely because it is in electronic form, and (2) a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation." 15 U.S.C. § 7001. We believe that the use of electronic signatures is appropriate and would pass a cost benefit test.

Proposal:

- We recommend that the Board reconsider its proposal to require firms to obtain and maintain manual signatures.

2. Action on Applications for Registration (Rule 2105).

Proposed Rule 2105(a) provides that the Board will determine whether approval of the application is consistent with the Board's responsibilities under the Act to "protect the interests of investors and to further the public interest in the preparation of informative, accurate, and independent [SEC issuer] audit reports . . . ." We believe that this standard, while not set forth in the Act, is an appropriate one. However, it is unclear how the Board intends to determine whether approval would be consistent with its responsibilities under the Act.

In our view, given the specific information requirements for registration, and the prospective inspection and oversight functions of the Board, the Board should make the determination that initial registration of a firm is consistent with the Board's responsibilities in the first phase of its operations, without purporting to undertake a substantive review. [5]

If, however, the Board intends to do something more than examine whether the registering firm has complied with the information and consent requirements and has provided adequate information to provide a basis for Board oversight going forward, then we believe the standard raises substantive and due process concerns.

a. The rule does not articulate any factors or grounds on which the Board will decide to approve or disapprove the application for registration. Nor does it require the Board to articulate its reasons for denying an application.

The rule, by its lack of criteria by which the Board will evaluate an application, could potentially put the interests of a firm, its employees and its clients in jeopardy. It would be useful for the Board to explain the types of things it will consider when determining whether to approve an application for registration so that applicant firms have a better

[5] It is not entirely clear whether the Board intends to apply the standard in the foregoing manner. It appears from Item 5.6 of Form 1 that the Board believes that it has the power to disapprove a registration application based on legal proceedings disclosed in the application. This notion is inconsistent with Section 102(b)(F) of the Act. That section requires that the firm provide information only about *pending* proceedings. Pending proceedings are, by definition, unresolved and therefore it would be unfair to ban a firm based on them. Since Congress did not require disclosure of past proceedings, it could not have expected such proceedings to be the basis for denying registration.

understanding of the review process. If the Board believes it may make a substantive decision about the qualifications of a firm, we believe minimum standards of due process would require the Board to adopt procedures comparable to those of the National Association of Securities Dealers (NASD).[6]

However, the Board's processes differ markedly from the NASD's registration procedures. These procedures, which do entail a substantive determination about fitness of the applicant to be registered as a broker-dealer, require the NASD to make findings with respect to 14 enumerated factors. (NASD Rule 1014(a).) They require the NASD to provide a detailed explanation of the reasons for denying any application. (NASD Rule 1014(c)(2).) We believe that an assessment to this extent is not called for by the Act. Moreover, we would expect that in most cases the Board would not be in a position to make such an assessment based solely on the registration application.

b. The rule permits the Board to deny an application based on information that is not part of the application.

Proposed Rule 2105(a) states that the Board will make a determination after "reviewing the application for registration, any additional information provided by the applicant, and *any other information obtained by the Board*." (Emphasis supplied.) This provision, on its face, allows the Board to take action based on information that is not part of the "record" contained in the application, without any notice to the applicant or opportunity for the applicant to respond to or rebut such information. Again, in this regard it differs markedly from the protections provided to broker-dealer registrants by the NASD rules. (See NASD Rule 1013(b)(7).)

Proposal:

- In light of the foregoing, the Board should confirm that its determination under Rule 2105(a) will consist of a determination that initial registration of the firm and commencement of Board oversight is appropriate based on the information in the application.

3. If an application that is complete on its face is filed 45 days before the registration deadline, then an applicant firm should be free to continue its public company audit practice unless the Board has specifically disapproved the application under 2105(b)(2)(ii).

Proposed Rule 2105(b) provides that the Board will, not later than 45 days after the date of the Board's receipt of the application, either: (i) approve the application, (ii) request more information from the applicant, or (iii) disapprove the application by written notice

[6] We believe that the actions of the Board would be "state action" and therefore the Board is subject to constitutional limitations on its actions even though it is not a federal agency as such. *See Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). The Board is composed of members appointed by a federal agency, has been delegated power to implement regulatory laws by the federal government, and operates under the supervision of a federal agency. It differs in this regard from the NASD, which has been held to be a voluntary association whose actions are not compelled by the government. *Cf. Desiderio v. NASD*, 191 F.3d 198 (2d. Cir 1999).

to the applicant. Rule 2105(c), however, provides that if the Board requests more information from an applicant that "the Board will treat the new application, as supplemented by the additional requested information, as a new application requiring action *not later than 45 days after receipt of the revised application*." (Emphasis supplied.)

a. The rules as proposed would create significant difficulties for the firm's issuer clients.

We are concerned about the uncertainty created by this aspect of the proposal. To allow an additional 45 days for review, irrespective of the amount of information requested, seems burdensome to the firms and could put them in jeopardy of missing the October 24, 2003 deadline for registration. Fall reporting clients could end up not knowing whether their firm would be able to sign an opinion after the firm was well into the audit, even if the firm submitted its application during the summer.

b. The following example illustrates the issue.

For example, if a firm submits an application on July 31, the Board's response would theoretically be due on September 15. If the Board decided on September 10 for whatever reason that the applicant needed to provide additional information and the applicant did so on September 15, then the Board would have an additional 45 days to review an application, which would mean that applicant would have no assurance that the Board would decide that it was a registered firm before the October 24 deadline.

The Board has said that its web-based system will not be ready until late June or early July. If a firm registers on July 5, and receives a response from the Board on September 10, the same thing could occur. This may be exacerbated by a flood of applications at or around the same time.

Proposal:

- The Board should consider two potential solutions. First, the Board could create a materiality standard for the requirement of additional information – if the Board only asks a firm for a minimal amount, then the Board should set a shorter time limit to complete its review of the application.

- Second, unless a firm's application is facially deficient, a request by the Board for additional information should not delay registration beyond the 180-day deadline. Because the registration time frame is compressed, the Board should create a safe harbor for applicants – if an applicant has materially complied with the statute but the Board's request for additional information could cause the process to run over the October 24 deadline, the Board should provisionally register the firm so as to prevent interruption of the firm's business and it should not disqualify audit reports issued subsequent thereto if the Board later decides to disapprove an application.

4. Public Availability of Applications and Reports. (Rule 2300)

We have no objection to certain of our information being made public, including the identity of our SEC issuer clients and the fees we are paid by those clients. The various firm's applications, however, are likely to include certain types of information that do not currently belong in the public domain. Principally, we are concerned to protect information about our personnel.

a. We believe that there are other categories of information that should be accorded blanket confidential treatment. (Rule 2300(b))

We agree that social security numbers and taxpayer identification should be kept confidential. Because of the potential burdens associated with seeking confidential treatment, the Board should grant blanket exemptions where possible. This burden will be particularly high on the foreign firms, because of the widespread secrecy and privacy laws.

Proposal:

- ***The names of our personnel should not be made public.***

  First, we believe that the names of our accountants should be kept confidential. To the extent that such disclosure does not violate local laws, we have no objection to providing the names of our accountants (and for foreign firms, those accountants that participate in the audits of SEC issuers) to the Board for its own use in connection with carrying out its responsibilities.

  In publishing such names and information, however, the Board could cause risk to the identified individuals. There is a high risk of identity theft. Further, we are concerned that information about individuals may be misused.

  The Board need not disclose such information in order to carry out its responsibilities. If an investor has an issue with respect to the firm or an issuer, for example, they can lodge a complaint with the Board and the Board will have the necessary information related to the firm and personnel to investigate any such complaint.

- ***Proceedings against individuals and the firm should be kept confidential.***

  We also believe that proceedings against individuals should be granted confidential treatment. Instruction 5 to the application suggests that requests for confidential treatment concerning non-public disciplinary proceedings will normally be granted. We agree with the Board, and suggest that, in light of the burden to make such individual requests, the Board give blanket confidential treatment to this category of information.

Further, while we appreciate the desire of the Board to be appraised of pending actions against the firm, we consider that due regard should be paid to the inherent sensitivities of disclosing details of actions which have not yet been fully tested by the appropriate Courts or regulatory bodies and that information related to them (which is not otherwise in the public domain) should be confidential pending a final determination of the issues.

- ***Firm revenues should be kept confidential.***

  In a significant number of territories outside the US, firm revenues are not currently subject to public scrutiny. While we understand the motivation of the Board in seeking this information, we believe that to the extent foreign firm revenue information that is not already in the public domain is required, it should be granted blanket confidentiality. This approach will allow the Board's registration requirements to mirror local territory practice with respect to disclosure of this type of information.

5. Procedures for Seeking Confidential Treatment. (Rule 2300)

The Act provides that the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information. We believe this statutory mandate imposes an affirmative obligation on the Board to provide protection of such information. However, the Board's proposal suggests that it will exercise discretion and decide whether protection should be granted for any information submitted to the Board in connection with an application for registration. Based on our understanding of Section 102(e) of the Act, we believe the only decision the Board would need to make in connection with proprietary information is whether the firm's designation of information as proprietary is "reasonable." We recommend that the final rules reflect this important distinction.

a. The Board's proposed procedures in Rule 2300(d) do not appear to have been designed to implement the statutory mandate.

The procedures impose on the registrant the burden to demonstrate, "based on the facts and circumstances of the request," why the information should be kept confidential. Firms must provide a "detailed explanation" of their reasons for requesting confidential treatment. The Board would then decide each request "on a case-by-case basis." (*See* Release at 7.)

We believe that this procedure could be refined in several respects. First, the requirement that the applicant file a detailed explanation with every request for confidential treatment will be burdensome, time-consuming and expensive. As suggested above, more categories of information should be designated for blanket protection. In addition, the Board's proposal does not describe the standards by which it will make the determination of whether to grant confidential treatment, and the provision for "case-by-case" determination raises the possibility of inconsistent or arbitrary determinations.

Proposal:

- We recommend that the Board's procedures should be revised to limit the Board's review of confidentiality requests as provided in Section 102(e) – that is, the determination should be whether the information is protected by applicable law or whether the firm's identification of information as proprietary is "reasonable."

b. The Board should establish reasonable mechanisms to permit a firm or affected third party to obtain an independent review of the Board's decision to disclose protected information.

After a firm is notified, pursuant to Rule 2300(f), of a decision relating to the confidential treatment of information submitted to the Board, a firm or an affected third-party should be allowed to file a written request for review of decisions regarding confidentiality with an independent review body or other disinterested party. A request for review should state with specificity why the firm or third party believes that the Board's decision is inconsistent with the standards set forth in Rule 2300(c), or otherwise should be set aside. Furthermore, the information that is the subject of such request for review should be keep confidential during the review period.

A review process is important because (1) certain of the material that the accounting firms are being asked to provide will be sensitive and (2) the accounting firms are providing information about third parties (including employees, issuers and associates), and such parties should be allowed every opportunity to protect information about themselves. A review process would have the added advantage of standardizing what would be considered confidential and what would not. Furthermore, without a review process, a firm or affected third party's only possible remedy would be to rely on the court system, which would be unduly burdensome on all.

The Board should consider looking to the Commission procedures for creating such a system. Rules 406 and 24b-2 set forth the means for obtaining confidential treatment of information contained in a document filed under the Securities Act and under the Exchange Act, respectively, that would be exempt from disclosure under the Freedom of Information Act. The Board should also create an appeals process from the confidentiality determinations made pursuant to that system.[7]

Proposal:

- With these concerns in mind, we propose that the Board adopt procedures similar to those that the Commission has established for requests for confidential treatment. The Board could appoint an officer to make confidential treatment decisions in the first instance.

[7] Rule 406 and 24b-2 provide that a filer making a filing that contains information that it would like to be considered confidential omit from the material filed the portion thereof that it desires to keep undisclosed. Where the material is omitted, the filer indicates that the omitted material has been filed separately with the Commission. The filer then files the confidential information, and states why the information should be afforded confidential status. There are then procedures for review of a decision by the Commission. *See also* 15 U.S.C. § 77i; 15 U.S.C. § 78y.

- Further, the Board could set up a procedure in which an applicant can first appeal to the Board as a whole, and then follow the process as exists under the statutory procedure applicable to information submitted to the Commission. That is, the Board should establish a process for review by the Commission of its confidentiality determinations.

c. The Board should protect the confidentiality of information when it receives a subpoena.

Rule 2300(h) includes the provision that the "granting of confidential treatment will not, however, limit the ability of the Board (1) to provide the information as to which confidential treatment was granted to the Commission, or (2) to comply with any subpoena validly issued by a court or other body of competent jurisdiction."

Although we do not object to the Board having the ability to grant access to the Commission, the second exception to confidential treatment – compliance with all validly issued subpoenas – is troubling because it is inconsistent with the legislative intent of the Act and, in our view, is unnecessary for the Board to carry out its mandate of protecting the public interest. It is in the best interest of the investing public for firms to be forthcoming with information to the Board. If firms and their personnel are concerned about the prospect of having their information produced in every civil litigation, that goal will be harder to achieve and the interests of the investing public will not be served

Further, because all the confidential information in the application or report was provided by the firm itself, any party seeking discovery of information should be, and is, required to seek that information directly from the firm. The Board's rule would allow third parties, especially private litigants, to circumvent the discovery process by subpoenaing information directly from the Board.

This could be very damaging to the firm and would serve no regulatory purpose. It would also be inconsistent with the protection afforded by the Act to foreign accounting firms (which has been acknowledged by the Board) that registration will not, of itself, be regarded as submission to the general jurisdiction of the US courts. If there is a valid basis for finding jurisdiction over a foreign accounting firm, then it will be bound to participate in cases brought against it in the US courts. Other requests by litigants for access to working papers should continue to be dealt with between the US and the local foreign courts and this due process should not be circumvented by the involvement of the Board.

Section 102(e) of the Act specifically states that the Board "shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information." If the Board merely complies with subpoenas, without objecting or providing the accounting firm the opportunity to object, then the Board would not be fulfilling its responsibility as set forth in the Act, particularly if public disclosure of the information would violate the privacy of an individual or violate a foreign law. Similarly, the Act specifies confidential treatment be accorded to inspections and

investigations.[8] Clearly, Congress intended that confidential and proprietary information of the firms be kept that way. By simply bypassing the confidential treatment requirement for a validly issued subpoena, the Board would be ignoring this intent.

Proposal:

- The Board should oppose subpoenas where confidential information is requested.

- If the Board determines that it will retain this proposed rule, then the rule needs to be supplemented by reasonable procedures to give notice to firms sufficient to allow them to appeal and, if they elect to do so, object to the subpoena or obtain appropriate protective orders, before the Board turns over any information.

C. REGISTRATION APPLICATION

1. Identity of the Applicant (Part 1)

a. The Board should recognize the issues associated with maintaining a current licensing system. (Item 1.8)

The US firm maintains a CPA license tracking system for Certified Public Accountants to help ensure that personnel hold the requisite licenses. We assume that the proposed requirement is not intended to include certifications and licenses that are not required for performing work as an accountant (*e.g.*, Certified Fraud Examiner). It would be useful if the final rules clarified this.

We also note that licensing in the United States is maintained by 54 different licensing jurisdictions (comprised principally of the individual states). There may be a time lag before temporary or reciprocal licenses can be issued, particularly for members of staff who may be transferring from one state to another. The licensing process in many states is manual and time consuming, taking in some cases six to eight weeks to process applications.

In addition, a firm's compliance in this area depends heavily on the cooperation of its thousands of professional staff, and the prompt action of state licensing boards. When combined with the lag time described above, it will be difficult to certify at any point in time that there are no *de minimus* violations of licensing rules.

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[8] (Section 104(g) ("no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.") and investigations (Section 105(b)(5)(A)) (other than allowing access by government agencies, "all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents . . . . shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency," and shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552a).

Outside of the United States, the local licensing and qualification systems for accountants vary widely. The Board should recognize the disclosure by applicant firms will mirror their own local certification requirements.

Proposal:

- Accordingly, we recommend that the firms be held harmless when there is an inadvertent *de minimus* mistake or omission involving licensing matters.

2. Listing of Applicant's Public Company Audit Clients and Related Fees (Part II)

In connection with the Part II requirements related to issuer and fee disclosure, firms will face a number of hurdles, principally in transition, as will be discussed further below (*e.g.*, retrospective application of proxy disclosure categories). Other issues are not simply transitional in nature and we have suggested below certain clarifications and modifications that will make it easier for applicants, yet allow the Board to collect the information that it needs.

a. The Board should adopt the SECPS definition of issuer, if not permanently, then at least on a transition basis. (Items 2.1 – 2.4)

A clear and workable definition of "issuer" is critical to an applicant's ability to register successfully. It is equally important for the Board's purposes that the applicant firms interpret this definition in the same manner so that the firms provide information using a consistent methodology. The Board should clarify its definition for the benefit of both domestic and foreign firms.

For a number of years, public accounting firms in the United States have been required to submit information about themselves and their clients to the SEC Practice Section (SECPS) of the American Institute of Certified Public Accountants. This information includes, for example, statistics about the number of issuer clients and the percentage breakdown of total client fees by category.

The proposed definition of an "SEC issuer" for registration differs from the definition adopted by the SECPS. The SECPS definition is as follows:

1. An issuer making an initial filing, including amendments, under the Securities Act of 1933, or
2. Registrants that file periodic reports (*e.g.*, Forms N-1R, 10-K and 11-K) with the SEC under the Investment Company Act of 1940 or the Securities Exchange Act of 1934 (except brokers or dealers registered only because of section 15(a) of the 1934 Act).

Examples of entities that are not encompassed by the above definition include:

1. Banks and other lending institutions that file periodic reports with the Comptroller of the Currency, the Federal Reserve System, the FDIC, or the Federal Home Loan Bank Board, because the powers, functions, and duties of the SEC to enforce its periodic reporting provisions are vested, pursuant to section 12(i) of the 1934 Act, in those agencies.
2. Subsidiaries or investees of an entity encompassed by the definition of an SEC engagement, which subsidiaries or investees are not themselves entities encompassed by such definition, even though their financial statements may be presented separately in parent and/or investor companies' filings under the 1934 Act.
3. Companies whose financial statements appear in the annual reports and/or proxy statements of investment funds because they are sponsors or managers of such funds, provided they are not themselves registrants required to file periodic reports under the 1940 Act or Section 13 or 15(d) of the 1934 Act.

Note: Series of unit investment trusts and series of limited partnerships sponsored by the same entity shall be treated as one SEC client.

Under a recent revision to the SECPS definition of SEC issuer, a series of mutual funds, limited partnerships and trusts sponsored by the same legal entity are treated as one SEC issuer. It is unclear at this point how the Board has proposed that these series of mutual funds and trusts should be treated with respect to registration. The language in the proposed rules seems to suggest that each individual trust or fund should be treated as a separate issuer. This proposal will make it be extremely difficult for the firms to compile the required information. (*See* Form 1, Item 2.1, Note.)

For purposes of registration, the definition of an issuer should include, as a single issuer, all investment companies sponsored by the same entity as discussed above. The Board has already recognized that investment companies have different characteristics than operating companies.[9]

Further, the Commission's rules on partner rotation recognize all registered funds that are part of the same investment company complex to be a single client. 17 C.F.R. § 210.2-01(c)(6)(iii). For many groups of investment companies with the same sponsor, there is in fact a common board and audit committee governing the entire group. The Board should similarly recognize the special circumstances surrounding investment companies and tailor the disclosure requirements of investment companies accordingly.

[9] Indeed, in the Board's "Proposal for Establishment of Accounting Support Fee," footnote 7 to the proposing release quotes the legislative history of the Act, specifically Senator Enzi as stating, "Audits of investment companies are substantially less complex than audits of corporate entities."

Proposal:

- We suggest that the Board consider adopting the SECPS definition of an SEC issuer for investment companies and other issuers to create consistent public company reporting and lessen the operational burden of compiling additional information.[10]

b. The Board should aggregate the fee information required for investment companies.

A related issue to the definition of issuer for investment companies is the fee aggregation requirement. The proposed rule requires that for investment company issuers, the fees disclosed in (e)-(g) should include all fees for services rendered to the issuer, to the issuer's investment adviser (not including any sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser), and to any entity controlling, controlled by, or under common control with, the adviser that provides ongoing services to the issuer.

Requiring disaggregated information for purposes of the application will substantially increase the resources required to complete the process and will produce less useful information for the Board. As the proposed registration rules are written, the Board will receive voluminous information about individual funds that we believe has very limited value. This is largely due to the legal structure of investment companies and the manner in which they currently file information with the Commission.

For purposes of registration with the SEC, numerous individual funds (in some cases, over one hundred funds) are commonly combined into a single legal entity. The legal entity is the registrant, not the underlying mutual fund(s). The specific fact patterns among various mutual fund companies may differ. However, as discussed above, even when a single sponsor manages funds contained in several different legal entities, these entities are often managed and governed in a uniform manner. In some instances, the same legal entity will have more than one audit firm serving funds within that legal entity.

We note that the Board's proposed approach to registration would contain a unique requirement for investment companies: inclusion of fees billed to an advisor or affiliate of the fund if that advisor or affiliate also provides services to the fund. If fees are provided at the trust or individual fund level, we believe it will be more difficult and time consuming for the Board to ascertain the nature and size of the relationship between a public accounting firm and a mutual fund complex because the fees billed to an advisor or affiliate that provides services to an issuer will appear in multiple locations and effectively be "double counted."

[10] We understand that there is currently no list of issuers compiled by the Commission. To the extent that the Commission or the Board develops such a list, we would appreciate the opportunity to confirm that our disclosure related to issuers is complete.

Proposal:

- We recommend that the fee information for mutual funds be gathered at the sponsor level. This will provide the Board with information about the relative size of a public accounting firm's relationship with a fund complex, and the relationship of audit fees to non-audit fees within the complex. We believe that this information will provide the Board with more meaningful information than if the fees were disclosed at the trust or individual fund level.

- We also recommend that audit fees be disclosed for the fiscal year end of the fund included within the calendar year. Further, we suggest that non-audit fees for the fund and the adviser also be measured on a calendar year basis, so there would be a uniform data collection process for this information. This is analogous to the approach taken by investment companies in disclosing aggregate trustee fees paid by a group of related funds for purposes of 1933 Act registration statements.

- For the first year, we also propose that the Board accept information at the sponsor level aggregated in a manner consistent with the calendar basis previously used to report to audit committees. This would avoid short term parsing and reshuffling of fee information that typically does not vary very much from year to year.

- Because it is important to avoid the possibility of different interpretations and presentations of the information in the registration form by various accounting firms, we suggest that the legal entity be considered the "issuer" and that non-audit fees rendered to the adviser and certain affiliates of the adviser be included only once. The fee information relating to the legal entity with the largest overall fees would be a logical place to include those fees.

c. In addition to investment companies, fee information cast into the new proxy categories is not readily available for most SEC issuers. (Items 2.1-2.2)

We are not opposed to collecting and disclosing fee information in the categories created by the Commission for proxy and other filings. However, in the short-term, the disclosure of fees for prior and current periods using the new categories of information is going to be difficult for the firms and there are better ways for the Board to obtain the necessary information during this transitional period. We believe that most firms' systems currently cannot capture information in these newly adopted categories and that to require collection in this manner at this point is going to be a laborious, and likely manual, process for most firms. The Board's proposed registration requirement, as it is currently written, would have the effect of accelerating the transition by six months with little commensurate benefit.

In cases where an issuer has filed a proxy statement with the Commission for implicated prior periods, firms should be allowed to report such data in previously existing categories. To require firms to recast information into new categories would be difficult and would not yield significant insight to the Board that it would not otherwise have from

the prior proxy categories. In this transitional year, allowing reliance on such previous reporting, where possible, would provide better quality data.

In addition to the issuers that do file proxies, there are quite a few issuers that have not historically been required to disclose fees paid to auditors, either in proxies or in other types of disclosure, such as most investment companies (as described above), foreign private issuers and others. Therefore, fee information, especially in the new SEC proxy categories, has not been collected for these clients.

Proposal:

- We recommend that where possible, as a transition matter, firms should be allowed to use the fee data previously published by proxy filers.
- In cases where a client has not historically been required to collect or report fee information related to its auditor, we propose that in this transitional year that there should not be any required disclosure of fee information. Our suggestion would be to begin disclosing this fee information when these issuer clients are required to adopt the new proxy and other disclosure rules.

d. Further, going forward the Board should allow firms to report data provided under the new proxy and related disclosure rules recently adopted by the Commission.

In addition to issuers that file proxies, for the first time, mutual funds, foreign private issuers and other issuers will be required to report fee data in the same categories. Going forward, it will be far easier and more efficient for the firms to report data that has already been reported by the clients of the firm. This would benefit investors as well because if firms had to report such data separately, there would be a risk of confusion due to factors such as exchange rate polices risk inconsistent data.

Proposal:

- Going forward, firms should be allowed to disclose fee information that has been previously presented in issuer clients' proxy or similar disclosure.

e. The Board should make clear that going forward, it has adopted the SEC proxy and required disclosure categories. (Items 2.1 – 2.2)

Appendix 3 of the proposal suggests that it was the Board's intention to adopt fee categories that are consistent with the new SEC proxy and other fee disclosure rules (adopted in connection with the SEC's new auditor independence rules released in January 2003). Currently, the proposed rules contain some inconsistencies with the fee definitions contained in the new proxy disclosure rules.

The Board should make clear in the rule that the fee category definitions that are proposed for adoption are intended to be consistent with those called for by the 2003 SEC independence rules. For example, the Board refers to the SEC's 2000 independence rules for definition of "audit services." (Release at A3-iv-v.) That definition, however,

excludes certain types of services that are now included in the category of "audit fees" for proxy disclosure purposes under the new Commission rule. Further, the proposal does not make clear for what period the fees associated with audit services should be disclosed. The current language implies that the disclosure of audit fees relate to the actual fiscal year of the issuer rather than the fees related to the audit report of the fiscal year financial statements.

The Board should recognize that issuers report fees on a global basis. That is, an issuer's report in its proxy statement reflects all fees paid to its principal accounting firm and that firm's associated entities. The language in the proposed rules is not clear as to definition of principal accountant.

Proposal:

- We propose that the Board adopt the actual language contained in the new 2003 SEC independence rules. This will eliminate confusion and make it easier for firms to compile and report information in a manner consistent with the requirements that apply to their clients.
- Further, the Board should clarify consistent with these proxy rules that client fee information may be reported on a global basis.

f. Issuers for Which Applicant Expects to Prepare Audit Reports During the Current Calendar Year. (Item 2.3)

This category includes issuers for whom the applicant has been engaged to prepare or issue an audit report. There is no systematic way to identify these issuer audit clients. The list of clients will need to be compiled manually through questionnaires to the individual engagement teams. It is not possible to continuously amend this information due to the fact that it will be collected manually through questionnaires to our partner group and could be changing at any point in time.

Proposal:

- We recommend that the Board establish a 30-60 day cut-off date prior to registration to alleviate last minute amendments to the registration form and allow adequate time for firms to manually compile this list.

g. Issuers for Which Applicant Played, or Expects to Play, a Substantial Role in Audit. (Item 2.4)

It is the auditor of the issuer who is usually best placed to conclude which firms do and do not play a substantial role in the issuer's audit. Applicants may be unaware that they have played or will play a "substantial role" in an issuer's audit.[11] This challenge is further exacerbated where the applicant may not be affiliated with the primary auditor and their work is not referenced in an SEC filing. It is clear that there are many possible

[11] We assume that the definition of "material services" set out in Rule 1001(n) is meant to include only audit hours performed or audit fees received in connection with an issuer client. It would not make sense to base this test on all fees received or total engagement hours performed for a client.

instances where the applicant would not know whether it had already, or might in the current year, play a "substantial role" in the audit of an SEC issuer.

Further, there are too many variables outside of a firm's control in order to determine whether a firm would play a substantial role in any future audit engagement for another signing territory. This regulatory exercise should be based on factual information and not intentions. For example, there would be many occasions when a foreign territory will not receive the global audit instructions or completed audit plan from the signing territory until shortly before the performance of the procedures. This would not allow that firm adequate time to identify and disclose the information related to this audit client for purposes of registration.

For these reasons, combined with the short timeframe that the Board and firms will have to register this year, we recommended earlier that the Board limit the categories of firms that will be required to register in the first year to firms that issue opinions on an issuer's financial statements. Thereafter, the Board can extend the registration requirement to other firms if it deems necessary.

As already noted in this response, foreign firms will be faced with the problem of ensuring that compliance with their information requirements will not conflict with local confidentiality laws. The practical problem is likely to be more pronounced in circumstances where the relationship is less direct (e.g. where consent may need to be obtained from a client for whom the accounting firm has played, or expects to play, a substantial role in the audit rather than from a direct client who is an SEC issuer).

Proposal:

- We recommend that the Board not require firms to provide a list of issuer clients for which they expect to play a substantial role due to the uncertainties in identifying these clients.
- If the Board decides to go ahead with this requirement, the Board should consider establishing a 30-60 day cut-off date in order to allow adequate time to manually identify these issuers and collect the associated information required for disclosure.
- Going forward, we recommend that if the Board requires firms that play a substantial role to register, the standard by which the significance of the role is determined should be based on whether the firm audited 20% or more of the issuer's consolidated revenues or assets.

3. Applicant Financial Information (Part III)

a. The Board should phase in the revenue requirements over a transition period because firms do not currently track this information.

We assume that the Board intended to adopt the new SEC proxy disclosure categories, as discussed above. In order to adopt these new categories, applicant firms will need to conduct a very detailed and labor-intensive service mapping exercise. Each service will

need to be categorized into one of the new fee buckets as described above. In addition, at PricewaterhouseCoopers each territory has its own unique set of codes to define its service offerings so this effort will be required for each of the territory firms as well.

With respect to the US firm, the SECPS annual report does require a very similar disclosure of firm client service revenue on a percentage basis. However, the fee categories required for the SECPS report are audit and assurance services, tax and other services. The compilation of this revenue information requires a substantial mapping effort and would need to be duplicated due to the category differences between the requirements for registration and the SECPS disclosure.

The principal difference between the required categories is the combination of audit and assurance services required by the SECPS. If the fee information is publicly available using different category definitions, there is a risk of confusion due to the potential for inconsistencies.

Proposal:

- We suggest, in this initial registration year, if the applicant firm currently reports such information to its local regulator, the firm should be allowed to report fee information to the Board in the same manner. In cases where there is not currently a reporting requirement for the local firms, we would suggest that these firms report total revenues (*e.g.*, a US firm could disclose revenue information using the fee category definitions consistent with the SECPS disclosure)

b. In the current year the Board should consider accepting domestic firm applicant revenue information for FY02, where available.

The proposed rules state that the applicant revenue information is required for the most recently completed fiscal year. This proposal could create substantial problems based on the timing of registration. For example, our fiscal years end on June 30. On average it would take approximately 90 days to compile the firm's revenue information required for disclosure. This is consistent with the 90-day filing requirement related to 10-K filings for SEC issuer clients.

Proposal:

- We suggest that for this first year, the Board permit domestic firms to disclose revenue information related to FY02 for purposes of meeting the revenue disclosure requirements, which will be more efficient for firms given the time they will have to prepare and submit an accurate registration application.

c. With respect to the foreign firms, the relevance of providing revenue information related to clients that are not SEC issuers is not clear.

We understand the Board's requirement to obtain information relating to the fees charged to SEC issuer clients. However, we are concerned about the Board's requirement for firms to disclose fee and revenue information for services provided to non SEC issuer

clients. This information will be difficult to compile for the foreign firms, particularly using the new proxy categories. If the purpose of registration is to establish a basis for inspection and potential investigation, the overall client service revenue of the foreign firms related to non-SEC issuing clients does not appear to be relevant.

Proposal:

- We suggest that the Board restrict its requests to fee and revenue disclosure to information that is in the public domain or relates specifically to services provided to SEC issuer clients.

4. Listing of Certain Proceedings Involving the Applicant's Audit Practice (Part V)

Part V of the application goes beyond what the Act requires in a number of ways. For example, the Board is seeking to obtain information from an applicant about *past* proceedings, related to *former* employees, and for matters that relate to *non-issuers.* The collection of such information will not only be burdensome, but likely will not yield much information relevant to the registration process.

Therefore, as expressed through the analysis below, we have suggested alternative approaches to address these registration requirements. We would recommend that the Board only require disclosure of proceedings pending against the firms and their current employees that relate to audits for SEC issuers, and if the Board insists on a look-back period, that such period be limited in time to five years (other than for Section 5.3, which should remain at 12 months). This period is consistent with the requirements for disclosure of past proceedings related to officers and directors contained in Item 401 of Regulation S-K. (17 C.F.R. § 229.401(f))

a. Requiring only information relating to recent and pending proceedings of a firm for matters related to SEC issuers would be sufficient for the Board to carry out its duties.

The Board can accomplish its objectives without creating such an extended look-back period for past proceedings against the firm and its personnel. Inclusion of current or recent proceedings gives the Board a baseline from which to start in this inaugural year of registration. The Board will then be on notice of pending proceedings, and if the Board so desires, can conduct follow-up activity with respect to a pending proceeding or action. Such an exercise would create an almost impossible burden by requiring the collection and production of a great deal of stale information.

b. The Board can conduct its responsibilities without information relating to proceedings against (i) former associated persons or (ii) information related to past proceedings for current firm personnel.

Collecting data related to former associated persons would be a tremendous burden and would not be possible in many cases. There are thousands of former associated persons

who would be likely swept in the Board's proposed rule. Because such personnel are no longer employed at an applicant firm, the firm would have no way to compel information from or about that person.

Within the United States, for example, firms will be constricted from carrying out certain searches to obtain the information. The individual states have laws relating to the depth and breadth of background checks that an employer or potential employer can conduct. Some are at variance with the proposed rules.[12]

Similarly, it is not relevant to the Board if the individual concerned does not participate in or contribute to the preparation of an audit report of an issuer. The provision of such sensitive information (which may not previously have been on the public record especially where the case is pending) could be seriously prejudicial to both the accounting firm and the individual concerned.

Particularly for firms outside of the United States this would be a burdensome requirement. Elsewhere in the application the Board has narrowed the definition for foreign firms to include only personnel who work on SEC issuer clients. We believe that this narrowing should be applied here as well. Information related to personnel should be limited to those who work on issuer clients.

Finally, the requirement for collection and disclosure of information related to past proceedings against former and current associated persons seems excessive. Because the firms are required to employ adequate training, supervision and quality control mechanisms with respect to all individuals, and because appropriate inquiry can be made in any instance where there is a question about an individual, the Board should balance the demand against the burden. Assembly of the data prospectively over the next five-year period would accomplish the same objective in a reasonable fashion.

c. Compliance with certain of the requirements of Part V will present difficulties for certain foreign firms.

As already noted, much of the information required in Part V would, in certain jurisdictions, be regarded as "sensitive personal data" the provision of which to the Board could violate both local data privacy laws and the employment law duties owed by audit firms to their employees.

To the extent the civil proceedings are not public (which will almost always be the case in arbitration proceedings), the issue of client consent also arises. Foreign firms should not be required to attempt to procure consent to disclose such information from their non-SEC issuer clients.

[12]The California Credit Reporting Act caps the relevant time period for background checks for criminal offenses, as well as for other information, to seven years. Cal. Civil Code §§ 1785.1-1785.36. Similarly, Massachusetts law prohibits an employer from inquiring into certain information that goes back more than five years. Mass. Gen. Laws ch. 151B, § 4.9(ii) –(iii).

d. The Item 5.5 requirement for additional information will prove difficult.

As stated above, the firm's ability to provide this information going back ten years for each of its current "associated persons" will be inconsistent with the laws of a number of states.

Further, the requirement that foreign firms must identify analogous criminal provisions and then report violations thereof creates a great deal of uncertainty. Applicants may not be able to identify properly and classify the particular proceedings that are intended to be covered.

Proposal:

- We propose that disclosure should relate to any pending criminal, civil, administrative, or governmental proceedings against the firm itself or its personnel in connection with audit reports for issuer clients. In addition, we propose eliminating the disclosure requirement for past proceedings against firm personnel and associated persons, as well as proceedings related to non-issuer clients.

- We believe that disclosures relating to proceedings against individuals and non-public pending proceedings against a firm should be kept confidential.

- The Board should consider either eliminating the requirement that foreign firms identify "substantially equivalent" violations under Item 5.5 or come up with a bright-line test so that foreign firms are not at risk of non-compliance.

- To the extent that the Board decides to retain look-back periods for any category of information we suggest that five years be the appropriate time period.

- If the Board decides to retain the request for past proceedings, it should recognize that pending or past proceedings relating to a firm or its past employees cannot be used as a basis to determine the fitness of the firm going forward.

5. Listing of Filings Disclosing Accounting Disagreements with Public Company Audit Clients (Part VI)

The issue with respect to the disclosure of accounting disagreements relates primarily to the foreign firms. The language of the proposed rules requires information about specific accounting disagreements filed with the SEC. There is no formal mechanism for reporting these disagreements in most territories. Further, there is no clear and consistent definition across territories of what constitutes a "disagreement."

Finally, Section 6.3 of the proposal requires that the firms attach copies of the documentation relating to actual accounting disagreement. As stated above, this filing is

going to be voluminous already, and these documents are publicly available from other sources.

Proposal:

- We propose to either include the link to the EDGAR filing or a CIK number to disagreements reported in 8-Ks. While firms can attach this information to the application, it is publicly available and including the filing seems to add unnecessary volume.

6. Roster of Associated Accountants (Part VII)

a. Certain of the information requested is sensitive individual data.

We are concerned about providing sensitive information about our personnel to third parties due to the high incidence of identity theft and other potential for misuse. Therefore we propose that the Board eliminate the requirement that applicants include the social security numbers of its personnel in its application.[13]

Proposal:

- We suggest that the Board require only disclosure of the names of the personnel of the applicant entity.

b. Foreign firms encounter additional issues with the definition of accountant.

To mirror the legal and professional responsibilities in many territories outside of the US, we believe that only the team of partners should be disclosed as an "accountant" for this purpose. In many cases, only a partner legally admitted to the partnership has the authority by virtue of the partnership agreement and by local law to commit the firm to any position or express any opinion in the name of that partnership.

The Board should require that only the names of the partners who work on SEC issuer clients to be listed on the firm's application. The majority of data related to personnel, including names and social security numbers, are clearly "personal data" which foreign firms may not, by virtue of the data privacy and employment laws existing in their territory, be at liberty to supply. In addition, the requirement to provide the Board with a non-US identifier is both excessive and unnecessary.

[13] A recent review of 15 federal agencies by the Inspector General of the Social Security Administration revealed that those agencies are unequipped, for the most part, to keep social security numbers from getting into wrong hands. The Inspector General's February 2003 report concluded that, "some federal entities are at-risk for improper access, disclosure and use of SSNs by external entities, despite safeguards to prevent such activity." *Report to the President's Council on Integrity and Efficiency: Federal Agencies' Controls over the Access, Disclosure and use of Social Security Numbers by External Entities*, Social Security Administration, Office of the Inspector General, February 2003 at 7.

Proposal:

- For foreign firms, only the names of engagement partners who work on SEC issuer clients should be disclosed.

7. Consents of Applicant (Part VIII)

The firms are likely to be willing to provide consent on their own behalf and obtain the consent of their partners and staff, except to the extent that signing or obtaining such consents violates local law. However, we believe that firms cannot be required to maintain consents from staff in other territories, particularly in light of the problems with local laws in many jurisdictions, as discussed above with respect to the definition of associated persons.

a. The requirement of a signed consent violates the laws of a number of territories.

Obtaining consent in the employment context may be difficult to establish. In a number of territories, as further described in the Linklaters Submission, it has been questioned whether consent given in an employment context constitutes "freely given consent" as employees do not have the option to refuse their consent without possible adverse consequences. Therefore, in certain territories, obtaining consent to cooperation with the Board will prove problematic.

b. It is important to preserve applicable privileges and rights.

Any such consent, on behalf of a firm or on behalf of an individual cannot and does not constitute a waiver of attorney-client privilege, the right against self-incrimination or any other privilege or right that exists under the law of the United States or of the home territory of the applicant. The Board further needs to make clear in its rulemaking that exercise of any such privilege during an investigation does not constitute an act of non-cooperation. Furthermore, if a current or former associated person of a firm refuses to waive their constitutional rights to privilege or to not incriminate themselves, the relevant firm should not be implicated, nor should such firm be required to force such individual to waive their rights.

Proposal:

- We recommend that the Board should not require firms to obtain consents to the extent that obtaining such consents would be unlawful. Further, if, despite a firm's best efforts, such firm is unable to enforce a consent, and if a former or current associated person refuses to comply with their consent, the firm should not be held liable.

APPENDIX

Following are responses to the Specific Questions posed by the Board in connection with foreign public accounting firms:

1. **Is it feasible for foreign public accounting firms to register within 180 days of the date of the Commission's determination that the Board is capable of operating? Should foreign public accounting firms be afforded some longer period (*e.g.*, an additional 90 days) within which to register?**

Because of the many problems with local laws, the foreign firms should be allowed additional time to register. Most firms will need additional time to assess the impact of the registration requirements on their local legal obligations, and make determinations as to the feasibility of registration. Dialogue will also be necessary between the foreign firms, their regulators and the Board and this process will inevitably prove time consuming.

Beyond that, once firms determine that they can complete all or part of the registration application, the firms may face additional hurdles before being able to provide information to the Board. For example, in certain cases, client consent and employee consent may be required before the production of certain information. That process will also add time to the registration process.

This issue is compounded by the Act's wide range of other new requirements and changes, and concurrent local regulatory initiatives that require attention. These other requirements also require a significant amount of management time and resources. Based on the foregoing, a longer registration period would be needed for non-US applicants should the Board proceed with the current proposals.

2. **Are there any portions of Form 1 that are inapplicable, or that should be modified, in the case of non-U.S. applicants?**

If an applicant is associated with a US accounting firm that has registered, or plans to register, the applicant should be allowed in Item #1.6 to refer to the US firm's listing of associated entities, to avoid duplication.

In general, the same transitional points and benchmarks that are discussed earlier should apply. It is, in addition, likely that the requirements of Form 1 will need to be tailored for applicants in specific territories depending on their ability or otherwise as a matter of local law to comply.

3. In addition to the information required by Form 1, is there any additional information that should be sought from non-U.S. applicants?

We are not aware of any additional information that the Board should seek from foreign firms at this time. The Board always has the ability to modify these requirements at a later date.

4. Do any of the Boards registration requirements conflict with the law of any jurisdiction in which foreign public accounting firms that will be required to register are located?

Please see the Linklaters Submission for the analysis.

5. Should registered foreign public accounting firms be subject to Board inspection? Could the Board, in some cases, rely on home-country regulation in lieu of inspection of foreign public accounting firms? If so, under what circumstances could this occur?

Direct oversight of the foreign applicant should continue to be exercised by its competent national regulatory authority rather than by the Board. The Board needs to be mindful of the different but equivalent ways in which accounting firms are regulated around the world and engage in dialogue with local regulators with the aim, where appropriate, of relying on home country regulation in lieu of Board inspections.

6. Aside from Board inspection, are there other requirements of the Act from which foreign public accounting firms should be exempted? If so, under what circumstances?

As stated above, the comprehensive oversight of a foreign public accounting firm should be exercised by a competent national regulatory authority. The Board should enter into a dialogue with those regulatory authorities responsible for foreign applicants to develop a clear understanding of the different regulatory cultures that exist around the world. As this could cover in excess of 100 countries, the Board may like to embark on this initiative once the registration process for the US firms has been completed and the domestic US oversight mechanism has been given time to mature. Avenues that could be explored include (where appropriate) a system of reciprocity or recognition.

Also as stated above, foreign public accounting firms should be exempt from requirements that contravene local law or that will not be in the applicant firm's own discretion or control (*e.g.*, obtaining consents from associated persons over whom the firm has no authority).