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COMMENT LETTER ON BEHALF OF DELOITTE & TOUCHE LLP, THE NON-U.S. MEMBER FIRMS OF DELOITTE TOUCHE TOHMATSU, AND DELOITTE TOUCHE TOHMATSU ON THE PCAOB'S PROPOSED REGISTRATION SYSTEM FOR PUBLIC ACCOUNTING FIRMS

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March 31, 2003

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

Re: PCAOB Rulemaking Docket Matter No. 001
Proposal of Registration System for Public Accounting Firms

This letter is submitted on behalf of Deloitte & Touche LLP, the non-U.S. member firms of Deloitte Touche Tohmatsu, and Deloitte Touche Tohmatsu. We all are pleased to respond to the request for comments from the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") on its *Proposal of Registration System for Public Accounting Firms*, PCAOB Rulemaking Docket Matter No. 001 (March 7, 2003).

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INTRODUCTION

We support the goals of the Sarbanes-Oxley Act of 2002 (the "Act") in restoring investor confidence as well as the Board's efforts to faithfully implement the Act. The Act requires that all public accounting firms that will prepare or issue an audit report for an "issuer" register with the Board.[1] The act of registering with the PCAOB is thus critically important to the Board, the public markets, and the accounting profession, and we support the Board in creating the most rational, efficient, and effective registration system possible. We believe that it is vital that the Board be successful in developing and executing its programs.

In this comment letter, we have sought to identify those aspects of the Board's proposal that we believe should be clarified or modified to enable the Board to carry out its duties and responsibilities in an efficient and effective manner and to ensure that applicants for registration better understand and are able to comply with their reporting responsibilities. It is very important that the nature and extent of our comments not be misconstrued by the Board. Completing the anticipated application for registration with the Board will be – perhaps unavoidably – an overwhelmingly cumbersome task, and we urge the Board to consider our recommendations included herein and identify areas where it can refine the scope of the application process – thereby reducing the burden on both public accounting firms and the Board – without hindering the Board's ability to perform its core responsibilities.

There are two important points that we would like to highlight at the outset in order to keep our specific comments in perspective. First, to the extent that we recommend that, for

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[1] *See* Act, § 102(a); S. Rep. No. 107-205, at 7 (2002) ("Conditioning eligibility to audit public companies on registration with the Board is the linchpin of the Board's authority."); *see also* Act, § 2(a)(7) (defining "issuer").

registration purposes, less information be required from applicants than required by the proposal, we are not suggesting that the Board or its staff would not have access to further information – to the extent permitted by law – from registered public accounting firms during the inspection or disciplinary process. Our comments relate solely to the registration process. Second, in this letter we recommend that, with respect to non-U.S. firms, registration be preceded by a dialogue and cooperation among regulators in order to resolve or reconcile conflicts that exist in law and to ensure that any conflicting or overlapping objectives among regulators be minimized. Our objective in making these recommendations is to assist the Board in following a logical path to the most effective result.

Our comments generally follow the order in which the Board's March 7, 2003 Release No. 2003-1 presents the registration system proposal. We first set forth general comments that address some of the larger issues that arise in many aspects of the Board's proposal. We then provide comments on the specific proposed rules, including the proposed definitions and the proposed method for treating material confidentially. Finally, we offer our comments with respect to each part of the proposed application form ("proposed Form 1").

GENERAL COMMENTS

We have identified a number of significant issues that are pervasive throughout the Board's proposal and warrant consideration by the Board.

I. COMPLYING WITH THE PROPOSED REGISTRATION REQUIREMENTS WILL BE CHALLENGING FOR FIRMS AND WILL RESULT IN VOLUMES OF INFORMATION THAT MAY NOT BE USEFUL TO THE BOARD

Complying with the proposed reporting requirements will be challenging. Collecting the information necessary to complete the proposed registration application will require substantial time, resources, and effort for those applicants with a significant number of issuers or associated personnel. We understand the need to devote adequate resources to the registration process, but

because many of the current proposed definitions are very broad, the subject matter that must be reported under the proposal would be voluminous, and ultimately not helpful to the Board. The following examples illustrate the scope of the problem.

First, we note that the U.S. member firm of Deloitte Touche Tohmatsu has approximately 23,000 professionals who could conceivably be deemed subject to one or more aspects of the proposed rule. There are an additional 80,000 non-U.S. professionals employed by non-U.S. member firms of Deloitte Touche Tohmatsu, and each of those non-U.S. associated firms anticipates registering individually so long as it meets the criteria for registration identified in Proposed Rule 2100.[2] We believe it is obvious that obtaining and reporting information concerning tens of thousands of individuals would be an overwhelmingly burdensome task. Moreover, we question both the relevance of much of this information to the Board's task, as well as the use that the Board will be able to make of much of the voluminous data that it currently proposes applicants to provide. In this regard, we note that the turnover among non-partner personnel in the accounting profession would make much of the information proposed to be reported almost immediately obsolete.

Second, under the Board's proposal, applicants would appear to be required to report information about not only their own personnel, but also information about certain other applicants' personnel as well. Thus, for example, the proposal could be interpreted as requiring the Deloitte Touche Tohmatsu U.S. member firm to list on its roster certain accountants who work for another Deloitte Touche Tohmatsu member firm – even though the Deloitte Touche Tohmatsu member firm located in that country would be submitting a separate application with

[2] As used herein, the term "associated firms" includes individual firms that are members of international organizations or members of international associations of firms.

the Board and listing these same individuals on its roster. Similar multiple reporting obligations would also arise in connection with the proposed consent requirements in Part VIII of the application form and the proposed reporting of past and pending proceedings involving certain individuals. The multiplicity that would result from imposing on more than one applicant identical reporting obligations regarding the same individuals would be needlessly burdensome for all involved – the applicants, their partners and employees, and the Board.

Third, much of the information that the Board's proposal would require applicants to provide is already available in the public domain and could be easily obtained by the Board without imposing a double-reporting obligation. For example, lists of issuers (not including foreign private issuers) for which audit reports were issued, information about fees related to such issuers on an individual issuer basis, and reports of changes in auditors, are all available through the EDGAR system maintained by the United States Securities and Exchange Commission (the "Commission" or the "SEC").

Given the broad scope of much of the current proposal, including the proposed definitions, it will likely take larger firms months and substantial human and monetary resources to collect and process the necessary information about their relevant personnel, certain independent contractors and other entities, and their clients' fees. Once collected, it will then take a significant amount of time to "upload" the collected information into the Board's web-based application form. Other unpredictable data integration and functionality problems with the web-based system could seriously hamper the registration process. In short, the registration process will be an arduous one, likely fraught with unforeseen problems.

II. THE BOARD SHOULD CONSIDER RELATED COSTS AND BENEFITS CAREFULLY BEFORE IMPOSING REPORTING REQUIREMENTS THAT GO BEYOND THE ACT'S REQUIREMENTS

Congress created the PCAOB to provide a new layer of oversight with respect to the performance of audits of issuers and set forth various reporting requirements in furtherance of that objective.[3] In several areas, the Board has proposed expanding upon the relatively extensive and specific requirements set forth in the Act by requiring applicants to report additional information. Parts of the Board's proposed registration requirements, for example, request information from applicants regarding information about such details as long-concluded legal proceedings against associated persons such as non-accountant staff members, revenues received from non-public clients, and information about accountants who do not work on audits for issuers. Those items are not required by the Act and are not clearly relevant to the Board's overall responsibilities with respect to audits of issuers.[4]

We understand that the Act gives the Board certain authority to require firms to provide more information than that specifically required by Congress when "necessary or appropriate in the public interest or for the protection of investors."[5] We would urge the Board to be cautious in exercising that authority, however, and to consider the costs and benefits carefully before deciding that more onerous reporting requirements are necessary for the application. We have

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[3] *See* Act, §§ 101(a), 102(b)(2).

[4] *See* Act, § 101(a) (establishing the Board "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors").

[5] Act, § 102(b)(2)(H).

noted in the specific comments below some of the places where we think the proposal should follow more closely Congress's specifications, including the reporting requirements with respect to legal proceedings. In addition, many of the problems posed by over-broad definitions occur in areas where the Board proposes to go beyond the Act. These aspects of the proposal would be particularly burdensome for larger firms – burdens that in our view would not be outweighed by any substantial benefits to the Board's ability to fulfill its duties.

III. THE PROPOSED REGISTRATION REQUIREMENTS RAISE VARIOUS PRIVACY ISSUES

Some of the information proposed to be reported to the Board ordinarily would remain confidential. For example, the proposal would require applicants to provide the social security numbers (or non-U.S. equivalents) of their accountants, as well as information about legal proceedings involving certain personnel. Applicants would also be required to disclose information about their clients and the fees billed for services provided to those clients.[6] Providing these types of information to the Board may implicate U.S. or non-U.S. privacy and confidentiality laws, as well as accountants' professional obligations (as discussed in more detail in section IV and in Appendix A). As a result of these legal and professional constraints, firms would be placed in the unfortunate position of having to choose between complying with the Board's requirements and potentially violating applicable legal and professional standards, or filing incomplete applications with the Board. The Board should revise its reporting requirements to avoid presenting firms with such an unworkable dilemma.

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[6] The proposed fee disclosures do not align with the Commission's fee disclosure rules and thus some of the information that would be reported to the Board under the proposal would not have otherwise been made public by the issuer in a filing with the Commission.

IV. THE IMPLICATIONS OF SEVERAL ASPECTS OF THE PROPOSAL COULD BE PARTICULARLY PROBLEMATIC UNDER THE LAWS OF MANY NON-U.S. JURISDICTIONS

A. Non-U.S. Applicants Will Be Forced To Confront Potential Conflicts With Various Legal And Professional Obligations

The Board's proposal requires certain non-U.S. public accounting firms to register with the Board.[7] As the Board's proposing release makes clear, the Board is acutely aware that issues concerning potential conflicts with non-U.S. laws may arise with respect to non-U.S. applicants.[8] The Board has rightly identified an area that is filled with difficulties for non-U.S. applicants. Several of the currently proposed reporting requirements appear to be at odds with non-U.S. laws and professional standards that govern the treatment of certain client and employee information.

The potential conflicts are numerous.[9] For example, we believe that much of the information proposed to be required by the Board likely would be considered "personal data" under the European Union Directive dealing with data protection, Directive 95/46/EC. Personal data includes many of the personal details requested in the proposed rule for accountants and other persons associated with a firm. Information relating to criminal, civil, or administrative

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[7] We have also attached hereto as Appendix B our responses to some of the specific questions regarding non-U.S. applicant issues that are posed by the Board in its release.

[8] *See*, *e.g.*, PCAOB Release No. 2003-1, at 13 (inviting comments on the question of whether "the Board's registration requirements conflict with the law of any jurisdiction in which foreign public accounting firms that will be required to register are located"); *see also id.* at 1 ("The Board recognizes that the registration of non-U.S. firms will raise special issues."); *id.* at 3 ("The Board recognizes that the registration of foreign public accounting firms may raise issues that are not present in the case of U.S. firms.").

[9] To highlight in more detail the issues raised by the potential conflicts with non-U.S. laws, we have attached as Appendix A a chart that illustrates some of these potential conflicts. We also have considered the additional analysis conducted by the Linklaters law firm and we understand that analysis is being separately supplied to the Board for its consideration. We would be pleased to provide the Board with a copy of this analysis if requested.

actions or disciplinary proceedings, as required to be provided under Part V of the proposed Form 1, is likely to be considered "sensitive personal data" subject to greater restrictions on dissemination under the Directive. Similarly, England, France, Germany, Israel, and Switzerland each impose strict privacy and data protection laws that restrict a firm's ability to disclose certain information about itself, its employees, or its associated firms' employees, and in some cases even obtaining the employee's consent would not shield the firm from liability for making the disclosure.[10] Some of the Board's proposed reporting requirements would appear to be in direct conflict with these laws.

Potential conflicts with the laws and professional standards governing confidentiality of client information also abound. For example, it appears that several countries impose strict confidentiality requirements on accountants not to reveal information about their work on behalf of clients, including fee information that has not been made public.[11] In several countries, a violation of these confidentiality provisions also constitutes a criminal offense.[12] In Switzerland, audit work papers appear to be protected from disclosure by the Secrecy Obligation of Article 730 of the Swiss Code of Obligations and Article 321 of the Swiss Penal Code. These Swiss

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[10] *See, e.g.*, Data Protection Act of 1998 (England); The 1978 French Law on Data Protection (France); The German Data Protection Act of 1990, as amended (Germany); Privacy Protection Law of 1981 (Israel); and Federal Law on Data Protection (Switzerland).

[11] *See, e.g.*, Article 321 PC ("Verletzung des Berufsgesheimnisses") (under this provision, even obtaining client consent would not extinguish a firm's potential liability to the client); Section 323 Handelsgesetzbuch (German Commercial Code) (establishing an accountant's duty to keep client information confidential).

[12] *See, e.g.*, Section 203 Strafgesetzbuch (German Penal Code) (providing fines and prison terms for violations of accountants' duties to keep information confidential); French Criminal Code, Article 226.13.

provisions protect not only the client's confidential information, but also confidential information of other third parties that may have been obtained during the course of an audit.

Similarly, the proposed requirement that applicants and their employees consent to produce documents may place them in violation of certain laws. For example, in the Grand Duchy of Luxembourg, firm partners and all the staff are bound by professional confidentiality obligations that can be waived with respect to foreign authorities only to the extent that the foreign authority has entered into a treaty with the Grand Duchy of Luxembourg.

Again, the existence of these potentially conflicting laws and standards would place non-U.S. applicants in the precarious position of having to choose between (a) complying with the Board's reporting requirements, thereby risking a violation of these non-U.S. legal and professional obligations, and (b) adhering to the legal and professional standards of their home jurisdictions, and thereby risk the Board's disapproval of their registration applications and the resulting inability to provide audit services to issuers. The Board should alter its proposal to account for these apparent conflicts.[13]

B. Conflicting Laws And Standards From Other Jurisdictions Will Also Impact U.S. Applicants

In addition to the impact that conflicting laws will have on non-U.S. applicants' registration process, U.S. applicants may also be seriously affected. Because the Board's registration proposal appears to contemplate that U.S. firms will provide information about non-

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[13] In passing the Act, Congress demonstrated its intention not to impose unwavering U.S. standards in the face of non-U.S. laws and regulations that might be to the contrary. As Senator Enzi explained, "I do not believe that it was the intent of the conferees to export U.S. standards, disregarding the sovereignty of other countries and their regulators." 148 Cong. Rec. S7350, S7356 (daily ed. July 25, 2002).

U.S. applicants and non-U.S. personnel, laws and professional requirements from jurisdictions outside the United States could be implicated even for U.S. applicants.

For example, if a U.S. applicant were to provide information about work that a non-U.S. "accountant" did on behalf of an issuer, the provision of that information could violate the non-U.S. accountant's professional obligations.[14] In addition, the proposal would seem to require U.S. applicants to report information about certain pending and prior proceedings against non-U.S. individuals and entities that have particular associations with the applicant. Deloitte Touche Tohmatsu member firms operate in approximately 140 countries and many of these entities and their personnel would appear to fall within the currently proposed definition of "person associated with" the applicant and thus be covered by Parts V and VIII of the proposed Form 1. Requiring U.S. applicants to provide information about non-U.S. applicants and personnel would raise many of the same potential conflicts with the various data protection and other laws identified above.

C. The Board Should Confer With Non-U.S. Regulators And Study The Potential Issues Raised By Extra-U.S. Application Of The Registration Process In Greater Detail

We strongly encourage the Board to engage in further study and analysis of the issues raised by the potential conflicts of the Board's reporting requirements with laws and professional obligations outside of the United States. As the Board is aware, accounting firms are subject to many different regulatory schemes throughout the world. The Board should continue its dialogue with non-U.S. regulators to facilitate the Board's consideration of these potential

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[14] *See, e.g.*, Section 9 Berufssatzung WP/vBP (German Accountants' Professional Articles of Association) (prohibiting an accountant from providing confidential information to third parties); Section 43 Wirtshcaftspruferordnung (Accountants Ordinance) (setting forth an accountant's duty to keep client information confidential).

conflict of law issues, as well as to further cooperation surrounding their respective responsibilities relating to the accounting profession. Because of the need for the Board to have dialogue with non-U.S. regulators, such that the Board and non-U.S. applicants have the necessary time to consider the full range of issues implicated by the proposed registration requirements' potential conflict with various non-U.S. legal and professional standards, we recommend that the Board extend the time for non-U.S. applicants to register into the year 2004 and defer implementation of the problematic registration requirements until the issues can be satisfactorily resolved.

We also look forward to further discussions with the Board concerning its oversight, inspection, and disciplinary roles in the context of non-U.S. applicants. We believe that dialogue and cooperation among regulators will be very important as these areas are contemplated. Without cooperation among regulators, non-U.S. applicants could be subject to conflicting regulatory obligations imposed by multiple regulatory bodies, or find themselves exposed to multiple liability or punishment for the same conduct. By adhering to the principle of positive comity, each national regulatory authority could take advantage of other national authorities' efforts and expertise to avoid duplication of effort and to provide a more efficient allocation of resources. At this point, it is difficult to offer a complete and satisfactory comment on the potential powers of the Board in its inspection and investigative capacities before the Board is properly constituted and the rules regarding its powers in these areas are drafted and offered for comment. We look forward to engaging in a more complete discourse at that time.

V. THE BOARD SHOULD REVISE ITS PROPOSAL TO REDUCE UNNECESSARY BURDENS AND TO AVOID CONFLICTS WITH APPLICABLE LEGAL AND PROFESSIONAL OBLIGATIONS

We acknowledge that the registration process constitutes a critical aspect of the Board's authority. We request, however, that the Board remain cognizant of the burdens imposed by the

registration process, including the sheer volume of information requested, the highly technical nature of the requests identified in the application, and the need for applicants to understand their new registration obligations in the context of existing (and potentially conflicting) legal obligations in their home jurisdictions. The Board should seek to mitigate these burdens – which impact both applicants and the Board – wherever possible, such as by narrowing the scope of the information requested for registration to that information that clearly relates to the Board's mission and by excluding information that is otherwise available to the Board. Our suggestions to narrow definitions and adopt a more restrained set of data requirements during registration is in no way intended to suggest that the Board would not be able to access (or that we would refuse to provide) further information – to the extent permitted by law – in the context of issuer-specific inquiries from the Board during inspections or disciplinary programs. Our comments in this regard are solely related to the registration process.

As noted above, some of the proposed registration requirements potentially conflict with several laws and regulations that relate to the protection of confidential information. We believe that these potential conflicts with our professional and legal obligations as accountants should be resolved by limiting the reach of the proposed reporting requirements and by otherwise tempering such requirements by only demanding information "to the extent permitted by law." Such a standard would embody appropriate deference to state and non-U.S. policies and judgments. At a minimum, the Board should defer implementation of the problematic requirements that we identify in this comment letter until those potential conflicts issues are fully considered and satisfactorily resolved.

We have also set forth in detail below several suggested approaches intended to clarify the scope of the proposed definitions to more clearly reflect the realities of the accounting

profession and how audits are performed. Related to our suggested definition clarifications, we propose that, in order to prevent applicants from collecting and reporting information that relates to individuals who are more directly under the control of another applicant, the Board limit an applicant's reporting obligations to information about those individuals and entities that are employed with or retained by the applicant and that the applicant would not reasonably expect to be covered by another firm's registration application. That approach would help to eliminate the prospect that more than one applicant could be faced with identical reporting obligations for the same individuals or entities, and would thereby serve to reduce the reporting burdens on applicants in a workable, principled manner.

The burdens associated with the registration process also should lead the Board to provide explicit assurances in the final rule to applicants – and to the issuers they audit – that good faith efforts at compliance will be deemed sufficient to satisfy the registration requirements, despite any inadvertent omissions or difficulties that might arise during the registration process. This flexibility is needed because the consequences of inflexibility raise the specter of failed registrations, which would have serious consequences for the capital markets. Similarly, we strongly urge the Board to consider adopting a rule that allows for an initial, provisional registration in the event the Board requests that an accounting firm supplement its application, or a firm is responding to such a supplemental request, at the time the October 24, 2003 deadline for registration comes to pass.

In addition, we recommend that the Board establish procedures for applicants whose registration applications were disapproved to obtain a formal, fair review of the decision. As detailed in our specific comments regarding the application form, we also urge the Board to

adopt certain transition periods where the requested information poses unique problems, or is particularly burdensome, as a result of the initial registration deadline.

RULES OF THE BOARD

Set forth below are comments with respect to selected proposed rules and definitions.

RULE 1001. DEFINITIONS OF TERMS EMPLOYED IN RULES

Throughout our comments, we address definitional issues as they relate to specific aspects of the proposed rules and form. As a more general matter, we recommend that the Board revisit the use throughout the proposal of the terms set forth below. We are concerned that, if adopted as proposed, these terms may expand the reach of the Board's rules beyond the scope envisioned by Congress, impose unnecessary burdens on accounting firms that must register with the Board, and create a host of other harmful, unintended consequences.

A. "Accountant"

The meaning of the term accountant is critical to determining the scope of the applicant's reporting obligations with respect to Parts V and VII of the proposed Form 1. Proposed Rule 1001(a) contains an extremely expansive definition of the term "accountant" that includes not only certified public accountants, but also individuals with an undergraduate or higher degree in accounting, or license or certification authorizing them to engage in the business of auditing or accounting, as well as individuals with at least a college degree, in any field, who "participate" in audits. The Board's section-by-section analysis indicates that the proposed definition is intended to include all individuals who "have the requisite licensing, certification, training, and/or

experience, whether obtained in the United States or a non-U.S. jurisdiction, to be considered an accountant."[15]

We believe that this definition is overly broad and that the definition of "accountant" should be limited to certified public accountants, and accountants in non-U.S. jurisdictions holding licenses equivalent to that of a certified public accountant in the United States, who in each case have the authority to sign a firm's name to an audit opinion. This would effectively limit the definition of "accountant" to audit partners, and prevent firms – particularly larger firms – from having to supply information about hundreds or even thousands of individuals who, although licensed or otherwise certified, are not empowered to bind the firm by signing an audit opinion. The Board should be most concerned with obtaining information about those accountants who are ultimately responsible for issuing the audit report. Significantly, the Board's proposed definition of audit report includes the important concept that only those reports that set forth "the opinion of th[e] firm" would fall within the definition.[16] Just as the definition of audit reports is limited to the "opinion[s] of th[e] firm," so too should the definition of the "accountants" who prepare the audit reports be limited to those who have authority to sign such opinions.[17]

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[15] PCAOB Release No. 2003-1, at A3-iii.

[16] *Id.* at A1-ii.

[17] We also stress that, in order to avoid duplicative reporting requirements for the same individuals, the Board should make clear that an applicant's reporting obligations with respect to "accountants" is limited to those accountants who are employed or retained by the applicant and who the applicant would not reasonably expect to be covered by another applicant's registration application. For example, a non-U.S. member firm of Deloitte Touche Tohmatsu should not be required to report information about an accountant who

[Footnote continued on next page]

In the alternative, the Board could choose to expand the definition of "accountant" beyond those who are empowered to bind the firm, to all certified public accountants and accountants with equivalent non-U.S. licenses, because, as a practical matter, the vast majority of individuals with the background necessary "to be considered an accountant" will be licensed. By adopting that modification, the Board would ensure that the term "accountant" includes those licensed professional accountants who are involved with audit reports, while simultaneously providing firms with a reasonably identifiable basis for determining which personnel are covered by the definition. In contrast, bringing other individuals within the definition of "accountant" on the basis of training and/or experience would obligate accounting firms to engage in fact-specific determinations about whether individual employees – who for larger applicants may number in the tens of thousands – possess the requisite qualifications to meet the Board's definition.[18] The proposed definition would also extend the Board's authority to individuals who are not licensed accountants and are not engaged in auditing or accounting. It is not clear that Congress intended the Board's authority to extend so far.[19]

If the Board retains the definition of "accountant" as currently drafted, we recommend that, at a minimum, the Board clarify what is meant by "participate" in an audit in Rule

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[Footnote continued from previous page]
works in the United States for the U.S. member firm because the U.S. member firm's application would capture that information.

[18] We note in this regard that under certain licensing rules, aspiring accountants cannot be licensed until they have had a minimum amount of accounting experience (e.g., two years) and have passed the required exam. In addition to providing firms with a more definitive reporting guideline, tying the definition of "accountant" to licensed accountants may also therefore provide some measure of consistency against which the Board, regulators, and the public could evaluate firms' application information.

[19] *See* Act, §§ 101(a), 102.

1001(a)(3)(ii). At the extreme, this language could be read to capture any college graduate employed by an accounting firm who has even a minimal role in audits: for example, a college graduate who works as an audit scheduler to assign audit staff to all engagements may be deemed, literally, to "participate" in an audit. Although we do not believe this would be an appropriate construction of the proposed definition, the Board should provide clear guidance to accounting firms and ensure that the definition more closely reflects the purposes of the Act.

B. "Audit Report"

The definition of "audit report" in proposed Rule 1001(e) also requires clarification. As drafted, the proposed definition broadly includes any "document or other record" that is "prepared following an audit . . . in which a public accounting firm . . . sets forth the opinion of that firm regarding a financial statement, report or other document." We believe that this definition will be confusing to applicants and should be refined to encompass only those audit reports that express an opinion on an issuer's *financial statements*, and are then filed with the Commission. The term "audit report" should not be defined to include documents that set forth opinions about "report[s] or other document[s]," because the inclusion of those terms in the definition of "audit report" makes the Board's intentions unclear. We understand that the proposed definition of "audit report" tracks the definition of "audit report" set forth in § 2(a)(4) of the Act, but it is not clear that Congress intended the Board to use that definition, particularly where, as here, it creates serious implementation problems. As proposed, the definition is so broad that it potentially could be interpreted to include any opinions expressed by an accountant in a document relating to a client on a variety of subjects whether or not the opinions have any direct relationship to a specific audit. In addition, the proposed definition could sweep in communications between offices on the results of audit procedures, known as inter-office

reports, potentially requiring non-U.S. firms to register even if they have conducted limited audit procedures on an immaterial subsidiary. We do not believe that the Board intended such a result.

The currently proposed definition of "audit report" is particularly confusing in the context of Part II of the proposed Form 1, which requires firms to report information about issuers for which the firm "prepared . . . any audit report,"[20] and proposed Part V, which requires the reporting of prior proceedings that involved conduct "in connection with an audit report." Much of the confusion could be avoided by refining the definition of "audit report" as we have proposed to include only those reports that express an opinion on an issuer's financial statements, and are then filed with the Commission, consistent with the definition historically used by the Commission to identify the report issued by the independent auditor.[21]

C. "Audit Services"

As proposed, the definition of "audit services" in Rule 1001(f) will present reporting difficulties in connection with Part II of the proposed Form 1. For reasons that are not explained in the proposing release, the Board has proffered a definition of "audit services" in Rule 1001(f) that "capture[s] the same category of services for which fees were required to be disclosed as

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[20] That is, when attempting to understand the reporting requirement in Part II, applicants will have to determine those issuers for which they "prepared" a "document," that was "prepared following an audit," which "set forth the opinion of that firm regarding a . . . report or other document." Such an exercise will be both difficult and confusing. The interplay between this definition of "audit report" and the other requirements in the proposal presents obvious interpretive problems.

[21] *See* 17 C.F.R. § 210.1-02(a) (defining "accountant's report" to mean "a document in which an independent public or certified public accountant indicates the scope of the audit (or examination) which he has made and sets forth an opinion regarding the financial statements taken as a whole, or an assertion to the effect that an overall opinion cannot be expressed.").

'audit fees' pursuant to the Commission's *2000* proxy disclosure rules."[22] Consistent with our comments provided below in connection with Part II, if the Board goes forward with this requirement, we recommend that the Board clarify that the term "audit services" means the same category of services for which fees are required to be disclosed as "audit fees" under the Commission's *2003* fee disclosure rules, or that the Board simply cite the Commission's rule as recently amended.

D. "Other Accounting Services"

The Board explains in its section-by-section analysis that the definition of "other accounting services" provided in Proposed Rule 1001(l) is modeled on "concepts used in the Commission's recent revision of its auditor independence disclosure rules."[23] The proposed definition of "other accounting services," however, appears to represent a hybrid of fee categories used under the Commission's new rules and those implemented as part of the 2000 rulemaking. The definition combines: (1) those fees for services that must be disclosed as "Audit Fees" under the Commission's new rules, but that would not have been disclosed as "audit fees" under the Commission's 2000 fee disclosure rules; and (2) fees that must be disclosed as "audit-related fees" under the Commission's new rules.[24]

If the Board goes forward with this requirement, we recommend that the Board clarify the definition of "other accounting services" to avoid implementation problems in Part II of the proposed Form 1. Specifically, "other accounting services" should be defined in a manner that

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[22] PCAOB Release No. 2003-1, at A3-v (emphasis added).

[23] *Id.* at A3-vi.

[24] *See id.* at A3-vi and A3-vii.

conforms with the Commission's new fee disclosure requirements. Among other things, by aligning its fee disclosure requirements with the Commission's new disclosure rules, under certain circumstances the Board will better enable investors to make sound comparisons between information provided in registration applications and other publicly available information.

E. "Person Associated with a Public Accounting Firm"

The term "person associated with a public accounting firm," as set forth in proposed Rule 1001(m), is overly broad and would cause great difficulties for firms in connection with their obligations under Parts V and VIII of the proposed Form 1. The proposed definition covers any individual who is a "proprietor, partner, shareholder, principal, accountant, or professional employee of a public accounting firm, or any independent contractor or entity that, in connection with the preparation or issuance of any audit report[:] (1) shares in the profits of, or receives compensation in any other form from, that firm; or (2) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm."[25] The section-by-section analysis goes on to state that "an employment or an independent contractor relationship with a public accounting firm is not required for a person to be covered by the definition."[26]

The proposed definition is very expansive and could be interpreted to include administrative staff, outside counsel for the firm, and others that are only tangentially related to an audit (and who would be very surprised to learn that they are "associated with a public accounting firm" and subject to the Board's authority). In addition, it would include all the individuals covered under the definition of "accountant" in proposed Rule 1001(a), which, as

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[25] *Id.* at A1-iv (Rule 1001(m)).

[26] *Id.* at A3-viii.

discussed above, is also defined too expansively. The definition of "person associated with a public accounting firm" would be particularly burdensome for accounting firms in the context of Part V of proposed Form 1, which requires applicants to provide information about associated persons that are defendants or respondents in criminal actions, governmental and private civil actions, and administrative and disciplinary actions, involving conduct in connection with an audit report. It would also be onerous in the context of Part VIII of proposed Form 1, which would require applicants to obtain, within 45 days of submitting an application for registration to the Board, signed consents from all of the applicant's associated persons. The problem of this over-broad definition thus cascades throughout the Board's proposal.

Although the Board's proposed language is largely derived from § 2(a)(9) of the Act, we believe that the definition of "person associated with a public accounting firm" should be narrowed and clarified, as the SEC has done in analogous circumstances. In adopting its new auditor independence rules, for example, the Commission first proposed a similarly broad reach for its rotation and compensation provisions, and subsequently limited the categories of professionals subject to those requirements based on the level of a professional's involvement in auditing, accounting, and reporting issues that affect the financial statements and the extent of contact with management and the audit committee, in response to comments that the proposed rules extended too deeply and were overly broad.[27] The narrower and more reasoned scope of

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[27] *See* Strengthening the Commission's Requirements Regarding Auditor Independence; Final Rule, 68 Fed. Reg. 6006, 6018-20 (Feb. 5, 2003) (citing comment letters on proposed rotation rules from The Business Roundtable (Jan. 14, 2003); Pfizer Inc. (Jan. 13, 2003); Aetna Inc. (Jan. 13, 2003); HSBC Holdings plc (Jan. 10, 2003); Deloitte & Touche LLP (Jan. 10, 2003); KPMG, LLP (Jan. 9, 2003); Philip A. Laskawy (Jan. 9, 2003); and PricewaterhouseCoopers (Jan. 8, 2003)); and *id.* at 6024-26 (citing comment letters on proposed compensation rules from Deloitte & Touche LLP (Jan. 10, 2003); KPMG, LLP

[Footnote continued on next page]

the final rules reflected the Commission's recognition that applying the rotation and compensation provisions to professionals with only minimal involvement or contact was not necessary to accomplish the purposes of the Act and could compromise audit quality.[28]

We urge the Board to take similar action in this instance, and to specify that the term "person associated with a public accounting firm" extends only to individual proprietors, partners, shareholders, principals, accountants, professional employees, and independent contractors and entities, whose work for the accounting firm has some meaningful and material relationship to auditing, accounting, and reporting issues that affect financial statement audits.[29] We recognize the somewhat imprecise nature of that guideline, but we would propose that the Board interpret it to mean the following:

- For those individuals who are *employees* of, or otherwise considered *personnel* of, the applicant, the term "persons associated" with an applicant should be interpreted only to include *managers*, *senior managers*, *directors*, and *partners*. That interpretation of the definition would capture those individuals with supervisory responsibilities over staff members as well as ultimate responsibility for the audits of public companies listed or traded in the United States. Such an

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[Footnote continued from previous page]
(Jan. 9, 2003); McGladrey & Pullen, LLP (Jan. 9, 2003); and Ernst & Young LLP (Jan. 6, 2003)).

[28] *See id*. at 6018-20; 6024-26.

[29] This limited definition still is problematic because applicants would not have the authority to compel employees of non-applicants or other applicants to execute consents. As a result, registration issues still could arise, and we therefore are concerned that even the limited definition could disrupt the orderly function of the capital markets. We urge the Board to work with the profession to identify a solution to this problem.

interpretation would thus ensure that the Board receives the information that is relevant and necessary to its task, while providing applicants with a clear dividing line between management and staff members that would greatly facilitate their ability to comply with their new registration obligations.

- With respect to independent contractors and entities, we suggest that the definition encompass only those independent contractors or entities that received payments from the applicant in connection with the preparation or issuance of an audit report to the extent that such payments exceed 10% of the fees paid to the applicant for that audit.[30]

We also reiterate that the Board should clarify that an applicant's reporting requirements extend only to those personnel that are employed or retained by the applicant and whom the applicant does not reasonably expect to be captured through another applicant's separate application submission. The "associated persons" definition should be clarified to reflect that concept.

F. "Play a Substantial Role in the Preparation or Furnishing of an Audit Report"

As proposed, the phrase "play a substantial role in the preparation or furnishing of an audit report," as set forth in proposed Rule 1001(n), and the explanatory note to the rule, presents several issues. We believe this phrase could be narrowed, with at most an inconsequential effect on the number of firms required to register with the Board.

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[30] In addition, we urge the Board to exercise its exemptive authority under § 2(a)(9) of the Act to exempt from the definition of "person associated with a public accounting firm" (and thus from the materiality calculation) those persons that are "engaged only in ministerial tasks." Granting such an exemption would be consistent with the purposes of the Act, the public interest, and the protection of investors.

First, as proposed, the first prong of Rule 1001(n) and the note accompanying the rule would mandate an assessment of whether a firm played a "substantial role" in the preparation or furnishing of an audit report based on a calculation of whether the "services" provided by the firm constituted 20% or more of the total engagement hours or fees provided by the principal accounting firm in connection with the issuance of its audit report.[31] In many instances, several different firms, including firms from several different countries (and in some cases, several different international or domestic associations of firms) are involved in the audit of an issuer's consolidated financial statements. For those issuers that do not manage their "total engagement hours and fees" on an all-firms, all-countries basis, the individual firms participating in the audit will have no way of knowing the total number of engagement hours or fees. Any such firm could only determine if it plays a substantial role in the audit if the total engagement hours and fees were accumulated on a consolidated basis by the *issuer* and such information was shared with each individual firm participating in the consolidated audit. It does not appear that the Board (or any other entity or body) has the authority to require such activities by issuers or such disclosure to the individual separate firms participating in the audit.

Second, as proposed, the first prong of Rule 1001(n) refers to "material services." As a result, the phrase "play a substantial role" could be interpreted to include situations in which a firm provides non-audit services, including internal audit services, to non-audit clients. As a result, any number of firms that have no relationship to the accounting profession or to the audit engagement could be subject to the Board's registration requirements through Rule 2100.

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[31] *See* PCAOB Release No. 2003-1, at A1-iv, A1-v.

Consequently, the first prong of proposed Rule 1001(n) would have the adverse effect of requiring accounting firms and other audit client service providers to engage in burdensome analyses intended to determine whether the other service providers played a substantial role in the preparation or furnishing of an audit report. This, in turn, could result in many service providers having to register with the Board simply because they provided services to issuers whose principal accountants are registered. This is particularly true of service providers in non-U.S. jurisdictions that would not otherwise be subject to registration.

We believe these issues can be resolved by limiting the definition of the phrase "play a substantial role" to the content of the second prong: "to perform audit procedures with respect to a subsidiary or component issuer the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer." This modification would encompass substantially the same universe of firms, although that universe would be determined by a simpler, more definitive test, and would dramatically ease administration of the requirement.

In addition, the Board should allow this determination to be made based on the issuer's consolidated assets and revenues as of the issuer's previous fiscal year end – otherwise, if based on the current year end, it is conceivable that an additional audit firm, not currently registered with the Board, could be deemed to play a substantial role, and if that additional firm is not yet registered, the firm would not have sufficient time to register and still work on the current year audit. Accordingly, we recommend that the Board revise the definition such that the significant subsidiary test is based on the issuer's consolidated assets and revenues as of the issuer's previous fiscal year end.

RULE 2100. REGISTRATION REQUIREMENTS FOR PUBLIC ACCOUNTING FIRMS

Proposed Rule 2100 imposes the requirement of registering with the Board on each public accounting firm that "prepares or issues any audit report with respect to any issuer" or

"plays a substantial role" in the preparation or furnishing of such a report. On its face, this language could be read to require registration of firms – including those located in non-U.S. jurisdictions – that have issued audit reports for issuers covering prior periods, but that do not currently have, and do not expect to have, an engagement with an issuer to prepare or issue, or play a substantial role in the preparation or issuance of, an audit report. This could cause significant problems in those situations where an unregistered firm has issued an opinion for a prior period. Either the firm would need to register with the Board in order to issue its consent with respect to the use of its opinion for the prior period, something the firm may be unwilling to do given the burden and expense, or the issuer would need to have the prior period re-audited by a registered firm, an expensive and seemingly wasteful undertaking. Accordingly, we believe Rule 2100 should be clarified, or an appropriate exemption created, to establish that the issuance of an audit report prior to October 24, 2003 (the expected deadline for registering with the Board), by itself, does not trigger the provisions of Rule 2100.

RULE 2101. APPLICATION FOR REGISTRATION

Rule 2101 requires applicants to file their applications and exhibits thereto electronically with the Board through the Board's web-based registration system. We encourage the Board to consult with technology specialists for the testing and development of that web-based system. Among other things, the Board should consider how functional this system will be and how much technological understanding applicants must possess to complete their submissions effectively. As firms proceed through the application process and seek to use the web-based system, technical questions will undoubtedly arise. To help address various technological issues with which applicants may be confronted during the registration process, the Board may wish to consider instituting a dedicated 24-hour help-line to respond to technology-based questions. The

Board should also consider the potential language difficulties that some applicants may have with an English-only web-based system and take appropriate steps to reduce those barriers.

In addition, given the amount of time that will necessarily elapse between an applicant's initial collection of information and the actual submission of the application, the Board should establish an operative date prior to submission of an application through which time information submitted should be current.

RULE 2103. REGISTRATION FEE

Proposed Rule 2103 provides that each applicant must pay a registration fee and that the Board will announce the registration fee from time to time. While the Board has not yet established the registration fee amount, the Board indicates that an applicant's fee amount "will be determined by a formula and that registration fees will vary with the size of the applicant."[32] Although it is not entirely clear, the formula could involve some relevant metric tied to the issuers audited by the applicant, such as the total number of issuers audited by the applicant, the U.S. market capitalization of issuers audited by the applicant, or some like variation. If this is the case, to avoid the potential for double-counting, the Board should clarify that only the issuer data for those issuers that are audited by the applicant would be included in calculating the registration fee. Issuer data for those issuers that are audited by associated entities that file separate applications should only be considered in connection with the associated entities' respective applications.

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[32] *Id.* at 7 (The Board notes that it "anticipates [determining the registration fee amount] in conjunction with establishment of its annual budget," which the Board states will occur "before the registration system is operational.").

In the alternative, the "size" of an applicant could be measured by the proportion of the applicant's revenues that is derived from auditing the financial statements of issuers. In this case, consideration should be given to the potential for significant variation, from one firm to the next, in the proportion of the firm's revenues that is attributable to issuers.

We believe that it is critical that the process for determining registration fees be as equitable as possible. To facilitate this result, we believe that the Board should not announce the definitive formula for calculating registration fees without first publishing its suggested approach and affording a reasonable time for public comment on that approach.

RULE 2105. ACTION ON APPLICATIONS FOR REGISTRATION

Proposed Rule 2105(b) provides that the Board will take action on a registration application within 45 days of its receipt. At that time, the Board will either approve the application, request more information from the applicant, or disapprove of the application by written notice to the applicant. The Board's proposal does not, however, contemplate procedures through which a rejected applicant can seek review of the Board's determination or otherwise seek the Board's reconsideration. We believe that the Board should establish formal, fair procedures for aggrieved applicants to seek and obtain review of a disapproval decision.[33]

As we explained in our general comments, we also believe that the Board should grant an initial, provisional registration to those applicants that submit their applications in a timely manner, but that are not approved as of October 24, 2003 as the result of a request from the Board to provide supplemental information. The consequences of non-registration of a firm due

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[33] *See also* Act, § 105(a) (in context of investigations and disciplinary proceedings, Board must establish "fair procedures"). Private regulatory bodies, such as the National Association of Securities Dealers, have chosen as a matter of policy to adopt fair procedures. *See, e.g.*, NASD Rule 1015.

to a rejected application or delayed acceptance (for other than substantive reasons) would not serve the public interest and would cause severe hardship for issuers. Furthermore, non-U.S. applicants should have an opportunity to submit an initial application that will be given automatic confidential treatment by the Board in order to prevent potential reporting miscues that may improperly distort investors' perceptions.

RULE 2300. PUBLIC AVAILABILITY OF APPLICATIONS AND REPORTS

We support the Board's intention to treat certain material confidentially and believe that the availability of such treatment is essential to the registration process. We note, however, that the proposal states that regardless of a decision to grant confidential treatment to information, the Board will maintain its ability to provide that information to the Commission.[34] Although we understand that the Board will work closely with the Commission and support that close relationship, we are concerned that such "onward" production – without more protection – will increase the likelihood that the information will lose its confidential character, and will erode the ability of the applicant to claim that the information should be protected from disclosure to third parties.

In order to help protect the confidentiality of any information that the Board provides to the Commission, the Board should clarify that it will request confidential treatment of any confidential information that it provides to the Commission. Further, once the information is provided to the Commission, the information might be deemed subject to disclosure under the Freedom of Information Act ("FOIA").[35] Compounding such potential disclosures is the

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[34] *See* PCAOB Release No. 2003-1, at A1-x.

[35] *See generally* 5 U.S.C. § 552.

possibility that if the information were the subject of a request under FOIA, the applicant that provided the information to the Board may never be informed by the Commission of that request. The Commission has procedures in place, however, by which a person (or entity) submitting information to the Commission for which it requests confidential treatment on behalf of another person (or entity) may provide the Commission with information about the person on whose behalf it is requesting the confidential treatment.[36] In such instances, if that information is the subject of a FOIA request, the Commission will notify the person on whose behalf the submitter requested the confidential treatment.[37] To help ensure that the party with the ultimate interest in maintaining the confidentiality of the information is informed of a pending FOIA request that it might want to challenge, we recommend that the Board expressly state in its final rule its intention to provide the Commission with any necessary information about the person on whose behalf it is seeking confidential treatment *and* that it will, in any event, notify the relevant applicant of any FOIA request for access to an applicant's information.

Given the lack of familiarity that non-U.S. applicants in particular will have with the registration process, non-U.S. applicants should have their applications given automatic confidential treatment until final submission and the Board should make efforts to work with these applicants during the registration process. Providing non-U.S. applicants with an opportunity to submit an application in "draft" form – similar to the treatment given first-time foreign private issuers by the Commission – would help to avoid inadvertent reporting mishaps and the public's receipt of misinformation.

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[36] *See* 17 C.F.R. § 200.83(c)(5).

[37] *See id.* at § 200.83(d)(1).

APPLICATION FORM

Set forth below are specific comments on the proposed Form 1.

PART I. IDENTITY OF THE APPLICANT

Part I of proposed Form 1 requires each applicant to provide certain identifying information to the Board. Although many of the requirements of Part I are consistent with the mission of the Board and the authority granted to it by the Act, certain requirements would place heavy burdens on applicants without providing commensurate benefits to the Board or its mission. Other proposed requirements could be clarified to ensure appropriate compliance.

A. The Undefined Term "Predecessor" Presents Complications

Item 1.1 requires the applicant to "state the name or names under which the applicant (or any *predecessor*) issues audit reports, or has issued any audit report during the five years prior to the date of this application."[38] The proposal does not define the term "predecessor." The term should be interpreted consistent with principles of corporate law to mean an entity for which the applicant is the successor in interest with respect to the entity's liabilities. The term "predecessor" should not be construed to include those entities from which the applicant has assumed no liability and would not be deemed to have successor liability. Accordingly, we recommend that the Board clarify Item 1.1 by defining the term "predecessor" to apply only to firm name changes and to firms for which the applicant would be deemed to be the successor in interest with respect to the other firm's liability.

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[38] PCAOB Release No. 2003-1, at A2-ii (emphasis added).

B. Applicants Should Not Have To List All Of Their Offices Or Associated Entities

Item 1.5 requires the applicant to "furnish . . . the physical address (and, if different, mailing address) of each of the applicant's offices."[39] Similarly, Item 1.6 requires the applicant to provide "the name and physical address . . . of all associated entities of the applicant that engage in the practice of public accounting or preparing or issuing audit reports or comparable reports."[40]

We suggest that the Board only require applicants to report those offices at which audit reports for issuers are prepared. Providing information regarding offices at which no audit reports are prepared for issuers is unlikely to assist the Board in overseeing the audit of issuers.

With respect to Item 1.6, the Board should clarify that applicants need not list as associated entities other firms that are expected to be separate applicants in their own right. For example, a Deloitte Touche Tohmatsu member firm in one country should not need to provide information in response to Item 1.6 about a Deloitte Touche Tohmatsu member firm in another country, which will file a separate application. We also propose that the same limiting principle we suggest for Item 1.5's office reporting requirement be applied to Item 1.6's requirement concerning associated entities, so that only those associated entities that prepare audit reports would be covered.

C. Proposed Item 1.8 Should Be Clarified

Item 1.8 requires the applicant to "[i]ndicate whether the applicant and all individual accountants associated with the applicant who participate in or contribute to the preparation of

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[39] *Id.* at A2-iii.

[40] *Id.*

audit reports have all licenses and certifications required by governmental (federal, state, and non-U.S.) and professional organizations."[41] We believe that this requirement should be clarified. First, the Board should limit the obligations under Item 1.8 to required *governmental* licenses and certifications, and *not* include any reference to *professional organizations*. Professional organization requirements may be particularly unclear or ill-defined in some jurisdictions. Second, it is ambiguous as to whether the Board intends for Item 1.8 to constitute a "blanket" certification that all of an applicant's professionals have the requisite licenses and certificates, or whether it is requesting that the applicant provide licensing and certificate information for each and every one of its accountants on an individualized basis. If the Board intended the latter, this requirement is largely (if not wholly) overlapping with the reporting requirements contained in Items 7.1 and 7.2. If the Board intends a "blanket" certification, it is somewhat unclear what value this certification would add over the information provided in Items 7.1 and 7.2. Third, the Board's proposal does not define who would be deemed to have "participate[d] in" or "contribute[d] to" the preparation of audit reports for the purposes of this Item. The lack of a clear definition could complicate compliance. Finally, Item 1.8 does not appear to contemplate that some accountants (as currently defined) in fact will not have licenses. In many U.S. states, an accountant may not apply for a license until he or she has a certain level of accounting experience and has passed the CPA exam. While these individuals may be labeled "accountants" – and certainly would fall within the currently proposed Board definition of "accountant" – it is unclear what treatment applicants should give them with respect to Item 1.8.

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[41] *Id.* at A2-iv.

In order to avoid confusion surrounding this issue, we suggest that the Board consider limiting the scope of Item 1.8 to whether the applicant itself possesses the requisite licenses or registration certificates to engage in the practice of auditing. If so limited, Item 1.8 would thus comport with Item 1.7's focus on the applicant's licenses, and serve as a certification that the licenses reported in response to Item 1.7 are all that are legally required of the applicant.

PART II. LISTING OF APPLICANT'S PUBLIC COMPANY AUDIT CLIENTS AND RELATED FEES

Part II of the proposed Form 1 requires an applicant to report fees charged to issuers. As a threshold issue, we believe that the Board should reconsider the need for applicants to provide the extensive fee information outlined in Part II of proposed Form 1. Issuers are already required, or will soon be required, to disclose substantially similar information about fees paid to their principal auditor under the Commission's rules, and this information is, or will shortly be, publicly available through the Commission's EDGAR system. If the Board decides to go forward as proposed, we have several suggestions with respect to the Board's approach as set forth below.

A. The Board Should Address Certain Confidentiality Issues

Proposed Rule 2300 sets forth a procedure by which applicants can request confidential treatment of any information submitted to the Board in connection with an application for registration. The proposed rule provides for an applicant to submit to the Board the information for which confidential treatment is requested along with an explanation why the information should be protected from disclosure. Although this procedure may be appropriate for most items on proposed Form 1 because they pertain to information about the applicant, its associated entities, and persons associated with the applicant, the procedure presents unique difficulties in the context of Part II, which focuses on the applicant's public company audit clients. Because

Part II pertains primarily to an applicant's clients, the information it seeks to elicit in some cases may not be the applicant's to disclose.

Requiring disclosure of information about an applicant's client may breach confidentiality expectations between the applicant and the client, regardless of whether the Board agrees to treat the information confidentially. For example, depending on timing, an applicant could face having to disclose fee information for audit clients that have not yet made that information available in their proxy statements, which under Commission rules are not due until 120 days after fiscal year end. The same confidentiality issue would arise with respect to information about audit reports that an applicant *expects* to prepare or issue, or with respect to which an applicant *expects* to play a substantial role (proposed Items 2.3 and 2.4, calling for such information about "expected" audits), because information pertaining to future periods will not necessarily have been disclosed publicly prior to the filing of the accounting firm's application with the Board. These confidentiality concerns also apply to non-U.S. applicants, where disclosure of the proposed fee information may violate laws and professional standards in several countries.[42] Similarly, because the proposed fee disclosure requirements do not align with the Commission's recently adopted fee disclosure rules, much of the financial information required to be disclosed would not have been previously reported in a public filing. This is true with respect to information about fees billed to foreign private issuers, which are not currently

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[42] *See, e.g.*, Italian Civil Code Article 2407 (setting forth the duty of auditors to maintain the secrecy of the information encountered in the course of the auditor's professional service); Institute of Chartered Accountants of Ontario, Rules of Professional Conduct § 208.1 (Dec. 2002) (providing that a "member shall not disclose confidential information concerning the affairs of any client, . . . except . . . (c) when such information is required to be disclosed by order of lawful authority," which exception may not be satisfied here because of the Board's stated private capacity); Section 9 of the German Accountants Professional Articles of Association (providing a broad duty to keep all client information confidential).

required to disclose fee information and are not required to comply with the Commission's new fee disclosure rules until the first fiscal year ending after December 15, 2003. It is also true with respect to subsidiaries that are consolidated for financial reporting purposes but that nevertheless are "issuers" under proposed Rule 1001(k), such as subsidiaries that have registered debt securities under the Securities Act of 1933. In such a case, frequently only the parent company would be billed for audit and other services. Accordingly, absent an allocation of fees to reflect the proportion attributable to the subsidiary, there would be no fee information available for the subsidiary.

In addition to raising issues with respect to firms' confidentiality obligations to their clients, requiring disclosure to the Board of confidential information about an applicant's client could undermine the client's ability to assert that the information is privileged against third parties in the future.

Accordingly, we recommend that the Board not require firms to provide non-public information about their issuer clients; or that the Board directly address these confidentiality issues. If the Board were to choose the latter option, the Board might consider permitting non-disclosure and requiring firms to maintain client consents that would allow disclosure upon a specific request from the Board; or to require periodic disclosures to capture information that, in the interim since the last Board filing, has become public. At a minimum, the Board should require firms to report issuer fee data only once issuers themselves are required to comply with the Commission's new fee disclosure requirement (i.e., for fee disclosures filed with respect to an issuer's first fiscal year on or after December 15, 2003).

B. The Proposed Fee Disclosures About Audit Clients Should Be Harmonized With The Commission's Fee Disclosure Rules

In the section-by-section analysis, set forth as Appendix 3 to the proposing release, the Board states that it has, "to the extent possible," used concepts from the fee disclosures required of issuers under the revised proxy disclosure rules recently adopted by the Commission.[43] The fee disclosures proposed by the Board, however, differ significantly from those required under the Commission's new rules.

To the extent the Board determines that it is appropriate to require the enhanced level of disclosure reflected in its proposal, we strongly believe that the Board's proposed rules should be harmonized with the fee disclosures required under the Commission's revised fee disclosure rules. In particular, applicants should be required to report information using fee categories that mirror those applicable to issuers under the Commission's fee disclosure rules.

Pursuant to the Act, the Commission recently adopted changes to its fee disclosure requirements that: (1) increased the number of categories of professional fees that issuers must disclose in the proxy statement; (2) redefined those categories to encompass "Audit Fees," "Audit-Related Fees," "Tax Fees," and "All Other Fees"; and (3) increased the years of service covered by the disclosure from the most recent fiscal year to the two most recent fiscal years. These changes were intended to "clarify the categorization of services provided by the audit firm in order to provide increased transparency for investors."[44] In particular, a new category was added for "Audit-Related Fees" to enable issuers "to present the audit fee relationship with an

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[43] PCAOB Release No. 2003-1, at A3-xxv.

[44] Strengthening the Commission's Requirements Regarding Auditor Independence; Final Rule, 68 Fed. Reg. 6006, 6030 (Feb. 5, 2003).

issuer's principal accountant in a more transparent fashion."[45] The Commission's new fee categories reflect carefully considered policy determinations about the types of disclosures that would be most useful and transparent for investors and other market participants.

The Board's proposed approach departs from the Commission's rule. Part II of proposed Form 1 would require applicants to list all issuers for which they have prepared or issued an audit report in the current or preceding calendar year and to disclose fees billed to those issuers under the categories of "audit fees," "other accounting services," "tax services," and "all other fees." For reasons that are not explained in the proposing release, the Board has proposed a definition of "audit services" in Rule 1001(f) that "capture[s] the same category of services for which fees were required to be disclosed as 'audit fees' pursuant to the Commission's *2000* proxy disclosure rules."[46] At the same time, proposed Rule 1001(l) defines a second fee category – "other accounting services" – to include fees for "audit-related" services (as now understood under the Commission's new fee disclosure rules) as well as those "audit fees" that would not have been reported in the Commission's 2000 "audit fees" category but that would be included in that category as recently reconfigured in the Commission's new fee disclosure rules.[47]

These differences will lead to unnecessary confusion for investors as well as firms by imposing an additional, and different, set of disclosure requirements on applicants at a time when

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[45] Strengthening the Commission's Requirements Regarding Auditor Independence; Proposed Rule, 67 Fed. Reg. 76780, 76798 (Dec. 13, 2002).

[46] PCAOB Release No. 2003-1, at A3-v (emphasis added).

[47] *Id*. at A3-vi and A3-vii.

issuers and accounting firms are attempting to adjust to new fee disclosures recently implemented by the Commission. Thus, even if the fee information provided in response to Part II is not given confidential treatment and is made available to the public, the information will be of little public value and, indeed, could confuse the public. In addition, although compliance with Commission disclosure requirements is ultimately the issuer's responsibility, accounting firms may seek to organize their internal systems with a view toward assisting their clients in complying with these requirements. Having to maintain two different classification systems for the same set of fees – one for purposes of the Commission's fee disclosure rules and one for purposes of the Board's rules – would impose an undue burden on applicants. Furthermore, some types of services may be difficult to classify. Particularly where this is the case, we do not believe it would be productive to require applicants to expend even greater resources determining how to classify services under not one, but two, different disclosure regimes.

The Board also should afford applicants sufficient time to prepare the fee information in the manner required under Part II of proposed Form 1 once the Board adopts final rules. We believe that this will necessitate time beyond the anticipated application submission deadline of early September 2003 set forth in the proposing release.[48] If adopted as proposed, Part II of proposed Form 1 would require fee information for all issuers for which we issued an audit report during 2002 and that part of 2003 leading up to the filing of our applications with the Board. Compiling the relevant information and assigning it to the appropriate categories will be an enormous undertaking, particularly in view of the fact that it will not be possible, in many

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[48] *See id*. at 10.

cases, to rely on fee information that is already publicly available because of the recent changes to the fees categories. Accordingly, we suggest that the Board consider some type of phase-in approach that would permit applicants to file an initial application with fee disclosures prepared according to the categories established as part of the 2000 rulemaking and, if otherwise appropriate, the Board would approve applications for registration subject to the provision of issuer fee information classified according to the new categories as soon as reasonably practicable following the filing of applicable fee information by issuers as required by the Commission.

In addition, because fees for services provided by non-U.S. firms are required to be disclosed in U.S. dollars, the Board should clarify the manner in which firms are to calculate the exchange ratio for purposes of this provision.

C. The Board Should Consider Other Clarifications For Part II

Proposed Items 2.2 and 2.3 would require the applicant to provide information with respect to audit reports prepared by the applicant or audit reports that the applicant expects to prepare during the current calendar year. Yet, an accounting firm that has been engaged to audit an issuer's financial statements remains the auditor of record until such time as the firm resigns or is dismissed and the U.S. filer files a current report on Form 8-K announcing a change in its independent accountant, which the issuer must do within five business days.[49] In view of this requirement, we believe it is unnecessary to have applicants provide multiple lists of issuers, setting forth issuers for which they have prepared or issued audit reports in both the preceding and current calendar years, and for which they expect to prepare or issue audit reports. A list of

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[49] *See* Item 4 and General Instruction B of Form 8-K; Item 304(a) of Regulation S-K.

issuers for which an applicant issued audit reports in the previous year (i.e., the information required to be provided under proposed Item 2.1), together with any changes to that list as evidenced by the filing of a current report on Form 8-K, would serve the same purpose.

In addition, proposed Item 2.4 sets forth a requirement that applicants provide information regarding issuers for which an applicant played or expects to play a substantial role in the preparation or furnishing of an audit report during the preceding or current calendar year. This disclosure item goes beyond the requirements of the Act and, as such, we believe that the Board should carefully consider whether the costs of requiring applicants to compile and provide this information are justified by resulting benefits. If after that consideration the Board still believes that the requested information in Item 2.4 should be provided, we would suggest that the definition of the phrase "play a substantial role in the preparation or furnishing of an audit report" set forth in proposed Rule 1001(n) be clarified in the manner described in this letter.

We also believe, as discussed above, that it would be appropriate to make clarifying changes to the definition of "audit report." This is particularly necessary in view of the information required under Part II of proposed Form 1. For purposes of the Part II reporting requirements, we believe it should be clear that only information concerning audit reports "issued," not simply "prepared," must be reported. Although we recognize that the Act includes the term "prepared" in § 102, we think that the Board should exercise its implementation authority and expertise to clarify the registration requirements in a manner that minimizes avoidable confusion and burden. Including references to the "preparation" of audit reports

would only generate questions about the distinction between "issuing" and "preparing" an audit report, when for practical purposes such distinctions are extremely rare.[50]

Finally, the Board should clarify what is intended by the phrases "expects to prepare or issue an[] audit report" and "expects to play [] a substantial role in the preparation or furnishing of an audit report," as used in proposed Items 2.3 and 2.4, respectively. Although a note to each item indicates that disclosure is only required with respect to issuers that have engaged an applicant, the note says nothing about the continued circumstances under which, following the engagement, an applicant is entitled to presume that it "expects" to prepare or issue an audit report or play a substantial role in connection therewith. The Board should provide guidance on this issue by, for example, establishing that an applicant may presume that it is expected to issue (or play a substantial role in the issuance of) an audit report absent an indication from the issuer that it no longer intends to engage the applicant, as evidenced by the filing of a current report on Form 8-K, or other contrary indication. Clarification would be particularly useful for applicants that audit the financial statements of foreign private issuers, because foreign private issuers may not be required to file current reports with the Commission announcing a change in an independent accountant.

PART III. APPLICANT FINANCIAL INFORMATION

Part III of proposed Form 1 would require an applicant to provide disclosure about the total amount of fees received by the applicant during its most recently completed fiscal year, broken down according to the same categories used in Part II.

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[50] Although there could be circumstances in which an accounting firm might prepare, but not issue, an audit report (such as, for example, where the firm is dismissed immediately prior to issuance of the report), in practice, these circumstances are so rare and exceptional that we do not believe they merit exception-driven distortions to the Board's rules.

A note to proposed Item 3.1 expressly states that the fee disclosures required under Part III "are not limited to fees received from issuers and include fees for audits performed other than pursuant to generally accepted auditing standards."[51] According to the section-by-section analysis, the more expansive disclosure "is meant to give a picture of the applicant's firm-wide sources of revenue."[52]

Providing this detailed information about issuers and non-issuers goes beyond the Act. We recognize that firm-wide fee information could be used in planning post-registration inspections that are expected to focus on audits of issuers. We suggest, therefore, that financial information about the relative size of an applicant's issuer/non-issuer practice could be an aid in understanding the scope and breadth of the applicant's practice regarding issuers. We believe that providing total dollars and percentages of an applicant's issuer vs. non-issuer practice would be most consistent with the Board's purpose of "oversee[ing] the audits of public companies" and would avoid extending the scope of the Act to areas where Congress did not intend it to reach.[53]

PART IV. STATEMENT OF APPLICANT'S QUALITY CONTROL POLICIES

We recognize that the Act requires that as part of the registration application a public accounting firm provide to the Board, in the form designated by the Board, a "statement of the quality control policies of the firm for its accounting and auditing practices."[54] The Board will

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[51] PCAOB Release No. 2003-1, at A2-viii.

[52] *Id*. at A3-xxvi.

[53] Act, § 101(a).

[54] Act, § 102(b)(2)(D).

undoubtedly review registered firms' quality control policies as part of the Board's inspection process. Accordingly, we believe that for purposes of the registration process, the Board would be most helped by an applicant's representation that the applicant is in compliance with the promulgated quality control standards (or a similar representation by non-U.S. firms), along with the provision of the date and type of report issued as a result of the firm's most recent peer review, rather than by the applicant's provision of a summary of what will be reviewed as part of the Board's inspection process. Nonetheless, if the Board determines that a summary statement of quality control policies is necessary or useful, we would not object to providing one.

PART V. LISTING OF CERTAIN PROCEEDINGS INVOLVING THE APPLICANT'S AUDIT PRACTICE

The Act provides that an applicant for registration with the Board shall submit "information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report."[55] The Senate's Committee Report further explains that this information is intended to capture "pending" actions "relating to the firm's audits of public companies."[56] We recognize the importance of providing this information to assist the Board in making its decision whether or not to allow a firm to audit publicly traded companies. Although the mere existence of a pending proceeding against a firm or a person currently associated with the firm that relates to the preparation or issuance of an audit report should not result in an applicant's automatic disqualification, the Board certainly should be made aware of the existence of current

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[55] Act, § 102(b)(2)(F).

[56] S. Rep. No. 107-205, at 46 (2002).

proceedings against an applicant that may raise questions about the applicant's performance in its role as auditor for public clients.

As the Board acknowledges, its proposal would go beyond Congress's approach. The Board's proposal seeks to expand upon the Act by requiring applicants to provide information about proceedings that are no longer pending and about proceedings not related to the firm's audits of issuers.[57] The proposal also seeks information that the applicant may have no reasonable basis for having and no reasonable ability to obtain. We are concerned that in its zeal to seek all information that could conceivably assist it, the Board has proposed obligations on applicants that are extraordinarily burdensome and impractical – indeed, in some cases impossible – for applicants to comply with.

We also emphasize the longtime role of the licensing authorities in determining the eligibility and fitness of individuals to engage in the practice of accounting and auditing. Congress recognized the significance of these bodies to the accounting profession, and thus expressly provided that applicants should provide the Board with licensing information about their accountants.[58] The Board, too, should have confidence in these licensing boards to determine those individuals who are qualified and fit to practice accounting and auditing, and the Board should rely on that process. Because of the existence and role of these licensing bodies,

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[57] *See* PCAOB Release No. 2003-1, at A3-xxviii ("While the Act only requires applicants to submit information about pending proceedings related to audit reports, the Form requires information about certain additional proceedings that may reflect on the applicant's fitness for registration, even though the proceedings may no longer be pending or do not relate to audit reports[.]").

[58] *See* Act, § 102(b)(2)(E).

the Board need not delve as deeply into an applicant's and its accountants' legal history as it might otherwise choose to do in their absence.

As noted earlier, in the context of non-U.S. persons, the Board also should consider carefully the presence of non-U.S. laws that may prohibit the provision of information called for by Part V. Several countries impose strict privacy and data protection laws that would restrict a firm's ability to disclose certain information about itself, its employees, or its affiliates' employees. This specific concern is addressed in more detail in Appendix A.

We have provided below a number of specific recommendations with respect to Part V of the proposed Form 1 that we believe will allow applicants to satisfy the Board's needs under this part.

A. Reporting Requirements Regarding Prior Proceedings Should Be Limited

The Board has proposed requiring applicants to provide information concerning any adverse decision in certain prior proceedings that were initiated against the firm, its accountants, or its associated persons. The Board has candidly acknowledged that the request for information about actions that are no longer pending is not required by the Act.[59] Despite Congress's decision not to require accounting firms to report past legal proceedings, we support the Board's view that reporting certain prior convictions, findings of liability, and sanctions based on conduct related to the firm's auditing of issuers would be appropriate. We believe, however, that the current proposal is broader in scope than necessary and would be exceptionally difficult for larger firms to comply with.

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[59] *See* PCAOB Release No. 2003-1, at 5 n.10.

First, under the current proposal, applicants must report information about certain prior proceedings that involved the firm, accountants of the firm, and persons who were associated with the firm "at the time that the events in question occurred." We recommend limiting the reporting requirement regarding prior adverse decisions in legal proceedings to those that were against the applicant itself (i.e., the firm), and not include prior adverse decisions against the applicant's accountants or other associated persons. Larger firms' institutional ability to provide information about past proceedings is somewhat restricted in light of their size. It would be virtually impossible for larger firms to collect accurate data concerning prior proceedings against each of many thousands of employees who would appear to be encompassed within the proposed definitions of "accountant" and "persons associated with" the firm.[60] Indeed, it is entirely possible that such proceedings could have taken place before an "accountant"-employee ever came to work for a firm. Nonetheless, the proposal would appear to require the firm to know about and report such actions. It would not be feasible for firms to provide all of this information. Accordingly, we suggest revising the disclosure requirement related to prior adverse decisions – which is not imposed by the Act – so that only those prior adverse decisions against the applicant itself need be reported.

Second, the proposal sets forth different time periods for which applicants are required to report prior adverse proceedings. For example, Item 5.1 would require applicants to report any

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[60] We also note that the proposed definition of "persons associated with a public accounting firm" includes independent contractors or other entities that may have only the most tangential connection to an audit report. As described above in our discussion of definitions, we strongly support the inclusion of a materiality standard with respect to these independent contractors and entities before they would be encompassed within the definition of "associated persons." Again, the reporting problems identified in this section simply underscore the pervasive nature of the problems created by the over-broad definition.

adverse judgments against the applicant (or its accountants or associated persons) in a criminal proceeding that was rendered within the last *ten years*. Item 5.2, meanwhile, would require applicants to report any adverse decision in a civil government action that was rendered within the last *five years*.[61] Item 5.3 (private civil proceedings or arbitration proceedings) would impose a *twelve-month* reporting period and Item 5.4 (administrative and disciplinary actions) would require a *ten year* review. Finally, Item 5.5, which seeks information about "other proceedings," uses a *ten year* period for part (a) and seems to establish no time period for part (b), suggesting that applicants are required to provide information about virtually any professionally-related admonition against it or its partners, principals, or officers that took place in any forum, *at any time whatever*. We recommend, in the interest of simplicity and practicality, that these periods be harmonized with each other, and limited to the last three years. The Board likely determined that different time periods were appropriate because of its perception that some types of proceedings were more serious than others. We understand and respect that viewpoint. Nevertheless, we think that divergent disclosure rules based on the type of proceeding involved will be needlessly confusing and will hamper applicants' ability to collect accurate information from their partners, principals, and employees. In addition, we believe that requiring firms to report proceedings that occurred as many as ten years ago (or more) would be unnecessarily costly and burdensome.

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[61] We note that oftentimes with respect to private arbitration proceedings, contractual provisions between the parties prohibit disclosure of the fact of arbitration and the results of the arbitration. The Board should establish in its final rule a method by which applicants can fulfill their reporting requirements without simultaneously subjecting themselves to liability for breaching private contractual obligations.

B. The Board Should Clarify That Applicants Are Not Required To Report Information About Proceedings That Involved Foreign Personnel

As currently defined in the proposal, the phrase "person associated with a public accounting firm" would seem to encompass foreign partners and professional employees who have any affiliation with an applicant.[62] That definition is unnecessarily overbroad as a general matter, and in the particular context of providing information about prior and pending proceedings it will be exceedingly difficult for firms to compile and submit the requested information. Accordingly, consistent with our comments above that the Board should refine certain definitions and limit an applicant's reporting obligations to those individuals who would not reasonably be expected to be covered by another applicant's submission,[63] we suggest that the Board revise its reporting requirements with respect to proceedings so as not to include information about proceedings involving foreign associated persons. Such a revision would enhance applicants' ability to comply with the reporting requirements and would be consistent with the Board's approach in Item 7.2 of the proposed Form 1, wherein it has proposed more modest reporting requirements for non-U.S. applicants.

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[62] We assume that the phrase "person associated with the applicant" used in Part V of the proposed Form 1 is intended to mean the same thing as the defined term "person associated with a public accounting firm." The Board should clarify, however, whether that is in fact its intention and, if so, adjust the terms used accordingly.

[63] This limitation still is somewhat problematic because applicants likely would not have the ability to obtain, or the authority to demand, information about proceedings involving employees of non-applicants or other applicants. As a result, registration issues still could arise, and we therefore are concerned that even with the limitation that we have proposed the orderly function of the capital markets could be disrupted. We urge the Board to work with the profession to identify a solution to this problem.

In addition, we note that the specific proceedings identified in Part V, and those offenses listed in Item 5.5, may not be easily translated into the types of proceedings and/or comparable offenses in non-U.S. jurisdictions. We recommend that the Board seek to address those issues in its final rule.

C. Applicants Should Not Be Required To Provide Information About Proceedings Involving Persons No Longer Associated With Them

The proposal requires applicants to report information about proceedings against its "accountants," as well as any "person associated with" it at the time that the events in question took place. Subject to our comments concerning the need to clarify these definitions to ensure that they encompass only the appropriate individuals, we support the proposal insofar as it requires a firm to report currently pending proceedings – of the types described in the proposal – against one of its current accountants or a person currently associated with the firm. The obligation to provide information about an accountant's or associated person's legal proceedings should be shouldered by the firm that currently has the employment relationship with that individual, and not on an applicant that no longer has the individual under its employment control. It is most reasonable to impose on firms the obligation to be knowledgeable about their current employees.

Consistent with our comments that information about prior proceedings should be limited to adverse judgments against the applicant only, we do not think that the Board should require firms to provide information about past proceedings for individuals. Thus, information about an individual's past proceedings, even if currently employed by the applicant, should not be required.

In any event, it would be particularly difficult for applicants to obtain information about proceedings against former employees, even if the conduct in question related to events that

occurred when the person was associated with the firm. Oftentimes, applicants will have no contact information for former employees and would receive no notice of a proceeding against a former employee. Moreover, with respect to individuals who have left a firm, they will either have left the practice of auditing public companies (in which case the Board would not be concerned); or be affiliated with another registered firm, which would then be required to report proceedings related to its current associated persons.[64]

We recommend, therefore, that the Board limit the legal proceeding reporting obligations to encompass only those individuals currently associated with the applicant. We note, however, that firms do not have the necessary resources to conduct an affirmative investigation to determine independently the accuracy of information received from employees and other associated persons. Accordingly, we recommend that the Board make explicit that an applicant's good-faith attempts to obtain the information requested in Part V will meet its obligations.

D. Applicants Should Not Be Required To Provide Information About Proceedings Unrelated To Audit Reports

Consistent with its determination that the Board would be responsible for "oversee[ing] the audit of public companies . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for [public] companies,"[65] Congress provided that firms should report information concerning

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[64] To the extent the Board believes such over-reporting of proceedings may be a useful measure of a firm's quality control policies, we note that disclosure of such policies would be required under proposed Part IV. Even if the Board were to concur with our recommendation that providing information about quality control policies not be required during the registration process, review of the adequacy of such policies would, presumably, be a key component of inspections under the Act's § 104.

[65] Act, § 101(a).

proceedings against the firm or its associated persons "in connection with any *audit report*."[66] As the language in the Act makes clear, Congress did not envision that accounting firms would be required to furnish to the Board information about proceedings that were not related to audits. Indeed, as explained in the Senate Committee Report, the Act requires firms to provide information about proceedings "relating to the firm's audits of public companies."[67]

We believe that Congress struck the proper balance by tying the reporting requirement directly to the activity that the Board is charged with overseeing. The proposal, however, would go beyond Congress's approach. As proposed, Item 5.5 of proposed Form 1 would require applicants to report information that has no connection to a firm's or an individual's preparation or issuance of an audit report. Moreover, Item 5.5(a) asks for information that is ten years old, while Item 5.5(b) has no time constraint on how far back in time an applicant must go to gather the requested information. The breadth of the proposed reporting requirement would impose a substantial burden on the applicant to collect the necessary information and the resulting benefit to the Board that would come from disclosing this information would appear to be negligible. We of course agree that if an accountant has been convicted of embezzlement, for example, his or her fitness to work on audit reports would be highly suspect, but we stress the role of the licensing bodies in determining who is fit for the practice of accounting or auditing. So long as an accountant is properly licensed to practice accounting and auditing (which other parts of the proposed Form 1 would cover), we believe his or her fitness for those responsibilities should be deemed sufficiently established and that the Board should defer to the relevant licensing bodies.

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[66] Act, § 102(b)(2)(F) (emphasis added).

[67] S. Rep. No. 107-205, at 46.

Requiring the provision of information about past proceedings that involves conduct that is unrelated to the preparation or issuance of an audit report goes beyond the scope of the Board's intended mission.

We also reiterate our comments above that the definition of the term "audit report" should be refined. Because many of the items required to be disclosed by the proposal are tied to proceedings "involving conduct in connection with an audit report" (and we believe that *all* of the proceedings required to be reported should be so tied), it is critical that the definition of "audit report" be clarified.

The proposal also seeks information about proceedings that involved conduct unrelated to issuers.[68] Again, that information is not required to be provided by the Act, and is of questionable relevance given that the Board has no responsibilities with respect to audits of non-public companies.[69] Information about proceedings that involved conduct that was not directly related to the preparation or issuance of an audit report for an issuer should not be required. We believe the Board should seek to limit the practical difficulties that applicants will face in trying to compile all of the requested information.

Completing the anticipated application for registration with the Board will be – perhaps unavoidably – an overwhelmingly cumbersome task, and we urge the Board to find areas where it can refine the scope of the application process without hindering its ability to perform its core

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[68] *See, e.g.*, PCAOB Release No. 2003-1, at A2-ix, A2-x, A2-xi, A2-xii (Items 5.1-5.4) (requiring information about proceedings "involving conduct in connection with an audit report *or a comparable report prepared for a client that is not an issuer*" (emphasis added)); *id.* at A3-xxviii (explaining that "Item 5.5 asks about certain criminal proceedings, *whether related to audit reports or not*. . ." (emphasis added)).

[69] For example, firms that do not audit public companies are not required to register with the Board. *See* Act, § 102(a).

responsibilities. We have identified the reporting requirements related to proceedings as one significant candidate for such modification.

E. Information Provided About Proceedings Should Be Kept Confidential

We also are concerned that in some instances providing information about pending or prior proceedings may impact our future ability to claim that certain information is privileged against third parties. Although some of the information requested in connection with proceedings would be publicly available, such as the name of the court in which the proceeding is pending, providing other information may reveal protected attorney-client communications or attorney work product. For example, whether a proceeding involves conduct in connection with an audit report, or the name of the issuer that was the subject of a certain audit report, could conceivably not be known publicly or not have been identified in the course of the proceeding. The Board should consider allowing applicants to protect certain confidences that may be implicated by the information requests by withholding certain information on privilege grounds in appropriate instances.

At a minimum, we believe that whatever non-public information is provided concerning proceedings should be given confidential treatment by the Board. The Board's proposal states that "[t]he Board will normally grant confidential treatment requests for information concerning non-public disciplinary proceedings."[70] We applaud the Board for recognizing the sensitive nature of information concerning non-public disciplinary proceedings. We believe that the same principles that underlie the Board's proposal to treat those proceedings confidentially equally support according confidential treatment to all other non-public information concerning pending

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[70] PCAOB Release No. 2003-1, at A2-i and A2-ii.

or past proceedings. Accordingly, we recommend that the Board clarify that it will grant any confidential treatment requests for non-public information that is provided by applicants concerning pending or prior proceedings.

PART VI. LISTING OF FILINGS DISCLOSING ACCOUNTING DISAGREEMENTS WITH PUBLIC COMPANY AUDIT CLIENTS

Part VI of proposed Form 1 provides that an applicant must identify instances in which its audit clients have disclosed disagreements with the applicant and furnish specified information about those instances. The Commission requires domestic issuers to disclose such disagreements under Item 304(a) of Regulation S-K, to which Item 6.1 makes explicit reference. Because issuers already report this information pursuant to Commission rules, we believe that the Board should obtain this information directly through the Commission's EDGAR system. Registered firms could then, on a going forward basis, provide the Board with any filed Form 8-Ks that show additional disagreements with domestic issuers. To require more from an applicant would be unnecessary.

In addition, the Board should clarify how applicants would comply with the requirements of proposed Part VI with respect to foreign private issuers, which are not required to disclose disagreements with a former accountant under Item 304(a)(1)(iv) of Regulation S-K.

PART VII. ROSTER OF ASSOCIATED ACCOUNTANTS

Subject to the concerns regarding confidentiality that were expressed previously, we have several suggestions with respect to the scope of the Board's approach in Part VII, particularly as to U.S. firms, and set them forth below.

A. Firms Should Only Be Required To Furnish Rosters Of Licensed Audit Partners

Part VII requires applicants to report information about "accountants" only, and thus a clear and appropriate definition of the term "accountant" is essential for applicants to be able to

comply with this roster requirement. As discussed above, the proposed definition of "accountant" should be clarified to reflect more accurately the nature of that professional position. Among the flaws in the current definition's scope, is its inclusion of any person who has an undergraduate degree in accounting as well as any college graduate who "participates in audits."[71] Employing that definition for purposes of the roster proposal would require firms unnecessarily to compile and provide information about a plethora of individuals such as administrative staff who, although not accountants, may play some minor role in the preparation of audit reports. Accordingly, we recommend that the term "accountant" be defined as those licensed accountants who are empowered to sign the firm's name to an audit report.

Even if the Board ultimately decides not to define "accountant" in the manner we have proposed, we recommend that, at least for purposes of Part VII of proposed Form 1, the Board limit the roster reporting requirements to those accountants who have the authority to sign the name of the applicant to an audit opinion, i.e., audit partners. Limiting the roster reporting requirement in this fashion would ensure that the Board is aware of those accountants who have the authority to bind the firm and sign audit reports (which are defined as "opinion[s] of th[e] firm"), while reducing the enormous burden that the proposed reporting requirement places on larger firms and the burden placed on the Board in terms of dealing with such volumes of information. Given the turnover rate of non-partner personnel at firms, a list of all accountants would not be very useful. Still, as discussed previously, we do not mean to suggest that the Board could not get access to names of such lower-level accountants if needed (to the extent permitted by law) for post-registration Board activities.

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[71] *Id.* at A1-i.

B. The Roster Reporting Requirement Should Apply Only To Accountants Who Participate In Or Contribute To Audit Reports

The Board's roster reporting proposal demands that U.S. applicants provide data regarding "*all* accountants associated" with the firm,[72] while it requires non-U.S. applicants to list only those "accountants associated with the applicant who *participate in or contribute to the preparation of audit reports*."[73] The Board's proposal with respect to U.S. applicants is inconsistent with the Act's approach, which does not differentiate between the applicants' countries, and uniformly ties the roster reporting requirement to those accountants who *participate in or contribute to* audit reports.[74] We believe that Congress's approach is appropriate because it is more tailored to the purpose of the Board and that the Board's roster reporting requirements for U.S. applicants should adhere to Congress's approach.

The Board is charged with overseeing the audits of issuers. Requiring U.S. firms to provide a list of all accountants associated with the firm – even those who do not participate in or contribute to the preparation of audit reports – does not seem to have any direct relationship to the Board's tasks, and would be exceptionally burdensome for larger firms and for the Board. The Board seeks to justify the broader reporting requirement for U.S. firms by explaining that it is intended "to avoid forcing these firms to choose which accountants to list on their registration application."[75] We appreciate the Board's interest in relieving U.S. firms from having to make potentially difficult determinations with respect to reporting obligations, and we have sought to

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[72] PCAOB Release No. 2003-1, at A2-xv (Item 7.1) (emphasis added).

[73] *Id.* at A2-xvi (Item 7.2) (emphasis added).

[74] *See* Act, § 102(b)(2)(E).

[75] *Id.* at A3-xxx.

identify several other areas in which the proposed reporting requirements are either particularly ambiguous or otherwise difficult for firms to comply with. We do not, however, believe that requiring U.S. firms to report the names, identifying information, and licenses of every accountant associated with the firm is an appropriate response to the problem that the Board identifies. The increased burden on firms to provide such information far outweighs any offsetting benefit in simplifying the decision of who should be included in the roster report. Instead of requiring the disclosure of all accountants, we believe (as discussed above) that the most useful manner in which to streamline the proposed reporting obligations into a simpler form is to refine the definitions for "accountant" and "audit reports," among others. Given the availability of such alternatives, the Board could relieve applicants from the difficult reporting determinations that the Board identified in its release, without straying from the Act's focus on those accountants who participate in or contribute to audit reports.

C. The Board Should Not Require Firms To Disclose Social Security Numbers

We recommend that the Board not require firms to provide their accountants' social security numbers (or non-U.S. equivalents). Given the ever-increasing reports of identity theft and other abuses committed against innocent individuals whose social security numbers are obtained improperly, individuals associated with a firm are likely to be wary of having that information provided to the Board. Indeed, a recent report published by the Social Security Administration described some of the shortcomings in various federal agencies' controls over social security numbers and concluded that federal agencies should "strengthen[] some of their

controls over the access, disclosure and use of SSNs by external entities."[76] We understand that the Board intends to maintain the confidentiality of these numbers, but nevertheless believe that the use of another identifier would be more appropriate. Accordingly, we suggest that the Board establish an alternative method by which firms can identify their accountants. For example, a firm could provide the name and initial CPA license number (or non-U.S. equivalent) of its accountants, or some other individual-specific numerical identifier.

D. The Board Should Grant Confidential Treatment Automatically To Roster Information

The Board has stated that it intends to grant confidential treatment to social security numbers and taxpayer identification numbers without the need for a request for confidential treatment. Subject to our comments herein, we support the Board's proposal, and recommend that the Board afford the same automatic confidentiality treatment with respect to all of the information requested in Part VII of proposed Form 1.

Little benefit would come from publicly listing the names of individual accountants associated with accounting firms, and we are troubled by the potential issues involved in such a public posting. Publicizing the names of professional accountants associated with a larger firm that may perform audit services for a multitude of different types of public companies, could put those individuals at risk of harassment or worse. Some members of society may take exception to the manner in which particular public companies conduct their business or take positions on controversial issues. We are sensitive to this reality and strive to protect our personnel from

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[76] *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, at 7 (Feb. 2003).

needless harassment that might stem from our relationship with particular clients.[77] Affording the roster reporting information automatic confidential treatment would help to ensure the safety of individual employees, without depriving the Board of information it needs to fulfill its statutory obligations.

PART VIII. CONSENTS OF APPLICANT

Pursuant to § 102(b)(3) of the Act, Item 8.1 of the Board's proposed Form 1 requires each application for registration to include the applicant firm's signed, written consent to cooperate with any request by the Board for testimony or document production. The statute also requires applicants for registration to agree to secure similar consents from their "associated persons," defined to include what would appear to be virtually every professional employed by or contracting with an applicant firm.[78] Item 8.1 requires applicants to secure those consents within 45 days of submitting the application for registration.

We have several suggestions with respect to the proposed rule, as set forth below.

A. Conditioning Continued Employment On Providing Consents May Pose Conflicts With Non-U.S. Or State Law

The proposal specifies that virtually all professional employment with a registered public accounting firm must be conditioned on the employee's consenting to cooperate with the Board's requests for testimony and documents. We are concerned that imposing such a condition may

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[77] *See, e.g.*, "Audit Firm Staff Details Leaked to Lab Activists," The Times of London, at 9 (Feb. 20, 2003) (describing an animal rights group's intention to harass Deloitte & Touche employees because of the firm's audit work conducted on behalf of a client).

[78] As discussed in more detail above, the proposed definition of "person associated with" a firm suffers from ambiguities as to its intended scope. If construed broadly, we fear the term would encompass almost all professionals employed or retained by the firm, personnel of *other* applicants, as well as a number of independent entities with very little connection to the firm.

conflict with provisions of employment law, both abroad and on the state level. We recommend that the Board undertake some modifications to its proposed rules and form to resolve these concerns.

1. Non-U.S. Employment Law

Various employment laws would preclude firms from conditioning their professionals' and associated persons' continued employment on their signing the Board's proposed consent form. In Appendix A hereto, we have set forth several examples in which non-U.S. laws would potentially conflict with the proposed consent requirement.

For example, under English law, there exists an implied common law duty of confidentiality between an employer and its employees.[79] That duty could be considered breached if an applicant were to require employees to execute consents that obligated the employee or the applicant to provide information about pending legal proceedings against an associated person working in England.

Similarly, accountants in Germany have the right to refuse to testify in civil, criminal, and tax proceedings.[80] An accountant's work papers in Germany also cannot be seized as evidence for use in a criminal proceeding to the extent the accountant has a right to refuse to testify in that proceeding.[81] It is conceivable that by executing the consent proposed under Item

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[79] *See, e.g., Prout v. British Gas plc*, [1992] FSR 478; *Smith, Kline & French Laboratories (Australia) Ltd. v. Dep't of Community Svcs.*, (1991) 28 FCR 291, 303; Toulson & Phipps on Confidentiality (1996), §§ 16-10, 16-11.

[80] *See* Civil Procedure Act § 383; Criminal Procedure Act § 53; General Tax Act § 385.

[81] *See* Criminal Procedure Act § 97.

8.1(b), an associated person in Germany could be viewed to have relinquished his rights to refuse to testify in a civil, criminal, or tax proceeding.

Accordingly, to avoid subjecting registered public accounting firms to irreconcilable obligations between non-U.S. and U.S. law, we recommend that the Board clarify that applicants must secure consents from their covered employees only to the extent that obtaining such consents does not conflict with an applicable non-U.S. law.

2. State Employment Law

The same issue occurs in the U.S. context, because some state employment laws may similarly forbid registered firms from conditioning continued employment on the signing of the consent that the Board requires. Indeed, firms' attempts to enforce the employment condition against a noncompliant employee could conceivably result in a tort action for wrongful discharge.[82] Moreover, some state contract laws might invalidate as procedurally unconscionable a contractual provision consenting to disclosure; one-sided terms that are

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[82] For example, "California courts have recognized a separate tort cause of action for wrongful termination in violation of public policy . . . where the employee is discharged for . . . exercising (or refusing to waive) a statutory or constitutional right or privilege . . . ." *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 81 (Ct. App. 1996). "[T]he assertion of the [state] constitutional right to privacy is the assertion of a fundamental principle of public policy which is sufficient to state a cause of action for wrongful termination." *Semore v. Pool*, 266 Cal. Rptr. 280, 286 (Ct. App. 1990). Some other states have followed a similar path. *E.g.*, *Tisdale v. Kayo Oil Co.*, No. 88-244-II, 1989 WL 4981, at *1 (Tenn. Ct. App. Jan. 25, 1989). As an alternative basis, in addition to state constitutional privacy rights, some states might permit a similar tort action for wrongful discharge when the employee is terminated for exercising his right against self-incrimination by refusing to turn over documents that have a testimonial aspect. *See United States v. Hubbell*, 530 U.S. 27, 36-37 (2000) (recognizing that the privilege against self-incrimination sometimes protects from compelled disclosure even documents that are not themselves privileged).

imposed as conditions of continued employment frequently are deemed unenforceable contracts of adhesion.[83]

This problem is more readily resolvable in the U.S. context than in the non-U.S. context, because the federal law that imposes the consent requirement on associated persons can, at least arguably, be deemed to preempt aspects of state employment law to the contrary. We therefore recommend that the Board include in its proposed rules an express statement that, in its considered legal judgment, the consent provision preempts any otherwise applicable provision of state or local law that would preclude firms from conditioning continued employment on the timely signing of the Board's prescribed consent form.

To be sure, this specification by the Board may not be strictly necessary. Congress determined in the Act that providing the consent was to be "a condition of . . . continued employment by or association with [a registered public accounting] firm," and that any firm that does not "secur[e] and enforc[e] such consents from its associated persons" risks termination of its registration with the Board.[84] A state's regulation subjecting a registered firm to liability for wrongful termination for the very action prescribed by Congress presents a good case for preemption, for not only does the "state law 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" but in fact "'compliance with both

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[83] *See, e.g.*, *Villa Milano Homeowners Ass'n v. Il Davorge*, 102 Cal. Rptr. 2d 1, 6-7 (Ct. App. 2000).

[84] Act, § 102(b)(3)(A).

federal and state regulations is [an] impossibility.'"[85] Thus, contrary state employment regulations might be preempted under the Act even in the absence of action by the Board.

Nonetheless, in light of the "presumption against federal preemption" that the federal courts employ in certain circumstances, we recommend that the Board make its judgment explicit.[86] At least once they are approved and adopted by the Commission, a clear statement in the Board's rules that employers must make the specified consent a condition of continued employment should be deemed to preempt state law to the contrary.[87] The Commission's approval of a Board rule constitutes a determination by the Commission that the rule is consistent with the Act and the securities laws, is in the public interest, or will protect investors.[88] Moreover, the Commission "may abrogate, add to, and delete from" the Board's rules if it finds such changes necessary or appropriate to further the objectives of the Exchange Act.[89] Thus, by approving a Board rule, with or without changes, the Commission pronounces

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[85] *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines v. Davidowitz* 312 U.S. 52, 67 (1941), and *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)).

[86] *See, e.g., New York v. FERC*, 122 S. Ct. 1012, 1023 (2002) (citing cases).

[87] *See* Act, § 107(a), (b)(2) (requiring Commission approval of Board rules).

[88] *See* Act, § 107(b)(3).

[89] *See* Act, § 107(b)(5); 15 U.S.C. § 78s(c).

the rule to be within the scope of the statutory authorization and gives the rule its own imprimatur. That decision would likely be entitled to preemptive effect.[90]

B. The Board Should Adopt Safeguards To Avoid Unintended Consequences Of The Consent Requirement

1. Reasonable Efforts Are Required

The Board should make clear that it expects an applicant to make reasonable, good-faith efforts to secure the Item 8.1 consents from its associated persons. So long as an applicant undertakes its responsibility to obtain those consents in good faith, however, a firm's registration application should not be denied as a result of an inadvertent, or *de minimis*, failure to obtain each and every associated person's consent. Imposing a standard akin to strict liability would not be appropriate in this context.

2. Firms And Individuals Should Not Forfeit All Otherwise Available Protections As A Result Of Signing A Consent

Under the proposed rule, registered firms are required to state that the firm consents, and will seek consent from its associated persons, to comply with "*any request* for testimony or the production of documents made by the . . . Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002."[91] Such a blanket consent raises some concerns, particularly with respect to legally recognized protections that would otherwise be available for assertion against requests for documents or testimony, and we encourage the Board to reconsider elements of its proposed consent requirement.

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[90] *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

[91] PCAOB Release No. 2003-1, at A2-xvi (Item 8.1) (emphasis added).

The consent regime incorporated in the Board's proposal is substantially broader in scope, and would have harsher consequences to applicants, than we believe was intended by Congress. The consent provision appears to have been included in the Act as an alternative to providing the Board with subpoena powers. By requiring firms to consent to cooperate with future Board requests for documents or testimony as a condition of their registration, Congress provided the Board with a mechanism through which the Board could secure necessary evidence to assist it in its oversight responsibilities. However, as drafted, the consent requirement would seem to impose considerably more severe restrictions on applicants than would be the case if the applicant were served with a subpoena. For example, the blanket consent mechanism contemplated by Item 8.1 appears to require applicants to relinquish various constitutional rights in advance, before being confronted with a request for specific documents or testimony. Whereas, in the subpoena context, a recipient of a subpoena has an opportunity to consider the request and determine whether to resist the production of documents or testimony on constitutional grounds, e.g., the right against self-incrimination, the proposed consent requirement could be read as forcing applicants to provide a blanket waiver of all such rights.[92]

Similarly, while a common-law legal privilege, such as the attorney-client privilege, might otherwise preclude a governmental body from obtaining documents or testimony pursuant to a subpoena, the proposal's consent procedure contains no safeguard to ensure that an applicant can assert such privileges once confronted with an actual request from the Board for documents or testimony. In this regard, the proposal is also considerably less protective than the regime established in § 105(b)(5) of the Act, which provides that information received by the Board in

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[92] Such blanket, advance waivers of constitutional rights would likely be deemed invalid as unconstitutional conditions. *See*, *e.g.*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

the course of an inspection or investigation retains its privileged status and would not be admissible, or subject to civil discovery, in proceedings before federal and state courts and administrative agencies. Section 105(b)(5) might have obviated certain concerns about the scope of the consent requirement imposed by Item 8.1, but Item 8.1 is broader, covering requests made "in furtherance of [the Board's] authority and responsibilities under the [Act]," whereas § 105(b)(5) applies only "in connection with an inspection under section 104 or with an investigation under this section."[93]

To avoid the Draconian consequences that the proposed consent requirement could lead to, we recommend that the Board amend its proposal and expressly include a reservation in the consent form. Applicants and their associated persons should maintain their rights to assert any legally recognized grounds for resisting compliance with a request for documents or testimony. The reservation should provide, therefore, that before any applicants or associated persons are required to turn over any information to the Board they will have an opportunity to be heard with respect to any legal grounds they may have for not producing information to the Board.

3. The Board Should Clarify That Associated Persons Need Not Provide *Written* Consent

We encourage the Board to clarify that firms need not assemble the *written* consents of each and every one of their associated persons within the 45-day period during which their applications are pending.

Certain aspects of the Board's proposing release could be misinterpreted with respect to obtaining written signatures. Specifically, the commentary on Part VIII of the proposed Form 1 states that "[t]he consents must be signed in accordance with rule 2104, which, among other

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[93] Act, § 105(b)(5)(A).

things, requires the manually signed version of the statement to be retained for seven years."[94] Rule 2104, in turn, requires a manual signature of "[e]ach signatory to an application for registration (including, without limitation, each signatory to the consents required by such application)."[95]

Our understanding is that Rule 2104's requirement that a manually signed copy be retained for seven years applies only to a registered firm's consent that is filed electronically with the Board. However, Rule 2104 and the commentary on Part VIII could be misinterpreted as applying to the consents of associated persons as well as to the consent of the registered firm.

We urge the Board to make clear that the requirements of Rule 2104 apply only to the registered firm's consent form, not to the consent forms that registered firms must gather from its associated persons. Rule 2104's seven-year retention requirement would not be well tailored to the preservation of associated persons' consents, because the seven-year period would be not tied to the signatory's continued employment by, or continued association with, the registered firm. More importantly, requiring physical signatures from each and every associated person would be a qualitatively different and infinitely more burdensome undertaking than requiring a physical signature from a single partner or owner on behalf of the firm. Securing, gathering, and maintaining the physical signature of every associated person who joins any larger firm would be a significant undertaking. But the *initial* registration process will require firms to secure consents from each and every one of their associated personnel within an extremely short time period. To impose the additional requirement that those consents contain a physical signature

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[94] PCAOB Release No. 2003-1, at A3-xxxii.

[95] *Id.* at A1-vii.

and be maintained in a central location would be incredibly costly for accounting firms. Obtaining and retaining the required consent from associated persons electronically, by contrast, would be more efficient and practical.

Consistent with the Board's proposed web-based registration system, electronic signatures can be just as effective as pen and ink to authenticate documents. Congress has directed federal agencies to afford electronic authentication the same recognition for most purposes and has expressly provided that transactions between private parties may be memorialized in electronic form, and that an electronic signature is to be considered just as effective as a physical signature to consummate such transactions.[96] Consequently, the Board should make clear that applicants need not secure written consents from their employees, and instead can utilize an electronic method of obtaining the necessary consent.

4. The Board Should Consider Extending The 45-Day Period In Which To Obtain Associated Persons' Consents

Whether or not the Board agrees that the requisite consents need not be obtained from associated persons in writing, we encourage the Board also to consider extending the 45-day deadline that Item 8.1 imposes for the gathering of consents from all associated persons. We note in particular that the 45-day deadline is *not* imposed by the Act, which does not specify a time period during which the consents are to be assembled. Indeed, the Act appears to require only that firms undertake good-faith cooperation with the Board to secure the necessary consents

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[96] *See* Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, §§ 101(a), (d), 104(b)(2), 114 Stat. 464, 464-69 (2000); *see also id.* § 104(a), 114 Stat. at 469 (allowing limited exceptions for records that, unlike the consents of associated persons, are required by law to be *filed* with Federal agencies).

from its associated personnel.[97] A firm that, despite its reasonable efforts, is unable to do so within 45 days should not be penalized, particularly during this initial registration process, which seems to entail assembling the necessary consents from virtually each and every professional associated in any way with a firm. We encourage the Board either to eliminate the 45-day restriction, at least for the initial registration process, or to extend it sufficiently to permit the requisite consents to be assembled with reasonable diligence.

5. The Board Should Clarify How Long A Consent Remains In Effect

The Board should also clarify how long a consent of an associated person remains in effect after that person ceases to be associated with an applicant. At a minimum, it should be made clear that an associated person's consent to cooperate in and comply with a request for testimony or production of documents made by the Board is limited to events that occurred while the person was associated with the applicant.

C. Providing Client Information To The Board To Fulfill Consent Obligations May Pose Conflicts With Non-U.S. And State Laws And Professional Standards

Proposed Item 8.1(a) provides that an applicant would be required to consent "to cooperate in and comply with any request for testimony or the production of documents" made by the Board in the exercise of its authority. As detailed in Appendix A, the provision of client confidential information to a third party, including the Board, presents numerous potential conflicts with non-U.S. laws and professional standards, as well as with professional standards in

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[97] *See* Act, § 102(b)(3)(B) (requiring firms to acknowledge that obtaining consents of employees is a condition of registration, but not placing any constraints on the method or timing for accomplishing the task).

the United States.[98] Therefore, we are concerned that the proposed consent requirement would place the applicant (and associated persons executing similar consents) in the untenable position of either refusing to comply with the terms of the consent, thereby jeopardizing its registration (or jeopardizing the associated person's continued employment), or providing client information to the Board, thereby committing an act in potential violation of non-U.S. or state law or professional standards. We recommend that, at a minimum, the Board modify the proposed consent requirement so that testimony and the production of documents is required only to the extent consistent with applicable law and professional standards.

CONCLUSION

The effective registration of public accounting firms is critical to the mission of the Board to oversee the audits of issuers, and we appreciate the opportunity to provide comments concerning the Board's proposed system of registration. Given the novelty of the reporting requirements, the breadth of some parts of the proposal, the conflicts of laws identified, and the short time period with which firms will have to digest the final rules and submit their applications, we believe that the adoption of the recommendations and revisions suggested herein would greatly enhance the proposed requirements, and help to ensure that the Board's registration process succeeds.

We have attempted to provide comprehensive recommendations and revisions. The issues presented are very complex and may warrant further discussion. We would be pleased to

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[98] *See, e.g.*, AU 339.11 (Statement on Auditing Standards 96) ("The auditor has an ethical, and in some situations a legal, obligation to maintain the confidentiality of client information. Because audit documentation often contains confidential client information, the auditor should adopt reasonable procedures to maintain the confidentiality of that information.").

discuss these issues with you further. If you have any questions or would like to discuss these issues further, please contact Robert J. Kueppers at (203) 761-3579.

Very truly yours,

/s/ Deloitte & Touche LLP

cc: Charles Niemeier, Acting Chairman of the PCAOB
Kayla Gillan, Member
Daniel Goelzer, Member
Willis D. Gradison, Jr., Member

APPENDIX A

Potential Conflicts Between Proposed PCAOB Registration Rule and Non-U.S. Law and Professional Standards[*]

Canada

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Rules of Professional Conduct	The Rules of Professional Conduct in Ontario provide that a "member shall not disclose confidential information concerning the affairs of any client, . . . except . . . (c) when such information is required to be disclosed by order of lawful authority." Institute of Chartered Accountants of Ontario, Rules of Professional Conduct § 208.1 (Dec. 2002). The fee information requested in Part II of the proposed Form 1 presents a potential conflict with the Rules of Professional Conduct in Ontario. In addition, if an accountant is obligated to provide client information to the PCAOB as a result of the consent executed pursuant to proposed Part VIII, the disclosure of this information potentially could be viewed to conflict with the Rules of Professional Conduct in Ontario. Moreover, it is unclear whether the PCAOB would be considered a lawful authority for the purposes of § 208.1, and thus a chartered accountant might be deemed in breach of the Rules of Professional Conduct if the accountant provided the fee information required under Part II or was obligated to respond to a PCAOB request for information that involves client confidential information as a result of the consent required pursuant to Part VIII of the form. As with the other potential conflicts identified throughout this Appendix A, it is unclear to what extent a client's consent or an employee's consent would operate to eliminate the potential conflict.

[*] To highlight in more detail the issues raised by the potential conflicts with non-U.S. laws, this chart provides a non-exhaustive list of potential conflicts with non-U.S. laws in some, but by no means all, countries.

China

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
CPA Law Article 19	Article 19 specifically states that a CPA has the responsibility to keep confidential the business information acquired in the performance of services. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between China's CPA Law and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.

France

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Code de Commerce Article L225-240; Decree 69-810 of August 12, 1969 Article 67; and Code of Professional Ethics Article 5	Article L225-240 of the Commerce Code provides that auditors shall be bound by professional secrecy for all acts, events, and information of which they may become aware in the course of their duties. The Code of Professional Ethics for auditors confirms this duty of confidentiality. The Decree provides that the French domestic securities regulator (Commission des Operations de Bourse) may have access to certain information under certain circumstances, and the duty of confidentiality cannot protect against this disclosure. There are, however, no provisions of French law providing for the disclosure of confidential information to foreign authorities. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between Article L225-240 of the Commerce Code and the information requested in Part II of the proposed Form 1, as well as the consents required under Part VIII of the form. Under French law, client consent may not cure a conflict with the confidentiality provisions because professional secrecy is imposed by legislation. Thus it may be a violation of professional secrecy to provide certain client information to the PCAOB, which could subject an accountant to criminal and civil penalties.
Statute n°68-678 of July 26th, 1968, as modified by statute n°80-538 of July 16th, 1980	Article 1bis provides that "no individual may request, seek or communicate, in writing, verbally or by any other means, economic, commercial, industrial, financial or technical documents or information, for the purpose of constituting proof

	with a view to court or administrative proceedings abroad or as part thereof." Article 3 also provides that for the applicable sanctions in case of violations of the rules provided for in Article 1bis: 6 months of imprisonment and/or a fine of FRF. 120,000. Article 2 requires to inform without delay the relevant French Minister when such a request is made. To the extent the information required to be provided under Parts II or V of proposed Form 1 or as a result of the consents executed under Part VIII of the form is construed to be information provided for the purpose of constituting proof with a view to court or administrative proceedings, there is a potential conflict with this Article 1bis of Statute n°68-678. The likelihood of obtaining a specific authorization from the French Minister of Justice in this context cannot be evaluated at this stage.

Germany

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
The Accountants Professional Articles of Association Section 9	This section provides that an accountant shall keep confidential all facts and circumstances with which the accountant is entrusted or of which the accountant becomes aware in the course of professional work. The scope of the duty in Germany is quite broad (extending the confidentiality obligations to third party information) and captures all information learned by the auditor in the course of providing professional services, whether by active revelation by the client or information which the accountant becomes aware of as a result of the accountant's professional position and activities. Not only are accountants to refrain from disclosing such confidential information, but accountants also have an affirmative duty to take the appropriate measures to ensure that such information is not disseminated to third parties who are not entitled to the information. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between Section 9 of the Accountants Professional Articles of Association and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.
Commercial Code Section 323; Accountants Ordinance Section 43; Penal Code	These sections establish an accountant's duty to keep information confidential, and provide that any illegitimate disclosure of confidential information by an accountant is a

Section 203; Commercial Code Section 333	criminal offense. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between these provisions and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.

Hong Kong

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Personal Data (Privacy) Ordinance, codified at Chapter 486	This ordinance protects against the disclosure of certain personal data. There is a potential conflict between this ordinance and the requirements to disclose employee data under Parts V and VII of proposed Form 1.

Israel

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
The Privacy Protection Law of 1981	Under this law, there is a general obligation of an employer to maintain in confidence certain employee information. There may be a conflict between the Privacy Protection Law and the demand for certain information relating to employees that may be disclosed under Part V and the roster list that would be required under Part VII of proposed Form 1. The Privacy Protection Law also may present a conflict with the fee information that would be disclosed under Part II of proposed Form 1. There is an exception providing for the ability to disclose confidential information pursuant to other legal obligations; however, this exception likely would not be applicable because the exception appears only to capture obligations under Israeli law.
Rules of the Institute of Certified Public Accountants in Israel	The Rules of the Institute of Certified Public Accountants in Israel ("ICPAI") impose a strict duty of confidentiality on accountants. An accountant is not to disclose to a third party, without client consent, any information provided to the accountant while performing professional services for the client. In an opinion paper published by the ICPAI in 1985, the ICPAI recommended that accountants only deliver documents of a

	client to governmental authorities in response to a court order, unless there is a specific law authorizing such delivery. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between the ICPAI provisions relating to confidentiality and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.
General Security Service Law of 2002	This law restricts the disclosure of information determined to be sensitive by the Israeli Government. It is possible that certain client information to be disclosed to the PCAOB as a result of the consent entered into pursuant to Part VIII of proposed Form 1 could be classified as sensitive, such as where a firm acts as auditor for defense contractors, and in this event Part VIII of form may be viewed to conflict with certain aspects of the General Security Service Law.

Italy

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Penal Code Article 622; Civil Code Article 2407	The relevant Penal Code provision makes it a crime punishable by fine or imprisonment for a person to reveal private information gained by virtue of the person's profession. Furthermore, the relevant Civil Code specifically outlines the duty of auditors to maintain the secrecy of the facts and documents they encounter in the course of their professional service. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between these provisions and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form. The provisions relating to confidentiality in Italian law also are such that client consent may not cure a violation. The Penal Code regulation is directed at the protection of third parties, and thus it is possible that client consent cannot authorize the disclosure of third party information gained by a professional accountant.
The Commissione Nazionale per le Società e la Borsa ("CONSOB") Auditing Standard No. 230	CONSOB is the public authority responsible for regulating the Italian securities market. The CONSOB issues principles to guide the profession. This recommended auditing standard confirms the duty of auditors to keep client information

(recommended in November 2002)	confidential. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between these provisions and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.

Japan

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
CPA Law (Law No.103, 1948) Article 27; Japanese Institute of Certified Public Accountants Code of Ethics; Law concerning Certified Tax Accountants (Law No. 237 of 1951)	Article 27 of the CPA Law prohibits any accountants from providing client confidential information to a third party. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between Article 27 of the CPA Law and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of form.

Mexico

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Code of Ethics of the Mexican Institute of Public Accountants Concept VI; Professions Law Article 36	Under the Code of Ethics applicable to accountants, a CPA may not give client information to a third party, except for information to be furnished to a competent authority with the express consent of the client. The Professions Law also obligates a professional to keep secrets on the matters entrusted to the professional by the client, with certain limited exceptions. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between the Code of Ethics provisions and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form. It is unclear if the PCAOB would be considered a competent authority for purposes of this provision.

Netherlands

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Rules of Professional Conduct and Practice of Registered Accountants Article 10; Rules of Professional Conduct of the Dutch Association of Tax Advisers Article 8; Rules of Conduct of Advocates Rule 6	Under the Rules of Professional Conduct and Practice of Registered Accountants, a registered accountant shall treat as confidential everything that has been entrusted to the accountant as such in the course of the accountant's duties. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between the Rules of Professional Conduct and Practice of Registered Accountants and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.

Spain

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Audit Law 19/1988 Article 13; Regulation implementing Audit Law 19/1988 Article 43; Law 44/2002 on Measures Reforming the Financial System Article 53	The Audit Law provides that an auditor shall be obliged to keep secret as much information as may come to the auditor's attention, and the information may not be used for purposes other than the audit itself. The Measures Reforming the Financial System provides the right of certain authorities access to audit documentation. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between the Audit Law and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form. The Measures Reforming the Financial System also may be construed to allow only Spanish governmental authorities access to auditor documents, which would present a further potential conflict with the information required by proposed Form 1.

Switzerland

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Penal Code Article 321 (Professional Secrecy, Duty of Confidentiality); Penal Code Article 162	These provisions make it a crime to reveal professional or business secrets of which the professional became aware during the course of work for a client. The provisions protect all information the client wishes to keep confidential. The

(Preservation of Business Secrets); Swiss Code of Obligations Article 730 (Violation of Professional Secrecy of Auditors)	provisions also apply to information not publicly known regarding third parties. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between the Swiss Penal Code and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.
Banking Act Article 47 (Banking Secrecy); Federal Act on Stock Exchanges and Securities Trading Article 43 (Professional Secrecy Obligations of Securities Traders)	Any accounting firm providing auditing services pursuant to the audit requirements of these Acts that gains insight into confidential information in the course of its mandate, where the client is a bank, stock exchange, or securities dealer, and then reveals such information to a third party, is subject to penal sanctions for violation of the banking secrecy obligation in the same way as officers and employees of a bank or securities trading firm. The protection covers any information that relates to the identity or other personal data of customers, information that relates to the mere fact that a certain person is a client, or information that allows for an inference of the identity or personal data of the customer. For the same reasons outlined with respect to the potential conflicts with Canadian standards, there is a potential conflict between these laws and the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form.

United Kingdom

Relevant Non-U.S. Law or Professional Standard	*Potential Conflict*
Common Law Duty of Confidentiality; Duty of confidence imposed by the Institute of Chartered Accountants in England and Wales Member Handbook Statements 1.205 and 1.306	The duty of confidence imposed by the rules of the Institute of Chartered Accountants in England and Wales provides that, absent informed client consent, an accounting firm may not disclose information regarding client affairs. This specifically includes the duty not to disclose the client's name or facts that could identify a particular entity as a client. For the same reasons outlined with respect to the potential conflicts with Canadian standards, the information requested in Part II of proposed Form 1, as well as the consents required under Part VIII of the form, may be in conflict with this duty of confidence.

Implied duty of confidence between employer and employee	Information held by an employer, such as details of disciplinary proceedings, may be regarded as confidential by the employee. Disclosure of confidential information about an employee by an employer may constitute a breach of the implied duty of confidence between employer and employee. This protection presents a potential conflict with the information that an applicant would be required to disclose regarding employees under Part V of proposed Form 1.

European Union Data Protection Directive

There is likely a direct conflict between the PCAOB's proposed rule on registration and the European Union Data Protection Directive.[99] Articles 25 and 26 of the Directive provide that member states are not to transfer personal data to a third country unless the recipient country provides an adequate level of protection for the data. Currently, it is our understanding that the United States is not considered to provide adequate protection of personal data. Although employee consent can form the basis for disclosure of personal information to recipients not providing adequate data protection, it is not clear that consent contemplated under Part VIII of the application form would constitute consent that is freely given, which is a required element to establish valid consent under the Directive.

Every European Union country is under an obligation to implement the Directive's protections into national law. Below are selected examples of potential conflicts between the PCAOB's proposed Form 1 and individual EU country legislation implementing the Directive.

Non-U.S. Law Implementing Directive	*Potential Conflict*
Netherlands Personal Data Protection Act	The Netherlands Personal Data Protection Act provides that the transfer of certain information outside the European Union requires that recipients adhere to the Safe Harbor Principles of the Act if the recipient does not provide adequate levels of protection for the data. There is a potential conflict between the Netherlands Personal Data Protection Act and the form's proposed requirements under Part V of proposed Form 1 regarding information on proceedings and under Part VII regarding roster information because disclosure of this information likely would be considered personal data subject to restriction on dissemination. As with the other potential conflicts identified below, it is unclear to what extent a consent

[99] European Union Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

	would operate to eliminate the potential conflict. Consents of the party must be "freely given, specific and informed." In addition, as with the other potential conflicts identified below, it may be possible to cure the potential conflict if the PCAOB were to enter into certain specified contracts (intended to limit the extent to which information could be made public in the United States) with relevant authorities in these European countries and/or the European Commission.

France – Statute no. 78-17 of January 6th, 1978, as amended, on Data Protection	The statute provides for a series of protections benefiting individuals. There is a whole series of rules against the collection and treatment of personal data through automated means. In particular, pursuant to article 30 of the statute, the collection and storage of personal data relating to an individual's "breaches of the law, condemnations or applicable safety measures" is prohibited. Even when the collection and automated treatment of personal information is not prohibited under the statute, there are a number of protective rules that are applicable, including in particular a right to access and correct the information, declaration obligations and a duty not to disclose the information There is a potential conflict between the French statute and the form's proposed requirements under Part V of proposed Form 1 regarding information on proceedings and under Part VII regarding roster information because disclosure of this information likely would be considered personal data subject to restriction on dissemination.
German Data Protection Act of 1990	The Data Protection Act of 1990 includes several data protection principles that set out the standards that "data collectors" (e.g., accounting firms) must comply with when "processing" information that relates to individuals. A possible form of processing personal data might include the transfer of the

	personal data to the Board. There may be a conflict between the German Data Protection Act of 1990 and the requirements to provide certain employee information and rosters under Parts V and VII of proposed Form 1. The proposed requirements likely would be considered personal data subject to restriction on dissemination under the German Data Protection Act.
United Kingdom Data Protection Act of 1998	The Data Protection Act of 1998 includes eight data protection principles that set out the standards that "data collectors" (e.g., accounting firms) must comply with when "processing" information that relates to individuals. Firms in violation of the Data Protection Act are subject to potential criminal and civil liability. There is a potential conflict between the United Kingdom Data Protection Act of 1998 and the requirements under Part V of proposed Form 1 regarding information on proceedings and under Part VII regarding roster information because disclosure of this information likely would be considered personal data subject to restriction on dissemination.
Swiss Data Protection Act Articles 6 and 35*	Articles 6 and 35 of the Swiss Data Protection Act subject the transfer of personal data outside Switzerland to specific requirements where the recipient does not provide protection of that information equivalent to protection provided under Swiss law. Also, personal data may not be transferred without the individual's consent in instances where the recipient declares that it will not treat the data as confidential. Under Article 35 of the Swiss Data Protection Act, whoever discloses

* Although Switzerland is not a member of the European Union, the Swiss Data Protection Act is similar in many respects to the Directive.

	confidential and sensitive personal data without authorization is subject to criminal punishment. There is a potential conflict between the Swiss Data Protection Act and the demand for certain employee information and roster information under Parts V and VII of proposed Form 1 because the United States is not considered to provide data protection equivalent to Swiss law.

APPENDIX B

Comments On Specific Questions Posed By The Board
Regarding the Registration of Non-U.S. Accounting Firms

In its release accompanying the proposed rules and application form, the Board poses several questions regarding the registration process for non-U.S. accounting firms. *See* Proposal of Registration System for Public Accounting Firms, PCAOB Rulemaking Docket Matter No. 001, PCAOB Release No. 2003-01 (Mar. 7, 2003), at 13-15. Our responses to several of these questions follow below.

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?

Non-U.S. accounting firms will have to assess whether any information requested by proposed Form 1 or the processes required to compile the information would conflict with local law or professional standards. As detailed in Appendix A, there may be several circumstances in which firms could not comply with the registration requirements without risking a violation of non-U.S. law or professional standards. Therefore, prior to proceeding with registration, non-U.S. firms likely will want some form of assurance that their actions in registering will not contravene laws in their home jurisdictions.

In addition, non-U.S. employees may have concerns that parallel those of non-U.S. applicants. Because consents are not widely understood outside the United States and their meaning (and the employee's obligations regarding them) will have to be communicated and comprehended, many individual employees may wish to seek independent legal advice before agreeing to execute the consent requested in Item 8.1(b) of the proposed rule.

Putting aside the concern regarding potential conflicts with non-U.S. laws, we believe it is unlikely that non-U.S. accounting firms could accurately complete the proposed registration form within 180 days of the date the Commission determines that the Board is capable of operating. It appears unlikely that non-U.S. accounting firms have ever sought to compile the extensive information required by proposed Form 1. Therefore, non-U.S. firms will have to establish processes and structures to ensure that the information collected is accurate and responsive to the information request contained in the form. For example, until adoption of the SEC's recently amended auditor independence rules, foreign private issuers have not had to comply with the SEC disclosure requirements regarding fee information. As a result, many non-U.S. firms have not obtained fee information on a consolidated basis, nor have they developed the processes to capture this information. A significant amount of time will be required to obtain and classify relevant fee information. It is highly unlikely that non-U.S. accounting firms would be able to implement these processes and structures and collect the required information prior to the October 24, 2003 deadline. Moreover, providing this information creates confidentiality issues, among other things, as non-U.S. accounting firms would face having to disclose fee information for foreign private issuers which have not yet disclosed such information.

Because of the need for the Board to have dialogue with non-U.S. regulators, such that the Board and non-U.S. applicants have the necessary time to consider the full range of issues implicated by the proposed registration requirements' potential conflict with various non-U.S. legal and professional standards, we recommend that the Board extend the time for non-U.S. applicants to register into the year 2004 and defer implementation of the problematic registration requirements until the issues can be satisfactorily resolved.

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

In our comment letter, we review in detail several aspects of proposed Form 1 that we believe should be modified. Those comments generally apply for both U.S. applicants and non-U.S. applicants.

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

The comment letter and Appendix A detail numerous potential conflicts between the proposed rules and application form and the laws or professional standard of jurisdictions in which non-U.S. applicants are located. We nevertheless offer the following additional comments on this important issue.

We believe that much of the information proposed to be required by the Board likely would be considered "personal data" under the European Union Directive dealing with data protection, Directive 95/46/EC. Personal data includes many of the personal details requested in the proposed rule for all the accountants associated with a firm. Information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm, as required under Part V of Proposed Form 1, is likely to be considered "sensitive personal data" subject to greater restrictions on dissemination under the Directive. Consent by the firm's employees may allow for the release of such information, but the consent must be informed and freely given, which presents special concerns in the context of the employer-employee relationship under the laws of certain European countries. In addition, even if employees provide the consents requested, it appears the relevant non-U.S. firm may not ultimately be able to compel the employee to testify or produce documents.

Potential conflicts with the laws and professional standards governing confidentiality of client information also abound. For example, in Switzerland, it appears that audit work papers are protected against disclosure by the Secrecy Obligation of Article 730 of the Swiss Code of Obligations and Article 321 of the Swiss Penal Code. These Swiss provisions protect not only the client's confidential information, but also confidential information of other third parties that may have been developed during the course of an audit.

Similarly, the consent requirement to produce documents may place the firm in violation of certain non-U.S. laws. For example, in the Grand Duchy of Luxembourg, firm partners and

all the staff are bound by professional confidentiality obligations that can be waived with respect to foreign authorities only to the extent that the foreign authority has entered a treaty with the Grand Duchy of Luxembourg.

In the case of non-U.S. firms that are required to register because they play a substantial role in the preparation or furnishing of an audit report on a U.S. issuer, is the Board's definition of "substantial role" in Rule 1001(n) appropriate? In particular, should the 20 percent test for determining whether a foreign firm's services are material to the audit, or whether the foreign firm performs audit procedures with respect to a significant subsidiary, be changed? Would a 10 percent threshold more realistically capture firms that materially participate in the preparation or furnishing of an audit report?

Our comment letter includes detailed discussion regarding the proposed definition of "substantial role." Those comments apply both to U.S. applicants and non-U.S. applicants. We support the 20 percent test for determining whether the non-U.S. firm performs audit procedures with respect to a significant subsidiary. As discussed in our comment letter, however, we believe the proposed 20 percent test for determining whether a non-U.S. firm's services are material should be revised or eliminated in its entirety. The 20 percent test for determining whether a non-U.S. firm's services are material would have the adverse effect of requiring accounting firms and other audit client service providers to engage in burdensome analyses intended to determine whether the other service providers played a "substantial role" in the preparation or furnishing of an audit report.