

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60497; File No. PCAOB-2008-04]

Public Company Accounting Oversight Board; Order Approving Proposed Rules on Annual and Special Reporting by Registered Public Accounting Firms

August 13, 2009.

I. Introduction

On June 10, 2008, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission" or "SEC") proposed rules (File No. PCAOB-2008-04) on annual and special reporting by registered public accounting firms, pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 (the "Act"). Notice of the proposed rules was published in the **Federal Register** on June 18, 2009.¹ The Commission received four comment letters relating to this rule proposal. For the reasons discussed below, the Commission is granting approval of the proposed rules.

II. Description

On June 10, 2008, the Board adopted rules and submitted to the Commission a rule proposal consisting of eight new rules (PCAOB Rules 2200-2207) concerning annual and special reporting by registered public accounting firms, instructions to two forms to be used for such reporting (Form 2 and Form 3), and related amendments to existing Board rules. The proposed rules would establish the foundation of a reporting and disclosure system for registered public accounting firms pursuant to Section 102(d) of the Act, specify the details of certain reporting obligations, and provide forms for such reporting. To the extent that the Board identifies additional reporting requirements that are necessary or appropriate in the public interest or for the protection of investors, the Board may propose and adopt them in the future.

According to the Board, the proposed reporting requirements serve three fundamental purposes. First, firms will report information to keep the Board's records current about such basic matters as the firm's name, location, contact information, and licenses. Second, firms will report information reflecting the extent and nature of the firm's audit practice related to issuers in order to facilitate analysis and planning related

to the Board's inspection responsibilities and to inform other Board functions, as well as for the value the information may have to the public. Third, firms will report circumstances or events that could merit follow-up through the Board's inspection process or its enforcement process, and that also may otherwise warrant being brought to the public's attention (such as a firm's withdrawal of an audit report in circumstances where the information is not otherwise publicly available).

The reporting framework includes two types of reporting obligations. First, it requires each registered firm to provide basic information once a year about the firm and the firm's issuer-related practice over the most recent 12-month period. The firm must do so by filing an annual report on Form 2. Second, upon the occurrence of specified events, a firm must report certain information by filing a special report on Form 3.

Proposed Rule 2201 sets June 30 as the deadline for the annual filing of Form 2. The reporting period covered by the report would be April 1 to March 31, leaving each firm with three months to prepare and file a Form 2 reflecting information from that 12-month period. Any firm that was registered as of March 31 of a particular year would be required to file Form 2 by June 30 of that year, but any firm that became registered in the period between and including April 1 and June 30 would not be required to file a Form 2 until June 30 of the following year.

Under the proposed rules, the occurrence of specified events triggers an obligation to file a special report on Form 3. The proposed rules provide that special reports must be filed within 30 days of the triggering event or a firm's awareness of a triggering event.

The Board expects annual and special reports to be complete and accurate, and inaccuracies or omissions could form the basis for disciplinary sanctions for failing to comply with the reporting requirements reflected in Rules 2200 and 2203 and the instructions to Forms 2 and 3. Proposed Rule 2205 provides for the filing of amendments to previously filed annual or special reports if the originally filed report included information that was incorrect at the time of the filing, or if the originally filed form omitted any information or affirmation that was, at the time of such filing, required to be included in that report.

Annual and special reports will be made public on the Board's Web site promptly upon being filed by a firm, subject to exceptions for information for which a firm requests confidential

treatment. The Board intends that as much reported information as possible be publicly available as soon as possible after filing.

The proposed forms identify certain categories of information for which a firm may request confidential treatment. The proposed rules include new requirements effected through amendments to PCAOB Rule 2300 concerning the support that a firm must supply to support a confidential treatment request. The proposed amendments require that a firm support a request with both a representation that the information has not otherwise been publicly disclosed and either (1) a detailed explanation of the grounds on which the information is considered proprietary, or (2) a detailed explanation of the basis for asserting that the information is protected by law from public disclosure and a copy of the specific provision of law. The proposed amendments also provide that the firm's failure to supply the required support constitutes sufficient grounds for denial of the request.

Under proposed Rule 2207, a non-U.S. firm may withhold required information from Form 2 or Form 3 if the firm cannot provide the information without violating non-U.S. law. If the firm withholds information on that ground, it must have certain supporting materials, including (1) a copy of the relevant provisions of non-U.S. law, (2) a legal opinion concluding that the firm would violate non-U.S. law by submitting the information to the Board, and (3) a written explanation of the firm's efforts to seek consents or waivers that would be sufficient to overcome the conflict with respect to the information. The firm must certify on the form that it has the supporting materials in its possession. The rule reserves to the Board, and to the Director of the Division of Registration and Inspections, the discretion to require that a firm submit any of those supporting materials in a particular case. The rule also reserves to the Board the discretion to require that the firm provide any of the withheld information in a particular case.

The proposed rules include an amendment to the Board's inspection rules that makes clear that the Board may require a firm to provide additional information. Specifically, existing Rule 4000 provides that registered firms shall be subject to such regular and special inspections as the Board chooses to conduct. The proposed amendment adds a paragraph providing that the Board, in the exercise of its inspection authority, may at any time request that a registered firm provide additional

¹ See Release No. 34-60107 (June 12, 2009); 74 FR 29091 (June 18, 2009).

information or documents relating to information provided on Form 2 or Form 3, or relating to information that has otherwise come to the Board's attention. The amendment provides that the request and response are considered to be in connection with the firm's next regular or special inspection. Accordingly, the cooperation requirements of Rule 4006 apply, and the request and response are subject to the confidentiality restrictions of Section 105(b)(5) of the Act.

The proposed amendments to Rule 2300(b)–(c), concerning the required support, would also apply prospectively to confidential treatment requests on applications for registration on Form 1.

Existing Rule 2107 governs the process by which a firm may seek to withdraw from registration with the Board. Under Rule 2107, a firm cannot withdraw at will, but must request the Board's permission to withdraw, and the Board may withhold that permission under certain conditions. The proposed rules include an amendment to Rule 2107 to change the way it addresses the reporting obligations of a firm that has filed Form 1–WD seeking leave to withdraw. Existing Rule 2107(c)(2)(i) provides that, beginning on the fifth day after the Board receives a completed Form 1–WD, the firm can satisfy any annual reporting requirement by submitting a report stating that a completed Form 1–WD has been filed and is pending. Under the proposed amendment, the firm's reporting obligation, including both annual and special reporting, would simply be suspended while Form 1–WD was pending. If a firm withdraws its Form 1–WD and continues as a registered firm, however, Rule 2107 would require the filing of any annual or special reports, and the payment of any annual fee, that otherwise would have been required while the Form 1–WD was pending. The Board is also eliminating from Rule 2107 the five-day delay between receipt of a completed Form 1–WD and the effect of that filing on a firm's reporting obligation. Suspension of that obligation would occur immediately upon the Board's receipt of the completed Form 1–WD.

The Board also proposed to delete from definitions in PCAOB Rule 1001 certain provisions that ceased to apply after December 15, 2003. Specifically, the Board proposes to amend Rules 1001(a)(vii) (definition of “audit services”), 1001(o)(i) (definition of “other accounting services”), and 1001(n)(ii) (definition of “tax services”) by deleting the paragraph denominated “(1)” from each rule.

The proposed rules would take effect 60 days after Securities and Exchange Commission approval.

III. Discussion

A. Comments Received

The Commission received four comment letters relating to the rule proposal. All four of the comment letters came from registered public accounting firms.²

Each of the commenters expressed support for the overall purpose of the Board's rules. However, similar to the comments made to the PCAOB during its comment period, the commenters raised several main concerns related to: (1) Provisions of proposed PCAOB Rule 2107 that relate to assertions of conflicts with non-U.S. laws; (2) Form 3 triggering events that depend on the firm's awareness; (3) the requirement that registered public accounting firms file with the PCAOB a Form 3 for withdrawn audit reports; (4) the reporting on Form 3 of the dates of registered public accounting firms' consents to the use of previously issued audit reports; and (5) the Board's differing approach in Forms 2 and 3 for reporting the engagement of consultants or professionals subject to PCAOB/SEC discipline.

1. *Assertions of Conflicts With Non-U.S. Laws*

Some commenters expressed concerns about the proposed requirement for non-U.S. firms to gather and maintain certain information. Proposed Rule 2207(c)(1) would require non-U.S. firms to gather and maintain, for a period of seven years, the information required by Forms 2 and 3 that the non-U.S. firm asserts is unable to submit because of a conflicting local law. Some commenters observed that this requirement may cause problems for non-U.S. firms because in some jurisdictions there may be privacy or other laws that would preclude registered firms from gathering the information necessary to complete Form 3.³

All of the commenters expressed concerns about the discretion afforded the Board in proposed Rule 2207(e) that would allow the Board to request a non-U.S. firm to file information withheld under proposed Rule 2207(c)(1) based on an asserted conflict with non-U.S. law. Each commenter recognized that although the Board stated in its adopting release that it does not foresee

invoking proposed Rule 2207(e) with any regularity, the commenters believe that where applied, it could be of significant concern to non-U.S. firms. According to the commenters, the concern rests on the fact that if the Board invoked Rule 2207(e), a non-U.S. firm could be put in an untenable situation where it would have to choose between breaching its reporting obligations under the PCAOB's rules and violating its home jurisdiction's laws.

The Board addressed these concerns in its adopting release. In that release, the Board asserted that the requirement for a firm to have in its possession a version of Form 2 or Form 3 that includes the information that the firm would be required to report in absence of a legal conflict imposes no greater burden on a non-U.S. firm than on a U.S. firm that actually reports the information. The Board further stated that the opportunity to assert a legal conflict is an accommodation in light of the possibility that a firm may believe it is caught stuck between competing legal requirements.

The Board also stated that a firm should not assume that its mere assertion of a conflict resolves the matter, and that there is no reason for the Board to provide that a firm need not even have assembled the information, in the form in which any other firm would have to assemble it, before asserting that non-U.S. law precludes it from disclosing the particular information it is withholding. Lastly, and as one of the commenters pointed out, the Board specifically addressed this issue by adding a note to Rule 2207(c)(1) to provide that the materials maintained by the firm do not need to include any information (1) that the firm does not possess, and (2) as to which the firm asserts that the firm would violate non-U.S. law by requiring another person to provide the information to the firm.

As the commenters noted, the Board explained at length its purpose and intended administration of Rule 2207(e). The Board noted that its position is not dissimilar from the same situation it faces in the registration context. The Commission is not aware of any instances or concerns in the registration context in which the PCAOB has acted unreasonably with regard to conflicts with non-U.S. laws that were raised by non-U.S. firms.

The Commission believes the Board's responses to these comments are not unreasonable. The Commission presumes that the Board will continue to exercise reasonable judgment and discretion in considering conflicts with

² See comments of Deloitte and Touche LLP (“Deloitte”), Ernst & Young LLP (“E&Y”), KPMG International (“KPMG”), and PricewaterhouseCoopers LLP (“PwC”).

³ See comments of Deloitte, E&Y, and KPMG.

non-U.S. laws that are raised in connection with the completion of a Form 2 or Form 3 as it has for the past six years with respect to similar issues in the registration context.⁴

2. Firm Awareness of Form 3 Triggering Events

Certain items reported in Form 3 describe events that a firm must report to the Board within 30 days after the firm has become aware of certain facts. The Form provides that the firm is deemed to have become aware of the relevant facts on the date that any partner, shareholder, principal, owner, or member of the firm first becomes aware of the facts.

All commenters expressed concern that triggering the reporting requirement based on the awareness of any one of the large number of people who fall into the definition provided by the Board, especially if they are not part of senior management, would be burdensome. Several of these commenters observed that, in response to the proposed rules, firms would put in place policies and procedures requiring reportable information be reported to the persons in the organization responsible for compliance with the rules. Because of their view that firms would put the necessary policies and procedures in place, these commenters recommended that the Commission encourage the PCAOB to consider issuing guidance providing that a registered firm will not be considered out of compliance with a reporting obligation if there is an inadvertent failure to follow internal procedures that are designed in good faith to effectuate reporting.

Similar comments were originally raised to the Board in connection with the Board's original proposal of the annual and special reporting rules. After consideration of the comments received, the Board narrowed the Form 3 reporting requirements as to the reportable events and clarified the "deemed aware" standard as to which persons are covered. In addition, the Board stated it believes it is reasonable to expect a firm to have controls designed to ensure that any such person who becomes aware of relevant facts understands the firm's reporting obligation and brings the matter to the attention of persons responsible for compliance with the obligation.

We agree. This matter is not dissimilar to the need for issuers to maintain appropriate disclosure and

controls and procedures to meet their reporting obligations, including for current reporting on Form 8-K that is on a much shorter timeframe than Form 3 reporting. Those procedures include those to ensure that information is accumulated and communicated to the appropriate personnel to allow timely disclosure. This matter also is not dissimilar to a registered public accounting firm's existing obligations under the Commission's and the PCAOB's auditor independence requirements, which in many instances reaches down to obligations involving members of an engagement team below a partner level. Lastly, as to when it would be appropriate for the Board to take disciplinary action for reporting violations, the Commission assumes the Board will continue to exercise its discretion as to whether disciplinary action is warranted under the particular facts and circumstances.

3. Disclosure of the Dates of Consents of Audit Reports

Under the proposed rules, firms would be required to report on Form 2 the dates of any consent to an issuer's use of an audit report the firm previously issued to that issuer, if such consent constitutes the only instance of the firm issuing an audit report for that issuer during the reporting period. Three commenters expressed opposition to this proposed requirement on the basis that it would not be sufficiently meaningful to warrant the potential burden of gathering and reporting it,⁵ with one noting that this information would in most, if not all, cases have already been listed in the previous year's public report on Form 2.⁶

We are not persuaded by the arguments raised by commenters that this requirement would be an undue burden, and we believe that it is not unreasonable for the Board to request firms to provide the dates of consents when such consent constitutes the only instance of the firm issuing an audit report for that issuer during the reporting period. We acknowledge that for the larger firms, they will likely need to institute additional controls to compile the information, but we do not believe the burden to be unreasonable.

4. Reporting of Withdrawn Audit Reports

The rules proposed by the Board include a requirement that a firm file a Form 3 when it withdraws an audit report and the related issuer has failed to comply with its requirement to file a

Form 8-K regarding the event. Some commenters opposed this proposal and expressed the view that this matter fundamentally is about issuer conduct and, therefore, is more appropriately left to the Commission in the context of its disclosure framework and that such monitoring and reporting would create an unnecessary and duplicative burden on registered firms.⁷

Commenters expressed these same concerns during the Board's comment period and the Board responded to these comments by noting the following: (1) The point of this item is not have the firm draw the Board's attention to potential problems with an issuer's financial statements, but that a withdrawn audit report is a risk indicator concerning the auditor's conduct preceding the withdrawal, not merely a risk indicator concerning the issuer's financial statements; and (2) the Board has a regulatory interest in being aware of this information and possibly following up on that information for reasons directly related to its oversight of auditors.

The Commission agrees with the responses made by the PCAOB and believes that a requirement for registered firms to report this information is not unreasonable. In addition, we note the response of one commenter who indicated that registered firms already routinely track such instances.

5. Differing Approach in Forms 2 and 3 to the Reporting of the Engagement of Consultants or Professionals Subject to PCAOB/SEC Discipline

Form 2 requires registered firms to report information about certain types of relationships with individuals and entities who have specified disciplinary and other histories. One such reporting requirement under Part VII of Form 2 requires firms to report arrangements for services related to the firm's audit practice or related to services the firm provides to issuer audit clients. Section II of Form 3 includes a similar reporting trigger, however that trigger is not limited to individuals who provide audit services. Two commenters raised concerns about these requirements.⁸

Both commenters acknowledged a statement made by the Board in its adopting release where the Board expressed its view that limiting the scope of the Form 3 reporting requirement would negate the purpose of the reporting requirement, "which is generally intended to gather information about new relationships with persons or

⁴ The Commission also notes that the Board has been willing to provide further implementation guidance where necessary to explain its administration of similar requirements. See http://www.pcaob.org/Registration/2004-03-11_FAQ.pdf.

⁵ See comments of E&Y, KPMG, and PwC.

⁶ See comments of PwC.

⁷ See comments of Deloitte and PwC.

⁸ See comments of KPMG and Deloitte.

entities that are effectively restricted from providing auditing services.”⁹ Both commenters disagreed with the Board’s response.

The Commission believes the Board appropriately explained its rationale for the difference in the Form 2 and Form 3 reporting requirements and believes that it is not unreasonable for the Board to request this information in the current manner in which it is requested.

6. Requests for Additional Implementation Guidance

As noted in the above discussion, the Commission has considered the concerns and issues raised by commenters and appreciates the feedback. While the Commission believes the aforementioned matters are not unreasonable requirements, the Commission does encourage the Board to monitor implementation of its annual and special reporting rules and to be open to issuing timely implementation guidance as necessary as to these and the other comments raised, as was done with the Board’s implementation of its registration rules.¹⁰

B. Recommendation as to the Annual Fee

Section 102(f) of the Act requires the Board to “assess and collect a registration fee and an annual fee from each registered firm in amounts that are sufficient to recover the Board’s costs of processing and reviewing applications and annual reports.”¹¹ The PCAOB has collected registration fees from every firm that has registered with the Board since 2003. However, the Board has not assessed or collected annual fees from any registered firms.

In our order approving the PCAOB’s budget and accounting support fee for 2008, the Commission directed the PCAOB to, among other things, analyze historical and planned expenditures related to the review and processing of registrations and annual reports of public accounting firms.¹² We understand from this analysis that there are unrecovered historical costs that need to be collected from registered firms. In addition, the Board needs to determine the amount of current and future costs of reviewing and processing registrations and annual reports and how and over what period to recover those costs. These matters also are impacted due to changes to the Board’s

registration profile that may occur as a result of the requirement for auditors of non-public broker dealers to be registered with the Board for fiscal periods ending on or after January 1, 2009.

The Commission recommends that, in setting its annual fee under PCAOB Rule 2202, *Annual Fee*, the Board recover all of the unrecovered historical costs associated with the Board’s review and processing of registration applications in the first annual fee billed to registered public accounting firms and that these costs be recovered only from registered public accounting firms that were registered prior to January 1, 2009, and that such bill be separately itemized. In addition, for consistency and to aid transparency, the Commission recommends that future costs associated with reviewing and processing registration applications, processing annual and special reporting, and related system maintenance and development costs be recovered over a time period that is consistent with the time period the PCAOB uses for its financial statement purposes to depreciate long-lived assets similar to that used by the PCAOB in processing registration applications and annual and special reports.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed PCAOB rules on annual and special reporting by registered public accounting firms are consistent with the requirements of the Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that proposed PCAOB Rules on Annual and Special Reporting by Registered Public Accounting Firms (File No. PCAOB–2008–04) be and hereby are approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60491; File No. SR–CBOE–2009–057]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to Market-Maker Orders

August 12, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on August 10, 2009, the Chicago Board Options Exchange, Incorporated (the “Exchange” or “CBOE”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to eliminate an order identification rule for Market-Maker and Specialist orders. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.cboe.org/Legal>), at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 6.73(d) currently provides that a Floor Broker holding an order for the account of a Market-Maker or Specialist shall verbally identify the order as such

⁹ See PCAOB Release No. 2008–004, June 10, 2008 [page 22].

¹⁰ See, e.g., http://www.pcaob.org/Registration/Registration_FAQ.pdf; and http://www.pcaob.org/Registration/2004-03-11_FAQ.pdf.

¹¹ 15 U.S.C. 7212(f).

¹² See Release No. 34–56986 (December 18, 2007).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.