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## Court Considers Sarbanes-Oxley Act Privilege for PCAOB Inspections

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A recent case from the Western District of Missouri highlights the significant privilege issues that surround the Public Company Accounting Oversight Board's inspection and disciplinary processes. In *Bennett v. Sprint Nextel Corp.*, the court held that documents and information prepared by KPMG for a PCAOB inspection were privileged under Section 105(b)(5)(A) of the Sarbanes-Oxley Act and therefore not subject to production in civil litigation. The documents in question included direct communications between the PCAOB inspectors and KPMG about KPMG's audit of Sprint, the PCAOB's comment about inspection issues and KPMG's draft and final responses, documents that would have revealed specific questions or inquiries from the PCAOB, documents prepared internally by KPMG to gather information about the audit for purpose of the inspection and a presentation which was used by KPMG at the kick-off meeting with the inspectors and later provided to a handful of Sprint employees. The court concluded that all of these documents were privileged under the Sarbanes-Oxley Act because they were prepared "specifically for" the PCAOB within the meaning of Section 105(b)(5)(A), since, absent the inspection, they would not have existed.

The court also held that KPMG had not waived the Sarbanes-Oxley privilege. While the Sarbanes-Oxley Act and PCAOB rules do not provide that disclosure to third parties waives the PCAOB privilege, the court looked to waiver principles under the attorney-client privilege and work product doctrine. The court cited emails and board minutes as showing that KPMG had informed Sprint that the inspection had taken place, but the evidence did not show that the details or substance of the investigation was divulged. And even though the kick-off presentation was divulged to Sprint employees, this "limited communication [was] inadequate to cause a wholesale waiver."

The *Bennett* case illustrates why accounting firms are often reluctant to disclose the PCAOB's non-public findings regarding their quality control systems. Under the Sarbanes-Oxley Act, these findings are not made public by the PCAOB if the firm remediates the quality control issues to the satisfaction of the PCAOB within 12 months. While firms are not barred from disclosing the PCAOB's non-public findings to their audit client, doing so runs the risk that plaintiffs in civil litigation will assert that such disclosure waived the privilege applicable to the non-public inspection reports and other internal and external communications about the PCAOB's inspections.

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