U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

November 7, 2023

Ms. Phoebe W. Brown
Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: *Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability* (PCAOB Release No. 2023-007, September 19, 2023; PCAOB Rulemaking Docket Matter No. 053)

Dear Ms. Brown:

The U.S. Chamber of Commerce ("Chamber") Center for Capital Markets Competitiveness appreciates the opportunity to comment on the Public Company Accounting Oversight Board ("PCAOB" or "Board") Exposure Draft on *Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability* (the "Proposal" or "Proposed Rule"). The Proposal is part of the Board's goal to strengthen PCAOB enforcement,[1] which includes revising PCAOB rules to enhance auditor accountability.

The Proposal would revise Rule 3502 to lower the threshold for contributory liability for associated persons from recklessness to negligence.[2] Further, the Proposal would extend contributory liability to violations by associated persons with any firm – not just violations by a firm with which they are associated.[3]

In 2004, the Board initially proposed negligence as the standard of conduct to govern the liability of associated persons who contribute to a registered public accounting firm's primary violation. However, after due consideration, which was informed by public comment, the Rule 3502 unanimously adopted by the Board in 2005,[4] and approved by the Securities

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[1] See the *PCAOB Strategic Plan 2022-2026,* page 13.

[2] The Proposal refers to associated persons as "persons" or "individuals." However, both natural persons and entities can be associated persons, and therefore Rule 3502 charges can be brought against both natural persons and entities, consistent with the meaning of the term "person associated with a registered public accounting firm" (page 3).

[3] The Proposed Rule is as follows (indicating the current language to be deleted and bolding the proposed language to be added):

Rule 3502. Responsibility Not to Contribute to Violations

> *A person associated with a registered public accounting firm shall not directly and substantially contribute to a violation by any registered public accounting firm of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, by an act or omission that the person knew or should have known would contribute to such violation.*

[4] See PCAOB Adopting Release *Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees* (PCAOB Release No. 2005-014, July 26, 2005).

and Exchange Commission ("SEC" or "Commission"), rejected negligence in favor of recklessness as the threshold for contributory liability.

In adopting Rule 3502, the Board concluded that a knowing or recklessness standard "strikes the right balance in the context of the rule."[5] In support of this decision, Board Member Goelzer emphasized: "[C]onduct that is only negligent can best be dealt with through our inspection program and our ability to require firms to strengthen their quality control and other internal procedures."[6]

The Board's decision to adopt a recklessness standard has stood the test of time. Rule 3502 has not been an impediment to PCAOB enforcement. Under the existing rule, the Board has expanded the types of cases it pursues, with fines and penalties at all-time highs. Nonetheless, the Board wants to upset the "right balance" in Rule 3502 with a Proposed Rule that would add a blunt and potentially draconian instrument to the PCAOB's already extensive enforcement toolkit to facilitate and further the Board's aggressive enforcement agenda.

The Chamber cannot support the Proposed Rule and the expansion of PCAOB tools for enforcement against associated persons of registered public accounting firms. The Proposal ignores congressional intent for authority granted to the PCAOB in The Sarbanes-Oxley Act of 2002 ("SOX") and legal constraints on PCAOB enforcement authority in accordance with SOX, along with raising other important legal questions. The Proposal lacks any compelling justification for the need to revise Rule 3502 or reasonable support for the claim that the benefits of the Proposed Rule outweigh the costs – for example, it fails to recognize and/or fully analyze significant costs, consequences, and other matters. Overall, the Proposal risks disturbing the PCAOB's inspection process, degrading audit quality, and diminishing investor protection.

The Chamber urges the PCAOB to withdraw the Proposal and maintain Rule 3502 in its current form. We discuss our concerns and recommendations in more detail below.

Discussion

Congressional Intent and PCAOB Authority

The PCAOB's legal authority under SOX for instituting a negligence threshold for contributory liability is not as settled as the Proposal assumes. The PCAOB's enforcement authority is not open-ended. SOX Section 105 articulates conditions for disciplinary actions and sanctions against registered public accounting firms and associated persons. SOX also provides some safe-harbors, including for failure to supervise.[7] Nowhere does simple

[5] Id., pages 12 and 13.
[6] See Statement of Daniel L. Goelzer on *Rules Concerning Independence, Tax Services, and Contingent Fees* (July 26, 2005).
[7] See SOX Section 105(c)(6)(B).

negligence appear in SOX as the level of intent justifying PCAOB sanctions.[8] This absence reinforces the need for caution by the Board before proceeding to adopt a negligence standard for contributory liability.[9] Indeed, as we discuss further below, the Board lacks the statutory authority to impose a negligence standard.

Further, a standard of simple negligence for contributory liability contrasts with existing legal standards for secondary liability. This raises additional legal concerns and reinforces issues of reasonableness and fairness, which we subsequently discuss in more detail.

Otherwise, while SOX gives the PCAOB authority for standard-setting, inspections, and enforcement, Congress did not intend for PCAOB oversight to give equal weight to each. Inspections represent the primary focus of the PCAOB – with the single largest portion of the PCAOB's staffing and resources directed towards inspection-related activities.[10] PCAOB enforcement is "a means of last resort."[11]

As emphasized by Board Member Goelzer, the Board recognized the power and primacy of the PCAOB's inspection process in finalizing Rule 3502, back in 2005. Inspections – along with the myriad of audit firm activities in support of and response to PCAOB inspections – is the PCAOB's most important process for maintaining and improving audit quality. The Chamber cannot support a Proposed Rule that would signal and solidify an elevation of PCAOB enforcement and disturb the PCAOB inspection process.

Unlike enforcement, inspection is not an adversarial process. A cooperative spirit and constructive dialogue between the PCAOB and each of the inspected audit firms and their associated persons are essential elements for the efficacy of the inspection process. Yet, by substantially expanding the scope and increasing the risk of PCAOB enforcement against associated persons for inspection deficiencies, the Proposed Rule would disturb the inspection dynamic and threaten the cooperative and constructive nature of the process that has developed over time.

Legal Authority

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[8] SOX Section 105(c)(5) identifies intentional or knowing conduct, including reckless conduct, or repeated instances of negligent conduct as necessary for applying various sanctions and penalties under Section 105(c)(4).

[9] The Board also relies on SOX Section 103 as authority for the Proposed Rule. However, Section 103 gives the PCAOB the authority to regulate ethical conduct, which the Board conflates with the statutory authority to punish negligent conduct, including single acts of negligent behavior.

[10] For additional context, the PCAOB's 2023 budget provides more than twice the amount for the Division of Enforcement and Investigations than the Office of the Chief Auditor (Standards). In addition, the budgeted amounts for the Office of Economic and Risk Analysis and the Office of the General Counsel each exceed that of the Office of the Chief Auditor.

[11] The SEC also has enforcement authority over PCAOB registered public accounting firms and associated persons.

The Board lacks the authority to enact the Proposed Rule. The Proposal cites Sections 103 and 105 of SOX in passing, but neither provides authority to impose secondary liability on the basis of a single negligent act. Section 103 allows the Board to set auditing, ethics, and quality control standards, but it is not untethered from the rest of SOX. Section 103 does not impart limitless rulemaking authority on the Board. Section 105(c)(5), which is entitled "Intentional or other Knowing Conduct" limits the Board's ability to levy sanctions and penalties for certain violations of law only to "intentional or knowing conduct, including reckless conduct" or "repeated instances of negligent conduct." While it is true that Section 105(c)(5) does not limit the Board's authority to impose sanctions under paragraphs (D)(ii), (E), (F) and (G) of Section 105(c)(4), it does not logically follow that the Board may impose a negligence standard under those paragraphs.[12]

In *Central Bank of Denver*, the Supreme Court drew a clear distinction between primary and secondary liability, and in the absence of a clear grant of congressional authority, barred courts from implying liability for aiding and abetting under the SEC's general antifraud authority.[13] The Court reasoned that "Congress knew how to impose aiding and abetting liability when it chose to do so."[14] In the context of Section 10(b) of the Securities Exchange Act, the Court was clear that it "is inconsistent with settled methodology in §10(b) cases to extend liability beyond the conduct prohibited by statutory text."[15] The Court was also clear that "it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose §10(b) aiding and abetting liability."[16]

Moreover, as the *Central Bank* court observed, "Congress has not enacted a general civil aiding and abetting statute."[17] Therefore, the Court continued, "when Congress enacts a statute under which a person may sue and recover damages . . . there is no general presumption that the plaintiff may also sue aiders and abettors."[18] We would also note that prior to *Central Bank*, the prevailing formulation for aiding and abetting liability under the federal securities laws required a showing of scienter.[19]

With this caselaw and these basic tenets of statutory interpretation in mind, and with *Central Bank* less than a decade old at the time of the passage of SOX, there is simply no basis to assume that Congress's silence implied a negligence standard under any part of Section 105. Indeed, Congress used clear and unequivocal language to empower the SEC to

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[12] Further, the Proposal does not distinguish between sanctions awarded under Section 105(c)(4).
[13] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).
[14] Id. at 176.
[15] Id. at 177.
[16] Id. at 185.
[17] Id. at 182.
[18] Id.
[19] See, e.g., *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206 (2d Cir. 1989).

pursue an administrative claim for secondary liability based on negligence under Section 21C of the Securities Exchange Act.

The Proposal's efforts to argue, since the SEC has some authority to pursue secondary liability on the basis of negligence, that the Board has such authority too is misplaced. As a threshold matter, Section 21C applies only to the SEC, not the Board. In any event, what authority the SEC (or any other regulator) may have under its organic statutes is irrelevant to the inquiry of whether the Board has authority under SOX. Further, while the Proposal wrongly conflates the Board's powers with those of the SEC, it does not discuss Rule 102(e) under the SEC's rules of practice.[20]

Rule 102(e) permits the SEC to suspend or disbar an accountant from practicing before the SEC for certain professional misconduct. Notably, Rule 102(e)(A) requires a showing of intentional, knowing, or reckless conduct, and Rule 102(e)(B) requires a showing of negligence under two heightened circumstances. The heightened negligence showing requires either a "single instance of highly unreasonable conduct" or "repeated instances of unreasonable conduct." Thus, under the SEC's rule, a single instance of simple negligence is not actionable.

In adopting the heightened negligence standard, the SEC was clear that the "highly unreasonable" standard is "an intermediate standard, higher than ordinary negligence."[21] Importantly, the SEC reasoned that "a single judgment error, even if unreasonable when made, may not indicate a lack of competence to practice before the Commission and, therefore may not pose a future threat to the Commission's processes sufficient to impose remedial sanctions."[22] The SEC in setting the higher standard was also concerned that "creating an undue fear that an isolated error in judgment would result in a 102(e) proceeding could be counterproductive. . . ."[23] Accordingly, the SEC did not adopt a "simple" or "mere" negligence standard.[24]

Need

The Board argues there is a need to lower the threshold for contributory liability from recklessness to negligence for associated persons because of a "mismatch" between individuals' and firms' respective minimum culpability levels, which limits the ability of the Board to hold individuals accountable.[25] In support of this argument, the Proposal explains

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[20] 17 CFR § 201.102.
[21] Release No. 33-7593, *Amendment to Rule 102(e) of the Commission's Rules of Practice*, 63 Fed. Reg. 57,164, 57,167 (Oct. 26, 1998).
[22] Id.
[23] Id. at 57,168.
[24] *See* id. at 57,169.
[25] See the Proposal, page 19.

that legal entities (i.e., registered public accounting firms) can act only through natural persons (i.e., associated persons) and, therefore, the standards for liability should be aligned.[26]

However, any so-called "incongruity" or "mismatch" was fully understood and considered by the Board in adopting Rule 3502 in 2005. It is neither a new insight nor a new development. Thus, "incongruity" or "mismatch" cannot and does not provide a convincing rationale or justify the need for the Proposed Rule. The Proposal provides no compelling evidence for the existence of a problem that needs solving.[27]

The Proposal states that the "[s]taff estimates two to three instances in 2022 where an amended Rule 3502 would have prompted staff to recommend a Rule 3502 charge."[28] The staff also estimates that this number is likely a "fair average representation across other years." Thus, "two to three" provides an estimate of the additional cases against associated persons that the PCAOB would pursue under the Proposed Rule, ceteris paribus.[29]

Conjecturing two or three additional cases a year (that may or may not be successful) falls far short of justifying the need for the Proposed Rule or meeting any cost-benefit threshold, given the significant costs and consequences that the Proposed Rule would impose. However, the Proposal alerts that ceteris paribus conditions may not apply. The Proposal states that "this estimate may vary to the extent that there are modifications in other Board standards (e.g., adopting and implementing a new quality control standard) or changes in enforcement priorities."[30]

This caveat – that past data may not reflect future application of a revised Rule 3502 – is of overriding concern, particularly because the Board declines to articulate its intent for the use of the Proposed Rule or to specify any limits on its use. The Board's aggressive enforcement agenda and lack of transparency on the intent for approaching enforcement in the future, including under newly revised PCAOB Auditing Standards ("AS"), undermines the propriety of the Proposal and supports that the Proposal is premature and should be withdrawn.[31]

Further, the only quantified data in the Proposal are problematic for establishing a baseline and the need for the Proposed Rule. To explain, the Proposal includes a table

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[26] See the Proposal, page 3.
[27] It is noteworthy the PCAOB does not argue that "bad actors" are escaping PCAOB enforcement. The PCAOB's enforcement tools, including Rule 3502 as currently constructed, are sufficient in that regard.
[28] See the Proposal, page 25.
[29] Id.
[30] Id.
[31] For example, under the QC 1000 proposal, individuals assigned specific responsibilities with respect to the quality control system could be charged with violations if they fail to comply with those responsibilities, as well as for knowingly or recklessly contributing to firm violations or failing reasonably to supervise. However, the Proposed Rule would lower the contributory threshold described to negligence and, thereby, extend the risk of disciplinary actions.

summarizing the number of cases from 2009-2022 with Rule 3502 charges (which total 87), the number of firms sanctioned (which total 245), and the ratio of the two (which is thirty-six percent). Based on these data, the staff concludes that "in nearly two-thirds of cases in which a firm was charged with a violation, no contributory actor was held accountable under Rule 3502."[32]

However, this analysis is mostly beside the point and misleading. Rule 3502 is not the only tool for PCAOB enforcement actions against individuals. The Board has other means of bringing disciplinary actions against associated persons (when appropriate), so there may be no need to revise Rule 3502. Revising Rule 3502 to bring duplicative charges against associated persons would be both unreasonable and unfair. Thus, in assessing the need for revising Rule 3502, an essential question is how many disciplinary actions involved individuals under any PCAOB rule?

In 2022, the Proposal reports six cases with Rule 3502 charges and thirty firms sanctioned overall, for a ratio of twenty percent. However, an analysis of enforcement orders announced in 2022 reveals forty-seven orders, although five are terminations of bars. The remaining forty-two orders involve thirty firms (as reported in the Proposal) and twenty-six individuals (not reported in the Proposal).

Thus, the Proposal fails to disclose that the number of associated persons sanctioned and/or penalized by the PCAOB in 2022 – for violating any applicable rule or regulation – almost equals the number of firms, which supports that there is no need to revise Rule 3502. Also, these data do not consider enforcement actions by the SEC.

Inadequate Economic Analysis

This section overviews the PCAOB's analysis of benefits and costs, which illustrates that the benefits elude; demonstrates how costs and consequences are dismissed; and provides background for a discussion of other inadequacies in the economic analysis, including the failure to consider the practical implications and collateral effects of the Proposed Rule.

Overview

As to the benefits, the Proposal includes a high-level discussion, which lacks any application to the specifics of the Proposed Rule itself. The qualitative discussion mostly focuses on increases in litigation risk and legal liability as benefits of the Proposed Rule – explaining that they improve audit quality by incentivizing compliance and serving as a deterrence against misconduct. The discussion concludes by speculating that "[u]nder the proposed rule, the increase in litigation and liability risk would be modest but meaningful,"[33]

[32] See the Proposal, pages 18 and 19.
[33] See the Proposal, page 22.

which hardly supports the proposed sea-change in liability for associated persons. In addition, litigation risk and legal liability involve costs from the perspective of audit firms and their associated persons, which require due consideration and likely offset any "benefits."

As to costs, the economic analysis recognizes the potential for increases in defense costs, opportunity costs (i.e., PCAOB enforcement diverting individuals from their normal responsibilities), audit fees, and indirect costs (e.g., from changes in individual behavior and additional effort). However, the analysis demurs on quantifying or qualitatively assessing the magnitudes of any of these costs. While the Proposal acknowledges that the costs "could … [be] substantial to the firms and individuals involved" and "may have more impact on smaller firms,"[34] it does not otherwise analyze, assess, or reconcile them with the purported "modest benefits" of the Proposed Rule. Instead, it appears that the PCAOB believes it is sufficient simply to mention these types of costs.

As to potential unintended consequences, the economic analysis discusses concerns over self-protective behavior (i.e., individuals undertaking excessive and unnecessary procedures in the face of uncertainty over the application of the rule), discouraging auditors from accepting important audit roles (with such roles perhaps going to less cautious or qualified people), and reduced competition in the audit market. However, the analysis dismisses these consequences, too. Yet these concerns are real and require a more substantive consideration by the Board.

Practical Implications

The practical implications of applying a simple negligence standard are sweeping and severe. The Proposed Rule would apply to a violation of any one of the many intricate and complex body of rules and regulations in SOX, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under SOX, and professional standards.

The Proposed Rule would greatly increase the risk of PCAOB disciplinary actions for even the most routine decisions made daily by the thousands of associated persons – both partners and staff – whether serving on audit engagements or in national office, quality control, or other roles under the purview of the PCAOB, including supervisory roles. It certainly would add inordinate pressure on the many difficult, often technical, judgments on accounting, auditing, independence, and other matters that associated persons in these roles are called upon to make on a regular basis related to issuer and broker-dealer audits and reviews, including the quality controls that frame these activities. Given the ever-changing and increasing complexity of all aspects of PCAOB audits since 2005, these judgments and decisions have become even more challenging since Rule 3205 was adopted.

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[34] See the Proposal, page 25.

While it is true that an entity can act only through individuals, nonetheless, it is most often the case that a registered public accounting firms' actions are the result of the confluence of decisions and actions by some number of different individuals. This complexity makes it challenging for any individual to "know or should have known" in advance that their action or inaction was contributing to a violation of any of the many laws, regulations, and standards encompassed by the Proposed Rule.[35]

Thus, the Proposed Rule could implicate any one of thousands of associated persons for engaging in behavior that they neither intended, nor reasonably believed, would contribute to a registered public accounting firm violating any aspect of the complex web of laws, regulations, rules, or standards encompassed by proposed Rule 3502.[36] Mere "foot-faults" could be turned into PCAOB disciplinary actions against associated persons.

Collateral Effects

The Board's objective in revising Rule 3502 is to lower the threshold for contributory liability from recklessness to negligence and increase the likelihood of PCAOB enforcement actions against associated persons, along with increasing the fines, penalties, and sanctions levied by PCAOB enforcement. PCAOB enforcement actions have sweeping and severe implications for registered public accounting firms and their associated persons. It is important to consider the "collateral effects" of the Proposed Rule and whether it is fair and reasonable given these effects, which the economic analysis fails to do.

For example, the Chair suggested that the Proposed Rule could be applied to associated persons for contributing to quality control and independence violations. The Chair used the failure to obtain audit committee pre-approval for (allowable) audit or non-audit services as one example of such an independence violation.[37] But, this example only reinforces concerns about the fairness and reasonableness of the Proposal. Rather than using enforcement under the Proposed Rule, PCAOB inspections (with a process that requires the remediation of such deficiencies) or Rule 3502 as currently constructed (with a recklessness threshold for egregious violations, which the Chair's example is not) are best suited to handle any such violations. A simple negligence threshold is way too draconian.

Moreover, it is essential to recognize that the complex set of rules and regulations encompassed by the Proposed Rule (such as independence rules and rules for filing PCAOB forms, such as Form AP) have no de minimis provisions. The lack of this provision reinforces

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[35] In the Proposed Rule, "directly and substantially" does not qualify the negligence standard of "knew or should have known would contribute to such violation." This represents another important revision in the recklessness standard in Rule 3502, which is not analyzed as to costs or consequences.

[36] See *Statement on Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability* by Board Member Duane M. DesParte (September 19, 2023).

[37] See *Chair Williams' Statement on Proposed Changes to Board Rule on Contributory Liability for Firm Violations* (September 19, 2023).

concerns over the disproportionate effect of a negligence standard, its intended application, and whether the Proposed Rule is fair and reasonable.

Relatedly, forthcoming standards, as part of the Board's agenda to revise and modernize PCAOB Auditing Standards, may put registered public accounting firms and associated persons at greater risk of violations under the Proposed Rule. For example, "more robust" quality control systems, with enhanced monitoring and reporting requirements, under the proposed QC 1000 standard,[38] in conjunction with a negligence standard for contributory liability, would create a trap for the unwary, greatly expand the opportunities for PCAOB enforcement, and impose disciplinary actions on an unfair and unreasonable basis. This reinforces concerns that the Proposal is premature, should be withdrawn, and that the Board needs to delineate its intentions for applying the Proposed Rule or any limits on its application.

The Proposal also fails to adequately consider the cascading consequences of PCAOB disciplinary actions that would put the reputations and careers of associated persons on the line for even unintentional slips, pure errors of judgment, and innocuous errors on "technicalities." While the magnitude of fines, penalties, and sanctions imposed by the PCAOB can reflect the severity of individuals' acts or omissions, **any** PCAOB enforcement action has significant consequences for targeted associated persons, along with their firms. For example:

- The Proposed Rule would make lawbreakers out of individuals caught by the negligence standard, because any violation of Rule 3502 would constitute a violation of the securities laws. The Proposal fails to consider the implications of PCAOB sanctions for federal collateral consequences as they would be considered the same as for securities law violations.[39]

- The Proposed Rule would lead to increased investigatory and sanctioning activity at the state level for associated persons, given notification and investigation requirements of state licensing boards. These activities could result in the suspension or loss of an individual's license and the right to practice as a certified public accountant.

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[38] See *A Firm's System of Quality Control and Other Proposed Amendments to PCAOB Standards, Rules, and Forms* (PCAOB Release No. 2022-006, November 18, 2022; PCAOB Rulemaking Docket No. 046).

[39] See Section 3(b) of SOX, which provides that a violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934. Although SOX Section 105 limitations on direct sanctions may override this provision, there may be federal collateral consequences to securities law violations that would still apply.

- Audit committees would be unlikely to accept associated persons – whether engagement partners, engagement quality review partners, other partners, or staff – whose record reflects a Board sanction, even for "foot faults."[40] Yet, staffing challenges and the level of staffing and the experience of the engagement team are major concerns of audit committees, and the Proposed Rule would only exacerbate these concerns.[41]

- In emphasizing and expanding PCAOB enforcement, the Proposed Rule may contribute to the decline in the attractiveness of the accounting profession. PCAOB registered public accounting firms are facing talent-related challenges in attracting, retaining, and promoting associated persons at all levels, including people at more senior and experienced levels.[42] While these challenges arise from many factors, a belief that the regulatory environment makes the profession unappealing is a major one.[43] The evidence should give the Board pause and motivate a candid assessment of how it may be diminishing the vibrancy of public company auditing.

  Relatedly, SOX requires that funds generated from the collection of monetary penalties by the PCAOB can only be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs.[44] This is a laudable provision of SOX. Given the cost of higher education, PCAOB scholarships are very welcome – indeed, they can be life-changing for the students that receive them.

  As of December 31, 2022, the PCAOB had $20.4 million in statutorily designated funds from monetary penalties (and investment earnings thereon) – up from $11.7 million on December 31, 2021.[45] Based on public announcements through September 30, 2023, the PCAOB has awarded about $3.7 million in scholarships, while assessing over $7.5 million in monetary penalties. Thus, as of September 30, 2023, the PCAOB has over

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[40] Relatedly, even for disciplinary actions over technical violations or "foot faults," audit firms may remove partners and staff from involvement in issuer and broker-dealer audits, quality controls, or other roles subject to PCAOB oversight.
[41] See the PCAOB *Spotlight: 2022 Conversations With Audit Committee Chairs* (September 2023).
[42] For example, see "Job Security Isn't Enough to Keep Many Accountants from Quitting" in *The Wall Street Journal,* (September 22, 2023).
[43] See *Increasing Diversity in the Accounting Profession Pipeline: Challenges and Opportunities* by Edge Research and the Center for Audit Quality (July 2023), page 31, that reports thirty percent of undergraduate accounting majors who chose not to purse, or are undecided on, licensure as a certified public accountant cite the regulatory environment as a major reason. An additional sixty-four percent cite this belief as part of the reason.
[44] See SOX Section 109(c)(2). The use of these funds is subject to the availability in advance in an appropriations Act.
[45] See the PCAOB 2022 Annual Report, page 34. As of December 21, 2022, Congress had not appropriated $7.3 million (from funds collected in 2017, including investment earnings).

$24 million in statutorily designated funds for scholarships (without considering investment earnings accumulated during 2023).

These data indicate that the PCAOB is falling far short of timely distributing the funds collected as monetary penalties as required by SOX. The data lend support to questioning the need for a Proposal to facilitate an increase in the collection of monetary penalties.

- The Proposed Rule could have additional more nuanced effects. For example, it could facilitate PCAOB enforcement over weaker claims and divert PCAOB resources to low merit or non-meritorious actions.

- The Proposed Rule could change the dynamics of the negotiation process for resolving potential enforcement actions. For example, the Proposed Rule could be used to "tip the scale" to weight the process in the PCAOB's favor and against registered public accounting firms and their associated persons. To illustrate, PCAOB enforcement staff could threatened to use a Rule 3502 for negligence against associated persons to extract settlements and/or higher penalties, fines, and sanctions from registered public accounting firms.

Further, as previously noted, the impact of the Proposed Rule may be greater for smaller firms. The Proposal only mentions this consequence in passing – without any analysis or consideration. Nonetheless, the Proposed Rule adds to the ever-expanding costs being imposed on audit firms by the PCAOB's regulatory activities, which are particularly disproportional for triennially inspected firms (both U.S. and non-U.S.) with a limited number of engagements. The Board needs to consider the effects (both overall and incremental to the Proposal) of the PCAOB's regulatory burden on audit firm deregistrations and the declining number of firms willing to conduct issuer and/or broker-dealer audits.[46]

Other Matters

The Proposed Rule would extend contributory liability to violations by associated persons with any firm – not just violations by a firm with which they are associated (by changing "that" to "any"). The rationale for this change is unclear; and, it receives no attention in the economic analysis in the Proposal. Chair Williams stated:

[46] Based on data available on the PCAOB website, over the last ten years, the number of PCAOB registered and inspected firms that provide audit reports for issuers has declined from about 650 to 450, and the number that provide audit reports for broker-dealers has declined from about 800 to 290. Audit firms that provide both issuer and broker-dealer audits are included in each count. Thus, the current number of unique registered and inspected audit firms is less than 740 (450 + 290), although the count does not include audit firms that only play a substantial role in issuer and/or broker-dealer audits.

> *While instances where auditors negligently, directly, and substantially contribute to the violations of firms with which they are not associated could be rare, arrangements among firms are becoming more and more complex every day. This clarification will ensure more complex firm arrangements, including some that we may not be able to contemplate today, cannot be used to evade accountability in the future.*[47]

However, it seems premature to revise Rule 3502 based on vague speculation about the future – particularly without considering any detrimental effects on the relationships among network/affiliate firms or the use of other auditors on PCAOB engagements.

Concluding Remarks

In conclusion, the Chamber has very deep concerns about the Proposal and its expansion of PCAOB tools for enforcement against associated persons of registered public accounting firms, which is neither fair nor reasonable. The Proposal ignores congressional intent, the lack of statutory authority for the Board to impose a negligence standard, and other legal issues. Further, the Proposal lacks any compelling justification of need and fails to recognize and/or fully analyze significant costs and consequences.

The Chamber strongly urges the Board to withdraw the Proposal.

Thank you for your consideration and we stand ready to discuss these matters with you further.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

[47] See Chair Williams' *Statement on Proposed Changes to Board Rule on Contributory Liability for Firm Violations* (September 19, 2023).