



November 3, 2023

Via email: [comments@pcaobus.org](mailto:comments@pcaobus.org)

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

Re: PCAOB Rulemaking Docket Matter No. 053

Dear Office of the Secretary:

BDO USA, P.C. (BDO USA) welcomes the opportunity to comment on the Public Company Accounting Oversight Board's (PCAOB or the Board) proposing Release No. 2023-007, Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability (the Proposal).

BDO USA understands the critical role of independent auditors as gatekeepers to capital markets. We are committed to continuous improvement in the quality of our audits, and we recognize and support the mission of the PCAOB to protect investors by improving audit quality. We also fully support the PCAOB and other regulators holding accountable those accounting firms and professionals whose failure to adhere to the Board's rules and standards threatens the capital markets.

While we confirm our unequivocal commitment to protecting the interests of the investing public from auditors who engage in misconduct, we respectfully do not support the proposed amendments to PCAOB Rule 3502. We believe that existing Rule 3502 gives the PCAOB the tools and processes to improve audit quality by imposing disciplinary sanctions on those who violate applicable rules and standards. We further believe that the proposed revisions to Rule 3502 would, if enacted, have the significant risk of the unintended consequence of being a detriment to our collective mission to improve audit quality.

Our concerns are outlined below:

1. *A Single Simple Act of Negligence, Without More, Should Not Expose Professionals to Regulatory Discipline.* While not defined in detail, the Proposal implicitly includes the risk of severe career consequences for the lowest possible threshold for negligence – a single instance of the failure to exercise reasonable care or competence. We believe this low threshold could allow the Board unfettered discretion to impose sanctions whenever it finds that an associated person's single decision, including those in a highly judgmental area, is one with which the Board disagrees.

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If negligence is the standard to be imposed, we believe the Board should qualify the definition of negligence to conform to SEC Rule 102(e), which clarifies that significantly more than a simple single act of negligence is required before severe consequences may be imposed.

Specifically, the SEC's rule for suspension and debarment defines negligent conduct in this context to mean:

- (1) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.
- (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

SEC Rules of Practice, Rule 102(e)(iv).

This standard under the SEC's Rule 102(e) is also consistent with the provisions of the Sarbanes-Oxley Act that already limit the PCAOB's ability to impose more severe sanctions to those circumstances where there is

- (A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or
- (B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

Sarbanes Oxley Act, Section 105(c)(5).

2. The Board's Cost/Benefit Analysis Is Not Sufficiently Thorough and Does Not Fully Consider Unintended Consequences. We believe the cost/benefit analysis described in the Proposal does not fully consider the cost of imposing sanctions for a single act of negligence.

For example, the Board's analysis evaluates at length the percentage of cases where there was a charge against a firm but no charges against an individual and suggests this demonstrates gaps under existing Rule 3502. However, the Board does not give adequate consideration in its analysis to alternative facts and circumstances where sanctions against an individual would be inappropriate even under the proposed Rule 3502, or where the absence of charges was supported by the Board's exercise of prosecutorial discretion not to seek sanctions against individuals.

Additionally, the Proposal includes supposition that changes to Rule 3502 would result in only two or three additional enforcement cases annually. The absence of empirical data evaluating how many cases could have been brought under the proposed Rule 3502 as

compared with cases actually brought suggests that further analysis – particularly of unintended consequences of the proposed rule change - would be extremely valuable.

Further, we believe such a low threshold for regulatory sanctions could – and is likely to – result in “defensive auditing” where auditors move toward unduly conservative and unproductive judgments regarding the nature, timing and extent of audit procedures, and potentially leading to unduly conservative overall conclusions by auditors. The cost implications of such human nature reaction to a low standard of culpability for good faith errors in judgment have not been fully considered by the PCAOB in its Proposal.

**3. The Board’s Intentions in Expanding the Language in Rule 3502 Should Be Clarified.**

The Board’s intentions are unclear in expanding the misconduct covered by Rule 3502 from the current standard (an associated person substantially contributing to a violation of the PCAOB’s rules by his or her employer registered accounting firm – “that firm”) to the proposed standard (an associated person substantially contributing to a violation of the PCAOB’s rules by “any” registered accounting firm). This expanded language could be used by the PCAOB to pursue enforcement actions against junior auditors; or could be used to target individuals who are involved in the development of internal policies, procedures and methodologies or who perform firm-wide or network-wide quality reviews or other professional practice roles.

The potential impact of broader enforcement against junior accountants is self-evident. There are already well documented concerns about the attractiveness of the accounting profession to college students. Putting these junior accountants in harm’s way and at risk for career-ending consequences for a single error in judgment, particularly when they are continuing to learn and improve their professional skills, does not make the profession more attractive.

For professionals later in their careers, if the goal is to police those individuals who agree to take on firm-wide, network-wide or similar broader responsibilities in pursuit of enhanced audit quality, those individuals will likely be dissuaded from taking on those roles when they understand the low bar for disciplinary action for judgment calls with which the PCAOB disagrees.

**4. The Board Should Clarify Language Relating to “directly and substantially contributing to a violation.”**

The Board’s Proposal includes revisions to the current rule around the necessary elements of proximate causation. The current rule is clear that an associated person may be subject to sanctions only if they “take or omit to take an action ... [that] would directly and substantially contribute to a violation.” The Proposal retains the language requiring that the actionable conduct “directly and substantially contribute to a violation” but goes on to state that the act or omission subjecting the associated person to sanctions “would contribute to such violation.”

The Board’s Proposal does not explain its intentions in this regard, and specifically does not address the significance of adding the words “contribute to” but dropping the words “directly and substantially” in the last clause of the proposed rule.



This proposed change in wording creates potential ambiguity and thus unfairness in the manner in which the Proposal would be enforced, and the Board should be explicit that absent conduct “directly and substantially contributing to a violation”, an individual’s actions or omissions are not subject to discipline under the Proposal.

5. *The Board’s Proposal Does Not Adequately Consider Its Negative Impact on the Attractiveness of Public Accounting.* Unquestionably, the ability to attract the best and the brightest college students to careers in public accounting is a key element of any accounting firm’s commitment to continuous improvement in audit quality.

Yet it is well-documented that there are significant existing pressures on the accounting profession to attract and retain high quality talent. Board Member Ho made these points clearly in her statements in connection with the Proposal, and much has been written on this topic elsewhere in recent months. See, e.g., Wall Street Journal, “Why No One’s Going Into Accounting,” October 6, 2023; Wall Street Journal, “Job Security Isn’t Enough to Keep Many Accountants From Quitting,” September 22, 2023; Wall Street Journal, “The Accountant Shortage Is Showing Up in Financial Statements,” July 11, 2023.

While the war for talent is complex and multifaceted, we believe one important element of consideration of the attractiveness of public accounting is the risk of career-ending regulatory enforcement. Anecdotally, many have left the profession, and many others have made career choices not to enter public accounting, based on these concerns.

To be clear, we support holding auditors accountable when they engage in misconduct – particularly intentional, knowing, or reckless acts or omissions. However, we believe that the risk of a career-ending regulatory sanction for a simple error in nuanced professional judgment will only increase the challenge of attracting and retaining high quality talent in public accounting.

Given the obvious connection between winning the war for talent and improving audit quality, we fear that implementation of the Proposal and thereby lowering the standard of liability to a single simple act of negligence runs the risk of further discouraging high quality professionals from joining and staying in public accounting. This will in turn create even greater challenges for the accounting profession in its pursuit of continuous improvement of audit quality.

6. *The Board Has Adequate Tools Today to Enforce its Rules.* As recognized in the Proposal, the Board currently has the authority to impose a wide range of disciplinary sanctions against both registered accounting firms and the associated persons of such firms who directly and substantially contribute to a violation of the Board’s rules and standards.

The Board’s current Rule 3502 permits discipline against an associated person where that individual knowingly or intentionally engaged in misconduct or exhibited recklessness in the form of an extreme departure from the standard of ordinary care for auditors. As



demonstrated by the Board's history and trends of imposing significant and frequently career-ending sanctions on such associated persons, there is little evidence that the current standard has been a deterrent to the Board imposing such sanctions.

We note that the Board's Proposal highlights the fact that, in limited circumstances, the Securities and Exchange Commission (SEC) has the authority to impose certain sanctions for mere negligence. However, based on our review, we found few if any examples where the SEC has done so. Indeed, each such situation cited by the Board in the Release involved findings of a significantly higher level of culpability beyond simple negligence, and generally a pattern of negligent activity. So, despite this authority of the SEC to impose disciplinary sanctions based on simple negligence, it appears the SEC has acted almost without exception only when there has been at least an instance of highly unreasonable conduct or a pattern of negligent behavior.

Given the highly judgmental nature of performance of audits and the significant number of judgments made by auditors during the performance of an audit, we believe the current standard is sufficient to achieve the Board's mission of improving audit quality by disciplining those accountants who do not adhere to the Board's current rules and standards. A good faith, even if erroneous, professional judgment should not in our view by itself expose an associated person to the risk of career-ending regulatory discipline.

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Our comments and recommendations are intended to be constructive in nature, and we appreciate your consideration of our point of view.

We would be pleased to discuss them with you at your convenience. Please direct any questions to Phillip Austin, National Managing Principal – Professional Practice and Auditing at [paustin@bdo.com](mailto:paustin@bdo.com).

Very truly yours,

*BDO USA, P.C.*

cc:

**PCAOB**

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