

Office of the Secretary, Phoebe W. Brown

October 1, 2023

PCAOB

1666 K Street, NW

Washington, DC 20006-2803

Cf. P.C.A.O.B. Rulemaking Docket Matter 053

Dear P.C.A.O.B. Secretary Phoebe W. Brown :

While it is a great privilege to be able to comment on P.C.A.O.B. Release No. 2023 – 007, “Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability”, the present commenter has read P.C.A.O.B. Release No. 2023 – 007 as issued on September 19, 2023, and understands the Board is proposing to amend the P.C.A.O.B. Rule 3502 “Responsibility Not to Knowingly or Recklessly Contribute to Violations” in principally two ways : First, the Board proposes a recklessness criteria be replaced by a negligence conduct criteria; and second, that a person associated with one firm can contribute to a primary infraction of another firm. This commenter also understands that “negligence” encompassed by this Release includes gross negligence, comparative negligence, contributory negligence and vicarious negligence and their various permutations. This commenter has re – printed the question stem in front of answers to questions in the Release for the convenience of the reviewer. Questions and answers are as follows :

1. Are the regulatory concerns discussed above clear and understandable? **Answer** : The regulatory concerns discussed above are valid, clear and understandable, and illustrate the need for additional requirements concerning the auditor’s responsibilities not to contribute to violations, knowingly nor by omission.
2. Are there other regulatory concerns related to the current formulation of Rule 3502? If so, what are they and how should the Board address them, if at all? **Answer** : Other regulatory concerns by this writing include the process or levels of analysis that are used to establish intent in the violation(s); e.g., lack of due care, lack of competency, and negligence or contributory negligence inviting the provisions of Rule 3502, and not just the intent in the violations, but the influences and other factors, again according to different levels of analysis that provoke or provoked any violation of governing principles, rules, standards and statutes.

3. Would addressing the regulatory concerns discussed above incentivize associated persons to more fully comply with the applicable laws, rules, and standards that the Board is charged with enforcing against registered firms? **Answer** : Given the impact of Rule 3502 in deterring violations and rules infractions involving, i.e., negligence and omissions, lack of due care and lack of competency; it is foreseeable associated persons are or will be incentivized to more fully comply with the applicable laws, rules and standards that the Board is charged with enforcing against registered firms. Also, to the contrary, Rule 3502 constitutes rulemaking that is a form of regulation as framed in academic studies that affects its subject matter in efforts to deter against violations and encourage compliance, though Rule 3502 as additional regulation or as modified might not change stakeholder behavior nor benefits, and will prove at least marginally more costly to the auditing profession (cf. “Theory of Economic Regulation”, Stigler, George J.) Rule 3502, though evidently a deterrent and safeguard against negligence, omissions, lack of due care and lack of competence among other things, might additionally be symptomatic of “regulatory capture” in that this rule is dominated mainly by the unique and special interests of the Board, as valid, and by stakeholders as delineated in the documentation of Docket 053 : It might also be proposed that such rules suffer from agency problems such as benefiting the interests under regulation, engendering additional efforts by stakeholders to influence regulators and the Board, and serving interests dominated by stakeholders and the Board but not the public at large.

4. Are there common types of cases or fact patterns not discussed above in which a negligent standard of liability would be particularly useful to promote greater individual accountability under Rule 3502? **Answer** : This commenter knows that defining, implementing and then enforcing a negligent standard of liability is something that might be unfamiliar insofar as it encompasses additional criteria and requirements that are newly developed and qualitative. Given the newness of the criteria and the requirement of greater accountability of the financial auditor under Rule 3502, this commenter knows of the academic Program of Corporate Compliance and Enforcement at New York University which has been gathering qualitative data on fact patterns in corporate business that relate to this proposed liability standard and greater auditor accountability. New York University’s program named hereby has compiled evidential matter on cases and fact patterns that might serve as a resource in confirming and validating the proposed changes to Rule 3502.

5. Is it clear and understandable how the proposed amendments to Rule 3502 advance the Board’s statutory mandate to protect investors? **Answer** : Yes, it is clear and understandable how the proposed amendments to Rule 3502 advance the Board’s statutory mandate to protect investors in the delineation and illustration of the criteria of negligence, lack of due professional care and lack of competency, and omissions and their consequences in view of rule violations.

6. Beyond the dual purposes of deterrence and accountability, are there other ways that the proposed amendments would protect investors? **Answer** : Rule 3502 as amended comprises a more thorough regulatory measure against misconduct, and a more valid approach to compliance and enforcement against violations involving negligence, omissions, lack of due care, lack of competency and related infractions that can be pervasive in a firm, but do not need to be – a

violation inviting sanctions can be a single unlawful act “directly or substantially” or contributing to such an act.

7. Are the proposed amendments to Rule 3502’s liability language (as seen in Appendix A) clear, understandable, and appropriate? **Answer** : Yes. The proposed amendments to Rule 3502’s liability language in Appendix A are clear and understandable, valid and appropriate given the purposes of the Board in implementing these changes.

8. Should the Board retain the “directly and substantially” modifier to describe the connection between an associated person’s contributory conduct and a firm’s violation? Are the meanings of each of “directly” and “substantially,” respectively, clear and understandable? **Answer** : The Board should retain the “directly and substantially” modifier to describe the connection between an associated person’s contributory conduct and a firm’s violation. The meanings of each of “directly” and “substantially”, respectively, are also clear and understandable concerning the subject of misconduct in this proposed Release.

9. Are there other phrases or terms that the Board should consider to modify “contribute,” or other limitations that the Board should incorporate into the proposed rule? If so, what are they? **Answer** : This commenter believes the Board should consider incorporating the term “influence” into the proposed rule to indicate that a negligence liability, including lack of due care, lack of competency, or omissions, etc.; as the result of misconduct, can also be the result of unlawful “influence” at least as a source of misconduct.

10. Is the proposed substitution of “any” in place of “that” in Rule 3502 (as seen in Appendix A) clear, understandable, and appropriate? **Answer** : Yes. The proposed substitution of “any” in place of “that” in Rule 3502 is clear, understandable, and appropriate.

11. Should the Board expand the scope of Rule 3502 to encompass secondary liability for associated persons who contribute to violations by other associated persons (i.e., not just by any registered firm)? If so, what (if any) limits or conditions should the Board place on such secondary liability? **Answer** : This commenter a priori believes that entity – level violations remain those of the entity, including those violations having to do with errors, acts, omissions, negligence, recklessness and so on as committed by officers representing the entity. To the contrary, a major doctrine in the law that should be written in to Rule 3502 is the “Vicarious Liability”, or Park doctrine in which the crimes and any personal wrongdoing of employees within the scope of employment can be considered crimes by the business entity.

12. Are there scenarios where an associated person’s conduct might contribute to another individual’s primary violation but the conduct would be outside the scope of any Board standard or rule (current or proposed), including the current and proposed versions of Rule 3502? If so, what are the scenarios? **Answer** : This commenter does not know of any scenarios in which an associated person’s conduct might contribute to another individual’s primary violation but the conduct would be outside the scope of any Board or standard or rule given the current Rule 3502 and modifications thereto, and considerations invited by the answer in question 11 above.

13. Are there other benefits and costs of the amendments that the Board should consider?

Answer : This commenter knows there are no other benefits and costs of the amendments to Rule 3502 that the Board should consider apart from agency questions that arise in the response to Question 3 hereby.

14. Are there any data sources that could provide a quantitative estimation of the expected benefits and costs? If so, please provide the names of such sources. **Answer :** No. This commenter does not believe there are any data sources that could provide a quantitative estimation of the expected benefits and costs of the amendments to Rule 3502.

15. Are there other academic studies that would inform our analysis of the expected economic impacts of the proposed amendments? If so, please provide citations for the studies. **Answer :** No. This commenter is not familiar with academic studies that would inform an analysis of the expected economic impacts of the proposed amendments to Rule 3502.

16. Are there additional unintended consequences that might result from the proposed amendments? **Answer :** Given the additionally detailed regulatory criteria of the proposed Rule 3502, and any additional related requirements, investigations and enforcement could become at least marginally more costly given enforcement requirements of the negligence and contributory negligence criteria and other provisions of the proposed rule. This evidently will result in additional investigative and enforcement work that will marginally affect the economic costs of enforcement activities.

17. As noted above, associated persons may currently face secondary liability for negligent conduct in actions by the Commission. Notwithstanding that current possibility, could the proposal discourage participation by associated persons in the audit profession? **Answer :** This question does not seem relevant to whether or not the proposed Rule 3502 will be effective, nor does it have to do with the overall efficiencies and deterrence it will create in the audit firms. The consequences of secondary liability for audit firms, including for negligence, might not discourage participation in the profession given assurances of the firms about compliance to incoming personnel, the response of audit firms overall to the rulemaking, e.g., by insuring for liabilities, raising audit fees and so on.

18. Are there additional economic impacts or considerations associated with the two regulatory alternatives discussed above that should be considered? If so, what are those considerations? **Answer :** No. This commenter does not believe there are additional economic impacts or considerations associated with the two regulatory alternatives discussed in the proposed Rule 3502 narrative.

19. Are there other regulatory alternatives the Board should consider? If so, what are they? **Answer :** No. This commenter does not believe there are other regulatory alternatives the Board should consider with respect to proposed Rule 3502.

20. Are other regulatory alternatives preferable to the proposed amendments? If so, please explain the reasons. **Answer :** No. This commenter does not know of any regulatory alternatives preferable to the proposed amendments.

21. What impact would the proposal have on EGCs, and how would this affect efficiency, competition, and capital formation? **Answer** : It is agreed that the current proposed amendments to Rule 3502 would have the effect of implementing higher standards of compliance for emerging growth companies, and the responses of the EGC's to the proposed rules would result in greater audit and financial efficiencies, including presumed increases in the quality of disclosures. This presumably would result in a benefit to EGC's in attracting more investment capital and lowering their costs of capital.

22. Would the economic impacts be different for smaller firms or EGCs? If so, how? **Answer** : This commenter does not know what the economic impacts would be of the proposed rulemaking apart from the smaller scale of any benefits or burdens to smaller firms or EGC's. Despite the importance of this rulemaking for all public companies, and importance overall of smaller firms and EGC's, the related economic effects cannot be foreseen with certainty, nor overall nor severally for these entities.

23. Are there reasons why the proposal should not apply to audits of EGCs? If so, what changes should be made to make the proposal appropriate for EGCs? **Answer** : No. This commenter believes the standards of recklessness and negligence, including recklessness and negligence contributing to violations, should be treated equivalently in examinations of firms auditing larger public companies and EGC's alike. The principles, standards, and scope of enforcement against violations involving omissions, negligence, recklessness and so on should be the same regardless of the scale and size of the entity and of the firm.

24. Is the proposed effective date (sixty days after Commission approval) appropriate? If not, what would be an appropriate effective date for the proposed amendments? **Answer** : Yes. This commenter believes the proposed effective date of sixty days after Commission approval is appropriate. Per the discretion of the Commission, attention should be paid to firms who would petition for a more distant effective date and their petitions if reasonable and well – founded should be considered by the Board.

By,

Thomas H. Spitters, C.P.A.

Thomas H. Spitters, C.P.A.

San Francisco, CA 94104 – Telephone : (415)800-4499 – E – mail : tom.spitters@hotmail.com