August 7, 2023

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

VIA EMAIL TO: comments@pcaobus.org

Re: Proposing Release: *Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations* (PCAOB Release No. 2023-003, June 6, 2023; PCAOB Rulemaking Docket Matter No. 051)

Dear Ms. Brown:

We write regarding the Public Company Accounting Oversight Board's ("PCAOB" or "Board") Exposure Draft ("Exposure Draft" or "Proposal") on *Company's Noncompliance with Laws and Regulations* ("NOCLAR").[1] We appreciate the opportunity to comment; however, the Exposure Draft raises a series of practical concerns for our Company and would result in an unjustified increase in our compliance costs.

We start by endorsing the comments filed by the U.S. Chamber of Commerce regarding the Proposal in their comment letter filed in Docket Matter No. 051, dated August 2, 2023. We follow by emphasizing a few concerns of our own, but which we believe are widely shared by companies that would having the burden of trying to comply with Proposal.

Also, we hereby also endorse the comments filed by the Audit Committee Council ("ACC"), an independent advisory committee of the Center for Audit Quality comprised of independent audit committee members, including audit committee chairs. The ACC and members, share the opposition "concerns raised by PCAOB Board Members Duane Desparte and Christina Ho in the PCAOB's June 6, 2023, open meeting"[2], where these two of the five Board Members voted against accepting NOCLAR.

[1] Proposing Release: Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations and Other Related Amendments. Available at: https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/pcaob-release-no.-2023-003---noclar.pdf

[2] See recorded statements from Board Members Duane DesParte and Christina Ho in PCAOB's June 6, 2023 open meeting.

Per the ACC,[3]

> "The expanded scope of the proposed amendments would have a substantial impact on the costs of the audit. For example, the PCAOB's NOCLAR proposal explains that "[a]uditors would likely need to expend considerable additional audit effort to identify relevant laws and regulations under the proposed standard" and that "the costs associated with the proposed amendments…may be substantial."[4] However, the PCAOB does not provide or quantify the potential costs. According to Audit Analytics, total audit fees for FY 2021 were $15.5 billion; the average SEC registrant paid $2.176 million in audit fees, which represents a $340,000 or 1.5 percent increase over FY 2020.[5] The modest increase in fees paid in FY 2021 can be attributed in part to the fact that there were minimal changes in accounting and auditing standards at that me and thus minimal scope changes in the audit relative to new standards or requirements. The NOCLAR proposal has the potential to introduce a significant increase in audit effort and thus audit fees, similar to the extensive change in the scope of the audit as a result of the implementation of the new auditing standard on internal control over financial reporting with the adoption of the Sarbanes-Oxley Act of 2002 (SOX). Between FY 2003 and FY 2004, total audit fees increased by nearly 59%.[6] If the proposed changes have at least the same impact to the scope of the audit as SOX, total audit fees could increase to $24.6 billion (an increase of $9.1 billion)."

The Proposal does not use precise terminology or otherwise reasonably limit the Proposal's NOCLAR requirements. The Proposal would establish an obligation for the auditor to plan and perform procedures to identify *all* laws and regulations with which noncompliance "could reasonably" have a material effect on financial statements. And then, it would create a duty for auditors to assess and respond to the risks of material misstatements related to those regulations to determine whether noncompliance has or may have occurred.[7] Further, it would insert auditors into our processes related to preventing, identifying, investigating, evaluating, communicating, and remediating instances of noncompliance, which encompass our operating controls and transcend financial reporting and internal control over financial reporting.

The "could reasonably" standard is unbounded and imprecise and would not provide auditors with a practical filter or guide for which laws and regulations to evaluate. The Proposal does not provide sufficient clarity on how auditors should determine which among the many, often complex and highly technical, laws and regulations that apply to our company globally "could reasonably have a material effect on the financial statements." Further, the conditional terminology employed by the Proposal – such as "likely," "may," and "might" – including a requirement to report to the audit committee "information indicating that

[3] Audit Committee Council letter to PCAOB re "Re: Proposing Release: Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations and Other Related Amendments; PCAOB Rulemaking Docket Matter No. 051" dated July 25, 2023 ("ACC Letter"), at pp. 3-4.
[4] See PCAOB Release No. 2023-003.
[5] See Audit Analytics Report, *Twenty Year Review of Audit and Non-Audit Fee Trends.*
[6] *Id.*
[7] Exposure Draft, p. A1-2.

noncompliance . . . *may have* occurred"[8] – would create serious challenges in determining precisely which instances of NOCLAR to prioritize, while burdening our audit committee in the process.

The vague and intentionally expansive[9] terminology used by the Exposure Draft would drive new liability concerns for auditors, creating a more unfocused and ineffective risk mitigation environment that would push our legal, compliance, and audit costs even higher. We are very concerned that the expansive scope of audits, in accordance with the proposed requirements, would significantly increase both our audit costs and our internal costs – without any clear corresponding benefit.

Further, auditors do not have the level of expertise needed to complete the kind of expansive review of all laws and regulations that apply to our company as would be required by the Proposal. Auditors are not lawyers; and they do not have the other specialized skills that may be needed to assess compliance with laws and regulations that lack a financial statement focus. Importantly, the market for such specialized expertise – whether legal or other – is limited. Accordingly, in addition to higher audit fees, additional costs will be imposed on us by the proposed approach because public audit firms will seek to hire qualified audit, legal, and other specialized staff from the very same sources as we do. This will create new risks and costs for our company as we seek to retain or replace our existing qualified staff. The only ones who would benefit from such onerous requirements are the audit firms who would dramatically increase their fees to ensure compliance.

The Proposal also threatens the attorney client privilege, a fundamental element of the relationship between public companies and their legal counsel. Compliance with the Proposal would inevitably lead the auditor to request information from their public company client to help the auditor assess indications of noncompliance with relevant laws and regulations. In such cases, the public company audit clients would have two bad choices: (1) voluntarily share information and legal analyses with the auditor on any noncompliance with relevant laws and regulations, thereby waiving privilege, or (2) refuse to share the requested information with the auditor, in which case the auditor might be unable to complete their audit.

Currently, public companies ask their outside counsel to provide annual audit response letters to their auditors, identifying matters that pose risk to the public company at a defined materiality threshold and/or relate to compliance with particular laws. This existing process facilitates the sharing of information with auditors that is needed to complete their audit, and includes relying on representations from outside counsel, who are best equipped to assess the nature and extent of a company's potential exposure based on noncompliance with a particular law or regulation, while at the same time maintaining attorney-client privilege. The Proposal would require auditors, who lack the training and expertise to assess compliance with relevant laws and regulations, to supplement and even supplant the legal judgment of counsel regarding the existence or likelihood of a legal or regulatory violation. This process would create a material

[8] *Id.* at p. A1-7.
[9] *Id.* at p. 24.

risk of conflict with a company's internal and external counsel with concomitant threats to the company's privilege and to the orderly, timely, and cost-effective completion of the audit process.

Turning back to comments made in the ACC Letter, the proposed rulemaking appears to ignore the "*existing three lines of defense within companies.*"[10]

> By design a significant control element of compliance with laws and regulations appropriately rests with the three lines of defense within corporations. The results of those processes are regularly reported to the audit committee, as well as to the external auditor for their input regarding the process and evaluation of any significant matters. According to a survey from the Association of Certified Fraud Examiners, the top three detection methods (approximately 70% of frauds detected) were as a result of tips (42%), internal audit (16%), and management review (12%).[8] In comparison, external auditors detected 4% of frauds.[11] External auditors do not represent a large percentage of identified frauds because compliance programs are operating at a sophisticated level such that wrongdoings and/or potential wrongdoings are detected independent of the external auditor's procedures.

Finally, our company has existing and stringent responsibilities for compliance with applicable laws and regulations, as well as appropriate 'checks' against noncompliance. We are subject to various federal and state regulatory authorities with the responsibility to examine, monitor and enforce these laws and regulations. Auditors have rightly played a role in identifying illegal acts by clients as part of financial statement audits under the existing PCAOB standard. But auditors should not be expected to do the combined work of lawyers, management, and regulatory and law enforcement authorities in rooting out noncompliance related to *all* laws and regulations.

The burden of the Proposal hits NuScale as a recently publicly listed company extremely hard. It is our opinion that NOCLAR leap frog's SOX 404(b) requirement that we estimate our aggregate value Class A equity to be greater than $700 million at the earliest June 30, 2024, if not June 30, 2025, for full SOX opinion for yearend December 31, 2024 or later, December 31, 2025. Since going public we have added the Internal Audit function and hired three employees to fill the roles in Internal Audit. We also, anticipate this will delay our efforts to meet recent COSO ERM and ESG Frameworks. In addition to expanding the role of external auditors, PCAOB's Proposal will require that we cease our current plan to achieve and maintain compliance with SOX 404(b) and pivot to achieve earlier compliance with these more onerous rules.

[10] ACC Letter at p. 3.
[11] See ACFE report, Occupational Fraud 2022: A Report to the Nations.

We appreciate your attention to our concerns and look forward to seeing these items addressed in any finalized standards.

Sincerely,

Robert K. Temple
General Counsel & Secretary

cc:
PCAOB
Erica Y. Williams, Chair (williamse@pcaobus.org)
Duane M. DesParte, Board member (desparted@pcaobus.org)
Christina Ho, Board member (hoc@pcaobus.org)
Kara M. Stein, Board member (steink@pcaobus.org)
Anthony C. Thompson, Board member (thompsona@pcaobus.org)
Barbara Vanich, Chief Auditor (vanichb@pcaobus.org)

SEC
Paul Munter, Chief Accountant (oca@sec.gov)
Diana Stoltzfus, Deputy Chief Accountant (oca@sec.gov)