November 2, 2023

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006-2803

RE: PCAOB Rulemaking Docket Matter No. 053

Dear Madam Secretary:

We appreciate the opportunity to comment on the Public Company Accounting Oversight Board's (PCAOB's or Board's) proposal, *Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability*, included in PCAOB Release No. 2023-007.

We support the Board's continuing effort to promulgate standards and rules that promote audit quality. We also support the Board's efforts to adopt meaningful and effective professional standards designed to hold the partners and other associated persons of public accounting firms to a high standard of professionalism and ethical conduct.

We are concerned, however, that the Board's proposal could shift the liability landscape in ways that will undermine the objectives of the proposal and adversely affect the quality of public company audits. Accordingly, we do not support the proposal as drafted.

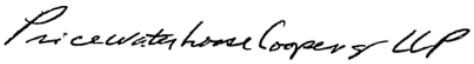
Our primary concern is the Board's proposal to reduce the threshold culpability for secondary liability from at least recklessness to simple negligence, a standard that the Board rejected after careful consideration in 2005. While the 2005 Board adopted a heightened standard to charge accountants with contributory liability, the proposal does not present sufficiently compelling reasons to lower that standard to a single act of simple negligence. Moreover, despite this Board's statements to the contrary in connection with the current proposal, adoption of a simple negligence standard for secondary liability would not align with the SEC's enforcement framework for similar conduct by accountants and could have unintended consequences that harm audit quality. If the Board ultimately concludes that the benefits of a change to the standard outweigh potential costs, it should align more closely to the heightened standard that the SEC applies to enforcement proceedings under Rule 102(e) of the Commission's Rules of Practice. As the Board indicates in the proposal, it has other means to hold associated persons accountable for conduct in violation of its rules and standards. We expand on these points in the appendix to this letter.

Separately, these concerns are exacerbated by the proposed amendment to extend potential secondary liability to associated persons regardless of whether they are associated with the registered public accounting firm that committed the primary violation. This change, particularly in combination with a lower threshold for liability, could deter practitioners from collaborating in a proactive way with others within the firm or with other member firms within an accounting network. That deterrence could negatively affect audit quality.

We urge the Board to consider carefully the appropriateness and potential implications of lowering the standard for secondary liability to simple negligence. We also encourage the Board to consider ways it can potentially reduce or avoid the unintended consequences of broadening secondary liability to address primary violations at "any" registered public accounting firm.

We appreciate the opportunity to provide input and would be pleased to engage in a dialogue with the Board and its staff on this important topic. Please contact Brian Croteau at brian.t.croteau@pwc.com regarding our submission.

Sincerely,



PricewaterhouseCoopers LLP

Appendix

This appendix provides additional details regarding our concerns with key aspects of the proposal.

The Board's proposed amendments to Rule 3502 would have far-reaching unintended consequences

1. *The Board's proposed negligence standard is not appropriate for judging conduct on complex audit engagements and compliance with professional standards and does not align with the SEC's existing framework for sanctioning accountants*.

In 2004, the Board first proposed adopting a negligence threshold for secondary liability. After careful consideration of comments received in response, it determined that a negligence standard was not appropriate and a heightened standard ("knew, or was reckless in not knowing") "strikes the right balance in the context of this rule."[1] In doing so, the Board acknowledged that accountants "must comply with complex professional and regulatory requirements in performing their jobs" and explained that it "does not seek to create through this rule a vehicle to pursue compliance personnel who act in an appropriate, reasonable manner, that in hindsight, turns out to have not been successful."[2] Today's Board has not presented sufficiently compelling reasons to reverse the reasoned judgment of the 2005 Board and to implement a negligence standard for contributory liability.[3] We are concerned that lowering the standard of secondary liability to simple negligence would upend the "right balance" sought by the 2005 Board and have significant negative ramifications to audit quality.

Concerns about applying a negligence standard to accountants in an enforcement context continue to be well justified. It is as true today as it was in 2005 that the nature of auditing and accounting, and the responsibilities of an accountant, strongly support exercising discretion in standard setting related to those responsibilities. Accountants routinely apply independent professional judgment to complex situations in which statutory and regulatory requirements intertwine with applicable professional standards and rules, calling on the support of other professionals with relevant experience and expertise to provide support and collaboration.[4] In fact, as then Board member Duane DesParte observed, "If

[1] See PCAOB Rulemaking Docket Matter No. 017, *Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees,* PCAOB Release No. 2005-014 (July 26, 2005) (hereinafter "2005 Adopting Release"), at 14.

[2] Id.

[3] While the Board asserts that it has the statutory authority to promulgate a negligence-based contributory negligence rule, that statutory grounding seems to be based on what is implied from interpretations of various provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"), rather than any express statutory grounding for such authority (e.g., Section 105(c)(5) of the Sarbanes-Oxley Act indicating that certain sanctions and penalties described in Section 105(c)(4) apply only to intentional, knowing, or repeated instances of negligent conduct, but not limiting other sanctions or penalties).

[4] In this regard, our firm's comment letter to the SEC's proposed amendment to Rule 102(e) of the Commission's Rule of Practice is similarly relevant here. "[GAAP and GAAS] are not like cookbook recipes, where reading words and following directions results in a uniform outcome. Resolution of many auditing and accounting issues requires judgment. Even where there is written guidance, there is often ambiguity. The accountant must attempt to synthesize practice and different pronouncements that may speak ambiguously or indirectly to the issue and that may change over time. What the proposed amendment labels as a 'violation of professional standard' is apt to be, in practice, a difference of opinion between the Commission's staff and the respondent accountant over how a particular pronouncement or pronouncements should be applied." See Comment Letter from PricewaterhouseCoopers LLP to Commission Proposed Amendment to Rule 102(e) of the Commission's Rule of Practice at 6.

anything, audits have become more complex, involve greater judgment, and include more participants than in 2004 when Rule 3502 was first contemplated."[5]

The Commission recognized similar policy concerns when it, like the 2005 Board, also declined to adopt a simple negligence standard for sanctioning accountants under Rule 102(e) of the Commission's Rule of Practice.[6] The Commission determined that "a single judgment error, even if unreasonable when made, may not indicate a lack of competence to practice before the Commission."[7] In declining to adopt a simple negligence standard for Rule 102(e), the Commission indicated that it "neither accepts nor condones unreasonable, or negligent, accounting or auditing errors" and noted that it had authority under other statutory provisions to address and deter such errors through, for example, Sections 17(a)(2) and (3) of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934.[8] As discussed below, however, the Commission routinely brings enforcement actions involving accountants' violations of professional standards in conjunction with Rule 102(e) proceedings, and therefore regularly exercises its discretion to sanction accountants using a heightened standard of liability.

In proposing to lower the standard for secondary liability for accountants' conduct to simple negligence, the Board observes that associated persons are "already subject to potential liability—including money penalties—for negligently contributing to registered firms' violations governing the preparation and issuance of audit reports" under the Exchange Act.[9] The Board further indicates that the proposed amendments "would not subject auditors to any new or different standard to govern their conduct," pointing to select Commission proceedings under the Exchange Act in which auditors were sanctioned for negligently contributing to primary violations by firms and issuers.[10]

But the Board's observations fail to recognize a critically significant distinction with SEC enforcement practices that would result in a substantial divergence in how the Commission routinely brings enforcement actions against accountants who contribute to a firm's identified deficiencies with audit standards, as compared with how the Board is proposing it be permitted to bring such actions. In particular, the SEC typically brings secondary liability actions against accountants in conjunction with its authority to censure firms and accountants for "improper professional conduct" under Rule 102(e) of the Commission's Rules of Practice.[11] The Board's proposing release, in fact, cites three Commission

---

[5] See *Statement on Proposed Amendments to PCAOB Rule 3502 Governing Contributory Liability*, Statement by Board Member Duane DesParte, (Sept. 19, 2023), at https://pcaobus.org/news-events/speeches/speech-detail/statement-on-proposed-amendments-to-pcaob-rule-3502-governing-contributory-liability.

[6] We observe that Congress also adopted similar language under Section 602 of the Sarbanes-Oxley Act (Section 4C of the Exchange Act), which mirrors the language the Commission used when it promulgated Rule 102(e). 15 U.S.C. § 78d–3.

[7] See Amendment to Rule 102(e) of the Commission's Rules of Practice (SEC Release No. 33-7593) (Oct. 26, 1998) (hereinafter "SEC 102(e) Release").

[8] See SEC 102(e) Release. Note also that, to demonstrate a finding under Securities Act Section 17(a)(2), the Commission would have to show that the respondent engaged in an action (1) in the offer or sale of securities, (2) by use of interstate commerce or the mails, (3) to obtain money or property, (4) by use of an untrue statement, (5) of a material fact. This comprises far more pleading requirements than simply showing a primary violation of a rule or standard of the Board. Under Section 17(a)(3), the Commission would have to show that the respondent engaged in any transaction, practice, or course of business (1) in the offer or sale of securities, (2) by use of interstate commerce or the mails, (3) and such transaction, practice, or course of business operates or would operate as a fraud or deceit upon the purchaser.

[9] Proposing Release at 13.

[10] Proposing Release at 14.

[11] See, e.g., In the Matter of Alfonse Gregory Giugliano, CPA, Exchange Act Release No. 98352 (Sept. 12, 2023), at https://www.sec.gov/files/litigation/admin/2023/34-98352.pdf; In the matter of Adam Bering, Esq., Exchange Act Release No. 93749 (Dec. 10, 2021), at https://www.sec.gov/files/litigation/admin/2021/34-93749.pdf; In the matter of Joseph Yafeh, CPA, Inc., Exchange Act Release No. 73770 (Dec. 8, 2014), at https://www.sec.gov/files/litigation/admin/2014/34-73770.pdf.

proceedings in support of its assertion that auditors "would not [be] subject to any new or different standard to govern their conduct" under the proposal.[12] In all three, the Commission not only alleges that the respondents caused the firm's and/or the issuer client's primary violations, but also that the respondents engaged in improper professional conduct under Rule 102(e) of the SEC's Rule of Practice, which does not permit sanctions based on a determination that the respondent committed a single act of simple negligence.

Instead, Rule 102(e) of the SEC's Rules of Practice requires the regulator to demonstrate either "repeated instances of unreasonable conduct" or "a single instance of highly unreasonable conduct" by the respondent to satisfy the minimum threshold for sanctions. In its adopting release for Rule 102(e), the Commission described this standard as "higher than ordinary negligence but lower than the traditional definition of recklessness."[13] As a result, rather than increasing symmetry between the PCAOB and SEC enforcement frameworks, the Board's proposed amendments, which, as drafted, suggest a single act of simple negligence would suffice to trigger liability, would result in conflict between these two frameworks. We note also that recent appellate decisions before the Fifth Circuit (and currently pending before the United States Supreme Court) have held that the SEC is constitutionally precluded from asserting enforcement claims in administrative proceedings rather than in federal court, where defendants can avail themselves of the right to a trial by jury, among other procedural rights.[14]

Just as the SEC has adopted a measured approach that recognizes a single instance of simple negligence should not be enough to bring a claim against an accountant (particularly given the potentially devastating consequences for the accountant's professional reputation), the Board should preserve a heightened standard above simple negligence. We submit that the policy concerns noted in this letter provide more compelling reasons to retain the current rule. If the Board nonetheless is determined to adopt amendments to Rule 3502, it should fully align to the SEC's practices, including adopting the heightened standard that applies to Rule 102(e) proceedings (i.e., requiring "repeated instances of unreasonable conduct" or "a single instance of highly unreasonable conduct").

2. *The Board's proposed negligence standard for secondary liability fulfills no regulatory purpose that is not already fulfilled by the existing enforcement framework and the Board's supervisory function*.

We agree that audit quality and investor protection is best served when the PCAOB holds individual accountants who have violated their professional obligations accountable. We also believe that the Board has used the authority provided to it by the Sarbanes-Oxley Act to promulgate professional standards that promote investor protection and audit quality and rules that allow it to enforce compliance with such standards. In fact, as the Board notes in the Proposing Release, existing Rule 3502 is not the only means by which it can enforce compliance with applicable Board rules and standards.[15] Given the standards and rules that the Board has promulgated and its existing ability to bring cases, impose sanctions to enforce its standards, and bring secondary liability cases under existing Rule 3502, we do not believe that any potential incremental benefits of this proposal would outweigh the potential costs, including unintended consequences, of broadening personnel exposure to contributory liability.

Congress authorized the Board to conduct a program of continuing inspections of registered public accounting firms through Section 104 of the Sarbanes-Oxley Act to "assess the degree of compliance" by firms and associated persons with the Sarbanes-Oxley Act, the Board's rules, standards, and the Commission's rules. Section 104 is separate and apart from the disciplinary functions of the Board set

[12] See Proposing Release at 14, n. 52.
[13] See SEC 102(e) Release.
[14] See *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).
[15] See n. 31 of the Proposing Release, referencing n. 25 of the 2005 Adopting Release; see also Rules 3100 and 3200, which require associated persons to comply with applicable auditing and related professional practice standards.

forth in Section 105 of the Sarbanes-Oxley Act, which is where the Board's ability to sanction associated persons is described. The Board recognizes that its inspection function serves this oversight process, describing its inspection function as a "process [that] aims to drive improvement in the quality of audit services through a focus on effective prevention, detection, and deterrence of audit and quality control deficiencies—and oversight of firms' remediation of identified deficiencies."[16] Yet the Proposing Release indicates that one of the Board's justifications for the proposal to lower the secondary liability threshold to simple negligence is its enforcement experience with respect to the design and implementation of firm quality control policies and procedures. In this vein, the Board states:

> For example, when dealing with the design and implementation of firm quality control (QC) policies and procedures under applicable QC standards, the Board has observed that registered firms that commit a QC violation often have multiple individuals with overlapping QC responsibility but that no single individual was reckless in failing to act, and thus no individual can be held personally accountable for the firm's QC failure.[17]

We take issue with two facets of this justification for the Board's proposal. First, the Board's inspection function already provides it with transparency into the inner workings of a firm's quality control system; the ability to monitor, detect, and deter deficiencies or non-compliance with laws, rules, and standards; and the ability to remedy any deficiencies on a real-time basis.

Second, the Board makes this statement in support of applying a lower standard of secondary liability as if multiple people with overlapping responsibility for a firm's QC system is an obstacle to investor protection or enhanced audit quality, when input from multiple professionals results in precisely the opposite. The design and implementation of a firm's QC policies and procedures are often quite comprehensive and complex, and often have been constructed over many years with continuous improvement efforts by multiple personnel. To suggest that a single individual needs to be held personally accountable in the absence of reckless behavior for contributing to a firm's violation belies the practical realities of a comprehensive QC system at a large firm. Many people may appropriately have critical and distinct roles, with sometimes overlapping responsibilities, in the design, maintenance, and operation of such systems. Extant QC standards specifically contemplate this fact, describing that the various elements of a firm's QC system are interrelated and should be appropriately comprehensive and suitably designed to account for the nature and complexity of a firm's practice and its size, among many other considerations.[18]

Moreover, the Board's stated justification for the proposal to permit it to hold a single individual accountable for contributing to a primary violation by the firm also appears to misunderstand that audits are not conducted with a top-down compliance model that may be appropriate in corporate organizations with linear decision-making structures. Instead, audits are often large and highly complex undertakings that involve many people (and multiple firms) and require substantial time to complete, particularly when the issuer is a large enterprise with disparate operations and complex accounting issues. On audit engagements, significant judgments and decisions are often made within firms with input from various persons outside of the engagement team. While the engagement leader is ultimately responsible for the overall audit, including communicating the firm's position on accounting, auditing, and reporting matters to the client, engagement leaders are expected, and in certain instances required by firm policies, to consult with other professionals prior to communicating a position to a client on a matter involving significant judgment. For example, engagement leaders are expected to consult with other professionals regarding complex independence issues, or the acceptability of client accounting policies, practices, and footnote disclosures or the form of accountants' report. The proposal appears to substantially discount the

[16] See PCAOB website, *Inspections,* at https://pcaobus.org/oversight/inspections.
[17] See Proposing Release at 9.
[18] See QC Section 20, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice,* at QC 20.03, .04, and .08.

fact that many firm personnel often play a role in supporting significant judgments and decisions related to an audit engagement.

3. *The proposed amendments would discourage, rather than promote, effective collaboration between and among accountants within the firm.*

We agree with the concern identified in the Proposing Release that "excessive monitoring and self-protective behavior" is a potential unintended consequence of the proposed change to Rule 3502.[19] Even if such a risk exists in the current regulatory framework, as argued in the Proposing Release, this change to Rule 3502 would exacerbate this risk and provide an incremental chilling effect on those professionals who may otherwise be motivated to advise and collaborate with engagement teams of their own registered public accounting firm.

Accountants routinely reach out to other professionals with various experience and expertise to provide support and collaboration when applying independent professional judgment to complex factual situations that require interpretation and application of various statutory and regulatory requirements, along with applicable professional standards and rules. Indeed, reaching out to firm colleagues with varying expertise, including in the firm's national office and independence office, on a range of topics is an important part of our firm's collaborative culture of "leaning in" to help colleagues who should "never go it alone." We frequently encourage our partners and employees who are dealing with complex interpretive issues to ask for help if needed, engage with colleagues, and share knowledge. That approach provides important benefits to audit quality through advice from experienced personnel who have seen a wide range of matters across the firm's clientele. The Board's proposed amendments to Rule 3502, however, could discourage or inhibit these types of discussions between and among professional colleagues and provide unfortunate disincentives to advising peers and sharing professional expertise, by spreading the very "undue fear" with which the Commission was concerned when it recognized: "an undue fear that an isolated error in judgment would result in a 102(e) proceeding could be counterproductive in some limited circumstances."[20]

If firm personnel believe that a single misstep could ensnare them in an investigation into whether their conduct constituted a simple act of negligent behavior, it is rational behavior for such personnel to be more circumspect about putting themselves in a position where their judgment later could be second guessed with the benefit of hindsight. This may also create a deterrent to recruiting experienced personnel to national office or other consultative roles that are critically important to audit quality. If the Board is determined to lower the threshold for contributory liability, it would be beneficial if the Board were to express its intention not to seek sanctions against those who exercise appropriate good-faith judgments based on the facts available to them. In this regard, we note that the Board's 2005 Adopting Release highlighted the Board's intent in adopting Rule 3502:

> It was not the Board's intention to establish a new standard for SEC enforcement of the securities laws and related applicable rules. The Board also recognizes that persons subject to its jurisdiction must comply with complex professional and regulatory requirements in performing their jobs. The Board does not seek to create through this rule a vehicle to pursue compliance personnel who act in an appropriate, reasonable manner that, in hindsight, turns out to have not been successful. Nor does the Board seek to reach those whose conduct, unbeknownst to them, remotely contributes to a firm's violation.[21]

[19] See Proposing Release at 26.
[20] See SEC 102(e) Release.
[21] See 2005 Adopting Release at 14.

If it adopts the proposed rule, the Board should encourage collaboration by affirming in its adopting release that a modified Rule 3502 would not be used to second guess reasonable, good-faith judgment calls by associated persons.

4. *The proposed amendments also would discourage effective collaboration between and among accountants at separate network member firms.*

The Board's proposal to expand the scope of secondary liability of associated persons to not only the accounting firm with which they are associated but also to "any" registered public accounting firm could also have significant negative consequences on the extent of collaboration between and among accountants at separate entities within a network. In principle, we recognize that the Board is trying to provide for equal accountability by associated persons as firm structures evolve. However, rather than providing an incentive for associated persons to collaborate, share perspectives and team on complex audit matters and other professional and regulatory issues, all of which increase audit quality, the proposed amendments may instead disincentivize collaborative and teaming behavior by creating an increased risk of subsequent, backward-looking criticism. As a result, the proposal could harm audit quality more than it would benefit it.

Additionally, it is unclear under the proposed rule how the Board will consider limitations on the individual's ability to influence or control the ultimate decision of another registered firm and how the "directly and substantially" language impacts the analysis in that regard. The Board states in the current proposal that it "believes that amending the rule as described would clarify that associated persons of *any* registered firm are potentially subject to liability under proposed Rule 3502, regardless of an individual's formal role or relationship with the firm that commits the primary violation."[22] But an individual's formal role or relationship is intertwined with that individual's scope of responsibility, especially as it concerns a public accounting firm other than their own, and that role or relationship (or the absence thereof) is key to demonstrating a causal relationship between the negligence of the individual and the accounting firm's primary violation. An associated person of one firm may be asked to advise or assist another professional accounting firm but may be unable to control or compel that accounting firm to accept the advice or take certain actions in response, either because of the individual's role, the entities' legal structure, or how the professional standards allocate responsibility. We also note that the PCAOB has proposed to remove Appendix K requirements through the proposed new quality control standard, QC 1000.[23] That change, if adopted, when combined with this proposed change to Rule 3502 could result in firms and their associated persons becoming less likely to engage in the sharing of perspectives.

If the Board intends to expand enforcement authority to include situations in which an associated person's conduct is the de facto cause of another firm's violation, such as a network member firm's conduct causing another member firm's independence rule violation, the rule could be more narrowly tailored to achieve that end. Otherwise, the breadth of the proposed rule and resulting uncertainty of application to assisting firms, entities, and professionals could result in the unintended consequences highlighted above.

Other considerations

- *The Board's proposal puts further strain on the efforts to recruit and retain accountants.*

The Board's proposal, in conjunction with other recent proposals, increases enforcement exposure for all accountants at all experience levels, which likely will further strain efforts to stem the reduction in the

[22] See Proposing Release at 10 (emphasis added).
[23] See QC 1000 Proposing Release at 130.

talent pool for new accountants.[24] As the Board proposal indicates, "excessive litigation risk could unintentionally discourage auditors from accepting important audit roles if they fear being held liable."[25] And the Board's recent proposals, including this proposal, are expressly intended to provide the Board with additional tools to augment its enforcement powers against individual auditors.[26] We also share Board Member Ho's concern that an additional unintended consequence of the Board's proposal is to increase the pressure on retention of audit professionals; that is, the proposal creates disincentives for more junior accountants to rise to more important audit roles, as well as other quality or national office roles, thereby increasing the chance that they may leave the profession altogether.[27] While we support the Board's efforts to hold practitioners accountable and to increase audit quality throughout the profession, the Board should consider how its recent actions could be perceived as making the profession a less desirable occupation for those considering whether to enter or remain in the profession.

- *The Board's economic considerations overstate the potential benefits and understate the costs*.

As described above, we believe that the Board's proposed amendments to lower the standard for contributory liability by associated persons to simple negligence could have far-reaching unintended consequences by incentivizing individual self-protective behavior, disincentivizing collaborative engagement and voluntary informal assistance between colleagues and across registered firms in a network, and increasing stress on formal and informal consultations with and among network member firms to the detriment of audit quality.

Given these unintended consequences, the incremental benefits to the Board's proposal are elusive. For example, the Board indicates that "the purpose is not to cause associated persons for the first time to feel as if they could be subject to liability (i.e., to impose liability for conduct that currently is not subject to enforcement)."[28] Yet, at the same time, the Board states that lowering its contributory liability standard to simple negligence "should incentivize associated persons to be more deliberate and careful in their actions."[29] The Board explains this inconsistency by observing that the PCAOB currently lacks the enforcement authority to charge contributory liability under a simple negligence standard that the Commission currently is empowered to undertake, and therefore the proposed amendments would provide "enhanced incentives for individuals to perform important roles at a reasonable person level of care" as they could be subject to sanction by both the Commission and the PCAOB. But that justification defies normal human behavior, suggesting that people would behave more prudently because they are subject to enforcement action by two agencies, instead of just one. This justification is especially

---

[24] See Maurer, Mark, "Accounting Graduates Drop By Highest Percentage in Years," The Wall Street Journal (Oct. 12, 2023), at https://www.wsj.com/articles/accounting-graduates-drop-by-highest-percentage-in-years-5720cd0f; see also Maurer, Mark, "Job Security Isn't Enough to Keep Many Accountants From Quitting," The Wall Street Journal (Sept. 22, 2023), at https://www.wsj.com/articles/accounting-quit-job-security-675fc28f?mod=hp_lead_pos7; see also SEC 102(e) Release ("Likewise, one of these commenters and one other commenter suggested that the proposed rule's use of a negligence standard would discourage competent practitioners from pursuing careers in public company accounting.").

[25] See Proposing Release at 26.

[26] See, e.g., A Firm's System of Quality Control and Other Proposed Amendments to PCAOB Standards, Rules and Forms, PCAOB Release No. 2022-006 (Nov. 18, 2022) (hereinafter the "QC 1000 Proposing Release"), at 75 ("Another key difference is that QC 1000 would impose specific responsibilities on the individuals assigned the specified roles, such that enforcement action could be brought against them individually if they fail to meet those responsibilities.").

[27] See *The Cost of Unintended Consequences: Accounting Talent, Audit Quality, Investor Protection*, Statement by Board Member Christina Ho, (Sept. 19, 2023), at https://pcaobus.org/news-events/speeches/speech-detail/the-cost-of-unintended-consequences-accounting-talent-audit-quality-investor-protection-(statement-on-proposed-amendments-to-pcaob-rule-3502-governing-contributory-liability).

[28] See Proposing Release at 20.

[29] See Proposing Release at 7.

confounding in the context of simple negligence, which, by definition, is not intentional conduct. Moreover, auditors face the risk of civil liability for negligent acts, which can involve significant financial and reputational damages. Civil litigation also provides additional investor protection. It is unclear what new benefit the proposed rule would achieve given the existing liability exposures for auditors.

Separately, the Board points to data reflecting those cases in which it brought charges against firms but no Rule 3502 violations were alleged as evidence that "no contributory actor was held accountable *under Rule 3502*" in these cases (emphasis added).[30] We observe that the Board does not state that no contributory actor was held accountable, just that they were not charged with a violation under Rule 3502. In other words, individual actors in these cases may have been charged with primary violations under different Board rules and thus *were held accountable*, just not under the specific charge of secondary liability under Rule 3502.[31]

Notably, the Board does not attempt to quantify the costs that could be imposed as a result of its proposed amendments. Instead, the Board simply states that the amendments, if adopted, "are expected to result in increased costs,"[32] and adding that those costs, in the form of increased enforcement actions, could "be substantial to the firms and individuals involved."[33] In contrast, the PCAOB staff itself estimates only modest enforcement benefits from the Board's proposed change, indicating that that there were only "two to three instances" in 2022 where it would have recommended an incremental charge in an enforcement action under Rule 3502 as proposed to be amended.[34] If the Board's estimate of two to three additional enforcement cases is an accurate prediction of future cases, the Board has not shown a clear need for this proposed change. Conversely, if the Board's estimate is not an accurate prediction of future enforcement matters, its economic analysis of potential costs is incomplete and has not demonstrated a basis to conclude that the benefits of these proposed amendments reasonably outweigh their potential costs.[35]

- *The Board should clarify the distinction between "due professional care" and "reasonable care."*

The Board describes its proposed negligence standard as "the failure to exercise reasonable care or competence."[36] Should the Board determine to go forward with this proposal, it would be helpful if the Board considered how the concept of "reasonable care" as used in this negligence description is

---

[30] See Proposing Release at 18.

[31] The Board acknowledged in the Proposing Release that it has other tools at its disposal to hold associated persons accountable for conduct that contributes to a firm's primary violation of Board standards and rules. See Proposing Release at 9, n. 31 ("As the 2005 Adopting Release notes, however, Rule 3502 'is not the exclusive means for the Board to enforce applicable Board rules and standards against associated persons.'"). In fact, the Board has brought recent enforcement actions against firms for primary violations, and in those actions has held associated persons of such firms accountable for related conduct. See, e.g., *In the Matter of BDO USA, P.C., Kevin Olvera, CPA, and Michael Musick, CPA,* PCAOB Release No. 105-2023-024 (Sept. 26, 2023) (charging BDO, an assisting partner, and an engagement quality review partner with violating audit standards on an issuer engagement); *In the Matter of KPMG Inc., Cornelis Van Niekerk, and Coenraad Basson*, PCAOB Release No. 105-2022-015 (Aug. 29, 2022) (charging the firm and Van Neikerk with violating audit standards on multiple audit engagements); *In the Matter of Citrin Cooperman & Company, LLP, Joseph Puglisi, CPA, Mark Schniebolk, CPA, and John Cavallone, CPA,* PCAOB Release No. 105-2022-007 (May 11, 2022) (charging the engagement partner and two engagement quality review partners with violating audit standards on a broker dealer examination engagement and the firm with violating quality control standards).

[32] See Proposing Release at 24-25.

[33] See Proposing Release at 25.

[34] See Proposing Release at 25.

[35] See *Mexican Gulf Fishing Co. v. United States DOC*, 60 F.4th 956, 965 (5th Cir. 2023); see also *Texas Independent Ginners v. Marshall*, 630 F.2d 398, 411, n. 44 (5th Cir. 1980).

[36] See Proposing Release at 4 (citing *In re S.W. Hatfield, C.P.A.*, SEC Release No. 34-69930, at 35 n.169 (July 3, 2013).

comparable with, or distinguishable from, the concept of "due professional care" as that concept is proposed to be defined by the Board's AS 1000 proposal. As described in proposed AS 1000, "due professional care" means "what the auditor does and how well the auditor does it. Due professional care means acting with reasonable care and diligence, exercising professional skepticism, acting with integrity, and complying with applicable professional and legal requirements."[37] Given the apparent overlap between the concept of "due professional care" and the description of "reasonable care," the Board should clarify if an individual is found not to have exercised due professional care under proposed AS 1000, would they be similarly liable under an amended Rule 3502 if the action, or inaction, that resulted in the finding of failure to exercise due professional care directly and substantially contributed to a primary violation by any registered public accounting firm.

- *If the proposal is adopted, the Board should consider its other pending proposals when setting the effective date.*

The Board has a number of proposals pending adoption that intersect and overlap, such as the proposal regarding QC 1000 and AS 1000, which, as proposed, would create new obligations on associated persons of registered public accounting firms. Since the Board's proposal on contributory liability may have different repercussions depending on the outcome of these other proposals, it would be beneficial for the effective date of this proposal to be at least for an appropriate period after those other proposals are adopted so firms can consider the implications of this proposal in relation to those other standard settings.

[37] See PCAOB Release No. 2023-001 *Proposed Auditing Standard – General Responsibilities of the Auditor in Conducting an Audit and Proposed Amendments to PCAOB Standards* (March 28, 2023), at 21, at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-049/pcaob-release-no.-2023-001-as-1000---proposed.pdf?sfvrsn=28304d26_4.