



August 7, 2023

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

**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:

The Energy Infrastructure Council ("**EIC**") is a non-profit trade association of companies that develop and operate energy infrastructure, including traditional and renewable energy infrastructure companies; investors in energy infrastructure; service providers; and other businesses and individuals that operate in and around the energy industry. The EIC writes today in response to the Public Company Accounting Oversight Board ("**PCAOB**" or "**Board**") Exposure Draft on Company's Noncompliance with Laws and Regulations ("**Exposure Draft**" or "**Proposal**"), which is part of the Board's standard setting agenda to update and modernize PCAOB Auditing Standards.

We appreciate the opportunity to comment on the Proposal. Due to our significant concerns about the scope of the Proposal and the unnecessary costs and burdens the Proposal would impose on companies, auditors, investors and the market, we are summarizing our concerns here and cross referencing the other comment letters with which we agree. We believe that, consistent with the comments provided by the U.S. Chamber of Commerce (the "**Chamber**"), the Edison Electric Institute ("**EET**") and The Williams Companies, Inc. ("**Williams**"), the Exposure Draft represents an overreach of regulatory authority on the part of the PCAOB, is substantively problematic and inconsistent with the mandate of the PCAOB, regulatory policy and existing regulatory requirements, and would impose substantial unnecessary costs on companies, auditors and investors.

While we agree with and support the comments made by the Chamber, EEI and Williams, we believe that our primary concern can be summarized as follows: We would ask whether it is appropriate for the PCAOB to require auditors to effectively provide reasonable assurance with respect to corporate legal compliance with all laws and regulations, including matters for which auditors have neither the expertise nor the visibility. We would argue that it is not. Below we have summarized our reasons for this conclusion.

1. ***The Proposal represents an overreach of the PCAOB's authority.*** The PCAOB lacks the statutory authority to extend auditor responsibilities on financial statement audits – from providing reasonable assurance that the financial statements (including footnote disclosures) comport with generally accepted accounting principles (e.g., “***U.S. GAAP***” as promulgated by the Financial Accounting Standards Board (“***FASB***”) – to encompass determining compliance with all laws and regulations as proposed. The Sarbanes-Oxley Act of 2002 (“***SOX***”) does not contemplate this type or level of statutory authority for the PCAOB, and the Proposal likely also exceeds the authority granted under Section 10A(a) of the Securities Exchange Act of 1934 (“***Exchange Act***”). The Proposal would require auditors to become involved with a company’s operational controls, which is outside the scope of SOX Section 404 and internal control over financial reporting, and likewise further implies that the Board has wandered outside of the scope of its authority.
2. ***The Proposal is inconsistent with existing regulatory policy and requirements.*** The Proposal also fails to align with fundamental elements of the U.S. financial reporting framework, including the federal securities law definition of materiality, U.S. GAAP and the disclosure requirements promulgated by the Securities and Exchange Commission (“***SEC***”). With respect to materiality, the Exposure Draft simultaneously ignores and abuses the definition of materiality adopted by the U.S. Supreme Court (“***Materiality***,” as used herein in reference to specific matters, “***Material***”), which applies to the federal securities laws, SEC rules and regulations, FASB standards and PCAOB rules and standards. First, where noncompliance is found, regardless of materiality, the auditor is given a new laundry list of obligations and there is no materiality qualifier on the auditor’s obligation under the Proposal to report all noncompliance regardless of significance or impact. Second, the Proposal is casually inconsistent in the use of materiality qualifiers in other contexts, without adding any explanations for the deviations from the definition of Materiality or explanations for deviations from one portion of the Proposal to another. The Proposal also fails to align to U.S. GAAP guidance with respect to core concepts and definitions, or to SEC guidance with respect to certain disclosures under Item 303 of Regulation S-K.
3. ***The Proposal is inconsistent with the scope of auditors’ existing obligations.*** The auditor’s responsibility is to examine and report on the financial statements and notes prepared by management as well as to evaluate internal control over financial reporting, not to replace the board of directors, its independent audit committee and management in overseeing and establishing appropriate compliance procedures and policies that can effectively detect noncompliance. EIC’s members have highly sophisticated compliance programs that take into account their industries, their unique operations and the specific regulatory landscape that they are subject to, including regulations regarding environmental, health and safety matters. We note that the board and management’s responsibilities in these matters are governed by their fiduciary duties, and state law

mechanisms exist for holding boards and management accountable in accordance with their duties. The Exposure Draft also fails to take into consideration the extent of industry-specific regulation and the need for unique types of expertise in those areas to assess overall legal compliance. Moreover, to the extent that auditors were to rely on outside expertise or staff up additional internal expertise, it is worth noting that all such individuals would need to understand and be able to comply with all applicable auditor independence and ethical requirements. Furthermore, by inserting the auditor into management's existing compliance processes and controls in such a direct manner, the Exposure Draft increases the risk of auditors violating PCAOB and SEC auditor independent rules, a perverse result that could simultaneously decrease audit quality while increasing potential liability exposures and costs for auditors and companies alike.

The Proposal would turn the financial statement audit process into a seemingly endless search for the needle in the proverbial compliance haystack, regardless of whether or not such a needle exists. How this search is not simply a vastly less efficient and significantly more costly duplication of companies' mandated compliance structures, policies and programs, the Exposure Draft fails to answer. With the Exposure Draft's intentionally broad application, literally all laws and regulations, globally and irrespective of whether such laws or regulations involve financial or operational issues or are immaterial in their application, would need to be considered by the auditor. Auditors are not lawyers. We respectfully challenge the Board to find any law firm in the world – law firms being far better equipped to speak to legal corporate compliance or noncompliance than auditors – that would assume the role of unqualified guarantor of their clients' legal compliance with all laws and regulations. We posit that no law firm, at least no law firm that wanted to stay in business, would do so, in large part because to assume such board-level liability without the benefit of the business judgment rule and director insurance protection would be a level of liability that no third party could practically navigate or mitigate, to say nothing of the potential deteriorative impacts on attorney-client privilege. Moreover, often the determination of legality requires adjudicative processes for the existence or degree of noncompliance to be determined. The Proposal would seek for the auditor to replace not only a company's board and management, but counsel, judge and jury as well.

4. ***The Proposal represents a prohibitively costly regulatory imposition on our capital markets that cannot be justified.*** The Proposal states that “[t]he Board recognizes that imposing new requirements would result in additional, potentially substantial costs for auditors and the companies they audit.”<sup>1</sup> However, the Proposal fails to articulate the nature of these “substantial” costs, and the economic analysis fails to actually quantify current or expected costs. We agree with the Chamber, EEI and Williams that, audit costs and related costs, including legal costs, would increase astronomically were the Proposal to be finalized as is. These costs would be borne by auditors, companies, investors and the capital markets. The Proposal does not sufficiently appreciate that many of the audit requirements contained therein will require significant company engagement and effort to enable the auditors to plan and perform the necessary procedures, assess and respond to risks, track down and address instances of noncompliance that have or may have occurred

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<sup>1</sup> For example, see the Exposure Draft, page 76.

(which will include a number of false positives), and communicate these actions and findings.

In conclusion, we believe that the current audit standards related to noncompliance with laws and regulations are effective and sufficient in identifying and disclosing any such matters that are Material, and urge the Board to withdraw the Proposal. As noted at the beginning of this letter, we also concur with the comments submitted by the Chamber, EEI and Williams. We welcome the opportunity to discuss our comments or any other matters that you believe would be helpful. Please contact me at 202.747.6570 or [lori@eic.energy](mailto:lori@eic.energy) if you have questions or wish to discuss our comments. Thank you for your attention and time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lori E. L. Ziebart', with a long horizontal line extending to the right.

Lori E. L. Ziebart  
President & CEO  
Energy Infrastructure Council