



**Patrick Darby**

*Executive Vice President,  
General Counsel and Corporate Secretary*

August 7, 2023

**VIA ELECTRONIC MAIL**

Office of the Secretary  
Public Company Accounting Oversight Board  
1666 K Street, N.W.  
Washington, D.C. 20006-2803  
Email: [comments@pcaobus.org](mailto: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 Office of the Secretary:

I respectfully submit this comment letter regarding the Public Company Accounting Oversight Board's (the "PCAOB") Proposing Release (the "Proposal") relating to *a Company's Noncompliance with Laws and Regulations* ("NOCLAR") for consideration. While we appreciate the opportunity to comment, the Proposal raises a series of concerns for our company, most of which are not unique to us. The following are the more obvious and significant of those concerns.

**Profound Change to Nature and Scope of an Audit**

The Proposal transforms the nature and scope of auditor responsibilities, turning financial statement audits into wide-ranging investigations of potential instances of NOCLAR. Auditors perform a vital function in financial markets, ensuring the integrity of financial statement information that ultimately facilitates effective capital deployment. Changing the nature of the audit to serve as an examination of NOCLAR would add a host of new responsibilities and requirements for auditors, unnecessarily deviating from the purpose of an audit and diverting auditors from their core responsibilities, and would place significant additional demands on public companies to cooperate and facilitate the audits on a timely basis. The diversion of auditor time and attention to broad-based compliance assessments would almost certainly come at the expense of the attention devoted to traditional audit responsibilities and to obtaining reasonable assurance that the financial statements are free of material misstatement. The costs of the additional personnel and audit processes demanded of our auditor will be passed on to public

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companies and their stockholders. Further, it would interpose auditors in our processes related to preventing, identifying, investigating, evaluating, communicating, and remediating instances of noncompliance, which include our operating controls and transcend financial reporting and internal control over financial reporting.

### **Dramatic Expansion of Expertise Required of Auditors**

These new auditor responsibilities would fundamentally alter the audit function and would insert auditors into our legal, compliance, and management functions and decisions. Auditors are not lawyers, and they do not have the specialized skills that may be needed to assess compliance with laws and regulations that lack a financial statement focus. Auditors would be required to retain a large number of attorneys to offer legal opinions on a voluminous number of areas of law, many of which would require multiple jurisdictional experts. Healthcare is a highly regulated industry. Not only are there extensive and complex laws and regulations at the federal, state, and local levels, but the Medicare and Medicaid programs rely heavily on sub-regulatory guidance and private contractors who adopt and apply their own interpretations of regulations. At great expense, we employ and retain highly specialized counsel for our small niche of the healthcare industry, in which few other public companies have a presence. Our auditor will not have access to such specialized counsel at any reasonable cost. Additionally, in the inevitable instances where the auditor's legal opinion conflicts with that of our legal counsel, management and the audit committee face the prospect of having to resolve potentially intractable disputes.

The auditor would also be required to retain compliance and management experts to assess existing compliance processes, policies, and programs and to assess the "appropriateness" of any remedial actions required, including assessing the adequacy of any internal investigation and disciplinary actions. With respect to the management function, the requirement that auditors perform enhanced risk assessment procedures could result in auditors second-guessing how we allocate our financial and human resources. This would not only blur responsibility between the legal, management, and audit functions but would also divert our auditor's time, attention, and resources away from auditing our financial statements. Likewise, it would divert our management and employee time and resources not already dedicated to compliance, along with the time of our audit committee, away from financial reporting to focus on NOCLAR.

### **The Imprecise Terminology of the Proposal**

The Proposal does not use precise terminology or otherwise reasonably limit or clarify the Proposal's NOCLAR requirements. The Proposal would establish an obligation for auditors to plan and perform procedures to identify *all* laws and regulations, noncompliance with which "could reasonably" have a material effect on financial statements. In addition auditors would be required to evaluate and communicate any potential noncompliance that "may" have occurred "regardless of whether the effect of the noncompliance is perceived to be material." We agree with Board Member DesParte that wording in the Proposal "suggests the auditor would be expected and held accountable to identify any and all information that might indicate instances of

noncompliance of any law or regulation across the company’s entire operations, without regard to materiality.”<sup>1</sup> Effectively, that would require the company and the auditor to prove the absence of noncompliance, which is antithetical to our legal system.

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 phrase “could reasonably” effectively creates the obligation to prove a negative — that noncompliance with a law could not reasonably have such effect. The Proposal does not provide sufficient clarity on how our auditor should determine which, among the many, often complex and highly technical, laws, regulations, and sub-regulatory guidance and interpretations that apply to our company “could reasonably have a material effect on the financial statements.”

Further, the conditional terminology employed by the Proposal — such as “likely,” “may,” and “might,” and including a requirement to report to the audit committee “information indicating that noncompliance . . . *may have* occurred” — would create serious challenges in determining precisely which instances of NOCLAR to prioritize. The result is likely to be over-reporting to audit committees which in turn will result in significant new demands on the committees to vet the reports. The associated burden could ultimately affect the functioning of audit committees and the ability to attract people to serve on audit committees.

The vague and expansive terminology used by the Proposal would drive new liability concerns for auditors and overly conservative audit assessments to mitigate that liability, creating a more unfocused and ineffective risk mitigation environment that would push our internal legal, compliance, and audit costs higher. The proposed expansive scope of audits and the associated imprecision of the requirements of those audits would significantly increase external audit costs and internal audit and compliance costs, both borne by stockholders, without any measurable corresponding benefit. Additionally, the proposed requirements could have the unintended consequence of hampering the lawful operation of businesses in the unfortunately common circumstances where laws and regulations are ambiguous, conflict, subject to legal challenge, or otherwise less than settled.

### **Threat to Attorney-Client Privilege**

The auditor’s proposed expanded responsibility to identify, evaluate, and report on compliance with a broader base of laws and regulations and to assess the timely and appropriate remedial action addressing instances of noncompliance will require sharing of significantly more information. The increased sharing of information from the audit client to the auditor that is required under the Proposal would increase the risk to the legal privilege public companies have with their internal and external counsels, which may

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<sup>1</sup> See *Statement on Proposal to Amend PCAOB Auditing Standards Related to a Company’s Noncompliance with Laws and Regulations and Other Related Amendments* by Duane M. DesParte (June 6, 2023).

ultimately inhibit the free exchange of information with counsel and proactive compliance efforts as well as increase third-party litigation risks.

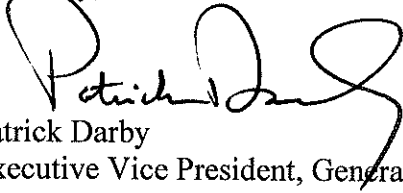
### **Required Duplication of Internal Compliance Procedures and Processes**

We maintain a compliance program designed to meet or exceed the standards promulgated by United States Department of Justice. We have invested, and will continue to invest, substantial time, effort and expense in implementing and maintaining compliance monitoring and training programs. In addition, we routinely cooperate with active regulatory oversight by federal, state, and local authorities. As a healthcare provider, we receive reimbursements from government agencies and are accordingly subject to liberal *qui tam* laws that facilitate and encourage whistleblower claims. Given the internal and external resources currently devoted to compliance and identifying instances of noncompliance, expansive new auditor oversight is unnecessary and would impose a substantial undue burden on us and ultimately our stockholders without providing any meaningful benefit to compliance efforts.

If the PCAOB believes the audit standards related to NOCLAR and illegal acts should be amended or supplemented, the Proposal should be withdrawn and the PCAOB should engage in more extensive and programmatic public engagement in order to tailor any amendments or supplements more narrowly to achieve the desired goals and avoid the potentially very harmful effects noted above. The fundamental changes in the nature and scope of the audit process and the attendant intrusions into the legal, compliance, and management functions of companies raise serious concerns that the Proposal exceeds the PCAOB's authority. The sum of those harmful effects is likely to have a negative impact on capital markets as public companies struggle with the new operational burdens and costs of the audit process and other companies choose to remain or go private to avoid those burdens and costs. Notwithstanding the obvious and significant new costs associated with the Proposal's requirements, including the costs to both auditors and public companies and the indirect effects on capital markets, the PCAOB provided no meaningful, quantitative analysis of the Proposal's cost-benefit. We believe it is necessary that any significant change to audit standards undergo a thorough and transparent cost-benefit analysis as part of the proposal engagement process.

We appreciate the PCAOB's attention to our concerns.

Sincerely,



Patrick Darby  
Executive Vice President, General Counsel and Secretary

cc: Christopher R. Reidy, Chair of the Audit Committee