EQUILIBRIUM

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Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

BY EMAIL ONLY: comments@pcaobus.org

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 (the "**Proposal**")

Dear Members of the PCAOB (the "**Board**"),

My name is Richard Jansson, I am a director of Equilibrium Capital Limited, which is authorised and regulated by the Financial Conduct Authority in the United Kingdom (reference number: 464325) and specialises in the provision of advice to minority shareholders.

Request for "evidence of a significant, pervasive market failure"

In its submission dated 2 August 2023, the U.S. Chamber of Commerce[1] states that the Proposal "*necessitates compelling evidence of a significant, pervasive market failure*", asserting that the Board has furnished the Proposal simply based on a "*general statement that auditors have a fundamental obligation to protect investors*".

In my experience, significant, pervasive market failure is not a one-off event, but a systematic way in which critically important gatekeepers[2] fail to conduct themselves towards vulnerable minority investors ("**Minorities**" or "**Savers**") in relation to large M&A-transactions in the "*public company market*", especially "*outside of the United States*", where the risk of being caught-out by regulators like the U.S. Securities and Exchange Commission ("**SEC**") and/or the U.S Department of Justice ("**DOJ**") is (or perhaps has been) significantly lower, as lawmakers' intended "*safeguards*"[3] ("**Safeguards**") are being methodically circumnavigated to the detriment of vulnerable Savers with the assistance of, amongst other, auditors.

[1] Through Mr. Tom Quaadman: https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/22_chamber.pdf?sfvrsn=a67832d5_4

[2] Auditors, alongside investment bankers, legal counsel and other so-called "*professionals*", like management consultants, tax experts etc.

[3] Such as "*financial statements, audits and reviews*" alongside domestic protections such as Article 266 under Luxembourg law or the Umwandlungsgesetz (UmwG) under German law, but also the securities laws of the United States of America, with its global reach (applicable also to foreign issuers).

Executive Summary

Based on my experience[4], I support the Proposal and believe that the Board should unanimously adopt the Proposal to prevent and put a stop to auditors potentially allowing or supporting their clients to circumvent such Safeguards by in effect:

(1) engineer financial statements on a pro forma basis by omitting material information[5],

(2) make self-serving forecasts which are totally unsubstantiated to support significant shareholder's 'desired' terms,

(3) instruct "*other auditors*" to cooperate with the appointed lead investment bank ("*financial advisor*") who unofficially is being portrayed to them as the one and only independent expert - whilst in reality being totally partisan - appointed to assisting the "*other auditors*" to value the companies and thus assess the alleged appropriateness of significant shareholder's 'desired' terms being imposed against such vulnerable Savers,

(4) deny "*other auditors*" (who are legally obliged to *verify* and *certify* the terms being enacted during their *review* / *audit*) insight into critically important financial information by refusing them access to something as basic as the *audit files* of the lead auditors,

(5) 'ferry' sensitive lines of communications from the lead investment bank ("*financial advisor*") to the "*other auditors*" via lead legal counsel, by imposing biased changes to legally required independent audit reports, as it seems in order to orchestrate client-attorney privilege with a view to escape transparency and accountability,

(6) undermine the legally required independence of such "*other auditors*" by in effect;

   a. provide them with hidden indemnifications in their engagement letters, as it appears in exchange for unconditionally approving the by significant shareholder's 'desired' terms whilst simultaneously being *refused* access to the critically important *audit files* of the lead auditors - in effect - make them verify critically important financial data without actually verifying it,

   b. have them delete comments identifying *valuation difficulties* and instead instruct them to ask for *relevant information* and then continue to *refuse* such basic access - in effect working like a 'circular reference',

   c. instruct them to rely on totally unsubstantiated assumptions (like *seasonality*, price of *material* or *currency* exchange ratios) and *not enter into too much detail* regarding the latest financial information, which does not support the self-serving 'forecasts' and therefore not the artificial valuations either and therefore not the adverse terms being imposed against such vulnerable Savers, and instead rely on other unconfirmed material,

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[4] I have amongst other advised minority shareholders in relation to (**1**) the Arcelor-Mittal merger, (**2**) the re-integration of T-Online International into Deutsche Telekom and (**3**) the squeeze out of the minority shareholders in HypoVereinsbank by UniCredit, all of which took place in the time-period leading up to the 2008 financial crisis.

[5] Such as the impact of certain *reorganizations* or *cost-loadings* and therefore its effects on cashflows and consequently on financial statements and therefore in turn on present value discounted valuations (i.e. the terms being imposed against such vulnerable Savers).

d. allow them to invoice considerably more for their 'services' than the agreed *budget* at the outset, for in effect not doing the work they were legally obliged to undertake, and

e. offer them very extensive false/misleading representation letters to be signed by the top *corporate directors* that amongst other guarantees that they were *provided with all Information in the possession or knowledge* of the companies that they *requested* despite such access to the demanded *audit files* was in reality consistently *refused*, which seems to provide an additional 'artificial' layer of protection against any liability for the "*other auditors*" to play its critical role in enabling the implementation of the adverse (fraudulent) terms against such vulnerable and defenceless Savers.

In my experience, all the above is carefully orchestrated by a lead investment bank with the assistance of the lead auditors as well as lead counsel, to orchestrate their ultimate client's aim; engineered terms and therefore unjust enrichment.

I believe that this line of activity is still very much ongoing in the market place and the (alleged) parties involved are all acutely aware or ought to be aware that what happened at the time was not only wrong, but it was also likely unlawful, perhaps even criminal, and in my view may also have breached the antifraud provisions of the US Securities Act of 1933[6], but the alleged offenders are (as opposed to their victims) so resourceful and 'connected' that they can undermine regulatory investigations for decades and defend their misconduct reductio ad absurdum.

After having read through a number of statements regarding the Proposal from various representatives of the auditing industry[7], I would like to respond as follows to a few of their expressed 'concerns':

1. Alleged increase in auditing costs

It is being asserted that cost of auditing under the Proposal could triple. I believe that such estimates are materially exaggerated in order to try to discourage the Board from progressing with the Proposal.

If it was true that costs would threefold by obligating auditors to try to discover "*noncompliance with laws and regulations*" ("**NOCLAR**"), then we must all ask the obvious question, what is the auditors role and what have auditors actually been doing up until today in this context?

In my view, the Proposal will encourage management and boards alike to be considerably more careful and transparent when they are (as guided by their 'creative' and indemnified investment bankers) seeking legal advice as to how they could, or perhaps rather should, structure their transactions, with a view to actually complying with the basic legal and regulatory requirements, rather than artificially seek only to be perceived as to complying.

Accordingly, in my view, the Proposal will (at least in the medium term) likely reduce costs for issuers to comply with laws and regulations, as auditors will most likely be provided with accurate and exhaustive information from legal counsel at the very outset, as the adverse

[6] https://www.sec.gov/rules/2001/12/cautionary-advice-regarding-use-pro-forma-financial-information-earnings-releases
[7] https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-051/comment-letters

consequences of such non-compliance will not only be risky (costly in the form of large fines and potential reputational consequences), it will also likely be exposed by auditors any way, sooner or later, as otherwise they themselves may risk becoming held liable, despite being offered hidden indemnifications and/or false/misleading representation letters behind the scenes.

Auditors are very much part of the problem and the sooner the industry recognises this, the sooner vulnerable investors (Savers) will be protected, and the sooner the mission of the SEC[8] will be accomplished.

Auditors are not there for their own interests or that of significant shareholders; they are supposed to operate to serve and protect the general public from being detrimentally affected, by making sure that financial information relied on was properly verified and being portrayed accurately.

In this context I note that the U.S. Chamber of Commerce and others do not once mention what impact NOCLAR may have on vulnerable Savers, who are the victims of auditors' failure to conduct themselves proficiently.

The auditing industry also ought to ask what the ultimate cost is to society due to auditors failure to conduct themselves, as they undermine the mission of the SEC, which in turn undermines confidence in markets and therefore growth and prosperity in the general economy.

2. Alleged undermining of attorney-client privilege

The auditing industry raises categorically concerns that the Proposal would undermine the attorney-client relationship, in effect requiring auditors to demand that companies and their legal counsel share substantive privileged and confidential materials regarding compliance with laws and regulations and asserts that this could create "*significant tension*"[9] between companies, their counsel, and their auditors.

I personally do not understand what would be so 'sensitive' and 'secret' as to how the law and regulation is to be interpreted, that issuers would be so reluctant to share such basic information with lead auditors / "*other auditors*", unless of course that legal advice is in fact unlawful and therefore enables the fraud in question.

In sharing such material, companies can of course require its lead auditors / "*other auditors*" to enter into strict non-disclosure agreements, which corporate directors would be well familiar with. Furthermore, the nature of the information required by the auditors should be information which is readily available and should be so on a transparent basis to allow all those involved in the transaction to understand the basis of the related technicalities to the valuations in question.

Auditors are often being legally appointed to undertake their tasks, sometimes even instructed in this capacity by the courts, who lack the resources to get to the bottom of what has actually happened with engineered financial statements / valuations and are therefore, to a large extent, dependent on, in the first instance, the integrity of the lead auditors when reviewing the terms being imposed, and in the second instance, other specifically appointed auditors,

[8] "*protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation*"
[9] As stated by Sifma: https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/51_sifma.pdf?sfvrsn=4728b4ad_4

such as merger auditors. The role of such 'experts' in most jurisdictions is that they should act as truly independent experts to assist the courts.

Lead auditors / "*other auditors*", who are naturally best placed to identify material effects on financial statements, would obviously benefit from reviewing the underlying legal advice to make sure that the advice is not unlawful and complies with basic regulatory requirements and if concerned have this verified by other (truly independent) legal counsel, and if that leads to "*significant tension*", that is likely a sign that something is not correct.

Such a requirement would also remove the risk for a potential 'blame-game' between legal counsel on the one hand, who may assert that they do not understand impacts on financial statements but only the law, and auditors on the other hand, who may assert that they do not understand the law but only the implications on the financial statements. Otherwise, it would become like a 'catch-22' as far as holding any "*professional*" accountable for allowing a fraud to evolve in the first place.

To me it is obvious that auditors would benefit from reviewing what the regulatory environment and the law stipulates and what the legal advice concludes when they are assessing any material effects on the financial statements being relied on.

Boards and management ought to view their lead auditors as a resource to reach excellence, not as a threat for exposing wrongdoing, as they will (hopefully) realise that attorney-client privilege protections are not meant to be used as a mean to shield illicit lines of communications from being detected by regulators and vulnerable Savers.

In the alternative, if the legal advice were to be so 'sensitive' to the issuer that it cannot be shared with the lead auditors / "*other auditors*" due to "*attorney client privilege protections*", then such auditors would have to seek at arm's length (in its true sense) their own legal advice (which would of course escalate costs for the client).

Accordingly, I believe that the Proposal will improve audit quality, significantly enhance investor protection and make legal counsel significantly more cautions as to how they are advising issuers to relate to compliance with laws and regulation.

3. There are already antifraud provisions in place

The auditing industry seems to argue that the Proposal is not necessary as there are already "*antifraud provisions*" in place for the SEC and others to deal with NOCLAR.

Clearly, regulators like the SEC have finite resources to enforce compliance with (amongst other) the antifraud provisions of the US securities laws, but under the Proposal I believe that such potential frauds will be stopped at source as opposed to many years down the line (if it is ever picked up by the relevant authorities).

It makes perfect sense to try to prevent NOCLAR already at the outset, and not allow it to evolve into absurdity.

4. Auditors are not lawyers

Auditors have various legal obligations and in most jurisdictions are subject to regulatory frameworks and so are expected to have an understanding of their professional duties and role. The Proposal is no different in this regard.

Auditors need to have a critical mindset and act with integrity, meaning that if there is a significant risk of a fraud or breach of law or regulation taking place, then they need an urge to take measures preventing a such illicit scheme from evolving further, that is true professionalism, and the same principles must apply to legal counsel, who also has a critically important gatekeeping role.

Spotting a breach or a fraud is all about using common sense, and well-educated auditors ought to be able to understand when a matter is contentious and therefore the risk of a breach or fraud materialising becoming more likely.

5. The Proposal would distract auditors from financial reporting

This is one of the more bizarre arguments I find, as it suggests that there is a low correlation between financial reporting and the law / regulation.

It is being argued that the Proposal is unwise as it would allegedly divert auditors' time, attention, and resources away from auditing the financial statements, which in turn would distract auditors from their core responsibilities, whilst the management of companies, alongside its audit committees, would have to focus on NOCLAR as opposed to on financial reporting.

From this I get the impression that the auditing industry finds compliance with laws and regulations as some kind of unwanted distraction. In my view and experience, it ought to be the other way around, namely that such compliance is the natural number one priority, a basic professional obligation, as otherwise, the "*financial reporting*" risks being misleading.

Company boards (as guided by indemnified investment bankers) and legal counsel must stop viewing auditors as 'party-poopers' when they speak up against misconduct, and instead start to value them as a sounding board in order to reach excellence.

6. The Proposal would undermine the independent audit function

The auditing industry seems to be of the opinion that the Proposal somehow will undermine the quality of financial reporting and therefore compromise the "*independent audit function*".

I am of the diametrical opinion, namely that the independent audit function is too often not at all independent and without the Proposal being implemented, there is a significant risk that the usefulness of public company financial statement audits and the trust and confidence in the same will be undermined. Accordingly, to oppose the Proposal would not be wise as it would fail protecting vulnerable Savers who rely on our markets to secure their financial futures.

Auditors are by definition assumed to be well educated and level-headed and should therefore be able to identify when there is a heightened risk for a breach of law, regulation or fraud (in effect someone potentially gaining something at the expense of someone else) and as soon as a such red-flag occurs, request the board to share the rationale behind the transaction and any necessary detail required to verify the legality of the underlying transaction.

If this is refused for attorney-client privilege reasons or whatever, then they should be obliged to seek other (truly independent) legal advice on their own, and if the board's advice were to be shared and seems biased, then such auditors should do the same but instead seek a second opinion, and if that advice confirms the advice shared, then everything ought to be good to proceed, and if not, the auditors should share their second opinion with the board and request

the board to respond as to why the (truly independent) second opinion sourced by the auditors, is inaccurate. This is clearly not 'rocket science'.

In the above context, the auditing industry seems to take the view that the Proposal would put auditors in the "*shoes*" of management alongside the securities lawyers that advise management, to assess various required SEC filings.

Auditors have a control function besides the board / management / audit committee of a company, to make sure that financial statements are accurate and not misleading. The cornerstone of this function is the "*auditor independence*" towards the same. In my experience, this alleged "*independence*" is systematically undermined in relation to large M&A-transactions in the "*public company market*", with a view to unlawfully enrich significant shareholders at the expense of vulnerable Minorities.

In his sworn statement to Congress, the SEC chairman at the time (24 September 2019), Jay Clayton, in relation to the question whether to extend time limitations for the SEC to pursue disgorgements of ill-gotten gains stated that private schemes like "*Ponzi*" are not like our public company market, as "*in the public company you have to publish financial statements, you have audits, you have reviews, you have all these kinds of things, you know, different environment in the private market*"[10].

In effect, as far as I understand, Clayton, who appears to have very extensive experience from large M&A-transactions in the public company market[11], asserted that there is a "*different environment*" with numerous "*safeguards*" in the "*public company market*", where the likes of large investment banks coordinates transactions in close collaboration with lead auditors, "*other auditors*" and legal counsel, as such minority investors are purportedly well protected by "*financial statements*", on top of "*audits*" and "*reviews*". I believe this to be untrue, at least in relation to the 3 large M&A-transactions I have to date been involved in.

However, under the Proposal, I believe that such conduct would come to an abrupt end, as in effect, lead auditors / "*other auditors*" would be expected to understand the most basic legal and regulatory requirements and early put a stop to the orchestration of financial statements, with a view to prevent the defrauding of vulnerable Savers.

I further believe that the "*chilling effect*"[12] the Proposal may have is highly desirable as it will likely simultaneously have a self-sanitary effect as boards (as guided by indemnified investment bankers), management and legal counsel alike will understand that auditors have in effect become potential 'internal whistleblowers', as opposed to 'buddies' (co-conspirators) to 'wine and dine' with, and cannot any longer simply be equipped with hidden indemnifications and/or false/misleading representation letters behind the scenes for 'looking the other way' and participating when unlawful/fraudulent acts take place, whilst simultaneously being allowed to invoice much more than budgeted for in effect not doing their job properly.

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[10] Please refer to 3h.18m. 24s into the hearing: https://www.c-span.org/video/?464386-1/securities-exchange-commission-oversight-hearing

[11] Clayton "*specialized in mergers and acquisitions transactions and capital markets offerings and represented prominent Wall Street firms, including Goldman Sachs*" before being "*nominated for the position by President Donald Trump*" as SEC Chairman: https://en.wikipedia.org/wiki/Jay_Clayton_(attorney)

[12] As stated by the National Association of Manufacturers: https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/82_nam.pdf?sfvrsn=d149b8ae_4

7. Savers are the ultimate victims of NOCLAR

In my experience, it is often being argued in relation to large M&A-transactions in the public company market, that acquirers themselves are the subject of "*greenmailing*"[13] by the likes of so-called 'activist' "*hedge funds*" who are themselves bending the rules, which in turn allegedly 'justifies' counter-measures by such acquirers, even if it were to entail NOCLAR.

I find this line of reasoning entirely self-serving, as it simply assumes that;

(a) all outstanding shares in relation to a take-over are held by such 'activist' "*hedge funds*" (see further below regarding NBIM as an example),

(b) assets held by such 'activist' "*hedge funds*" are not ultimately beneficially owned by Savers[14], and

(c) "*greenmailing*" is unlawful[15].

To illustrate how inappropriate it would be to justify NOCLAR in the above context, take Norges Bank Investment Management ("**NBIM**"), the world's largest institutional investors (ca. $1.4 trillion in AUM) as an example, ultimately beneficially owned by the entire population of Norway (5.4 million people), who on average owns "*1.5 percent of all listed companies*"[16] globally[17].

This means, statistically, that in every large global M&A-transaction in the public company market, NBIM owns ca. 1.5% of the target company (whose shareholders are potentially being subjected to NOCLAR) directly, and therefore likely is a direct victim of NOCLAR.

Now, in relation to any such transaction, there are of course other than NBIM and so-called 'activist' "*hedge funds*" that may hold shares in a target company, such as large banks[18], who may also fall victim to NOCLAR. Given that NBIM also owns (statistically) ca. 1.5% of the likes of such large banks, NBIM is also likely an indirect victim of NOCLAR.

Undoubtedly, the same line of logic can easily be applied to other large US based institutional investors such as CalSTRS[19] who as of 30 June 2023 held a "*global investment portfolio valued at approximately $315 billion*" for the benefit of "*more than 980,000 Californian educators and their families*", whose mission it is to secure their "*financial future*"[20], so US

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[13] The "*practice of buying enough shares in a company to threaten a takeover, forcing the owners to buy them back at a higher price in order to retain control*".
[14] It is obvious that pension funds, mutual funds and the likes invest in such 'activist' hedge funds and therefore the ultimate (indirect) victims of such manipulation are also vulnerable and defenceless Savers.
[15] Greenmailing is not illegal, nor does it constitute "*extortion*" because there is no unlawful obtention of property [Viacom Int'l, Inc. v. Icahn, 747 F. Supp. 205 (S.D.N.Y. 1990)] and management does not have the right to be free from the threat of a hostile takeover [Id. at 213-14; Chock Full O'Nuts Corp. v. Finkelstein, 548 F. Supp. 212 (S.D.N.Y. 1982). See also Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983)]; source: https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1164&context=bclj
[16] https://www.nbim.no/en/the-fund/Market-Value/
[17] Alongside other large institutional investors such as Vanguard, BlackRock, Bridgewater, State Street, Invesco, Nuveen, Charles Schwab and Aviva, to mention a few.
[18] e.g. UBS, Credit Suisse, Deutsche Bank, JPMorgan Chase, BofA Securities, Morgan Stanley, Citigroup and HSBC to mention a few.
[19] The California State Teachers' Retirement System.
[20] https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/137_calstrs.pdf?sfvrsn=79f6140c_4

based investors are in no way immune against such alleged fraudulent activities, even if it were to be taking place "*outside of the US*".

The above line of reasoning is in fact also confirmed by the SEC's own homepage, which explained under the heading "*FOCUSING ON MAIN STREET*", that "*American households own $29 trillion worth of equities*", and that this is held "*either directly or indirectly through mutual funds, retirement accounts and other investments*" (see enclosed extract), and clearly, NOCLAR could (and likley would) therefore also adversely effect the average Saver based in the United States.

Concluding Commentary

As the Board will be aware, about a year ago, the Board "*adopted amendments to its auditing standards to strengthen requirements that apply to audits involving multiple audit firms*", which in effect (**1**) specifies "*certain procedures for the lead auditor to perform when planning and supervising an audit that involves other auditors*" and (**2**) applies a "*risk-based supervisory approach to the lead auditor's oversight of other auditors for whose work the lead auditor assumes responsibility*"[21].

This amendment was in my view a very important first step in protecting vulnerable investors and strengthening the public's trust in the system and that the Proposal on top of this will prevent the same kind of conduct from repeating itself going forward.

In light of what is stated above, may I propose that the Board contemplates the following questions ahead of deciding whether to adopt the rules pertaining to the Proposal:

1. Is auditor manipulation a one-off situation, or is it common practice?

2. Has this kind of behaviour changed since the period leading up to the 2008 financial crisis or have those involved just become more skilled in covering their tracks?

3. By opposing the Proposal, are the auditing, investment banking and legal industries ultimately promoting the protection of vulnerable Savers or the interests of their lucrative clients and themselves?

4. If the Proposal is not adopted unanimously by the Board, what kind of signal would that send to Mr. & Mrs. 401k, whose interests the members of the Board, as far as I understand, ultimately are there to jointly represent?

5. Is it not true that these large organisations have become what I would define as "*corporate oligarchs*", they are (or think they are) above the law and can get away with more or less anything, as courts and regulators are under-funded and incapable of keeping up with their cross-border, ever evolving illicit 'creativity'?

6. Is it not true when it comes to large M&A-transactions in the public company market that the more confusion that can be added to the equation, the easier it is to deceive vulnerable Savers, and if it does not work with manipulation, conspirators will just try with more manipulation?

7. I believe that there is a "*code of silence*" within the finance/auditing/legal industries, which reminds me of gang shootings, where there is an unspoken consensus not to

[21] https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-adopts-new-requirements-for-lead-auditor-s-use-of-other-auditors

mention, discuss, or acknowledge inappropriate behaviour in fear of repercussions, would the Board agree?

In concluding remark, I firmly urge the Board to unanimously implement the Proposal without delay and continue to build on PCAOB's public image as a fair, reasonable, and proportionate audit regulator, both in the U.S. and abroad.

Grind Slow, Grind Fine, but First of All, Grind.

Sincerely yours,

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SEC Monitoring Wildfires in California

The SEC is closely monitoring the wildfires in California and stands ready to help ensure investor access to their securities accounts, provide extensions to filing or other regulatory deadlines, and to keep a watchful eye for fire-related scams.

FOCUSING ON MAIN STREET

The SEC's focus on Main Street investors reflects the fact that American households own $29 trillion worth of equities — more than 58 percent of the U.S. equity market — either directly or indirectly through mutual funds, retirement accounts and other investments.