

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21831

In the Matter of

EDWARD F. HACKERT, CPA,

Respondent.

RESPONDENT EDWARD F. HACKERT'S MOTION
FOR A MORE DEFINITE STATEMENT

Pursuant to SEC Rule of Practice 220(d), Respondent Edward F. Hackert, by and through undersigned counsel, hereby respectfully moves the Commission for an order requiring the Division of Enforcement (the "Division") to provide Mr. Hackert with a more definite statement regarding certain of the allegations and claims set forth in the March 12, 2024 Amended Order Instituting Administrative and Cease-and-Desist Proceedings (the "AOIP"). If the Division is unable to provide Mr. Hackert with the information and specificity to which he is entitled, the inadequate allegations should either be stricken from the AOIP or the administrative proceeding should be dismissed altogether.

BACKGROUND

On March 12, 2024, the Commission granted the Division's motion to amend and issued the AOIP, which alleges that Mr. Hackert violated certain PCAOB auditing standards relating to audit supervision and documentation in his role as engagement partner with Marcum LLP ("Marcum"). While not entirely clear, the AOIP appears to advance two somewhat overlapping theories of liability against Mr. Hackert. *First*, it alleges that "[i]n 187 of the 239 audits on

which [Mr.] Hackert was the engagement partner during the relevant period (or about 78%), [Mr.] Hackert did not review significant portions of the audit work performed or conclusions reached prior to the report release date.” AOIP at ¶ 44; *see also id.* at ¶ 5. And *second*, the AOIP alleges that “[d]uring the relevant period, on 123 of the audit engagements for which Hackert was the engagement partner, he failed to ensure that a complete and final set of audit documentation was assembled for retention by the documentation completion date.” *Id.* at ¶ 56; *see also id.* at ¶ 7.

In alleging these two supposed violations, nearly all of the at-issue audits are anonymized (*e.g.*, “Operating Co. 1,” “Operating Co. 2,” “SPAC 1,” “SPAC 2,” etc.) and aggregated in two lengthy appendices to the AOIP.¹ *See id.* at ¶ 58. As to the first allegation, that Mr. Hackert “did not review significant portions of the audit work performed or conclusions reached prior to the report release date,” Appendix A does nothing more than list 187 anonymized audit clients and count the purported number of “sign-offs” before and after the report release date. *See id.* at Appendix A. And for the latter allegation, that Mr. Hackert “failed to ensure that a complete and final set of audit documentation was assembled for retention by the documentation completion date,” Appendix B similarly purports to list 123 anonymized audit clients, provides the supposed total number of “sign-offs” after the report release date, and indicates whether the audit file contains an “AS 3 memo,” which the AOIP appears to claim was required by Marcum’s internal policy (but not by the PCAOB auditing standards). *See id.* at ¶ 58 and Appendix B.

While less than clear, it appears that the Division alleges that a total of 193 audits are at issue in this administrative proceeding. *See id.* at ¶ 58. Some of those 193 audits are listed on Appendix A’s list of 187 audits; some are on Appendix B’s list of 123 audits; and some appear

¹ To be clear, Mr. Hackert does not object to withholding his clients’ names from the public—indeed, they should remain nonpublic.

on both. The AOIP does not explain (or even mention) the apparent overlap. Nevertheless, the AOIP claims that, as a result of the alleged auditing standard violations, Mr. Hackert engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and SEC Rule of Practice 102(e)(1)(ii) and caused Marcum to violate Rule 2-02(b)(1) of Regulation S-X “in connection with the [193] audits listed on Appendices A and B.” *See id.* at ¶ 58. Only one audit client—approximately 0.5% of the 193 at-issue audits—is specifically identified in the AOIP. *See id.* at ¶¶ 15-16, 50-51, 59-83. And for all but a handful of the 193 at-issue audits, the AOIP contains *no allegations whatsoever*, beyond an entry on one or both of two appendices.

Mr. Hackert has located in the discovery provided thus far by the Division two documents labeled “Appendix A” and “Appendix B,” which appear to list the names of audit clients rather than the anonymized entries appearing in the AOIP. However, the former document has 204 entries and the latter 126—*i.e.*, both documents appear to list more audits than are alleged in the AOIP.² While the discovery files are not well organized, it also appears that the Division produced to Mr. Hackert audit work papers for, at most, only 12 of the 193 audits identified in the AOIP.

ARGUMENT

While the Division need not disclose its evidence in advance of the hearing, Mr. Hackert is “entitled to be sufficiently informed of the charges against [him] so that [he] may adequately prepare [his] defense.” *In re W. Pac. Capital Mgmt. LLC, et al.*, SEC Release No. 691, 2012 WL 8700141, *1 (2012) (citing *In re Charles M. Weber*, 35 S.E.C. 79 (1953)). Stated another way, the Division must set forth in the AOIP “the factual and legal basis alleged . . . in such detail as

² Appendix A and Appendix B to the Division’s original OIP had 204 and 126 entries, respectively, and were a focus of the Division’s February 5, 2024 motion to amend, wherein the Division admitted that both appendices were inaccurate due to “certain inadvertent errors.”

will permit a specific response thereto.” SEC Rule of Practice 200(b). Accordingly, the information to which Mr. Hackert is entitled here includes (i) the specific identity of the audits with respect to which he is alleged to have engaged in improper professional conduct and caused Marcum’s violation of the law, including those variously totaled and subtoted in the AOIP, and (ii) the “factual and legal basis” for the Division’s claims that the work papers for the 193 at-issue audits were inadequate, constitute improper professional conduct, and caused Marcum’s violations. *Cf., In re James L. Copley, et al.*, SEC Release No. 406, 1994 WL 36824, *1 (1994) (requiring Division to specifically identify at-issue securities); *In re J. Logan & Co.*, 38 S.E.C. 827 (1959) (“However, we consider that if the fraud allegations relate to any securities of issuers not specifically named in the order, movants should be apprised of the names of the issuers of such securities.”). As discussed below, because the AOIP fails to set forth sufficient information to meet these requirements, it must be supplemented, or the insufficient allegations must be removed from the AOIP.

A. The Division Must Provide Mr. Hackert With The Identity Of Each Audit Client Alleged In The AOIP.

Aside from the Ault Alliance, Inc. (“AAI”) audits, *see* AOIP ¶¶ 50-51, 59-83,³ the AOIP does not identify any of the audits during which Mr. Hackert supposedly violated the PCAOB accounting standards. The AOIP contends that Mr. Hackert was the engagement partner for 239 audits over a 10-year period, and that 193 of those audits were deficient—but the Division has not informed Mr. Hackert *which* of his 239 audit engagements are included in the subset of 193 audits the Division identifies as problematic. Again, the lengthy appendices are completely

³ Given the allegations regarding AAI, which (while largely incorrect) provide Mr. Hackert with detail sufficient to “permit a specific response thereto,” the Division is well aware of the level of specificity necessary to satisfy the pleading requirements set forth in the SEC Rules of Practice and Commission precedent. Indeed, the inadequacies of the Division’s summary allegations are even more glaring when contrasted with the AOIP’s AAI allegations.

anonymized, and the body of the AOIP contains a series of totaled and subtotaled audits that make it impossible for Mr. Hackert to do more than guess as to the identity of the audits the Division has placed at issue in this administrative proceeding. For example, the Division has not informed Mr. Hackert of the identity of the following:

- The 187 audit engagements during which Mr. Hackert allegedly “failed to supervise the work of the engagement team.” AOIP ¶ 5; *see also id.* at ¶ 44.
- The 123 audits during which Mr. Hackert supposedly “failed to ensure that a complete and accurate set of audit documentation was assembled by the documentation completion date.” *Id.* at ¶ 7; *see also id.* at ¶ 56.
- “Operating Company 14” and “Operating Company 18.” *Id.* at ¶ 45.
- The “at least 14 audit engagements” during which Mr. Hackert supposedly failed to review the work of the engagement team. *Id.* at ¶ 47.
- “Operating Company 12.” *Id.* at ¶ 48.
- “Operating Company 22.” *Id.* at ¶ 49.
- The “122 . . . audits” and “one . . . SPAC audit” alleged in AOIP ¶ 52.
- The “37 . . . SPAC audits, [for which Mr.] Hackert failed to sign routing slips. . . prior to the audit release date,” *id.* at ¶ 55.
- And, the “21 audits” for which Mr. Hackert supposedly did not add the “AS 3 memo” that the Division contends was required. *See id.* at ¶ 57.

Accordingly, the Division must specifically identify for Mr. Hackert each of the audits alleged, totaled, or subtotaled in the AOIP, including those alleged only via the appendices. *Cf. In re J. Logan & Co.*, 38 S.E.C. 827 (1959) (“if the fraud allegations relate to any securities of issuers not specifically named in the order, movants should be apprised of the names of the issuers of such securities”).⁴

⁴ Again, Mr. Hackert does not request that this information be made publicly available and submits that it should not be.

B. The Division Must Amend The AOIP To Provide Mr. Hackert With The “Factual And Legal Basis” For The Division’s Allegations.

The anonymization and various totals and subtotals of audits, discussed above, serve to further confuse the mélange of PCAOB accounting standards that the Division contends were violated, though in largely unstated ways. Again, the AOIP contains *no* allegations, beyond the inclusion in a total or subtotal, as to nearly all of the at-issue audits. The Division has not, therefore, informed Mr. Hackert which of the totaled and subtotaled audits the Division contends were improper, which auditing standards were violated by each audit and/or subtotal of audits, and how the Division contends each audit and/or subtotal of audits violated the identified standard(s). By way of example:

- The AOIP alleges that Mr. Hackert “failed to supervise the work of the engagement team” on 187 engagements, yet the Division has failed to (i) specify the PCAOB standard(s) supposedly violated in each audit, and (ii) state how, for each audit alleged, the standard was violated “in such detail as will permit a specific response thereto.” AOIP ¶ 5; *see also id.* at ¶ 44. Appendix A, which appears to correspond with this allegation, also provides none of this information.
- The Division alleges that Mr. Hackert “failed to ensure that a complete and accurate set of audit documentation was assembled by the documentation completion date” in 123 audit engagements, yet it again fails to (i) state the PCAOB standard(s) supposedly violated during each audit, and (ii) specifically allege how the standard(s) was/were violated “in such detail as will permit a specific response thereto.” *Id.* at ¶ 7; *see also id.* at ¶ 56. Again, Appendix B, which seemingly corresponds with this allegation, does not provide this information.
- Paragraph 47 of the AOIP alleges that Mr. Hackert did not review “key work papers” in the “significant audit areas” of “at least 14 audit engagements.” The AOIP, however, fails to identify each of the “significant audit areas” or the “key work papers” alleged. *Id.* at ¶ 47. Absent such information, Mr. Hackert cannot provide a “specific response” to this allegation.
- And, paragraph 49 alleges that Mr. Hackert failed to evidence his review of “significant risk areas” for Operating Company 22, but it fails to identify the “significant risk areas.” *Id.* at ¶ 49.

In sum, the Division cannot hide behind anonymized and summarized allegations.

Mr. Hackert is entitled to understand the “factual basis” for the Division’s allegations regarding

each of the audits the Division alleged in the AOIP, again, in “such detail as will permit a specific response thereto.” SEC Rule of Practice 200(b). The AOIP, in its current state, clearly does not do so, and the Commission must require the Division to either provide this information or amend the AOIP to omit these allegations.

C. The Division’s AS 1215 Allegations Are Especially Deficient.

Though not entirely clear given the foregoing, it appears that the Division claims that each of the 193 audits on which Mr. Hackert worked failed to comply with PCAOB Auditing Standard (“AS”) 1215,⁵ which covers the “general requirements for documentation the auditor should prepare and retain in connection with engagements.” AS 1215.01. The Division’s improperly summarized and aggregated allegations are especially problematic and prejudicial to Mr. Hackert in this regard.

Specifically, in alleging Mr. Hackert’s supposed violation of this auditing standard, the Division almost exclusively cites the existence, nonexistence, or timing of Mr. Hackert’s “sign-off” on certain portions of the engagement binder, again largely by purporting to count “sign-offs” in its appendices. See AOIP at ¶¶ 39, 45, 47, 55, Appendix A and Appendix B. AS 1215, however, provides that audit documentation can take many forms—far beyond the “sign-offs” pleaded by the Division:

The auditor must prepare audit documentation in connection with each engagement conducted pursuant to the standards of the PCAOB. Audit documentation should be prepared in sufficient detail to provide a clear understanding of its purpose, source, and the conclusions reached. Also, the documentation should be appropriately organized to provide a clear link to the significant findings or issues. **Examples of audit documentation include memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation. Audit documentation may be in the form of paper, electronic files, or other media.**

⁵ See AOIP ¶ 58 (Mr. “Hackert violated AS . . . 1215 in connection with at least 193 audits.”).

AS 1215.04 (emphasis added). Indeed, though carefully omitted from the Division’s AOIP, the PCAOB commentary to AS 1215 makes clear that sign-offs, such as those cited in the AOIP, cannot be used as a proxy for appropriate audit documentation:

The Board accepted this recommendation, and paragraph 4 in the final standard includes audit programs as an example of documentation. Audit programs may provide evidence of audit planning as well as limited evidence of the execution of audit procedures, but the Board believes that **signed-off audit programs should generally not be used as the sole documentation that a procedure was performed, evidence was obtained, or a conclusion was reached.** An audit program aids in the conduct and supervision of an engagement, but completed and initialed audit program steps should be supported with proper documentation in the working papers.

AS 1215, Appendix A, ¶ A12 (emphasis added).

Accordingly, in order to properly allege a violation of AS 1215, and to provide Mr. Hackert with the notice to which he is entitled, the Division must identify the “memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation” (or specifically allege the absence of such documents) for *each* of the 193 audits the Division alleges was insufficiently documented. It cannot simply provide Mr. Hackert with a chart purporting to count “sign-offs.” Indeed, even if it is the Division’s position that each and every one of the 193 at-issue audits lacked the documentation discussed in AS 1215.04 or violated the PCAOB auditing standards in some other way, the Division must specifically say so with respect to *each* audit—assuming, of course, that the Division has a factual basis, formed after reasonable inquiry, for such an allegation.⁶ Only then is Mr. Hackert able to provide a “specific response thereto.”

⁶ We understand that the Division likely lacks a factual basis to allege that each audit lacked sufficient “memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation,” and this absence of evidence likely explains the Division’s singular reliance on the alleged absence of the “sign-offs” that the PCAOB standards state are not dispositive. On information and belief, the Division has never even looked at the work papers for nearly all of

Here, however, the AOIP fails to indicate which work papers or documentation, other than “sign-offs” (which, again, the PCAOB commentary states are not dispositive), the Division claims serve as the basis for each of the hundreds of auditing standard violations alleged. As the AOIP now stands, Mr. Hackert is again left to guess as to the Division’s allegations that he violated AS 1215 with respect to 193 audits, nearly all of which are not even mentioned in the AOIP. Given that audit documentation can take the form of, among other things, “memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation,” what is it, exactly, the Division claims is included in or missing from the audit work papers in *each* of the audits alleged in the AOIP? Again, the Division must be ordered to provide this information to supplement the AOIP’s allegations, or these allegations should be stricken from the AOIP.

CONCLUSION

Based upon the foregoing, Mr. Hackert respectfully requests that the Division be ordered to provide him with a more definite statement regarding at least the following:

1. The identity of each of the “187 . . . audit engagements” alleged in AOIP ¶¶ 5 and 44, assuming both allegations refer to the same subtotal of audits;
2. The identity of each of the “123 . . . audit engagements” alleged in AOIP ¶¶ 7 and 56, assuming both allegations refer to the same subtotal of audits;
3. The identities of “Operating Company 14” and “Operating Company 18” alleged in AOIP ¶ 45;⁷
4. The identity of each of the “14 audit engagements” alleged in AOIP ¶ 47;
5. The identity of “Operating Company 12” alleged in AOIP ¶ 48;
6. The identity of “Operating Company 22” alleged in AOIP ¶ 49;⁸

the audits listed in Appendix A and Appendix B. As such, we question whether the Division could comply with SEC Rule of Practice 153(b) in advancing such allegations.

⁷ A reference to “Operating Company 14” also appears in AOIP ¶ 54.

⁸ A reference to “Operating Company 22” also appears in AOIP ¶ 54.

7. The identity of each of the “122 . . . audits” and “one . . . SPAC audit” alleged in AOIP ¶ 52;
8. The identity of each of the “at least 37” audits alleged in AOIP ¶ 55;
9. The identity of each of the “21 audits” alleged in AOIP ¶ 57;
10. The identity of each of the audit clients listed in Appendix A; and
11. The identity of each of the audit clients listed in Appendix B.

Mr. Hackert also requests that the Division be ordered to file an amended AOIP containing at least the following allegations “in such detail as to permit a specific response thereto”:

1. The “significant audit areas” and “key work papers” alleged in AOIP ¶ 47;
2. The “significant risk areas” alleged in AOIP ¶ 49;
3. For each of the audits listed in Appendix A, the following:
 - a. The specific “sign-offs” the Division alleges occurred after the report release date;
 - b. The specific auditing standard(s) the Division alleges was/were violated by Mr. Hackert;
 - c. For any alleged violation of AS 1215, the specific work papers (e.g., the “memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation”) the Staff contends were inadequate and/or absent; and
4. For each of the audits listed in Appendix B, the following:
 - a. The specific “sign-offs” the Division alleges occurred after the report release date;
 - b. The specific auditing standard(s) the Division alleges was/were violated by Mr. Hackert; and
 - c. For any alleged violation of AS 1215, the specific work papers (e.g., the “memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation”) the Staff contends were inadequate and/or absent.

If the Division is unable to provide this information for any allegation, Mr. Hackert requests that the Commission either strike the allegation or dismiss the AOIP.

Dated: April 1, 2024

Respectfully submitted,

/s/ Stephan J. Schlegelmilch

Arian M. June

Stephan J. Schlegelmilch

Mark D. Flinn

DEBEVOISE & PLIMPTON LLP

801 Pennsylvania Avenue, N.W.

Washington, DC 20004

202.383.8000

ajune@debevoise.com

sjschlegelmilch@debevoise.com

mflinn@debevoise.com

Andrew J. Ceresney

DEBEVOISE & PLIMPTON LLP

66 Hudson Boulevard

New York, NY 10001

212.909.6000

aceresney@debevoise.com

Counsel for Respondent

Edward F. Hackert, CPA

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024, the foregoing was filed via eFAP and served on the following by email:

Timothy K. Halloran
Michael J. Friedman
U.S. Securities and Exchange Commission
Division of Enforcement
100 F. Street, N.E.
Washington, DC 20549
hallorant@SEC.gov
friedmanmi@SEC.gov

/s/ Stephan J. Schlegelmilch
Stephan J. Schlegelmilch
Counsel for Respondent