

**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.**

**DIVISION OF ENFORCEMENT’S MOTION TO AMEND**  
**ORDER INSTITUTING PROCEEDINGS AND BRIEF IN SUPPORT**

**MOTION TO AMEND**

The Division of Enforcement (“Division”), pursuant to SEC Rules of Practice 154 and 200(d)(1), respectfully moves to amend the Order Instituting Administrative and Cease-and-Desist Proceedings (“OIP”) that the Commission issued against Respondent Edward F. Hackert (“Hackert”) on January 18, 2024. The Division requests this amendment to correct certain inadvertent errors in the OIP. The Amended OIP would correct those errors and it would not unfairly surprise or prejudice Hackert. For these reasons, and those set forth more fully in the Brief in Support below, the Division respectfully requests that the Commission issue the Amended OIP attached hereto as Exhibit 1. Attached hereto as Exhibit 2 is a redline showing changes from the original OIP to the Amended OIP. Due to readability issues in comparing spreadsheet information, the Appendices are not redlined, but the Appendices to the Amended OIP show the corrected information for each audit.<sup>1</sup>

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<sup>1</sup> Currently, Hackert’s answer to the original OIP is due by February 7, 2024. As noted below, the Division has informed Hackert’s counsel that it intends to file this motion and the reasons for it. If this motion to

## BRIEF IN SUPPORT

### I. Background

On January 18, 2024, the Commission issued the OIP against Hackert, a certified public accountant (“CPA”) and engagement partner at Marcum LLP (“Marcum”). *See* OIP ¶¶ 2, 13. The OIP alleged that Hackert engaged in improper professional conduct under Section 4C of the Securities Exchange Act of 1934 due to multiple violations of the Public Company Accounting Board’s (“PCAOB”) auditing standards. *See id.* ¶¶ 1, 10, 84. The OIP also alleged that Hackert caused Marcum to violate Rule 2-02(b)(1) of Regulation S-X in connection with multiple audits because Marcum’s audit reports stated that the audits were conducted in accordance with PCAOB standards when, due to Hackert’s conduct, they were not. *See id.* ¶¶ 12, 85.

As alleged in the OIP, Hackert’s conduct and supervisory failures generally fell into three categories: (1) Hackert’s failure to sign-off on audit work papers and document his review by the report release date on 204 audits, or 85% of the relevant audits, *see id.* ¶¶ 5, 39, 58, App’x A; (2) Hackert’s failure to assemble complete and final audit documentation by the documentation completion date on 126 audits, or 53% of the relevant audits, *see id.* ¶¶ 7, 56, 58, App’x B; and (3) additional failures related to audits of Ault Alliance, Inc. (“AAI”), *see id.* ¶¶ 9, 59-83.

After the OIP was filed, on January 23, 2024, Division staff discovered errors in how the number of late sign-offs by Hackert, which occurred after the report release date,

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amend is granted, Hackert’s answer to the Amended OIP would be due 20 days after service of the Amended OIP. *See* Ex. 1 at p. 16, § IV. If this motion to amend is denied, the Division consents to extend the deadline for Hackert’s answer to 14 days after the Commission rules on this motion. For the avoidance of doubt, in the event that this motion remains pending on February 7, 2024, the Division agrees that Hackert need not file his answer until after this motion is decided.

was calculated for certain audits described in the OIP. In particular, in connection with work on the Division's litigation, Division staff reviewed a spreadsheet that had been used in drafting the OIP to calculate the number of late sign-offs. In the course of this review, Division staff realized that in a number of instances, sign-offs by Hackert *on* the report release date (which were not late sign-offs) had mistakenly been counted as late sign-offs. Division staff determined that these errors were the result of a miscommunication among staff members and were inadvertent.

Upon discovering these errors, Division staff immediately undertook a comprehensive review of the report release date and late sign-off calculations in the OIP and Appendices A and B thereto. This review took several days because it involved manually re-checking approximately 14,000 sign-offs for 240 audits. During this review, Division staff also discovered certain inaccurate balance sheet and report release date information in records provided by Marcum during the Division's investigation, which the staff corrected.

On February 2, 2024, once its review was complete, Division staff notified Hackert's counsel that it would move to amend the OIP to correct the errors that had been discovered.

The proposed Amended OIP would reduce the number of audits at issue regarding the first two categories of Hackert's conduct described above, but the third category would not be affected. Specifically, if this Motion is granted, the Amended OIP would allege: (1) Hackert's failure to sign-off on audit work papers and document his review by the report release date on 187 audits, or 78% of the relevant audits (down from 204 audits and 85%), *see* Ex. 1 ¶¶ 5, 58, App'x A; (2) Hackert's failure to assemble complete and

final audit documentation by the documentation completion date on 123 audits, or 51% of the relevant audits (down from 126 audits and 53%), *see id.* ¶¶ 7, 56, 58, App’x B; and (3) the allegations related to AAI audits would remain unchanged, *see id.* ¶¶ 9, 59-83.<sup>2</sup>

Hackert has not yet filed his answer to the original OIP, and no date has been set for the evidentiary hearing in this proceeding.

## **II. Argument**

SEC Rule of Practice 200(d)(1) provides that, “[u]pon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.” Amendments to an OIP “should be ‘freely granted, subject only to the consideration that other parties should not be surprised, nor their rights prejudiced.’” *Steven Wise*, Release No. 34-48850, 2003 WL 22827675, at \*1 (Nov. 26, 2003) (citation omitted); *Donald Howard*, Release No. 34-98291, 2023 WL 5770175, at \*1 (Sept. 6, 2023) (same).

The Commission has explained that amendments to an OIP “in order to correct an error are contemplated by Rule 200(d).” *J. Stephen Stout*, 1996 SEC LEXIS 3557, at \*3 (Dec. 10, 1996). Thus, where an OIP contains errors, the Commission has allowed amendments to correct those errors. *See, e.g., Wise*, 2003 WL 22827675, at \*1 (allowing amendment “to correct errors in the OIP”); *Gary Edward Haynes*, Release No. IA-6172, 2022 WL 13566113, at \*1 & n.3 (Oct. 21, 2022) (amending OIP to correct error in allegations); *Stout*, 1996 SEC LEXIS 3557, at \*1, 3 (amending OIP to add claim for penalties that was “unintentionally omitted”).

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<sup>2</sup> As noted above, the Appendices to the Amended OIP show the corrected information for each audit (*see* Ex. 1) and the redline shows the changes from the text of the original OIP (*see* Ex. 2).

Here, the Amended OIP should be allowed. First, the Amended OIP will not unfairly surprise or prejudice Hackert because the proposed corrections narrow the scope of the audits and allegations at issue. *See Wise*, 2003 WL 22827675, at \*1 (allowing amendment to correct errors in OIP because such amendment “will not result in surprise or prejudice to the other parties”); *Haynes*, 2022 WL 13566113, at \*1 (finding that correction of allegations in OIP “will not surprise or prejudice” respondent).

Second, the timing of this amendment – early in this litigation when Hackert has not yet filed an answer and no date for the evidentiary hearing has been set – underscores the lack of prejudice. *See Howard*, 2023 WL 5770175, at \*2 (finding no prejudice or surprise from amended OIP where proceeding was “still in its earliest stages, and [respondent] will have the opportunity to file an answer to the amended OIP and to contest its allegations”); *Wise*, 2002 WL 22827675, at \*1 (finding no prejudice from amended OIP where “no hearing [date] has been set”).

### **III. Conclusion**

Accordingly, the Division respectfully requests that the Commission grant this motion to amend and issue the Amended OIP attached hereto as Exhibit 1.

Dated: February 5, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, the foregoing document was filed via eFAP and served on the following by the following means:

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**DIVISION OF ENFORCEMENT'S INDEX OF ATTACHMENTS**

<b><u>Attachment</u></b>	<b><u>Description</u></b>
Exhibit 1	Amended OIP
Exhibit 2	Redline Showing Changes from Original OIP to Amended OIP