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## PCAOB 3.0: The Evolving Role of Investor Protection at the PCAOB

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### I. Introduction

Thank you Michael [Alles] for that kind introduction. [1](#)

First, my thanks to Rutgers Business School for the opportunity to speak at the 50th World Continuous Auditing & Reporting Symposium. It is a great privilege to be here today (virtually).

Before I begin, I need to remind you that the views I am expressing today are my own and do not necessarily reflect the views of my fellow Board members or the staff of the PCAOB.

The concept of continuous auditing is critical to the future of the audit profession. The issue goes to the heart of the relevancy of the audit. I have, in the past, talked about audit relevancy and the risks that, without changes, the profession may confront extinction. [2](#)

My view was, and still is, that the role of the auditor in providing assurance for information outside of the financial statements should be modernized. This type of disclosure is increasingly used by investors and other participants in the capital markets. Investors rely on non-GAAP measures, key performance indicators, and environmental, social, and governance (ESG) metrics to make investment and voting decisions.

I believe that the PCAOB is in a good position to lead the discussions on the role, if any, of auditors, in providing assurance on these metrics.

Today though I want to talk not about extinction but evolution. The PCAOB is an almost two decades experiment in the oversight of the audit profession by an independent regulatory organization. Before 2003, the audit profession was subject to self-regulation, a time when standards were written by practicing auditors without adequate public input [3](#) and inspections were conducted by peer audit firms, a practice subject to extensive criticism. [4](#)

The creation of the PCAOB ended the era of self-regulation. Perhaps the most far reaching change made by Congress in setting up the PCAOB was to include in the statute an explicit mission to act in the interests of investors and the public. [5](#) In setting standards, conducting inspections, and imposing disciplinary sanctions, the explicit objective was and is to act in the public interest.

The change had the potential to profoundly affect the approach to auditor oversight. While all stakeholders presumably wanted to improve audit quality, investors and the public often had very different ideas about how to accomplish this goal. [\[6\]](#)

Seventeen years after the creation of the PCAOB, implementation of this mission warrants reexamination. While the PCAOB has taken some useful steps, much more needs to be done. The policies designed to promote investor input should be clearly specified and added to the PCAOB's bylaws and rules, making them a requirement not a choice. [\[7\]](#) In doing so, these avenues should be structured in a manner consistent with congressional initiatives.

So today I want to talk about the evolution of the investor protection mission of the PCAOB and ways to ensure that this evolution strengthens the role played by investors and the public in the oversight of the audit profession.

## II. The Mission of the PCAOB

Until 2003, firms auditing public companies regulated themselves. Self-regulation meant that audit firms wrote their own rules and standards, inspected each other, and conducted investigations of potential violations of their requirements. [\[8\]](#) Investors and the public did not play a significant role in the process. [\[9\]](#)

Enron and Worldcom effectively put an end to the system of self-regulation. [\[10\]](#) The profession would no longer write the standards or engage in peer reviews, at least with respect to audits of public companies and, eventually, SEC-registered broker-dealers. Instead, audit oversight would fall to an independent regulator. [\[11\]](#)

In Congress's decision to create an independent regulator, investors and the public were top of mind and perhaps the most significant driver for the Sarbanes-Oxley Act (SOX). [\[12\]](#) This could be seen most clearly in the audit space through the mission given to the PCAOB. Audit oversight would focus on, and reflect, the interests of investors and the public. [\[13\]](#) The approach was strengthened by the requirement that the SEC appoint to the Board only individuals who had a history of "demonstrated commitment to the interests of investors and the public." [\[14\]](#)

This mission significantly reoriented audit oversight. [\[15\]](#) Investors and the public were given a seat at the standard-setting table. They could be expected to, and did, have some very different ideas about the structure and content of standards and other aspects of audit oversight. [\[16\]](#)

The public protection mission was not, however, self-executing.

The PCAOB from the outset took steps designed to obtain input and advice from investors. The PCAOB sometimes engaged in outreach with respect to specific matters. [\[17\]](#) Investors and the public were given an opportunity to comment whenever standards were changed. [\[18\]](#) Advisory groups that included investors were formed. [\[19\]](#)

These policies and approaches were, however, precarious. They were for the most part not enshrined in the rules of the PCAOB or its bylaws and could be set aside at the discretion of the Board. Even with respect to advisory groups, which had some statutory and regulatory basis, the Board retained significant discretion, including control over the agenda and the frequency of the meetings. [\[20\]](#)

Over time, the discretionary nature of these policies became increasingly apparent. Advisory groups at the PCAOB were not convened after November of 2018. [\[21\]](#) When the PCAOB recently revised the standard setting and research agendas, there was no meaningful discussion of outreach to, or input from, investors. [\[22\]](#) The concept release on quality control issued in December 2019 did not include a section on, or otherwise discuss, outreach to investors. [\[23\]](#)

All of this suggests that changes are necessary for the PCAOB to more effectively achieve the public interest mission. This requires increased transparency, including the addition of mechanisms designed to increase awareness of the operations and activities of the PCAOB. Transparency also should include improvements in the information provided to investors and the public for use in assessing audit quality and in making investment and voting decisions.

In addition to transparency, the PCAOB needs to increase and make permanent the avenues of investor and public input. These mechanisms should be inserted into the rules or bylaws of the PCAOB, making clear to the public that they are a requirement not a choice.

### III. Accountability and Transparency

Transparency is essential to accountability. Investors and the public can't provide input and advice on what they don't know.

The PCAOB has struggled with transparency, having been described as "completely opaque." [\[24\]](#) SOX did not make mandatory the suite of laws designed to ensure transparency by government agencies. [\[25\]](#) Unlike the U.S. Securities and Exchange Commission (SEC or Commission), therefore, the PCAOB is not subject to the Sunshine Act, [\[26\]](#) the Freedom of Information Act (FOIA), [\[27\]](#) or the Administrative Procedure Act (APA). [\[28\]](#)

The failure to make these laws mandatory was not the same as a prohibition. Nothing prevented the PCAOB from implementing the principles embodied in these laws. Nonetheless, the PCAOB has, for the most part, chosen not to do so.

This approach should be reconsidered. Although not a government agency, the PCAOB remains accountable to the public. And while the budget is approved by the SEC, it is ultimately paid by the public in the form of an accounting support fee assessed on issuers and SEC-registered broker-dealers. [\[29\]](#) Investors and the public are, therefore, entitled to a level of transparency comparable to government agencies.

Similarly, while Congress imposed some limitations on the PCAOB's ability to disclose information to the public learned during the inspection process and enforcement proceedings, these should not, given the mission of the PCAOB, be extended. [\[30\]](#) Yet they have been.

Public inspection reports have excluded the identity of the companies where the audit deficiencies occurred, sharply reducing the usefulness of the reports to investors and the public. [\[31\]](#) With respect to enforcement settlements, the PCAOB typically identified the company where the allegedly deficient audit occurred, an approach consistent with practices at the SEC. [\[32\]](#) In 2019, however, the instances of issuer disclosure were significantly reduced, limiting the usefulness of enforcement settlements to investors, audit committees, and the public. [\[33\]](#) These decisions bear reexamination. [\[34\]](#)

Changes that would improve transparency at the PCAOB should include:

## A. Organizational Transparency

With respect to organizational transparency, the PCAOB should implement and observe the fundamental principles of the FOIA, APA and Sunshine Act. Here are a few examples of how this might be done.

The PCAOB should disclose meetings by the Board with outside parties and the agendas of these meetings. [\[35\]](#) The Board often meets with large audit firms and rarely with investors. Making this information public would presumably act as a catalyst for more investor interaction. [\[36\]](#)

Correspondence and other materials received by the PCAOB could be posted along with any responses on the PCAOB website, at least to the extent discussing policy issues and matters of interest to investors and the public. [\[37\]](#) Letters to the PCAOB can come from anyone, including investors, industry trade associations, audit firms and public companies. [\[38\]](#)

As is done at the SEC [\[39\]](#) and required by the APA, [\[40\]](#) the PCAOB should, where permitted by statute, publish the voting records of Board members. The public would presumably benefit from understanding any significant and clear divisions within the Board.

With respect to Board meetings, the PCAOB should look to the Sunshine Act [\[41\]](#) and hold public meetings whenever the Board discusses matters of public importance. [\[42\]](#) In the early days of the PCAOB, public meetings were held monthly. [\[43\]](#) The public had a front row seat in the creation of a new regulatory organization. The PCAOB's bylaws, however, only require public meetings on a quarterly basis. [\[44\]](#)

## B. Transparency and Public Disclosure

The PCAOB should provide information more useful in assessing audit quality and making investment and voting decisions. Doing so will encourage investors and the public to allocate scarce resources to the oversight of the PCAOB.

The PCAOB can do so with respect to public inspection reports. Currently the PCAOB reveals some of the deficiencies uncovered in an inspection but does not disclose the identity of the public company where the purported deficiency occurred.

The identity of the issuer is important information for investors and other stakeholders. Audit committees would presumably want to know that their own financial statements were subject to a potentially deficient audit. Investors might have questions about the company's financial statements or the quality of the audit. The information may be relevant in assessing the oversight of the audit committees.

In addition to disclosure of the identity of the issuer, the PCAOB should look to increase the usefulness of information provided to customers about audits of broker-dealers. [\[45\]](#) Other places where PCAOB disclosure should be made more useful include the reconsideration of the decision to more often withhold the identity of the issuer from enforcement settlements [\[46\]](#) and the policy of withholding opinions by the Board in matters that are appealed to the Commission. [\[47\]](#)

## IV. Accountability and Public Input

With respect to the PCAOB's mission, transparency is necessary but not sufficient. Transparency is no guarantee of actual participation. For this to occur, the PCAOB must put in place structures that ensure investors have clear, consistent and recognized avenues for input. In doing so, the PCAOB should ensure that input is sought from underrepresented segments of the investor community.

## A. Current Mechanisms

The PCAOB has traditionally sought investor input in three basic ways: notice and comment with respect to proposed standards; direct outreach; and advisory groups.

Advisory groups have been an important source of investor input and views, particularly with the creation of the Investor Advisory Group, an advisory group consisting entirely of investors and those familiar with the investor community. [\[48\]](#) Members of the advisory groups have been given multiple year terms [\[49\]](#) that allowed for the development of an increased understanding of the activities of the PCAOB and the audit process. In addition, the advisory groups relied on open meetings, providing the public with insight into the activities of the PCAOB and the issues raised by investors at those meetings.

These groups were governed by charters adopted by the PCAOB. [\[50\]](#) The charters gave the PCAOB plenary control over the frequency of the meetings, the agenda, and any follow-through. They can be changed without notice to, or input from, the public. The PCAOB could, if it wanted, dispense with meetings in their entirety.

This, in fact, has occurred. Advisory groups have not met since November 2018, a hiatus of two years and counting. Given this dearth of meetings, there was no opportunity for the advisory groups, particularly the investors on these advisory groups, to publicly weigh in on recent changes to the standard setting agenda despite their impact on issues identified by investors as important. [\[51\]](#)

The PCAOB also permits investors to participate by providing an opportunity to comment on proposed standards. Merely allowing for investor participation does not ensure that participation will in fact occur. In the past, the PCAOB has engaged in outreach and taken into account investor input when issuing standards or considering changes to the standard setting agenda. The discretionary nature of these practices means that they can be discontinued at any time. [\[52\]](#)

## B. Reforms

After almost two decades of experience, it's clear that the efforts to obtain adequate investor input and advice needs to be strengthened. The PCAOB should enhance existing avenues, add additional ones, and make them mandatory through inclusion in the bylaws and rules. This would transform them into an obligation rather than a choice.

In setting up the relevant structures, the PCAOB should also take cues from Congress. Congress has recognized that agencies charged with protecting investors can sometimes benefit from structural changes designed to enhance that mission. Where Congress has stepped in, the PCAOB should implement these requirements, altered appropriately to address any unique attributes of the PCAOB.

### 1. Advisory Groups and Investor Advocate

With respect to advisory groups, the PCAOB approach should rely on the model adopted by Congress for use at the SEC.

In the Dodd-Frank Act, Congress instructed the SEC to establish an investor advisory committee. [\[53\]](#) In requiring that the SEC do so, Congress set out a clear structure. The committee was given a broad purpose, [\[54\]](#) a specified size, and mandatory representation for certain important groups or organizations. [\[55\]](#) The statute specified the terms of office and a minimum frequency of meetings. [\[56\]](#) The officers, including the chair, were to be elected by the committee.

Perhaps most significantly, the committee received the authority to issue recommendations and the Commission was obligated to respond. [\[57\]](#) The meetings were held in public with a webcast posted for anyone to review. [\[58\]](#) The investor advisory committee also formed subcommittees to discuss and advance recommendations in between meetings of the entire committee. [\[59\]](#)

Dodd-Frank did more than mandate an investor advisory committee. Congress also created the Office of the Investor Advocate. [\[60\]](#) The Investor Advocate must have experience "in advocating for the interests of investors in securities and investor protection issues, from the perspective of investors." [\[61\]](#) The provision addressed compensation, reporting lines, staffing, and the functions of the office. [\[62\]](#) Some degree of transparency was ensured by a requirement that the office produce an annual report filed with Congress. The PCAOB would benefit from the addition of this Office. [\[63\]](#)

## 2. Notice and Comment

The PCAOB has, since inception, provided investors and the public with an opportunity to comment on proposed standards. The policy is, however, discretionary and could be set aside at any time by the Board. In addition, while providing opportunities for notice and comment, the PCAOB has never publicly committed to adherence to the requirements of the APA. The APA requires more than public notice and an opportunity for comment.

The PCAOB should do two things with respect to notice and comment.

First, the PCAOB should make it an obligation not a choice. [\[64\]](#) The requirement should, therefore, be included in the PCAOB's bylaws or rules. The PCAOB can provide exceptions but they should be limited to those set out in the APA. [\[65\]](#)

Second, the PCAOB should agree to follow the requirements of the APA with respect to informal rulemaking. This would require the submission of memoranda to the rulemaking file whenever Board members or other staff meet with an outside organization to discuss a proposed standard. [\[66\]](#) Investors and the public would benefit from knowing who met with Board members and/or the staff in connection with a proposed rule or standard.

## 3. Right to Petition

The PCAOB should take from and adopt other provisions in the APA designed to encourage investor and public participation. In particular, the PCAOB should set up a mechanism that allows for public petitions to change standards or rules and requires the posting of any comment letters received on the petition.

This is a requirement for government agencies. [\[67\]](#) Market participants make extensive use of the authority at the SEC. [\[68\]](#) Recent petitions have addressed topics ranging from changes to require companies to report on the physical location of their significant assets, [\[69\]](#) to ending the Commission's "backdoor" regulation of 12b-1 fees, [\[70\]](#) to the use of electronic signatures. [\[71\]](#) Petitions are made public and sometimes generate a substantial number of comment letters. [\[72\]](#)

Implementing this mechanism would be a substantial change at the PCAOB. Right now if an investor or member of the public writes to us and asks for revisions in our standards, rules, or approach, the PCAOB doesn't make the communication (or any response) public. As a result, other investors and the public may be unaware of these views or concerns.

Implementing a public petitioning mechanism, including the posting of comment letters, would likely increase public participation. Investor views would become more accessible and potentially encourage other participants in the capital markets to submit their own comments to further the discussion.

## 4. Outreach and Underserved Communities

With respect to outreach, the PCAOB currently has a position devoted to outreach to all stakeholders, including audit committees, preparers, and investors. The operating divisions sometimes conduct outreach to investors in specific cases. [\[73\]](#)

Outreach concerning proposed standards or other policy decisions is, however, discretionary not mandatory. <sup>174</sup> Nor is there structural mechanism designed to ensure that outreach occurs with respect to underrepresented communities or that these communities are adequately considered in connection with the PCAOB's advisory groups.

Congress, however, provided a way forward with respect to this issue. Dodd-Frank required that the SEC put in place an Office of Minority and Women Inclusion. <sup>175</sup> The purpose was to promote diversity and inclusion in the financial services industry. <sup>176</sup> As a regulator in the financial services industry, the PCAOB would benefit from a similar office. The office would help improve outreach by the PCAOB to underrepresented communities and to promote transparency and awareness of diversity practice within the PCAOB.

## V. Conclusion

So let me return to where I started. This is about the evolution of the PCAOB.

Congress inserted into the DNA of the PCAOB a mission to act in the interests of investors and the public. The mission, however, came with few specifics. Execution was left for the PCAOB to determine.

In 2003, the PCAOB, in executing the mission, was writing on whole cloth. Figuring out how to incorporate investor views into the process would necessarily be a learning exercise that would evolve over time.

We've now had 17 years of experience and insight. Investors and the public want, and are entitled to, a level of transparency comparable to what is provided by government agencies. They also want more useful information that can be factored into investment and voting decisions. Avenues for investor input, which means input for all investors, including underrepresented communities, should be guaranteed through structural changes to our bylaws or rules.

We should implement these evolutionary steps because we know from experience that they are necessary. As Congress knew, the capital markets benefit from the public interest mission. Investor and public input increases trust in the actions of the PCAOB, the audit and, ultimately, the financial disclosure process. <sup>177</sup>

<sup>171</sup> Board Member, Public Company Accounting Oversight Board, see PCAOB, *J. Robert Brown, Jr.* (available at <https://pcaobus.org/About/Board/Pages/J-Robert-Brown.aspx>). This statement is based upon remarks made at Rutgers Business School's 50th World Continuous Auditing & Reporting Symposium on November 6, 2020. I want to thank Clara Fryer, an intern in my office during the fall of 2020, for her valuable work on this statement.

<sup>172</sup> See J. Robert Brown, Jr., Board Member, PCAOB, Preventing Audit Extinction, Data Amplified 2019 Conference, Shanghai, China (Oct. 24, 2019) (available at <https://pcaobus.org/News/Speech/Pages/Preventing-Audit-Extinction.aspx>).

<sup>173</sup> J. Robert Brown, Jr., Board Member, PCAOB, Statement Regarding the PCAOB's Revised Research and Standard-Setting Agendas: Reducing Credibility, Accountability and Confidence in the Financial Reporting Process (Oct. 13, 2020) (available at <https://pcaobus.org/News/Speech/Pages/Brown-Statement-Regarding-PCAOBs-Revised-Research-Standard-Setting-Agendas.aspx>).

<sup>174</sup> *Accounting Reform and Investor Protection, Hearings Before the S. Comm. on Banking, Hous., and Urban Aff.*, 107th Cong. (Feb. 26, 2002) (testimony of Lynn Turner, Chief Accountant, SEC); United States General Accounting Office, *The Accounting Profession, Major Issues: Progress and Concerns*, GAO/AIMD-96-98 (Sept. 1996) (available at <https://www.govinfo.gov/content/pkg/GAOREPORTS-AIMD-96-98/pdf/GAOREPORTS-AIMD-96-98.pdf>). 

<sup>175</sup> 15 U.S.C. § 7211 (2002).

<sup>[6]</sup> See J. Robert Brown, Jr., Board Member, PCAOB, Maintaining Investor Trust: Independent Oversight in the System of Quality Control, Massachusetts Public Employee Retirement Administration Commission Virtual Conference (Sept. 17, 2020) (*available at* <https://pcaobus.org/News/Speech/Pages/Brown-Maintaining-Investor-Trust-Independent-Oversight-System-Quality-Control.aspx>) ("If past history is any indication, the differences in commenter views will be significant. The auditing profession has traditionally favored a principles-based approach that uses general language applicable to all firms, irrespective of their differences in size, resources and number of clients. Investors tend to favor an approach that involves a mix of principles and specific requirements."). This can be seen based on views reflected in the comment letters on the PCAOB's concept release about quality control. Potential Approach to Revisions to PCAOB Quality Control Standards, PCAOB Release No. 2019-003 (Dec. 17, 2019) (*available at* <https://pcaobus.org/Rulemaking/Docket046/2019-003-Quality-Control-Concept-Release.pdf>). In the comment letters, investors for the most part supported structural mechanisms designed to raise confidence in the integrity of the decision making process, including certification of effectiveness, independence of audit quality from commercial interests, and greater transparency. Letters from audit firms mostly opposed these mechanisms.

<sup>[7]</sup> Amendments to the PCAOB's bylaws and rules must be approved by the Commission in accordance with Rule 19b-4 under the Securities Exchange Act of 1934. 17 C.F.R. § 240.19b-4.

<sup>[8]</sup> The Commission also occasionally brought actions against audit firms. See *In Re Combellick, Reynolds & Russell, Inc. et al.*, Admin. Proceeding File No. 3-7187, 1991 WL 286760 (June 19, 1991) (*available at* <https://www.sec.gov/litigation/alidec/1991/id19910619jks.pdf>); *In Re Charles W. Wallin, CPA*, Admin. Proceeding File No. 3-8987, Exchange Act Release No. 37127, 1996 WL 191583 (Apr. 19, 1996) (*available at* <https://www.sec.gov/litigation/admin/3437127.txt>).

<sup>[9]</sup> Charles D. Niemeier, Former Board Member, PCAOB, Independent Oversight of the Auditing Profession: Lessons from U.S. History, German Public Auditors Congress of 2007, Berlin, Germany (Nov. 8, 2007) (*available at* [https://pcaobus.org/News/Speech/Pages/11082007\\_NiemeierGermanPublicAuditorsCongress.aspx](https://pcaobus.org/News/Speech/Pages/11082007_NiemeierGermanPublicAuditorsCongress.aspx)).

<sup>[10]</sup> Hearings on the subject were held after Enron but before Worldcom. Worldcom's failure, however, was a catalyst for the adoption of the Sarbanes-Oxley Act. See Cynthia Glassman, Former Commissioner, U.S. Securities and Exchange Commission, College of Business and Economics, California State University, Fullerton, California (Jan. 28, 2003) (*available at* <https://www.sec.gov/news/speech/spch012803caq.htm>).

<sup>[11]</sup> *About the PCAOB*, PCAOB (*available at* <https://pcaobus.org/About>).

<sup>[12]</sup> The purpose of the Sarbanes-Oxley Act was to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

<sup>[13]</sup> 15 U.S.C. § 7211(a).

<sup>[14]</sup> *Id.* § 7211(e)(1).

<sup>[15]</sup> In the era of self-regulation, the public interest was ostensibly channeled into the process by the courts and the SEC. See J. Robert Brown, Jr., Board Member, PCAOB, Facilitating Investor Participation at the Standard-Setting Table, Public Pension Financial Forum, Salt Lake City, UT (Oct. 21, 2019) (*available at* <https://pcaobus.org/News/Speech/Pages/brown-facilitating-investor-participation-standard-setting-table.aspx>).

<sup>[16]</sup> J. Robert Brown, Jr., *supra* note 6.

<sup>[17]</sup> PCAOB Concept Release No. 2011-003 discusses outreach in connection with a standard. See Concept Release on Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements, PCAOB Release No. 2011-003, at 6-10 (June 21, 2011) (*available at* [https://pcaobus.org/Rulemaking/Docket034/Concept\\_Release.pdf](https://pcaobus.org/Rulemaking/Docket034/Concept_Release.pdf)).

<sup>[18]</sup> Notice and comment for informal rulemaking by a government agency is required by the Administrative Procedure Act. See 5 U.S.C. § 553. Because the PCAOB was set up as a non-profit corporation rather than a government agency, the APA does not apply. See J. Robert Brown, Jr., Board Member, PCAOB, Grading the PCAOB: Transparency, Accountability and Investor Protection, Conference of the Council of Institutional Investors, Minneapolis, MN (Sept. 17, 2019) (*available at* <https://pcaobus.org/News/Speech/Pages/Brown-Grading-the-PCAOB-Transparency,-Accountability-and-Investor-Protection.aspx>).

<sup>[19]</sup> The PCAOB had convened an Investor Advisory Group and a Standing Advisory Group. *Advisory Groups*, PCAOB (*available at* <https://pcaobus.org/About/Advisory/Pages/default.aspx>).

[\[20\]](#) The statute did reference advisory groups but only required that they be convened "as may be appropriate." See 15 U.S.C. § 7213(a)(4) ("The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section."). The PCAOB adopted rules that largely reflected the language of the statute. See PCAOB Rule 3700(a) ("To assist it in carrying out its responsibility to establish auditing and related professional practice standards, the Board will convene one or more advisory groups, in accordance with Section 103(a)(4) of the Act."); PCAOB Rule 3700(b) ("Advisory groups, in combination or as sub-groups designated by the Board within one advisory group, will contain individuals with expertise in one or more of the following areas: (1) accounting; (2) auditing; (3) corporate finance; (4) corporate governance; (5) investing in public companies; and (6) other areas that the Board deems to be relevant to one or more auditing or related professional practice standards.").

[\[21\]](#) *Past SAG Meetings*, PCAOB (available at <https://pcaobus.org/Standards/SAG/Pages/SAGMeetingArchive.aspx>); *IAG Meeting Archive*, PCAOB (available at <https://pcaobus.org/About/Advisory/Pages/IAGMeetingArchive.aspx>).

[\[22\]](#) J. Robert Brown, Jr., *supra* note 3.

[\[23\]](#) The release contained only a few isolated references to "outreach" mostly with respect to "advisory groups." See Concept Release: Potential Approach to Revisions to PCAOB Quality Control Standards, PCAOB Release No. 2019-003 (Dec. 17, 2019) (available at <https://pcaobus.org/Rulemaking/Docket046/2019-003-Quality-Control-Concept-Release.pdf>) ("Outreach to our advisory groups has indicated general support for strengthening the QC standards, including support for implementing a risk-based approach and for enhancing requirements for firm governance and leadership. We have also considered relevant academic research and literature."); *id.* ("We are considering using Proposed ISQM 1 as a starting point for a future PCAOB QC standard. Information gathered through our oversight, outreach, and research activities persuades us that our QC standard should be built on an integrated risk-based framework, as Proposed ISQM 1 is."); *id.* ("Outreach to our advisory groups has indicated general support for strengthening the QC standards, including implementing a risk-based approach."). Advisory groups have not met publicly, however, since November 2018. See *Past SAG Meetings*, *supra* note 21; see also *IAG Meeting Archive*, *supra* note 21.

[\[24\]](#) See *Investor Advisory Group Meeting Transcript*, PCAOB, at 97-99 (Nov. 8, 2018) (available at <https://pcaobus.org/News/Events/Documents/IAG-Meeting-Transcript-2018.pdf>).

[\[25\]](#) J. Robert Brown, Jr., *supra* note 18.

[\[26\]](#) The Sunshine Act provides for mandatory open meetings in certain circumstances. 5 U.S.C. § 552b.

[\[27\]](#) The FOIA provides a mechanism for obtaining various records from agencies. 5 U.S.C. § 552.

[\[28\]](#) The APA mandates notice and comment in the case of certain rulemakings and requires the implementation of a mechanism for petitioning an agency to change its rules. 5 U.S.C. § 551.

[\[29\]](#) 15 U.S.C. § 7219.

[\[30\]](#) 15 U.S.C. § 7215(b)(5).

[\[31\]](#) See J. Robert Brown, Jr., Board Member, PCAOB, *Seeing Through the Regulatory Looking Glass: PCAOB Inspection Reports*, CFA Institute's Corporate Disclosure Policy Council and Capital Markets Policy Council, Virtual (July 23, 2020) (available at <https://pcaobus.org/News/Speech/Pages/Brown-Seeing-Through-Regulatory-Looking-Glass-PCAOB-Inspection-Reports.aspx>).

[\[32\]](#) The PCAOB did not disclose issuer identities mostly in enforcement settlements where the underlying violations related to failures of audit firms or associated persons to cooperate. See, e.g., *In Re Clay Thomas, P.C., and Clay Thomas, CPA*, PCAOB Release No. 105-2016-006 (Feb. 18, 2016) (available at <https://pcaobus.org/Enforcement/Decisions/Documents/105-2016-006-Clay-Thomas.pdf>) (The identities of the firm's two issuer audit clients are disclosed in this settled order for sanctions imposed on findings concerning noncooperation with the Board's investigation and violation of PCAOB rules and auditing standards in connection with the firm's audits of the two issuers); see, e.g., *In Re Chunmin Liu, CPA*, PCAOB Release No. 105-2016-025 (June 14, 2016) (available at <https://pcaobus.org/Enforcement/Decisions/Documents/105-2016-025-Liu.pdf>) (Sanctions are imposed for noncooperation with the Board's investigation and the names of the firm's three issuer clients are anonymized).

[\[33\]](#) As a result, disclosure of the identity of an issuer or broker-dealer now only occurs in three limited circumstances — when the issuer or broker-dealer has disclosed or admitted previously to concerns relevant to the matter; when a separate regulator has taken or plans to take public action against the issuer or broker-dealer or its directors or officers related to the core facts relevant to the matter, or when the issuer or broker-dealer or its directors or officers have been found in a public proceeding to have engaged in misconduct relevant to the matter. See *PCAOB Staff Considerations on Recommending the Identification of Issuers and/or Broker-Dealers in Settled Enforcement Orders*, PCAOB (available at <https://pcaobus.org/Enforcement/Pages/staff-considerations-recommending-identification-issuers-broker-dealers-settled-enforcement-orders.aspx>).

- [34] The PCAOB has been asked to reconsider some of these instances of non-disclosure. See Letter from POGO to PCAOB, Comment on Auditing Watchdog's Plan to Revamp Its Inspection Reports (Dec. 3, 2019) (available at <https://www.pogo.org/letter/2019/12/comment-on-auditing-watchdogs-plan-to-revamp-its-inspection-reports/>).
- [35] At the SEC, meetings with outside organizations by the entire Commission would likely qualify as a public meeting, requiring advance notice of the meeting. See *Sunshine Act Meetings*, U.S. Securities and Exchange Commission (Apr. 27, 2020) (available at <https://www.sec.gov/news/openmeetings/2020/ssamtq050420.htm>) ("This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting."). With respect to meetings by individual commissioners, the Chair of the SEC publicly discloses his calendar, presumably a consequence of the FOIA. The information has been the source of public discussion. See Kadhim Shubber & Laura Noonan, *Morgan Stanley boss is frequent caller to SEC chairman*, FIN. TIMES (Aug. 12, 2020, 4:00 AM), (available at <https://www.ft.com/content/161bfb3b-c55e-42fe-94d8-01572ba71db1>).
- [36] To the extent that we publish calendars and agendas of meetings with outside groups, investors will be made aware of the ability to request meetings and may well seek to meet with the Board more often.
- [37] The PCAOB could implement the spirit of the FOIA by making information that would otherwise be available under the FOIA public without the need for a specific request. At the same time, some organizations not subject to the FOIA have implemented a voluntary system that allows for requests for disclosure from the public. See *Bank Policy: Access to Information*, The World Bank (July 1, 2015) (available at <http://pubdocs.worldbank.org/en/393051435850102801/World-Bank-Policy-on-Access-to-Information-V2.pdf> ). The PCAOB could and should consider implementing a similar structure.
- [38] For an example of a letter that is addressed to the PCAOB but available only through a third party website, see Letter from POGO to PCAOB, *supra* note 34.
- [39] The voting records of the Commissioners are here: *Final Commission Votes for Agency Proceedings*, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/about/commission-votes/commission-votes-2018-06.xml>). One commissioner discussed her voting record in a speech. See Hester Peirce, Commissioner, U.S. Securities and Exchange Commission, *The Why Behind the No*, 50th Annual Rocky Mountain Securities Conference, Denver, Colorado (May 11, 2018) (available at <https://www.sec.gov/news/speech/peirce-why-behind-no-051118>).
- [40] The APA requires that "[e]ach agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding." 5 U.S.C. § 552(a)(5).
- [41] 5 U.S.C. § 552b.
- [42] See *Information Disclosure: Government in the Sunshine Act Compliance at Selected Agencies*, GAO/GGD-88-97, at 1 (July 1988) (available at <https://www.gao.gov/assets/220/210377.pdf> ) ("the act requires those agencies to open their meetings to public observation, except in instances where the agencies find that disclosure of information discussed at the meetings could be detrimental to the public interest.").
- [43] *SEC Form 19b-4 Proposed Rules By Public Company Accounting Oversight Board*, PCAOB (Mar. 17, 2004) (available at [https://pcaobus.org/Rulemaking/Bylaws/19b-4\\_Amended\\_Bylaws.pdf](https://pcaobus.org/Rulemaking/Bylaws/19b-4_Amended_Bylaws.pdf) ).
- [44] See *Section 5.2 of the ByLaws of the Public Company Accounting Oversight Board*, PCAOB (available at <https://pcaobus.org/Rules/Pages/Bylaws.aspx>) ("The Governing Board shall hold at least one (1) public meeting each calendar quarter, and such other meetings, which may be either public or non-public (in accordance with the Open Meeting Policy of the Governing Board), as the Chair (as defined below) deems necessary or appropriate to further the purposes of the Act.").
- [45] The PCAOB does not identify the audit firms or broker-dealers where the deficiencies occurred. As a result, customers will have a hard time using any of this information when selecting a broker-dealer. The information could be added to the report published each year on the results of the inspections of audit firms for broker-dealers. See J. Robert Brown, Jr., Board Member, PCAOB, *A Story that Will Not Tell Itself: The PCAOB's Role in the Protection of Customers of Broker-Dealers*, North American Securities Administrators Association (NASAA), Virtual (Oct. 7, 2020) (available at <https://pcaobus.org/News/Speech/Pages/Story-Will-Not-Tell-Itself-PCAOBs-Role-Protection-Customers-Broker-Dealers.aspx>).
- [46] See J. Robert Brown, Jr., Board Member, PCAOB, *Issuer Disclosure in Settled Enforcement Actions at the PCAOB*, CFA Institute's Corporate Disclosure Policy Council, Washington, D.C. (Sept. 6, 2019) (available at <https://pcaobus.org/News/Speech/Pages/Brown-Issuer-Disclosure-in-Settled-Enforcement-Actions-at-the-PCAOB.aspx>).

[47] The Sarbanes-Oxley Act requires the Board to report to the public a disciplinary sanction after it is imposed (or once any stay on the imposition of such sanction has been lifted). 15 U.S.C. § 7215(d). Therefore, the Board has a mandatory duty to publicly disclose a sanction after an SEC stay on the sanction is lifted. The statute, however, does not appear to prohibit public disclosure of a sanction subject to a stay during the pendency of an SEC review. Moreover, appeals from the PCAOB are treated "public proceedings." See Gately & Assocs., LLC, Admin. Proc. File No. 3-13535, 2009 WL 6805010, at \*1 (Oct. 23, 2009). As a result, briefs and other materials filed by the parties in an appeal to the Commission are public. See, e.g., Admin. Proceeding File No. 3-16518, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/litigation/apdocuments/ap-3-16518.xml>). In these circumstances, the policy of withholding the decision by the Board seems unnecessary.

[48] See generally *Investor Advisory Group*, PCAOB (available at <https://pcaobus.org/About/Advisory/Pages/IAG.aspx>); see also *Charter of the Investor Advisory Group*, PCAOB (available at <https://pcaobus.org/About/Advisory/Pages/Charter.aspx>).

[49] *Id.*

[50] *Id.*

[51] J. Robert Brown, Jr., *supra* note 3.

[52] See *supra* notes 20-23. The PCAOB did conduct outreach in connection with the recent efforts by the Division of Economic Research and Analysis in its review of critical audit matters. See Michael J. Gurbutt, Wei-Kang Shih & Carrie von Bose, *Staff White Paper: Stakeholder Outreach on the Initial Implementation of CAM Requirements*, PCAOB (Oct. 2020) (available at <https://pcaobus.org/EconomicAndRiskAnalysis/pir/Documents/Stakeholder-Outreach-Initial-Implementation-CAM-Requirements.pdf>). ERA conducted a survey of investors and also provided an opportunity for comment. The PCAOB also has a single employee responsible for "outreach" to all stakeholders, whether audit committees, preparers and investors.

[53] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); 15 U.S.C. § 7800.

[54] 15 U.S.C. § 78pp(a).

[55] *Id.* § 78pp(b).

[56] *Id.* § 78pp(d).

[57] *Id.* § 78pp(g).

[58] See *Investor Advisory Committee Meeting*, U.S. Securities and Exchange Commission (May 21, 2020) (available at [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac052120](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac052120)).

[59] See *Subcommittees of the Investor Advisory Committee*, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/investor-advisory-committee-2012-subcommittees.shtml>).

[60] 15 U.S.C. § 78d(g).

[61] In addition to the Office of the Investor Advocate, the SEC also has an Office of Investor Education and Advocacy. See *Office of Investor Education and Advocacy*, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/page/oieasectionlanding>). The PCAOB has no similar office.

[62] 15 U.S.C. § 78d(g).

[63] We do have a structure in place to provide educational functions to audit firms. See *Forums on Auditing in the Small Business Environment and Forums for Auditors of Broker-Dealers*, PCAOB (available at <https://pcaobus.org/News/Pages/SmallBusinessForums.aspx>) ("The Forum on Auditing in the Small Business Environment is a program for representatives of the small business community to learn more about the work of the Board, specifically the PCAOB inspection process and the impact of new auditing standards. Auditors from smaller registered public accounting firms are invited to attend. The seminars, which are offered at no cost to attendees, give participants the chance to learn about and discuss PCAOB issues with Board members and staff.").

[64] While the SEC does generally require notice and comment when approving a standard, the opportunity comes at the end of the process when most decisions are already baked into the standard. Before matters get to the SEC, the PCAOB often subjects standards to multiple iterations and multiple opportunities for comments in a lengthy process.

[65] 5 U.S.C. § 553(b)(B) ("Except when notice or hearing is required by statute, this subsection does not apply— . . . when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").

[66] The SEC, for example, includes as part of the record for proposed rules a section titled "Meetings with SEC Officials" that typically references meetings with outside groups, including the identity of the attendees.

[67] See 5 U.S.C. § 555. The requirement was designed to implement a similar concept included in the U.S. Constitution. See Maeve P. Carey, *Petitions for Rulemaking: An Overview*, CRS, at 2 (Jan. 23, 2020) (available at <https://fas.org/sqp/crs/misc/R46190.pdf>) ("The APA's petition mechanism essentially re-stated the right to petition the government established by the U.S. Constitution, which can be traced as far back as the Magna Carta and Declaration of Independence.").

[68] *Petitions for Rulemaking Submitted to the SEC*, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/rules/petitions.shtml>); see also 17 C.F.R. § 201.192.

[69] See Letter from Joseph F. Keefe, President and Julie Gorte, Senior Vice President, Impax Asset Management LLC, to the U.S. Securities and Exchange Commission, Rulemaking petition requiring companies to report on the physical location of their significant assets, Petition No. 4-763 (Jul. 9, 2020) (available at <https://www.sec.gov/rules/petitions/2020/petn4-763.pdf>).

[70] See Letter from Sam Kazman, Competitive Enterprise Institute; Mark Chenoweth, New Civil Liberties Alliance; Helgi C. Walker, Gibson, Dunn & Crutcher LLP; David T. Bellaire, Financial Services Institute, to U.S. Securities and Exchange Commission, Rulemaking petition to end the Commission's backdoor regulation of 12b-1 fees, Petition No. 4-761 (Apr. 29, 2020) (available at <https://www.sec.gov/rules/petitions/2020/petn4-761.pdf>).

[71] See Letter from Stephen E. Bochner and Richard C. Blake, Wilson Sonsini Goodrich & Rosati; David A. Bell and James D. Evans, Fenwick & West LLP; and, David G. Peinsipp and Charles S. Kim, Cooley LLP, to the U.S. Securities and Exchange Commission, Rulemaking petition requesting the Commission amend Rules 11 and 302 of Regulation S-T, as well as any other rules or forms necessary to permit such amendments to have their desired effect, at its earliest convenience to permit electronic signatures in addition to manual signatures, Petition No. 4-760 (Apr. 16, 2020) (available at <https://www.sec.gov/rules/petitions/2020/petn4-760.pdf>).

[72] The SEC has, for example, received a number of petitions relating to disclosure of environmental, social and governance matters, including climate change. Some have received extensive public comment. See *Comments on Request for rulemaking on environmental, social, and governance (ESG) disclosure*, File No. 4-730, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/comments/4-730/4-730.htm>).

[73] Compare *supra* notes 17-19 with, *supra* notes 51-52.

[74] J. Robert Brown, Jr., *supra* note 3.

[75] *Office of Minority and Women Inclusion*, U.S. Securities and Exchange Commission (available at <https://www.sec.gov/page/omwi-section-landing>).

[76] Congresswoman Maxine Waters of California explained that Section 342's objectives are to "not only give oversight to diversity, but to help the Agencies understand how to do outreach [and] how to appeal to different communities." Stephanie Wilson & Raeann Traficante, *United States: The Final Regulations For Section 342 Of Dodd-Frank Are Almost Ready...Are You?*, Mondaq (Mar. 27, 2015), (available at <https://www.mondaq.com/unitedstates/Finance-and-Banking/384450/The-Final-Regulations-For-Section-342-Of-Dodd-Frank-Are-Almost-Ready-Are-You>).

[77] J. Robert Brown, Jr., *supra* note 3.