

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 BRIEF IN OPPOSITION
TO MOTION FOR A MORE DEFINITE STATEMENT**

The Division of Enforcement (“Division”) respectfully submits this brief in opposition to Respondent Edward F. Hackert’s (“Respondent” or “Hackert”) motion for a more definite statement (“motion”). The Amended Order Instituting Proceedings (“AOIP”) provides a sufficient factual and legal basis for Respondent to defend against the allegations, and thus the motion should be denied.

BACKGROUND

On January 18, 2024, the Commission issued an Order Instituting Proceedings (“original OIP”) against Respondent. On February 5, 2024, the Division moved to amend the original OIP, and, on March 12, 2024, the Commission issued the AOIP.

The AOIP alleges that Respondent is a certified public accountant and engagement partner at the public accounting firm Marcum LLP (“Marcum”), and that he engaged in improper professional conduct under Section 4C of the Securities Exchange Act of 1934 by engaging in multiple violations of the Public Company Accounting Oversight Board’s (“PCAOB”) Auditing Standards (“AS”) relating to, among other

things, the supervision and documentation of audits. *See* AOIP at ¶¶ 1, 10, 84. The AOIP also alleges that Respondent 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 Respondent’s conduct, they were not. *See id.* ¶¶ 12, 85.

The AOIP alleges that Respondent’s misconduct and supervisory violations generally fell into three categories, each demonstrating the absence of due professional care: (1) failure to review the work of the audit engagement team and to document his review by the report release date on 187 audits, *see* AOIP at ¶¶ 5, 40, 44-55, 58, App’x A; (2) failure to assemble complete and final audit documentation by the documentation completion date on 123 audits, *see id.* at ¶¶ 7, 56-58, App’x B; and (3) additional failures related to audits of Ault Alliance, Inc. (“AAI”), *see id.* at ¶¶ 9, 59-83.

Respondent’s conduct with respect to the first two categories allegedly violated AS 1015 (due professional care), 1201 (supervision of the audit engagement), and 1215 (audit documentation). *See* AOIP at ¶¶ 54, 58. The AOIP includes two appendices corresponding to the first two categories of alleged violations: “Appendix A . . . summarizes Hackert’s failures to evidence his supervision by the report release date, and Appendix B . . . summarizes Hackert’s failures to assemble a complete and final set of audit documentation by the document completion date.” *Id.* at ¶ 58.

Respondent’s conduct with respect to the third category allegedly violated AS 1010 (training and proficiency), 1015 (due professional care), 1105 (audit evidence), 1201 (supervision), 1210 (use of specialist), 2315 (audit sampling), 2401 (consideration

of fraud), 2501 (accounting estimates), and 2810 (evaluating audit results). *See id.* at ¶¶ 64, 72, 78, and 83.¹

The AOIP and its appendices refer to the companies audited by Marcum, except for AAI, using anonymized descriptions (e.g., “Operating Co. 23,” etc.) rather than their names.²

After the original OIP was filed, the Division produced to Respondent hundreds of thousands of pages of documents pursuant to Rule 230. These materials include non-anonymized (i.e., company names revealed) versions of the appendices that were attached to the original OIP. The original OIP and its appendices used the same numbering as the AOIP and its appendices. This means that “Operating Co. 23,” or any other anonymized company in the original OIP and its appendices, refers to the same company in the AOIP and its appendices.

On April 2, 2024, the day after Respondent’s motion was filed, the Division sent Respondent’s counsel a letter attaching non-anonymized versions (i.e., company names revealed) of the appendices attached to the AOIP, like the Division had earlier done for the appendices attached to the original OIP. *See* Letter from T. Halloran to A. Ceresney, April 2, 2024 (without attachments), attached hereto as Exhibit A.³ The Division’s letter recounted that counsel for Respondent did not confer with the Division to ask for this information, and, had Respondent’s counsel done so, the Division would have voluntarily

¹ The motion seeks no relief with respect to the third category of alleged violations (the additional failures related to audits of AAI). *See* Mot. at 4 n. 3.

² Respondent “does not object to withholding his clients’ names from the public” and he agrees that the client names “should remain nonpublic.” Mot. at 2 n.1 and 5 n.4.

³ Exhibit A attached here does not include the unblinded Appendices so as not to reveal them in this public filing, per Respondent’s request. *See* note 2 *supra*. But the Division’s April 2, 2024, letter to Respondent’s counsel included those Appendices and disclosed the names of all the relevant audit clients.

provided the information without the need for a motion. *Id.* at 1. The Division’s letter also informed Respondent’s counsel that the anonymized numbering of companies was consistent from the original OIP to the AOIP. *Id.* at 1 n.1.

The documents produced by the Division in discovery (before the motion was filed) also include spreadsheets obtained from Marcum documenting, for each audit at issue in the AOIP: (a) the name of each of the work papers; (b) the “sign off date” on each of the work papers; and (c) the name of the person who signed off.⁴

Respondent filed an Answer to the AOIP on April 1, 2024, and that same day filed his motion for a more definite statement.

ARGUMENT

In the motion, Respondent argues that the AOIP fails to set forth sufficient information about (1) the “specific identity of the audits with respect to which Respondent is alleged to have engaged in improper professional conduct and caused Marcum’s violations”; and (2) the factual and legal basis for the claims in the AOIP that “the work papers for the 193 at-issue audits were inadequate, constitute improper professional conduct, and caused Marcum’s violations.” Mot. at 4. The motion seeks an order requiring the Division to provide a more definite statement or, alternatively, to have certain allegations in the AOIP stricken or the AOIP dismissed. *Id.* at 1, 11.

There is no merit to Respondent’s arguments. Indeed, the specific information Respondent purports to seek in the motion, *see* Mot. at 9-10, already has been provided in (i) the AOIP, (ii) the unblinded Appendices A and B thereto, and (iii) the discovery

⁴ The AOIP alleges that the “generally accepted method for engagement partners to document their supervision of an audit in compliance with the PCAOB auditing standards, and their review of the work performed by engagement team members, is by signing and dating (or “signing off”) on work papers when they perform or review work.” AOIP at ¶ 39.

produced by the Division. Accordingly, as explained more fully below, Respondent’s motion should be denied.

A. Legal Standards

As relevant here, an order instituting proceedings is required to “set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.” Rule of Practice 200(b)(3). The order instituting proceedings need only “inform the respondent of the charges in enough detail to allow the respondent to respond to the allegations – that is, admit or deny them or state that it does not have sufficient information to do so – and prepare a defense.” *American Cryptofed DAO LLC*, Release No. 93971, 2022 WL 118206, at *2 (Jan. 12, 2022). The order instituting proceedings “need not ‘disclose to the respondent the evidence upon which the Division intends to rely.’” *Id.* at *2, citing *Daniel Joseph Touizer*, Release No. 86420, 2019 WL 3251484, at *2 (July 19, 2019). “The purpose of the [order instituting proceedings] is to provide notice of *what* violations of the securities laws are alleged, not to explain *how* the Division will try to prove those violations.” *Id.* (emphasis in original), citing *Morris J. Reiter*, Release No. 6108, 1959 WL 59479, at *2 (Nov. 2, 1959) (“appropriate notice of proceedings is given when the respondent is sufficiently informed of the nature of the charges against him so that he may adequately prepare a defense, and that he is not entitled to a disclosure of evidence”).⁵

Rule of Practice 220(d) provides that a “respondent may file with an answer a motion for a more definite statement of specified matters of fact or law,” and such motion

⁵ The *Reiter* decision was issued prior to an amendment to the Rules of Practice requiring that the Division make its investigative file available to respondents, but “there is no requirement that the Division provide a roadmap or highlight particularly inculpatory or exculpatory materials.” *American Cryptofed*, 2022 WL 118206, at *n.12, citing *optionsXpress, Inc.*, Release No. 70698, 2013 WL 5635987, at *7 (Oct. 16, 2013).

must “state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite.” But there is no basis to order a more definite statement where an order instituting proceedings “satisfie[s] the due process requirement that a respondent be given fair notice of the claims lodged and the grounds upon which those claims rest.” *Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005).

“In short, a motion for a more definite statement may not be used to obtain an advance ruling about what the evidence shows or what legal theory will prevail. Nor is it a means to try to rewrite the [order instituting proceeding’s] allegations. If a respondent believes that an allegation in the [order instituting proceedings] mischaracterizes the facts or draws incorrect inferences from them, it may deny the allegation.” *American Cryptofed*, 2022 WL 118206, at *2 (citations omitted).

B. Respondent Knows the Identity of Each Audit Client Alleged in the AOIP

The motion incorrectly argues that the Division has not informed Respondent of the identity of the audit clients referred to by anonymized descriptions in the AOIP and its appendices. *See Mot.* at 4-5. But as described above, and as Respondent acknowledges (*see Mot.* at 3), the Division produced in discovery non-anonymized versions of the appendices attached to the original OIP. Respondent thus had the ability to identify the companies in the AOIP and its appendices because the anonymized numbering of the companies was consistent from the original OIP to the AOIP. Additionally, the Division’s April 2, 2024, letter (attached here as Exhibit A) included

non-anonymized versions of the appendices to the AOIP.⁶ There is no basis to order a more definite statement under these circumstances.

C. Respondent Has Fair Notice of the Allegations Against Him

Respondent also incorrectly asserts that the AOIP “contains *no* allegations, beyond the inclusion in a total or subtotal, as to nearly all of the at-issue audits,” and that he has not been informed “which of the [audits] the Division contends were improper, which auditing standards were violated by each audit [], . . ., and how the Division contends each audit [] . . . violated identified standard(s).” Mot. at 6 (emphasis in original). Respondent’s complaints, however, are rebutted by the language of the AOIP and its appendices.

The AOIP sufficiently alleges that the 187 audits documented in Appendix A each involved a failure by Hackert “to review the work of the engagement team members and to document that review prior to the report release date,” AOIP at ¶ 44, resulting in violations of AS 1015 (due professional care), 1201 (supervision of the audit engagement), and 1215 (audit documentation), *id.* at ¶¶ 54, 58. Supporting factual allegations in the AOIP include references to the specific audits where Respondent allegedly did not review and sign off on work papers prior to the report release date. *See, e.g., id.* at ¶¶ 44-55. Additionally, Appendix A details, for 187 different audits, the number of work papers that Respondent failed to sign off on prior to the release of the audit report, demonstrating Respondent’s failure to review the work of the engagement team and to document that review as required.

⁶ Again, if Respondent’s counsel simply requested non-anonymized versions of Appendices A and B to the AOIP, the Division would have provided those documents without the need for motion practice. *See* Ex. A. at 1.

The AOIP also sufficiently alleges that the 123 audits documented in Appendix B involved a failure by Hackert to timely assemble for retention a “complete and final set of audit documentation,” AOIP at ¶ 56, resulting in violations of AS 1015 (due professional care), 1201 (supervision of the audit engagement), and 1215 (audit documentation), *id.* at ¶¶ 56, 58. Supporting factual allegations in the AOIP include the contents of Appendix B, which, for 123 different audits shows: (a) the number of instances where Respondent signed off on audit work papers *after* the “document completion date” (the deadline under AS 1215.15 to assemble for retention a complete and final set of audit documentation); and (b) the number of audits where an “AS 3 Memo” was prepared by the audit engagement team, demonstrating that complete and final audit documentation was not assembled by the document completion date.⁷

The motion additionally complains that paragraphs 47 and 49 of the AOIP contain insufficient information to permit Respondent to make a specific response. *See Mot.* at 6-7. But Respondent apparently had enough information to deny all allegations in those paragraphs in his Answer, and he possesses sufficient information – from the AOIP, the unblinded Appendices A and B thereto, and the discovery provided by the Division – to prepare a defense. Respondent further claims that paragraph 49 of the AOIP “fails to identify the ‘significant risk areas’” of a particular audit. *Mot.* at 6. But the AOIP specifically alleges “significant risk areas in the audit identified by the engagement team, including accounts receivable and sales and inventory and cost of sales,” AOIP at ¶ 49.⁸

⁷ The AOIP alleges that an “AS 3 Memo” was a quality control document designed to satisfy the requirements of AS 1215.16 that any late-added audit documentation must include information about when it was added, who added it, and why. AOIP at ¶ 57.

⁸ Notably, so far as the Division is aware, Respondent remains employed by Marcum and his counsel represents both Respondent and Marcum. Thus, Respondent likely has easier access to Marcum’s audit work papers than the Division does.

D. The Allegations Regarding AS 1215 are Sufficient

The motion also claims that the allegations in the AOIP regarding AS 1215 (audit documentation) are “especially deficient” because, in Respondent’s view, the allegations are impermissibly “summarized and aggregated . . .”. See Mot. at 7-9. Respondent’s arguments are without merit. The allegations regarding violations of AS 1215 are sufficient under Rule 200(b)(3) and Commission precedent.

The AOIP clearly alleges that “Hackert violated AS . . . 1215 in connection with at least 193 audits.” AOIP at ¶ 58.⁹ Appendix A to the AOIP “summarizes Hackert’s failures to evidence his supervision by the report release date” in violation of, among other provisions, AS 1215. *Id.*; see also *id.* ¶¶ 25-27. The AOIP and Appendix A thus put Hackert on notice of each audit on which his sign-offs after the report release date violated AS 1215. Appendix B to the AOIP likewise “summarizes Hackert’s failures to assemble a complete and final set of audit documentation by the documentation completion date,” *id.* at ¶ 58, and puts Hackert on notice of each audit on which his untimely assembly of final audit documentation violated AS 1215. Additionally, the AOIP alleges that Hackert violated AS 1215 on certain audits by backdating his signature on work papers called “routing slips.” *Id.* ¶ 54. Respondent may disagree that the alleged conduct violates AS 1215, but such disagreement provides no basis for a more definite statement because the AOIP gives “fair notice of the claims lodged and the grounds upon which those claims rest.” *McConville*, 2005 WL 1560276, at *14.

⁹ The AOIP explains that the 193 audits referenced in paragraph 58 consist of the 187 audits on Appendix A plus six audits that are on Appendix B but not on Appendix A. See AOIP at 11 n.8.

Respondent further asserts that, “in order to properly allege a violation of AS 1215, . . . the Division must identify” various information “for *each* of the 193 audits the Division alleges was insufficiently documented.” Mot. at 8 (emphasis in original). Tellingly, however, Respondent cites no authority for this assertion – because none exists. While Respondent would prefer that the AOIP be rewritten to suit his preferences, “a motion for a more definite statement may not be used . . . to rewrite the [AOIP’s] allegations.” *American Cryptofed*, 2022 WL 118206, at *2 (citations omitted). Instead, if Respondent “believes that an allegation in the [AOIP] mischaracterizes the facts or draws incorrect inferences from them, [he] may deny the allegation.” *Id.*

In sum, the AOIP provides fair notice sufficient to inform Respondent of the charges in “enough detail to allow [him] to respond to the allegations – that is, admit or deny them or state that [he] does not have sufficient information to do so – and prepare a defense.” *Id.* Nothing more is required from the AOIP.

CONCLUSION

For these reasons, the Division respectfully urges the Commission to deny Respondent’s motion.

Dated: April 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

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