ORIGINAL

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

Admin. Proc. File No. 3-16430

In the Matter of the Application of

MARK E. LACCETTI, CPA

For Review of Disciplinary Action Taken By

PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S OPPOSITION TO LACCETTI'S APPLICATION FOR COMMISSION REVIEW

June 15, 2015

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The Public Company Accounting Oversight Board (Board or PCAOB) hereby opposes Mark E. Laccetti's application for review by the Securities and Exchange Commission (Commission or SEC) of disciplinary sanctions ordered against him by the Board.

FACTUAL BACKGROUND

On January 26, 2015, the Board issued lengthy, separate final decisions in this disciplinary proceeding against Laccetti and another individual, following *de novo* review of the large case record, extensive briefing, and oral argument. Laccetti was the auditor with final responsibility, or engagement partner, for Ernst & Young's audit of the 2004 financial information of a United States subsidiary (Taro USA) that drove the financial results of a foreign private issuer traded on the NASDAQ National Market. Ernst & Young, through Laccetti, rendered an unqualified audit opinion on Taro USA's 2004 financial data to another audit firm, which used that audit work and report in auditing the parent company's consolidated financial statements. The parent company later restated its financial statements for 2004 and other periods, principally due to Taro USA's erroneously low estimates of a major sales incentive (chargebacks), which had caused multi-million-dollar overstatements of net sales and related receivables. The OIP charged Laccetti with violating numerous PCAOB auditing standards in his audit work on Taro USA's 2004 sales adjustments and related reserves in total, and for chargebacks specifically. Index to the Record, Record Document (R.D.) 1.

In a 103-page final decision (R.D. 220) addressing a wide range of issues raised by Laccetti and the PCAOB's Division of Enforcement and Investigations (Division) on appeal from the PCAOB hearing officer's initial decision in the case, the Board found that Laccetti had violated multiple PCAOB auditing standards and that his violations formed a pattern of conduct that was fundamentally at odds with the role of the independent auditor. The Board's detailed

findings, based on extensive analysis and evidence, showed that he had "disregard[ed] [ ] some of the most basic auditing principles," such as exercising due professional care, including maintaining an attitude of professional skepticism; obtaining sufficient competent evidential matter to afford a reasonable basis for an opinion; and performing audit procedures that are appropriate for the risks of material misstatement. Determining that Laccetti had acted recklessly, or at least engaged in numerous, serious instances of negligent conduct, the Board barred him from associating with a registered public accounting firm, with leave to petition to associate after two years, and ordered him to pay an $85,000 civil money penalty, to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports of issuers of securities.

ARGUMENT

There was no error in the Board's imposition of sanctions on Laccetti, and any error he claims existed earlier in the case is no basis to disturb them. The sole premise of this appeal is that the "sanctions" were based on "proceedings" that were constitutionally deficient. Br. 1. Aside from two newly raised defenses (Br. 31-32), Laccetti locates the alleged deficiencies in the investigation and initiation of the case. Specifically, he contends that: (1) statutory restrictions on Board member removal in place when this case was investigated and initiated violated the constitutional separation of powers; and (2) the Board violated his "right to counsel" by declining to allow an Ernst & Young accounting partner, in addition to Laccetti and his attorneys, to attend his investigative testimony. Br. 7-31.

As the Board explained, however, it determined sanctions when it was "'a constitutional agency accountable to the Executive,'" under a statute that "'remains fully operative as a law with the[] tenure provisions excised,'" and mindful that the excision did not affect "'the validity

of any officer's continuance in office.'" *See* R.D. 220 at 79, 80, 82, quoting *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508, 509, 513 (2010) (internal quotation marks omitted) (*FEF*). Laccetti has not shown that *FEF* invalidates investigative and prosecutorial acts preceding a valid sanctions determination. *See* R.D. 220 at 78-80. Further, he "has no sound basis" for his claimed right to counsel, and it was not violated. *See id.* at 74-78. In any event, any injury he alleges is purely speculative and is remedied by subsequent actions. *See, e.g., id.* at 76, 80-81. Neither the sanctions nor the proceedings reduce to the investigation and initiation of the case. Laccetti's demand for dismissal of a disciplinary proceeding adjudicated against him by a constitutional Board, without use of his investigative testimony, to a conclusion he does not challenge on the merits is extreme and unjustified.

The basis for Commission review of a Board disciplinary proceeding is the "disciplinary action taken," that is, "the final sanction." Sarbanes-Oxley Act Section 107(c), 15 U.S.C. 7217(c).[1/] In taking disciplinary action against Laccetti, the Board found, based on *de novo* review of the record, that the Division proved by a preponderance of the evidence that he engaged in an act or practice, or omitted to act, in violation of PCAOB rules and auditing standards, as charged in the OIP. *See* Section 105(c), 15 U.S.C. 7215(c); PCAOB Rules 5201(b)(1), 5202(a)(1), 5204, 5300(a), 5460(c), and 5465. This is distinct from the role in which the Board acts, the standards by which it acts, and the basis upon which it acts in commencing an

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1/ The statute requires the Board to promptly file notice with the Commission of "any final sanction" ordered; provides that the action "with respect to which" the Board "is required to file notice" is subject to review by the Commission upon application by any person aggrieved "thereby"; authorizes Commission review of "final disciplinary sanctions imposed by the Board"; and specifies circumstances under which the Commission shall affirm or set aside, or may modify, the "sanction imposed," or may remand for further proceedings. 15 U.S.C. 7217(c)(1)-(3) (in part referencing Securities Exchange Act of 1934, Sections 19(d)(2) and 19(e)(1), 15 U.S.C. 78s(d)(2) & (e)(1)).

investigation or a disciplinary proceeding.[2/] *See generally Doolin Security Savings Bank, F.S.B. v. OTS*, 139 F.3d 203, 212 n.8 (D.C. Cir. 1998). Short of a sanction, those acts are not subject to appeal to the SEC under Section 107(c). *See FEF*, 561 U.S. at 486, 489, 490.

Given Laccetti's narrow application for SEC review, there is no dispute that, under the provisions governing Commission review of Board sanctions—Sarbanes-Oxley Act Section 107(c)(2), 15 U.S.C. 7217(c)(2) and Exchange Act Section 19(e)(1)(A), 15 U.S.C. 78s(e)(1)(A)—Laccetti "engaged in such acts or practices" or "omitted such acts" as the Board "has found him to have engaged in or omitted." *See, e.g.*, R.D. 220 at 3-61. Nor is there any dispute on the merits that such acts or practices or omissions to act "are in violation of" the rules and auditing standards "specified in the [Board's] determination." *See, e.g., id.* at 62-64. Finally, Laccetti does not contest that "such provisions are, and were applied in a manner, consistent with the purposes of" the Exchange Act and Sarbanes-Oxley Act title I, aside from his affirmative defenses. *See, e.g., id.* at 70-73; SEC Rel. No. 34-47745, 2003 WL 1956168 at *3.

Contrary to Laccetti's statement that the investigation and OIP "led directly to the imposition of sanctions on him" (Br. 1), the Board did not "directly" order sanctions because the Division gathered raw investigative materials or because the OIP made allegations and charges. Rather, the Board ordered sanctions because, on *de novo* review of the hearing officer's 90-plus-page initial decision, based on the extensive evidence admitted and arguments made in connection with nine days of hearings in an adversarial proceeding, the Board found that the

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2/ *See* PCAOB Rules 5100 (informal inquiry may be commenced "where it appears" to the Division Director "that, or to determine whether, an act or practice, or omission to act" "may" be violative), 5101 (formal investigation: "when it appears" to the Board "that an act or practice, or omission to act" "may" be violative), 5200(a)(1) (disciplinary proceeding: when "it appears to the Board, as the result of an investigation or otherwise, that a hearing is warranted to determine whether" a firm or individual "has engaged in any act or practice, or omitted to act" in violation), 5200(c) ("Separation of Functions"), 5403 ("Ex Parte Communications").

Division proved by a preponderance of the evidence charges in the OIP that Laccetti committed numerous, serious violations of PCAOB auditing standards and the Board determined that substantial sanctions were warranted to protect investors and further important public interests in issuer audits. *See, e.g.*, R.D. 220 at 62-64, 93-97. The Board determined that the proceeding was "conducted fairly and in accordance with applicable laws and rules." R.D. 220 at 80.

The Board's reasoned conclusions and considered judgments reflect precisely the kind of exhaustive analysis of the extensive evidence and arguments that Laccetti had urged the Board to undertake. *See, e.g.*, R.D. 217 at 89, 97. Laccetti has not challenged the merits of any of the 103-page final decision's findings of violations or determinations on sanctions or its resolution of any but the two main defenses on appeal here, discussed on nine of its pages.

As we discuss further below, those two defenses—separation of powers and right to counsel—lack merit. The claims of error Laccetti raises for the first time on appeal here—that the Board violated a statutory right to counsel now claimed by him under the Administrative Procedure Act (APA) and that the Board has violated the Constitution's Oath or Affirmation Clause and Commission Clause—are forfeited and, in any event, are also meritless.

I. No Separation of Powers Error Exists and Any Claimed Error Was Cured.

A. Laccetti fails to identify any error in the Board's imposition of sanctions.

Laccetti's separation of powers challenge fails because he has not established that there was any error in the Board's imposition of sanctions. He claims he "was subjected to sanctions" due to "an unconstitutional framework" in place when the case was investigated and the OIP was issued. Br. 1. His claim is not that he is currently at risk of the Board opening an investigation or commencing a disciplinary action against him in violation of the Constitution's separation of

powers. He never challenged PCAOB action in court. His only claim to a live injury from PCAOB investigative and prosecutorial activity is the sanctions imposed in this case.

There is no dispute, however, that the "unconstitutional framework" to which he refers—restrictions on Board-member removal that the Supreme Court held violated the separation of powers—was ordered stricken from the statute by the time of the hearing, initial decision, and final decision in this case, before the Board made any sanctions determination. This "vitiates" Laccetti's constitutional claim. *See Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987).

Regnery involved a challenge to a government program on the grounds that the many acts preceding its implementation, carried out by one agency official, and its implementation, ordered by a newly appointed second agency official, were taken when each official allegedly "exercised power in violation of the Appointments Clause." *Id.* at 1257. The court held "the particularized injury that permitted appellants to have standing to raise their claim" was the impact when the program "went into effect," "not the mere fact that the government initiated plans that could have resulted in" that effect. *Id.* at 1256-57. Determining that the second official had been properly appointed by that later date, the court held that the "legally cognizable action" that caused "a legally cognizable injury" was the implementation of the program and rejected the constitutional challenge. *Id.* at 1257. Likewise "vitiate[d]" (*id.*) is Laccetti's attempt to challenge PCAOB investigative and prosecutorial actions as violating separation of powers principles through an appeal of the sanctions the Board imposed when fully compliant with those principles.

None of the cases cited by Laccetti can salvage his claim. He relies on *FEF, FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), and *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), a prior decision in the same

case as *Regnery*. The constitutional errors found in the first three cases continued until the decisions were issued. *Landry* did not disturb *Regnery*; in fact, *Landry*'s author, who also wrote *Intercollegiate*, had joined the unanimous opinion in *Regnery*.

The plaintiffs in *FEF* complained they were subject to a statute that was currently unconstitutional due to its restrictions on SEC removal of Board members. The Court discussed the plaintiffs' claim as a "general challenge" to application of the statute in the future on the ground that they were "subject" to the PCAOB's authority. 561 U.S. at 490, 513. The Court referred to "investigations" and "exercise of prosecutorial discretion" by the PCAOB in that context. *Id.* at 503-05. Concluding that the plaintiffs had established "a 'here-and-now' injury that can be remedied by a court," the Court stated that they were "entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. The "here" and "now" before the Court involved unconstitutional removal restrictions still in place in the Act and a challenge to its overall prospective application. The case does not establish that an investigation and the issuance of charges are legally cognizable actions in a challenge to the validity of sanctions imposed by a constitutional body.

Nor does *NRA*. There, the entire enforcement action ran its course under the statutory provision held in that case to "violate[] separation of powers principles." 6 F.3d at 822, 823. Similarly, in *Intercollegiate*, the court vacated and remanded a final decision issued "at the time" of a live Appointments Clause violation. 684 F.3d at 417. As the court explained in a later case, *Intercollegiate* remanded so that the claims "could be heard by a constitutionally valid tribunal." *Kuretski v. CIR*, 755 F.3d 929, 938 (D.C. Cir. 2014). Laccetti's claims have been so heard.

Finally, Laccetti relies on the discussion of standing in *Landry* (Br. 10), but it does not help him. *Regnery* also found standing. 824 F.2d at 1257. Standing to raise a claim does not mean it has merit. *Landry* was an Appointments Clause challenge to an administrative law judge's authority in a proceeding against a bank officer that had been finally adjudicated on *de novo* review by the FDIC. By statute, the ALJ was appointed by "a set of agencies" allegedly ineligible to act under the Appointments Clause and was a required adjunct to the adjudicative process at the FDIC, issuing a recommended decision. 204 F.3d at 1128, 1130. Like *Regnery*, *Landry* recognized that the legally cognizable injury was the final agency action. *Id.* at 1132. And *Landry* reaffirmed *Doolin*, which rejected a challenge to "the final merits order by a properly appointed [agency official]" as allegedly defective because "enforcement proceedings culminating in [that sanction] order were initiated by an improperly appointed" predecessor official. *Id.* Essentially, *Landry* treated the challenged ALJ as a significant participant in the final agency action for purposes of standing analysis.

Specifically, the court found standing to challenge the ALJ's appointment due to his significant role in the adjudicative process—*e.g.*, he "draft[ed] opinions" for the agency—and a "catch-22" specific to that case. *Id.* at 1131, 1132. As the court explained, it was required to assume at that stage that the ALJ had sufficient authority to be subject to the Appointments Clause, as alleged. But if "the process of final de novo review could cleanse" the claimed violation "of its harmful impact," as FDIC urged, and if the court did not give the challenger "a chance to raise" the constitutional claim, then all such arrangements as governed the ALJ could "escape judicial review." *Id.* at 1132. According to the court, this would be "to rule, in effect, that officers holding purely recommendatory powers subject to de novo review" are not subject to the Appointments Clause, "*i.e.*, to resolve the merits without purporting to do so." *Id.*

Laccetti does not raise such issues. He does not mount a new separation of powers challenge to a statute. The Supreme Court, based on the filing of a district court action by an accounting firm subject to a PCAOB inspection, has already heard and decided the constitutional objections to the removal restrictions. Instead, he seeks to benefit from that prior deficiency in the statute, even though his case was heard, and sanctions were imposed, by a Board that Laccetti does not contest was fully accountable to the Executive.

Unlike cases on which Laccetti relies, the "here" and "now" in the present case concerns the imposition of sanctions under a statute that no longer contains a provision found to be unconstitutional and generates no separation of powers problem. The question is not whether he is entitled to retrospective application of *FEF* (*see* Br. 7, 11, 12, 14) but why such application is relevant to the posture of this case. In the words of a leading Supreme Court case on retrospective application, there is a "special circumstance" here for why the new rule "does not determine the outcome of th[is] case." *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-59 (1995). An already corrected constitutional error in the Board's governing statute does not establish error in the Board's imposition of sanctions.

B. Laccetti fails to show that any PCAOB actions taken in the case were invalid.

Laccetti's separation of powers defense also fails because he has not shown that *FEF* invalidates investigative and prosecutorial acts preceding a valid sanctions determination. Although Laccetti asserts that the Board's decision "misreads" the case by "taking [certain] statements out of context" (Br. 12), it is he who misreads the context, misses the statements' combined import, and does not thoroughly analyze them in relation to other cases.

In *FEF*, the Supreme Court decided a challenge based on general separation of powers principles. It did so before reaching an Appointments Clause challenge, which the Court rejected

as without merit based in part on its resolution of the other issue. *See* 561 U.S. at 492, 508, 510. The Court thus held that "the Board members have been validly appointed by the full Commission." *Id.* at 513. Moreover, the Court rejected the challenge to "the Board's existence" and "such a broad holding" as was sought, namely that an alleged defect in the governing statute "rendered [the Board] 'and all power and authority exercised by it' in violation of the Constitution." *Id.* at 490, 508. Instead, the Court held that "the existence of the Board does not violate the separation of powers, but the substantive removal restrictions" do. *Id.* at 508-09. Determining to sever those provisions, the Court made clear that the Act "remains fully operative as a law with these tenure restrictions excised." *Id.* at 509 (emphasis added; quotation marks omitted). Accordingly, the Court held that the challengers "are not entitled to broad injunctive relief against the Board's continued operations," and ordered only declaratory relief. *Id.* at 513.

Significantly, the Court majority addressed (*id.* at 508) an argument by the dissent that the decision would "put on hold" the work of various officials likened to Board members until the constitutionality of those other officials' authorizing regimes could be assured through judicial or congressional action because, for one thing, it would put "their administrative actions and decisions constitutionally at risk" *(id.* at 540-41, 544). This is precisely the risk to which Laccetti seeks to expose pre-*FEF* actions taken by the Board in this case. In response to the dissent, the majority stated there was not "any substance" to the dissent's concern. Work would not be put on hold because "[t]he only issue in this case is whether Congress may deprive the President of adequate control over the Board" and "restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might someday be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office." *Id.* at 508. Indeed, by taking up first the general

separation of powers issue, which necessarily implicates no particular prior action by any officer, before the Appointments Clause issue, which plainly does implicate the prior act of appointment itself, the Court avoided addressing anyone's past actions except for Congress's.

Additionally, the Court stated that, in practice, the President "can always choose to restrain himself in his dealings with subordinates." *Id.* at 497. To essentially take that choice away from the President (and SEC) for the pre-decision period by going beyond granting declaratory relief to invalidating past actions under the circumstances of *FEF* raises concerns of its own for a court. This is especially true where, as the Board noted: (1) the two successive administrations that defended the constitutionality of the statute were content with what the Court viewed as "[b]road," even if not "plenary," power over the Board; and (2) during the pre-*FEF* stage of this proceeding, the Commission could have appointed a new Board majority, including a Chairman, because the Board Chairman position was vacant and the terms of two other Board members had expired, but the SEC instead withheld making new appointments. R.D. 220 at 80; *see* Br. 8 (alleging Commission restraint).

No such concerns are presented by other cases cited by Laccetti. The Board's decision (R.D. 220 at 79 n.37) distinguished *Bowsher v. Synar*, 478 U.S. 714, 726, 736 n.10 (1986), *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272, 276 (1991), and *NRA* as all involving statutory schemes where persons were fundamentally ineligible to act in the positions they held. Indeed, the legal authority for those duties was eliminated by the court decisions. The unconstitutional provisions in the first two cases infected the larger statute. In *NRA*, the D.C. Circuit struck the statutory provision authorizing agents of Congress to serve as *ex officio* members, and the FEC had to

"reconstitute[]" itself before it could take further enforcement action. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706, 708 (D.C. Cir. 1996).

In these cases, statutes created invalid mechanisms authorizing persons controlled by Congress to perform executive branch functions. The D.C. Circuit has indicated that situations of "interbranch," rather than "intrabranch," removal authority can raise special constitutional concerns. *Kuretski*, 755 F.3d at 932, 938-45 (rejecting separation of powers challenge to Tax Court judges by extensively analyzing whether the case "involve[d] the prospect of presidential removal of officers in another branch"). Of course, a statute can violate the Constitution by impairing the exercise of authority within another branch, not just seizing power for Congress from that branch. *See FEF*, 561 U.S. at 500. But Laccetti errs in urging the SEC to assume, without any careful analysis of the nature and circumstances of the particular violation found, that all past actions taken under the statute in question are invalid. It is hardly unprecedented for the Supreme Court to hold otherwise. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).

Finally, *Intercollegiate* does not assist Laccetti. That case found, as to Copyright Royalty Board Judges, that "Congress's vesting of their appointment in the Librarian [of Congress] rather than in the President violates the Appointments Clause." 684 F.3d at 1342. The court proceeded to "invalidate and sever the portion of the statute limiting the Librarian's ability to remove the Judges" and to vacate and remand their "final determination" in that case. *Id.* at 1335. Thus, unlike *FEF*, *Intercollegiate* held that the officials had not been validly appointed. Even so, contrary to what Laccetti seeks, the court did not dismiss the ratemaking proceeding the Judges had "initiated," but only their "final determination." *Id.* at 1335, 1342. This accords with the special concern expressed by the Supreme Court in Appointments Clause cases about an adjudicator. *See Ryder v. United States*, 515 U.S. 177, 182-83 (1995). But *Intercollegiate* does

not, any more than *FEF* or any of the other cases, establish Laccetti's claim that PCAOB actions to investigate and initiate this case are invalid and require valid sanctions to be set aside.

C. Any claimed separation of powers error is remedied.

Unable to identify any actual error in the Board's imposition of sanctions, Laccetti presses an extreme and unfounded claim. He tries to insist that the existence of the separation of powers problem in the governing statute at the time of the investigation and OIP "tainted the entirety of this enforcement proceeding" and that the "only" remedy is dismissal. Br. 9, 13.

As the Board held, however, citing dispositive case law, his claimed injury is purely speculative and has already been cured by PCAOB action. *See* R.D. 220 at 80-82, citing *Legi-Tech*, 75 F.3d 704 and *Doolin*, 139 F.3d 203. There is thus no cause to discard this amply proven, thoroughly adjudicated, now undisputedly meritorious disciplinary proceeding brought to protect investors and further the public interest. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388-89 (2012) (court considers remedy "while at the same time not grant[ing] a windfall to the defendant or needlessly squander[ing] the considerable resources" "properly invested" in prosecution of the case); *see Intercollegiate*, 684 F.3d at 1336-37 (seeking to "provide a remedy that cures" a violation "with as little disruption as possible").

Laccetti unravels his entire separation of powers argument at the end with a concession he is constrained by case law to make. His brief spends eight pages contending that because the Board "made" "decisions" and "obtained" "information" in investigating and commencing the case, this "tainted the entirety of this enforcement proceeding" and "must be undone"; and that "[s]ubsequent proceedings cannot possibly sanitize" this "unconstitutional conduct and its aftermath." Br. 9, 13, 14. Then, at the end of his argument, he turns around and concedes that such a situation as this could be "cured" by "ratifying" the "previous actions." Br. 14-15.

This not only brings to bear a forceful point made in *Doolin*. Namely, there the court observed that to require issuance of "a new notice containing charges already found to be supported, not merely by probable cause, but by substantial evidence"—and here by even more, a preponderance of the evidence—and forcing the "redoing [of] the administrative proceedings" "would do nothing but give the [respondent] the benefit of delay (assuming that we would refuse to stay our judgment pending reinstitution of agency proceedings against [that party])." 139 F.3d at 214; *see Bowsher*, 478 U.S. at 736 (staying judgment to permit implementation of statutory "fallback provisions"). But Laccetti's concession also means that his entire argument hangs on his mere assertion, without any discussion, analysis, or authority, that "the Board never ratified the decisions that it made and the actions that it took." Br. 13, 15.

In *Legi-Tech*, the D.C. Circuit considered a constitutional challenge to an FEC enforcement action that had been pending when the court decided *NRA*. *NRA* held that because Congress improperly constituted the FEC by including two congressional officers as non-voting *ex officio* members, the court would sever that provision and reverse the judgment in the enforcement action on review. *See* 75 F.3d at 706. Soon after *NRA*, the agency had "voted to reconstitute itself, excluding the *ex officio* members from all proceedings," and later "voted to find probable cause" for the charges against Legi-Tech in the pending action and "to authorize the General Counsel to continue th[e] litigation." *Id.* Even so, the district court dismissed the case, making exactly the use of *NRA* that Laccetti attempts here.

But on appeal in *Legi-Tech* the author of the *NRA* decision, writing for the court, reversed the dismissal. *Legi-Tech* squarely rejected arguments identical to Laccetti's (*see id.* at 707-09):

- that the case declaring the constitutional violation "dictates the same remedial result—dismissal" of any like suit pending when that case was decided (emphasis in original);

- that "[s]eparation of powers is a structural constitutional defect," which "makes the [agency's] entire investigation and decision to file suit void *ab initio*";
- that a party "therefore does not have to show any specific prejudice to warrant dismissal";
- that "a vote at the end of the administrative process does not remove the taint from the entire sequence of decisions"; and
- that the body must "start [back] at the beginning of" the "entire administrative process."

Retrospective application of a rule of law from one case "does not always dictate the same remedy (or result) in the second case." *Id.* at 708, citing *Reynoldsville*, 514 U.S. at 758-59. The Supreme Court has made clear that "as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." The first example given by the Court was when a court finds "an alternative way of curing the constitutional violation." *Id. Legi-Tech* highlighted "the discretion the judiciary employs in the selection of remedies." 75 F.3d at 709.

Applying these principles, the D.C. Circuit held that if the agency's decision to reconstitute itself, find probable cause, and authorize the continuation of the litigation—summarized as "the FEC's reconstitution and ratification"—"adequately addressed the prejudice to Legi-Tech from the constitutional violation, then dismissal is neither necessary nor appropriate." *Id.* at 708. Focusing, like *FEF* and *Bowsher*, on the here and now, the court explained that "the relevant issue is the degree of continuing prejudice now, after the FEC's reconstitution and ratification, and whether the degree of prejudice—if it exists—requires dismissal." *Id.* The court assumed that Legi-Tech "was prejudiced by the original suit," but focused on "whether, given the FEC's remedial actions, there is sufficient remaining prejudice to warrant dismissal." *Id.* at 708 n.5. It concluded that the agency's post-*NRA* activity was "an adequate remedy" for the separation of powers violation declared in *NRA*. *Id.* at 709.

In *Doolin*, the D.C. Circuit followed *Legi-Tech* as "directly on point" in addressing the validity of a sanction ordered in an administrative enforcement proceeding by OTS against a bank. One agency official initiated the proceeding. After an ALJ issued a "'recommended decision'" with "exhaustive findings of fact and conclusions of law," the agency official resigned. His successor "reviewed the ALJ's proposal and the parties' exceptions" and issued a final written opinion and sanction order. 139 F.3d at 204, 205-206, 213. The bank challenged under the Appointments Clause and the Vacancies Act the authority for the actions taken by the officials. *Id.* at 206. That statute "is concerned with positions requiring Presidential appointment" and "[f]or more than two centuries" had provided a backstop to the Appointments and Recess Appointments Clauses by "authoriz[ing] the Executive to fill positions temporarily" when, as pertinent here, an appointee resigned. *Id.* at 204, 207.

After determining that the successor "lawfully occupied [his] position" when he issued the sanction, the court considered whether that order would be invalid if the predecessor "had no authority to issue the Notice of Charges." *Id.* at 211, 212. The court concluded it would not for essentially the same reasons it held in *Legi-Tech* that even though the entire "lengthy, elaborate series of administrative steps involving investigation and deliberation before [the FEC] votes to bring an enforcement action in court" had been taken while the agency was unconstitutionally constituted, dismissal of that enforcement action was not required. Namely, it did so due to the subsequent actions taken by the agency with respect to the proceeding. *Id.* at 212-15. And it did so after determining it "need not go down th[e] path" of a formal ratification analysis because *Legi-Tech*'s "implicit ratification" approach was "directly on point." *Id.* at 212, 213.

Specifically, *Doolin* applied *Legi-Tech*'s holding that the degree of continuing prejudice here and now is relevant to whether dismissal is warranted, observing that this suggested a

"harmless error analysis." *Id.* at 212-13 (discussing *United States v. Mechanik*, 475 U.S. 66, 71-73 (1986) and *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) as holding that "irregularities in grand jury proceedings leading to indictment may be disregarded 'unless such errors prejudiced the defendants'"). Also, *Doolin* cited *Regnery*. Although *Regnery* was decided on the ground discussed in Section I(A) above, that court had noted that an alternative rationale "potentially could provide an adequate basis" for rejecting the constitutional challenge there as well, namely that the challenged agency actions "had been cured by" the second official's "completion of an affidavit ratifying all actions taken." 824 F.2d at 1257.

The *Doolin* court examined the OTS successor official's actions in detail, commenting that he "acted in the normal course of agency adjudication," issuing a written opinion and sanctions order "[r]ather than simply writing a letter or a memorandum adopting the Notice of Charges as his own"; that in doing so he rejected a motion to dismiss "resting on" the arguments that the agency "lacked authority to initiate" and decide the proceeding; that he "made a detached and considered judgment in deciding the merits"; and laid out a "reasoned conclusion that the Bank violated the law as the Notice of Charges had alleged." *Id.* at 205-06, 213. This was "necessarily an affirmation of the validity of the charges." *Id.* at 213. Determining that he "issued the [sanction] order after reviewing the evidence, explaining his reasons, and concluding that the Bank had violated the law," the court held that this "effectively ratified" and "had the legal consequence of ratifying" the predecessor official's act, "representing as it did an affirmation of the decision to commence an enforcement proceeding, even though" the successor official "did not formally invoke the term." *Id.* at 213, 214 & n.11. Consequently, the court rejected the challenge to the validity of the sanction order. *Id.*

So it is here. Any claimed separation of powers error already has been cured. Laccetti's alleged injury is purely theoretical. He asserts that "[w]e simply cannot know whether a Board appropriately concerned with the Commission's approval would have formally charged [him], or what the charges would have been"; that before *FEF*, the Board "could pursue whatever enforcement action they wished free from any concern that it might displease the Commission"; and that "the Board's unconstitutional structure affected these proceedings regardless of whether the Commission would have put a stop to them." Br. 10, 11, 14.

Well after the removal of the constitutional deficiency that Laccetti speculates could have affected the investigation and initiation of this case, the Board, which could have dismissed the proceeding at any time, took action that, at least as plainly as the actions that constituted acceptable remedies in *Legi-Tech, Doolin,* and *Regnery*, necessarily and powerfully affirmed the validity of the charges and the prior actions taken in the case. Specifically, the Board devoted substantial resources to *de novo* consideration of the evidentiary record and parties' arguments. It issued a final decision that closely examined the charges and defenses, exhaustively discussed and evaluated the evidence, made detailed findings of violations, carefully analyzed Laccetti's legal challenges, concluding that "this proceeding was conducted fairly and in accordance with applicable law and rules," and made thorough and in-depth sanctions determinations, stating that "[f]or violations such as those found here, the Sarbanes-Oxley Act calls on the Board to determine and impose appropriate sanctions." *See, e.g.,* R.D. 220 at 3-25, 26-30, 31-63, 74-82, 93-103. There is no dispute about the substantiality of the case on the merits. In the face of all

of this, Laccetti cannot show any prejudice warranting dismissal. His bald assertion (Br. 15) that the Board "never ratified" its prior actions is insupportable.[3/]

Given the foregoing, there is little, if anything, left of Laccetti's claim of a "structural" error for which he need show no harm, which "cannot possibly [be] sanitize[d]," and which requires dismissal. Br. 9, 13, 14. One of Laccetti's citations holds that constitutional claims can be subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 17 (1999). Even a criminal defendant who prevails on a constitutional claim not involving sufficiency of the evidence is not ordinarily entitled to dismissal of the charges, but only to retrial. *See, e.g., Lockhart v. Nelson*, 488 U.S. 33, 40 (1988).

Laccetti, arguing that a "decision to formally institute proceedings against a respondent following a Board investigation is analogous to a grand jury's decision to indict a potential defendant," stretches the analogy to a case involving racial discrimination in grand jury selection. Br. 14. His only basis for likening his situation to that one, for which criminal law cases use the word "structural" to describe a "'fundamental'" error requiring reversal of a

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3/ Laccetti makes no statute of limitations argument against implicit ratification. In *Legi-Tech*, a statute of limitations concern was raised by the FEC, but the court did not find it necessary to decide the issue. 75 F.3d at 707, 708. The Board was modeled on SROs, and was established "as a private 'nonprofit corporation'"; its members and staff "are not considered Government 'officer[s] or employee[s]' for statutory purposes." *FEF*, 561 U.S. at 484; 15 U.S.C. 7211(a), (b); *see Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013) (describing an SRO). The SEC has long held that SROs are not subject to the five-year statute of limitations in 28 U.S.C. 2462, applicable to proceedings for the enforcement of a governmental civil penalty. *See, e.g., mPhase Technologies, Inc.*, SEC Rel. No. 34-74187, 2015 WL 412910 at *11 & n.91 (Feb. 2, 2015); *Henry James Faragalli, Jr.*, SEC Rel. No. 34-37991, 1996 WL 683707 at *10 & nn. 35-36 (Nov. 26, 1996); *Larry Ira Klein*, SEC Rel. No. 34-37835, 1996 WL 597776 at *6 & n.36 (Oct. 17, 1996). In any event, no statute of limitations would prevent the Board, on any remand from the SEC, and on motion by the Division, from amending the original OIP simply to reflect the new "law" that the Board is properly accountable to the Executive under *FEF* and the new "fact" that the Board states explicit agreement with the original OIP as a charging document. *See* PCAOB Rule 5201(d)(1); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 609 (4th Cir. 1980).

conviction, is references in certain cases to a separation of powers violation as "structural in the sense that it derives from the constitutional structure." *See Landry*, 204 F.3d at 1132.

But those references were "made in the context of a standing analysis, not in the discussion of the appropriate remedy." *Legi-Tech*, 75 F.3d at 708 n.5 (discussing similar cases cited in *NRA*); *see Landry*, 204 F.3d at 1130-32 ("a chance to raise the issue"; an "assumption" about what "may" cause prejudice). And none of those cases involved "de novo review following the decision of the (arguably) unlawfully designated official." *Id.* at 1131. As discussed, *Landry* crafted a special standing exception for an extraordinary situation, not present here. Standing does not establish a violation or a remedy.

Careful attention to "the circumstances" of a claimed violation—as discussed in Section I(B) above—is essential to remedy. *Legi-Tech*, 75 F.3d at 708 n.4 ("the [agency's] actions here were only voidable, not void"). Also essential is the considerable "discretion" "employ[ed] in the selection of remedies." *Id.* at 709. In the remedies context, *Doolin* drew a far different analogy to grand jury error than Laccetti does (139 F.3d at 212), as *Landry* acknowledged without quarrel (204 F.3d at 1132).[4/] Any separation of powers error has been cured.

II. Laccetti Has No Basis for His Claimed "Right to Counsel," the PCAOB Did Not Misapply Its Rules, and Any Claimed Violation Was Remedied.

A. Laccetti has no basis for the "right to counsel" he claims.

Laccetti alleges he was deprived by the PCAOB of an unqualified right to the attendance at his investigative testimony of any non-lawyer technical consultant of his choice, which he

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4/ Laccetti tries to distinguish *Doolin* by arguing it "involved a statutory challenge subject to harmless error review under the [APA]." Br. 15. But the same could be said of *Landry*, which never made this point in discussing and distinguishing *Doolin*. 204 F.3d at 1132. *Doolin* stated that *Legi-Tech* was "directly on point" and cited *Regnery*, both constitutional-issue cases brought in court. 139 F.3d at 213-14. Indeed, the statutory and constitutional issues in *Doolin* were closely connected and concerned whether agency officials "illegally exercised authority," had "no authority" to act, and took "invalid," "void" actions. *See id.* at 206, 211, 212.

describes as a "right to counsel." Br. 15. It has long been recognized, however, that there is no right to counsel in administrative proceedings unless the Constitution or some applicable statute, rule, or regulation creates it. *E.g., Seuss v. Pugh*, 245 F. Supp. 661, 665 (D. W.Va. 1965). Laccetti now concedes that "the Sixth Amendment, which applies to 'all criminal prosecutions,' is not the source of [his] right to counsel before the Board." Br. 17 n.15. And, in the face of Supreme Court cases (R.D. 220 at 77), he has also abandoned his argument that the Fifth Amendment creates a right to counsel here, though he tries to minimize its inapplicability by briefly suggesting (via inaccurate citation to caselaw) that the right to counsel is so fundamental it somehow transcends Fifth Amendment due process norms.[5/]

All that is left to Laccetti is to argue the Board's own rules create the "right to counsel" he claims, though he also tries to raise for the first time on appeal here the entirely new (and waived) contention that he has a statutory right to counsel in a PCAOB investigation under the APA. He argues the denial of such rights violates Sarbanes-Oxley Act Section 105(a), 15 U.S.C. 7215(a), which requires the Board to establish "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms."

[5/] Specifically, Laccetti quotes *Backer v. CIR*, 275 F.2d 141, 143 (5th Cir. 1960), as holding that the "right to be 'accompanied, represented, and advised by counsel'" is "'much broader' even 'than the right to have an attorney...under the Fifth Amendment.'" Br. at 17 (alteration is Laccetti's). But *Backer* made no such statement. The court was describing an informal agency policy that purported to curtail the right to counsel described in the APA by permitting a witness in an IRS investigation only to "have an attorney present at the time of his questioning for the purpose of advising the witness relevant to his right to refuse to give any answers which might incriminate him." 275 F.2d at 143. The court went on to explain, "It is clear that the right to counsel guaranteed under the [APA] is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment." *Id.* (emphasis added). All the court was noting was that the right to counsel in the APA was broader than the agency's policy, which limited an attorney's job to advising the witness of his right to plead the Fifth.

The applicable Board rules—which were subject to a notice and comment process at both the PCAOB and the SEC and were approved by the Commission as consistent with the Sarbanes-Oxley Act—do not create the claimed absolute right. Rather, PCAOB Rule 5109(b) allows participation of a witness's counsel in an investigative examination, but that participation is expressly made subject to PCAOB Rule 5102(c)(3):

> Any person compelled to testify pursuant to a subpoena issued pursuant to Rule 5111, or who appears pursuant to an accounting board demand or request, may be accompanied, represented and advised by counsel, subject to Rule 5102(c)(3), provided, however, that the counsel provide the Board's staff with a notice of appearance that states, or states on the record at the commencement of testimony, that the counsel represents the witness. [Emphasis added.]

Rule 5102(c)(3) limits those permitted to be present during investigative testimony to "the person being examined and his or her counsel, subject to Rule 5109(b)"; "any Board member or member of the staff of the Board"; "the reporter"; and "such other persons as the Board, or the staff of the Board designated in the order of formal investigation, determine are appropriate to permit to be present, provided, however, that in no event shall a person," other than the witness, "who has been or is reasonably likely to be examined in the investigation be present."

The adopting release explained that Rule 5102(c)(3) "provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony, and we expect the staff to allow that presence in appropriate circumstances and on appropriate terms, including, for example, that the consultant not be a partner or employee of the firm with which the witness is associated." The release continued, "We expect the staff to be accommodating, but we also expect the staff to be vigilant about not permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel." PCAOB Rel. No. 2003-015 at A2–18-19. Rule 5102(c)(3)'s "provided, however" clause also reflects this

concern. The Board publicly proposed Rules 5109(b) and 5102(c)(3), along with its other rules relating to investigations and adjudications, on July 28, 2003. *See* PCAOB Rel. No. 2003-012. After considering the comments, the Board adopted the rules, *see* PCAOB Rel. No. 2013-015 (Sept. 29, 2003), and filed them with the SEC pursuant to Sarbanes-Oxley Act Section 107, 15 U.S.C. 7217, and Exchange Act Section 19(b), 15 U.S.C. 78s(b).

On May 14, 2004, the SEC approved the Board's rules, also after a notice and comment period, and, in doing so, specifically found the rules were "consistent with the requirements of the [Sarbanes-Oxley] Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors." SEC Rel. No. 34-49704 at Section IV.[6/] The Board is entitled to some deference in interpreting its rules. *See, e.g, Heath v. SEC,* 586 F.3d 122, 139 (2d Cir. 2009) (SRO); *Shultz v. SEC,* 614 F.2d 561, 571 (7th Cir. 1980) (same).

Despite all this, Laccetti contends the Board may not interpret Rule 5109(b) and Rule 5102(c)(3) to allow the exclusion from the room of any technical consultant chosen by a witness's lawyer. In so arguing, he misdescribes the rule language, tries to import into Rule

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6/ In approving the rules, the Commission specifically noted commenter concerns about Rule 5102(c)(3) and stated: "The Commission recognizes that the rules are broad in scope and that they contemplate the exercise of discretion by the PCAOB and its staff in a number of important areas. We fully expect the PCAOB and its staff to exercise this discretion in a balanced and fair-minded fashion with due regard for both the purposes of Section 105 of the Act and the legitimate concerns of the firms and individuals affected by the rules." *Id.* at Section III. That, of course, is what Board staff did with respect to Laccetti, as discussed in Section II(B) below. The approval order also noted: "The Commission also recognizes that the rules are new and undoubtedly will be revised and improved over time, as the PCAOB gains experience with their implementation. As this process continues, we would encourage the PCAOB to consider carefully the concerns expressed by commenters and others affected by the rules." *Id.* In otherwise amending its rules in certain respects in 2013, the Board declined to amend Rules 5109 or 5102, but noted it would "consider the comments on this issue, as well as all other relevant factors, in determining how the staff should continue to exercise that discretion [to permit technical consultants to attend] going forward." PCAOB Rel. No. 2013-010 at 45 (Dec. 4, 2013). The Commission approved the amendments without comment on Rules 5102 or 5109. SEC Rel. No. 34-72087 (May 2, 2014).

5109 various notions selectively abstracted from Sixth Amendment criminal cases or the APA, and simply resurrects policy disagreements publicly vetted and taken into account in the rulemaking process. In fact, there is no violation here of the Constitution, the law, or the rules, and what Laccetti claims as injury is, in fact, the regular and fair operation of the rules, according to their terms, as explained in the adopting release and approved by the SEC.

Specifically, Laccetti asserts that, to be fair, "the right to counsel" established by Board rules must follow the contours of the "right to counsel" created by the Sixth Amendment even though he acknowledges the Amendment does not apply to Board proceedings. Br. 17 & n.15. But in trying to extend Sixth Amendment principles here, he confuses and conflates two distinct forms of that right. Under the Amendment, a criminal defendant's right to counsel includes a right to his choice of counsel (*see* Br. 17, citing *Backer*, *Csapo*, and *Great Lakes*) and, separately, a right to the effective assistance of counsel (see Br. 17, citing *McMann*).[7/]

Those two concepts cannot be conflated and inflated, however, to mean that a witness enjoys an absolute right to have his attorney bring his choice of consultant into the testimony. Significantly, both constitutional right to counsel cases involving experts that Laccetti cites were Sixth Amendment ineffective assistance cases. *See* Br. 18-19 (citing *Tucker* and *Knott*). Additionally, Laccetti's tortured attempt to apply selective, purported Sixth Amendment principles to the Board's rules on investigative testimony would eviscerate Fifth Amendment due

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7/ *Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007) ("The Sixth Amendment's right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel."); *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) ("A defendant who can hire his own attorney has a different right, independent and distinct from the right to effective counsel, to be represented by the attorney of his choice.") (emphasis in original) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006)).

process precedent that squarely rejects any right to counsel in administrative investigations. *See, e.g.*, R.D. 220 at 77 & n.35; *SEC v. Meek*, 1980 WL 6690 at *1 (10th Cir. Mar. 7, 1980) (unpub.).

Equally unavailing to Laccetti is *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985), decided under the APA. The APA is not applicable to the Board because it is not a government agency. *See* R.D. 220 at 75 n.32. Although Laccetti claims that *Whitman* "was not limited to the context of the APA" (Br. 29), that was the only basis for a right to counsel in that case. Furthermore, only by omitting critical words can Laccetti assert (Br. 19) that the Board's rules on counsel participation in investigative testimony are "nearly identical" to the APA. *Whitman* characterized the APA as providing an "absolute right to counsel." 613 F. Supp. at 49. Rule 5109 creates no such "absolute right"; it is expressly subject to the limitations in Rule 5102(c)(3). The adopting release noted that *Whitman* did not bind the Board. PCAOB Rel. No. 2003-015 at A2–19 n.1. He provides no basis for a view that a body that creates a right to counsel, in circumstances where it is not required to create that right, may not qualify the right it creates. *See, e.g.*, Br. 30; R.D. 220 at 77 ("We can find no support in the law for the theory that restrictions under which the SEC may operate must pass through to organizations it oversees.").

Although Laccetti concedes the Board is "not subject to" the APA as an "agency," he now asserts, for the first time, it is subject to the APA as a "representative" of the SEC. Br. 29, citing 5 U.S.C. 555(b) ("appear in person before an agency or representative thereof"). He has waived this argument for the same reasons discussed in the final decision (R.D. 220 at 83-84) and Section III(A) herein as to other forfeited claims, for it is an affirmative defense.

Even if properly raised, there is no support for Laccetti's new theory. To the extent the SEC has approached the question, it has found SROs are not subject to Section 555(b). *See, e.g.*,

First Choice Sec. Corp., SEC Rel. No. 34-31089, 1992 WL 216697 at *4 & n.18 (Aug. 25, 1992) (citing, *e.g.*, *United States v. Bloom*, 450 F. Supp. 323, 329-30 (E.D. Pa. 1978)).

The APA does not define "representative," but the term ordinarily refers to an agent for an entity. *See Black's Law Dictionary* 75, 1494 (10th ed. 2014) (defining "representative" as "[s]omeone who stands for or acts on behalf of another" and cross-referencing "agent"; defining "agent" as "[s]omeone who is authorized to act for or in place of another; a representative"). But the Sarbanes-Oxley Act specifies that "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service." 15 U.S.C. 7211(b) (emphasis added). Because no Board member, employee, or agent can be a representative of the Commission (or any other government entity), it is nonsensical to say the Board itself is the Commission's representative.

Moreover, Section 555(b), read as a whole, indicates it governs only agency proceedings, and not proceedings under the purview of another, non-agency entity. The first sentence (the one at issue here) permits a person compelled to appear before an agency or its representative to be accompanied by a non-lawyer (called an "other qualified representative") "if permitted by the agency." The final sentence then clarifies that the "subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding" (emphasis added). The implication of the last sentence is that appearances "before an agency or representative thereof" are a subset of (if not coterminous with) appearances "before an agency or in an agency proceeding."

As the Board held, Laccetti "has no sound basis for his claim of right." R.D. 220 at 74.

B. The PCAOB did not misapply its rules.

Applying PCAOB Rules 5102 and 5109 in a manner consistent with their plain language and with the release adopting them, the Division declined to allow an accountant partner from the same firm that employed Laccetti to attend Laccetti's investigative testimony. *See* R.D. 220 at 74. This did not deprive Laccetti of the attendance of any other technical consultant. Yet, contrary to an unappealed factual finding by the hearing officer, as well as the Board's decision, Laccetti now contends that the Division refused to allow any non-lawyer technical consultant to attend, not just the individual who was specifically proposed. Br. 24, 26-27. And he asserts that in doing so the Division "acted in its own self-interest," not in a "balanced and fair-minded fashion," simply "to secure for itself tactical advantages" and that the Board "simply endorsed that action." Br. 21, 23, 24. These characterizations badly distort the facts.

As the Board stated (R.D. 220 at 76), the Division did not exclude all non-lawyer technical consultants, but instead properly responded to a particular proposal about an Ernst & Young partner, whose attendance the staff identified as inappropriate based on employment by that firm. Specifically, more than two months before Laccetti's scheduled appearance to give testimony, the outside counsel representing both Ernst & Young and its associated persons in the matter asked that "when [these] witnesses appear for testimony," PCAOB staff "permit the witness to be accompanied by a technical expert consultant" and more specifically "for that consultant to be internal to the firm." R.D. 182 at 97, 98. The letter concluded, "We ask that you approve our request to allow our witnesses to be accompanied during testimony by a technical expert consultant from E&Y's [General Counsel's Office]." *Id.* at 98. The letter had identified the intended consultant as a partner in that office, who could "provide technical

consultation regarding accounting and auditing issues" to counsel "at substantially less cost" than "an outside technical consultant." R.D. 182 at 97, 98.

A week later, the Division Director acknowledged the request for permission "to have [the named individual], an Ernst & Young ('E&Y') partner who works in the General Counsel's Office," attend testimony, with "[that individual]" "serving as a technical expert consultant." R.D. 139a at 40. The letter stated that consideration had been given to the matter but that the staff "has concluded that under PCAOB Rule 5210(c)(3)(iv)" the presence of a non-lawyer consultant "at the testimony of present and former E&Y personnel" was "not appropriate at this time," citing the rule release and elaborating that "[t]he staff's decision to exclude [the named individual] is fully consistent with the rationale set forth in that release." *Id.*

Thus, for good reason, the hearing officer found that "as a factual matter, the Division did not preclude Laccetti's counsel from having any technical consultant attend Laccetti's investigative testimony, but rather prohibited only the attendance of a specific individual, in accordance with the Board's policy as set forth [in the release]." R.D. 197 at 88. Laccetti took no exception to the adverse factual finding in his appeal to the Board (R.D. 199 at 17-19; R.D. 204 at 12-16; R.D. 210 at 23), even though it related to his affirmative defense and the Division addressed it in its brief (R.D. 205 at 51-53). He may not challenge it now. *See* PCAOB Rule 5460(a) (petitions for Board review must "set[] forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception") & (d) (review limited to "the issues specified in the petition for review" unless, with notice, Board broadens review); *see also, e.g., Mayer A. Amsel,* SEC Rel. No. 34-37092, 1996 WL 169430 at *5 (Apr. 10, 1996) (arguments deemed waived when raised for first time on appeal); Section III(A) herein. And to do so would be futile, as shown above.

Furthermore, Laccetti has pointed to no evidence in the record—even after enlarging it in this appeal—and we have found none, showing that he proposed the attendance of a different expert. Nor does he claim he was prevented from consulting with an expert in preparing for the examination, which lasted several days, or during breaks. Indeed, the Division's letter noted that "we have provided ample notice of, and time to prepare for, the scheduled testimony," that "[n]othing prevents a witness and counsel from consulting with technical experts before or after his testimony," and that "after the testimony, if a witness believes that his testimony should be clarified or corrected," the Division "is amenable to reasonable requests to resume the testimony for that purpose if necessary." R.D. 139a at 40. He gave his testimony without an expert present. This certainly did not mean, however, that "assistance from a technical expert" was "absent." Br. 18. Laccetti's sweeping statement that without such assistance in the testimony room a non-accountant attorney "cannot provide meaningful representation" is utterly conclusory. According to *Whitman*, those "occasions when a technical adviser is deemed by the witness' attorney to be essential" will be "limited." 613 F. Supp. at 50.

Laccetti further argues that the Division misapplied the rules because it could not have acted for the reason it said it did. Br. 24-27. Any concerns expressed in the release about the attendance of non-lawyers from the witness's firm were "not applicable," he says, because "E&Y's internal and external counsel attended the investigative testimony" of all firm personnel who testified. Br. 26. But outside counsel's letter told the Division that the witnesses were "represented by my firm and by E&Y's General Counsel's Office": "All the witnesses relevant to this request will be represented during testimony by the firm's internal and external lawyers." R.D. 182 at 97-98. This means that under Rules 5102(c)(3) and 5109(b), those attorneys were "permitted to be present" because they were "counsel" of "the person being examined."

This hardly means, however, that in applying a rule titled "Right to Counsel" and in being attentive to a matter of concern to the fact-gathering function of an investigation, the Division had to forfeit any discretion to address that matter and had to throw the doors open wide to non-lawyers. The release gave this example of the "appropriate circumstances" and "appropriate terms" for the staff to permit a non-lawyer technical consultant to be present: when the consultant was "not [ ] a partner or employee of the firm with which the witness is associated." And it stated that vigilance should be exercised about "not permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel." Sitting in creates an occasion where a witness's testimony could be influenced based on other witnesses' accounts, a witness's account could be obtained and influence others' later testimony, a road map of the investigation could be obtained and influence other testimony, and a witness could be influenced through a high-level accountant's presence, such as a main-office partner, with the witnesses' employer. These are hardly trivial[8/] or aberrational[9/] concerns.

8/ *See, e.g., Brooks v. Tennessee*, 406 U.S. 605, 607 (1972) (referring to "ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case") (citing 6 J. Wigmore, Evidence § 1837 (3d ed. 1940)); *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996) (tracing history of witness sequestration to "biblical times" and noting "its important role in reaching the truth"); Andrew W. Bogue, *Discovery: A Judge's Perspective*, 33 S.D. L. REV. 199, 201 (1987/88) ("It has long been the practice in many areas that non-parties may be excluded from the deposition."); Fed.R.Civ.Proc. 26(c) (permitting courts to issue protective order during the civil discovery process "designating the persons who may be present while the discovery is conducted").

9/ *See* 12 C.F.R. 747.807(b) & (c)(2); 56 Fed. Reg. 37,762-01 (Aug. 8, 1991) (National Credit Union Administration rule generally permitting only the witness and counsel to be present; requiring sequestration of all witnesses; and allowing that in some circumstances, "it may be appropriate that a technical expert (such as an accountant) accompany the witness and his or her counsel in order to assist counsel in understanding technical issues" but stating, "These circumstances should be rare, are left to the discretion of the officer conducting the investigation, and shall not in any event be allowed to serve as a ruse to coordinate testimony between witnesses, to oversee or supervise the testimony of any witnesses, or otherwise defeat the

Applying the Board's rules relating to right to counsel in a manner that leaves room to differentiate lawyers from non-lawyers to incrementally advance important goals does not render their application "unfair" or "erroneous" (Br. 27, 31). The presence of a senior in-house accountant monitoring the case could encourage the witness to echo the firm's views and version of events, or to avoid saying something that might create exposure for the firm or endanger a job. *See generally Adams v. Shell Oil Refinery,* 136 F.R.D 615, 617 (E.D. La. 1991) (excluding corporate representative from attending deposition of employee for fear that latter "might not testify as fully as he would otherwise" but allowing representative to be available outside the deposition room and "assist counsel during breaks"). That problem is more likely to arise when an in-house accountant, compared to an in-house lawyer, attends testimony. An accountant working for the firm is more "reasonably likely to be examined in the investigation" (Rule 5102(c)) than a lawyer, and any accountant could have been, or could become, within the chain of command of an accountant-witness in ways a lawyer most likely could not. *See Monroe v. Sisters of Saint Francis Health Servs., Inc.*, 2010 WL 4876743 at *3 (N.D. Ind. Nov. 23, 2010) (excluding supervisor at deposition because of intimidating influence on former employee's testimony). And ethical obligations against coaching witnesses directly bind attorneys—but not accountants or other professionals—in ways that help preserve the integrity of the investigation and subsequent adjudication. *See* Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389 (1987) ("The attorney's duty as an officer of the court...prohibits him from

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beneficial effects of the witness sequestration rule."); 12 C.F.R. 1080.7(c), 77 Fed. Reg. 39,101 (June 29, 2012) (CFPB rules limiting attendance, in pertinent respect, "[a]t the discretion of the...investigator, and with the consent of the person being examined"); *see also* 17 C.F.R. 11.8(a) (CFTC sequestration rule); 18 C.F.R. 1b.16(b) (FERC).

'seeking improperly to influence [a witness' testimony].'") (quoting *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976)).

Indeed, exercise of control over the procedures in the conduct of an investigation to further the integrity and efficacy of fact-gathering is not "an unworkable conflict of interest" (Br. 24). It is a time-honored and necessary part of the process. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-43 (1940) (agencies "have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest" and "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"); *see also Hannah v. Larche*, 363 U.S. 420, 445-46 (1960) (when agencies are "conducting nonadjudicative, fact-finding investigations, [due process] rights such as apprisal, confrontation, and cross-examination generally do not obtain"); *Kennecott Copper Co. v. EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972) ("We are keenly aware of the need to avoid procedural straitjackets that would seriously hinder this new agency in the discharge of the novel, sensitive and formidable, tasks entrusted to it by Congress."); *Angov v. Holder*, 736 F.3d 1263, 1280 (9th Cir. 2013) (presumption of regularity applies to trained agency investigators); R.D. 220 at 77.

Laccetti's charge that the Division's application of the rules was "arbitrary and capricious" is based on his faulty characterization of his "right to counsel" and of the Division's action. Br. 20, 24-26. His charge that the Division applied the rules to perpetrate an "inequality" or "obtain a tactical advantage" (Br. 20, 21) is also misplaced. It is based simply on the fact that when the Division lawyers, who, unlike a witness's own counsel, do not have ready access to the witness, had the relatively limited opportunity of an investigative interview to question the audit

firm partner who led the audit in question and who was represented by a team of lawyers, about what he understood and did at the time of the audit, the staff lawyers were accompanied by staff auditors. Br. 18, 20, 25-26. The Division did not misapply the rules.

C. Any alleged harm has been remedied.

Several times, the Board made clear in its decision that "we do not rely on [Laccetti's] investigative testimony in deciding this case." R.D. 220 at 2 n.1, 74. Laccetti offers no valid reason why refraining from relying on his investigative testimony and relying exclusively on "other (and ample) record evidence" in adjudicating the case, on *de novo* review, would not serve as a fully sufficient remedy for the claimed right to counsel violation. *See* R.D. 220 at 74, 76 & nn.33, 34 (citing cases); *see also, e.g., United States v. Morrison*, 449 U.S. 361, 364-65 (1981); *Kuretski*, 755 F.3d. at 946. This is all the more true because "[a]ny prejudice Laccetti claims to have suffered could fairly be attributed to his own decision not to seek out another expert in the two months before his scheduled examination." R.D. 220 at 76.

Laccetti does not address the court cases cited by the final decision and the many cases in which the Commission has held that an alleged error, such as bias, selective prosecution, or investigative or prosecutorial misconduct, in an earlier stage does not taint a later decision in the matter if there is no evidence that it factored into that decision and there is sufficient evidence supporting the decision.[10/] Against the weight of this precedent, Laccetti merely (and newly)

10/ *See, e.g., Richard G. Cody*, SEC Rel. No. 34-64565, 2011 WL 2098202 at *19 (May 27, 2011) (*de novo* review "cures whatever bias, if any, that may have existed [below]"), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *mPhase*, 2015 WL 412910 at *8; *Robert Tretiak*, SEC Rel. No. 34-47534, 2003 WL 1339182 at *10 (Mar. 19, 2003) *Frank J. Custable*, SEC Rel. No. 34-33324, 1993 WL 522322 at *6 (Dec. 10, 1993); *Stephen Russell Boadt*, SEC Rel. No. 34-32095, 1993 WL 365355 at *2 (Sept. 15, 1993) (citing *Dillon Sec., Inc.*, SEC Rel. No. 34-31573, 1992 WL 383783 at *7 n.29 (Dec. 8, 1992) (collecting cases)).

asserts that "the denial of the right to counsel is a structural error that does not require a showing of harm" (Br. 27).

But this mistakenly assumes that his claimed right to a counsel with unfettered discretion to choose whichever consultant he wishes to accompany him into the testimony room derives from, and a denial of it must be analyzed under, a line of cases involving a criminal defendant's fundamental Sixth Amendment right to his choice of counsel (identity of the counsel) rather than effective assistance of counsel (performance of the counsel). *Compare, e.g., Gonzalez-Lopez*, 548 U.S. at 150 (cited at Br. 27) *with Strickland v. Washington*, 466 U.S. 668, 694 (1984) (cited in R.D. 220 at 76); *see Gonzalez-Lopez*, 548 U.S. at 150 (there is a "requirement of showing prejudice" in effective assistance of counsel claims by contrast to "choice-of-counsel" claims). Laccetti offers no explanation for why his counsel's attendance at investigative testimony with a consultant other than the proposed firm partner would be such a "structural error" or why the Board's *de novo* decision that made no use of that testimony, along with the opportunity he had, but did not take, to have the Commission review the Board's findings of violations *de novo*, does not "dissipate[ ] even the possibility of unfairness." *Custable*, 1993 WL 522322 at *6.

Furthermore, contrary to Laccetti's contention, the Board's holding about lack of harm is not "factually erroneous." Br. 27. Prior to the Board's decision, the only particularized harm Laccetti claimed to have suffered from the exclusion of the other Ernst & Young accountant from the room was, as the Board noted (R.D. 220 at 74), the alleged use of that testimony against him in the disciplinary proceeding. *See* R.D. 210 at 23. Although he now purports to give four new reasons why he was harmed (Br. 28), the first and third (that he was charged following the investigation) are redundant and so general as to merely restate his faulty structural error theory.

The second reason is based entirely on Laccetti's new Exhibit E, a 12-page letter from the Division to his counsel stating an intention to recommend the Board commence a disciplinary proceeding against him. Without analysis, Laccetti points to six propositions, supported by seven citations to his investigative testimony, out of a total of more than 40 citations in the letter's footnotes, as his only support for his claim that his investigative testimony "featured prominently as information in support of the Division's allegations." Br. 3 & n.5, 28 & n.20.

Generally, in belatedly proffering "certain" selective materials "related to the investigatory process" as his new exhibits, Laccetti made no pretense of reconstructing a complete "investigative record" relevant to the topics for which he uses the materials, or providing any analysis of particular detailed evidence, from which a historically accurate and fair conclusion might be drawn about the process and how "prominent[ ]" his investigative testimony actually was in it. In particular, he nowhere discusses that the six propositions are readily supported by other evidence from the investigation, such as the audit work papers, *see, e.g.*, Exs. J-29 at 6, 8, D-72 at 6, & L-1 at 3, 6, R.D. 168 at 119 (citations), Ex. E at 7-8 & n.27, 8 & n.30; investigative testimony of other witnesses, such as Laccetti's subordinate on the 2004 audit, *see, e.g.*, Ex. D-303 at 53-54, 57-58, 105, Ex. E at 8 & n.30, 10 & n.38; or, as with some other propositions in the letter, by the audit standards themselves, *see, e.g.*, Ex. E at 5 & n.16, 7-8 & n.27, 9-10 & n.37. Furthermore, Laccetti testified to the same points at the hearing, he admitted them in his answer, and they are established by documentary evidence. *See, e.g.*, R.D. 10 at 7 ¶ 45; R.D. 135 at 265, 275-77, 283-84, 286, 318-20, 366, 383-84, 388; R.D. 139a at 952-53.

Finally, the fourth reason Laccetti contends he was harmed is incorrect. He erroneously claims (Br. 28) to have found one "instance" in the 103-page, densely annotated Board decision that cited his investigative testimony. At issue are two pages of his hearing testimony cited on

page 10 of the decision, along with several other pages of that testimony and a letter, for a proposition that makes clear why his brief is wrong: "Indeed, on January 26, 2005, Laccetti had reviewed and included in the audit work papers a December 17, 2004 letter to SEC staff from Taro USA's parent company which stressed subjectivity in the estimates of accounts receivable allowances and indicated limitations on access to information about the wholesale customers' inventory levels." Of the two cited pages referred to by the brief, the first confirms Laccetti had read the letter. The questioning in that line is then interrupted by a very different inquiry ("And at the time you read it, you were not aware of what management did to assess whether its accruals and reserves were, in fact, historically adequate; is that correct?"), followed by Laccetti's disagreement with that question, and the reading by the Division attorney to him of part of his investigative testimony. Then the second cited page returned to the line of questioning, without any reference to investigative testimony, for which the Board cited the page, on which Laccetti was asked whether the letter "was included in the 2004 work papers" and he answered, "Yes, it was." R.D. 135 at 266-67.

Thus, regardless of whether, contrary to the Board's decision, Laccetti's claimed "right to counsel" were valid and violated, any alleged harm has been remedied.

III. Laccetti's Oath and Commission Clause Arguments Are Forfeited and Meritless.

Laccetti's brief raises for the first time a new affirmative defense, alleging that Board members never took an oath or received a commission and so the Board's actions are unconstitutional. This defense is waived. In any event, neither act is a prerequisite for taking office. Even if one were, the Board's actions are valid under the *de facto* officer doctrine.

A. Laccetti forfeited these arguments by failing to raise them below.

Having failed to raise his Oath and Commission Clause arguments before the PCAOB, Laccetti has forfeited them. First, he failed to raise them as affirmative defenses in his answer to the OIP, as required by PCAOB Rule 5421(c). It is just as the Board held he failed to do with another, now-abandoned defense. *See* R.D. 220 at 83-84; *see, e.g., Laurie Jones Canady*, SEC Rel. No. 34-41250, 1999 WL 183600 at *12 (June 2, 1998), *aff'd* 230 F.3d 362, 365 (D.C. Cir. 2000); *Russell Ponce*, SEC Rel. No. 34-43235, 2000 WL 1232986 at *11 & nn.53-54 (Aug. 31, 2000), *aff'd* 345 F.3d 722 (9th Cir. 2003).

Second, Laccetti failed to comply with the exhaustion requirement. "The Commission has frequently applied an exhaustion requirement in its review of disciplinary actions by SROs." *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) (collecting cases). Parties "must fully exhaust the remedies made available by those organizations before seeking Commission review." *Id.* That requirement "promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review." *Id.* That practice is especially relevant here given that Congress consciously modeled the PCAOB on SROs. *See FEF*, 561 U.S. at 484.

These purposes support forfeiture here. Laccetti's actions prevented the development of a record relevant to his claims. And had he raised the alleged technical defects in a timely manner, the Board and Executive Branch could have considered them and taken any necessary action.

This case bears no resemblance to *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991), in which the Supreme Court refused to apply forfeiture principles to a fundamental separation of powers challenge that would have required an Act of Congress to address. Laccetti's objections

go at most to technical incidents that, if timely raised, could have been considered and, to the extent necessary, addressed. He should not be allowed to object for the first time now.

B. Laccetti's arguments fail on the merits.

1. An oath is not a prerequisite to assuming office.

Although Article VI directs that "all executive and judicial Officers...shall be bound by Oath or Affirmation, to support this Constitution," nothing in that text mandates that officers swear that oath before assuming office, or conditions their authority to act on having done so. By contrast, Article II expressly states that the President must swear an oath "[b]efore he enter[s] on the Execution of his Office." U.S. Const. art. II, § 1, cl. 8 (emphasis added).

Indeed, the First Congress allowed certain officers to take an oath up to one month after assuming office. Act of June 1, 1789, § 3, 1 Stat. 23, 23-24 (1789). Similarly, in *Vaccari v. Maxwell*, 28 F. Cas. 862 (C.C.S.D.N.Y. 1855) (No. 16,810), the court stated that oath requirements "have not been regarded by the courts as conditions precedent to [an officer's] rightful authorization." *Id.* at 865. More recently, the Office of Legal Counsel has opined that, although officers " 'are usually required by law to take the oath of office,' doing so 'is not an indispensable criterion and the office may exist without it, for . . . the oath is a mere incident and constitutes no part of the office.' " Office of Legal Counsel, *Officers of the United States within the Meaning of the Appointments Clause*, 2007 WL 1405459 at *36 (Apr. 16, 2007) (quoting 1 Floyd R. Mechem, *The Law of Public Offices and Officers* § 6 (1890)) (emphasis added).

Laccetti relies on a concurring opinion in a case in which these issues were not before the Court. Concurring in *DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234-35 (2015), Justice Alito posited "good reason to think" an oath was required, but allowed that "[p]erhaps there is an answer." *Id.* at 1235. While some authorities have suggested officers should take an oath before assuming office, *see, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 131-32 (1966), none directly considered

whether not doing so would incapacitate the officer from exercising any powers of that office. Thus, in no event would Board member actions be called into question. Indeed, Justice Alito's concern was accountability to the public, and *FEF* addresses this extensively. *E.g.*, 561 U.S. at 497-98.

2. A commission is not necessary to assume office.

Nor is a presidential commission a prerequisite. The Commission Clause states that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. But that language merely obligates the President to issue a commission. It does not suggest that his failure to do so invalidates the appointment or disables the appointee from acting.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), made clear that an officer's appointment is complete when the appointing official takes the last open, unequivocal act necessary to evidence the appointment. *Id.* at 157; *see* 1 Mechem, *supra*, § 114. The signing of a commission can serve as the last act, but it is not required: "[I]f an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer" and would "enable him to perform the duties without [the commission]." *Marbury*, 5 U.S. (1 Cranch) at 156; *see also Dysart v. United States*, 369 F.3d 1303, 1312 (Fed. Cir. 2004) (holding that a "certificate of appointment"—the "formal document most like a commission for promoted naval officers"—was "not required" to complete an appointment); *Nat'l Treasury Emps. Union v. Reagan*, 663 F.2d 239, 245-46 & nn.8-9 (D.C. Cir. 1981); *Hazlett v. Dep't of Def.*, 873 F.2d 1452 (Fed. Cir. 1989).

It is therefore well settled that a commission is not itself an appointment, but merely "conclusive evidence" of such. *Marbury*, 5 U.S. (1 Cranch) at 157; *see also Bennet v. United*

States, 19 Ct. Cl. 379, 385 (1884) (affirming appointment even though commission issued two years later); 1 Mechem, *supra*, § 117. As the Office of Legal Counsel explained:

> [A]lthough the holder of an office usually receives a commission, that characteristic too, like an oath or pay, is incidental rather than essential. . . . That a person has a commission may no doubt provide evidence that he holds an office. . . . But it does not follow that a person not commissioned does not hold an office, or, conversely, that only officers have commissions.

2007 WL 1405459 at *38 (emphasis added).

Accordingly, what matters to the validity of Board members' appointments is that the SEC took some "action that reveal[ed] [its] awareness [it was] making an appointment." *Watts v. Office of Personnel Mgmt.*, 814 F.2d 1576, 1580 (Fed. Cir. 1987). The SEC clearly did that here—for example, by issuing press releases announcing the appointments. *See, e.g.*, SEC Press Release, *Steven Harris and Jay Hanson Reappointed to PCAOB* (Mar. 1, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513036. Those SEC appointments, not presidential commissions, are what authorized the Board members to act.

C. The Board's actions are valid under the *de facto* officer doctrine.

Even if oaths and commissions were necessary, the alleged absence of those technical requirements would not invalidate the Board's actions in this case. "'[W]here there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.'" *NRA*, 6 F.3d at 828.

Courts have repeatedly applied the *de facto* officer doctrine to uphold an officer's actions in the absence of an oath. For example, the Second Circuit recently held that, "even if the oaths taken by the identified public officials were defective..., those officials' actions are valid under the *de facto* officer doctrine." *Maunsell v. WCAX TV*, 477 F. Appx. 845, 845 (2d Cir. 2012); *see also Maunsell v. Johnson*, 100 F. Appx. 47, 49 (2d Cir. 2004). The Supreme Court upheld the actions of a deputy marshal even though the clerk who administered his oath was not authorized

to do so. *See Wright v. United States*, 158 U.S. 232, 238-39 (1895). Other cases reach similar results.[11/] Courts have likewise stated that "defects in a law officer's commission do[] not render his acts unlawful." *Turley v. United States*, 503 F. Supp. 2d 912, 916 (N.D. Ohio 2007).

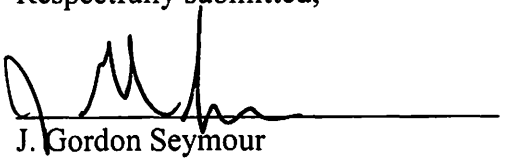
Thus, even if Board members were required to, but did not, take an oath and receive a commission, their acts are nevertheless valid.

CONCLUSION

Accordingly, the Commission should sustain, and in no event dismiss without remand, the Board's order imposing sanctions that Laccetti does not contest are currently necessary to protect investors and further the public interest.

Dated: June 15, 2015

Respectfully submitted,



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11/ *See, e.g., De Jan v. De Jan*, 18 F.2d 690, 691 (5th Cir. 1927); *Vaccari*, 28 F. Cas. at 865; *Rice v. Wayne Cnty. Treasurer*, No. 13-cv-12456, 2013 WL 5913685 at *9 (E.D. Mich. Nov. 1, 2013); *In re Keenan*, Civ. No. 07CV451, 2008 WL 878913 at *7 (S.D. Cal. Mar. 28, 2008); *United States v. Nye*, No. CR-01-82, 2005 WL 1806419 at *7 (D. Idaho July 28, 2005); *cf. United States v. Moore*, 968 F.2d 216, 223 (2d Cir. 1992) (defective oath for search warrant does not require exclusion of evidence).

CERTIFICATION OF COMPLIANCE WITH RULE 450(c)

I, Jodie J. Young, certify that the foregoing Public Company Accounting Oversight Board's Opposition to Laccetti's Application for Commission Review complies with the word count limitations set forth in Rule 450(c) of the Commission's Rules of Practice, 17 C.F.R. 201.450(c), and that the foregoing brief contains 13,990 words, exclusive of pages containing the Table of Contents and Table of Authorities, as counted by the Word Count feature of our Microsoft Word word-processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of June 2015, I caused to be sent to Lawrence J. Zweifach and Darcy C. Harris (via Federal Express, with courtesy copy by electronic mail to DHarris@gibsondunn.com) and to Michael J. Scanlon and Jacob T. Spencer (via hand delivery) copies of "Public Company Accounting Oversight Board's Opposition to Laccetti's Application for Commission Review" (the original and three copies of which were filed via hand delivery with the Office of the Secretary today) addressed as follows:

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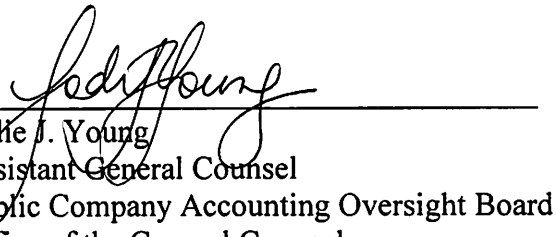
Mr. Zweifach and Ms. Harris are being served via Federal Express, with courtesy copy by electronic mail, rather than by hand delivery, because they are located in New York.



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