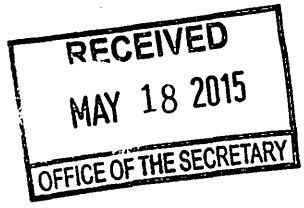
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-16430

In the Matter of the Application of

MARK E. LACCETTI

For Review of Action Taken by PCAOB



BRIEF OF MARK E. LACCETTI IN SUPPORT OF HIS APPLICATION FOR COMMISSION REVIEW

May 15, 2015

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PRELIMINARY STATEMENT

Mark Laccetti was subjected to sanctions by the Public Company Accounting Oversight Board ("PCAOB" or "Board") based on unfair proceedings that deprived him of his right to counsel and that were conducted under an unconstitutional framework. In the Sarbanes-Oxley Act of 2002, Congress created the PCAOB and granted it the authority of the United States to oversee the complex and specialized public company accounting profession. The Board is tasked with regulating this highly technical industry, and it has the power to initiate investigations regarding potential wrongdoing, including demanding the production of documents and taking investigative testimony. Because of the subject matter, these investigations are necessarily complex and wide-ranging. Mr. Laccetti's investigative testimony, for example, covered multiple years of audits and reviews for a large multinational pharmaceutical corporation, and involved many complicated accounting and auditing issues.

The Board's findings and sanctions in this case resulted from multiple errors. *First*, when it established the PCAOB, Congress violated the Constitution by assigning executive power to the Board without sufficient executive oversight, accountability, or allegiance. The Board's impermissible structure allowed it to conduct investigations and initiate disciplinary proceedings shielded from appropriate scrutiny. In this case, the Board investigated Mr. Laccetti, took his investigative testimony, and initiated disciplinary proceedings against him, all under an unconstitutional framework and all of which led directly to the imposition of sanctions on him.

Second, at the same time that Congress created the Board, it directed the Board to establish fair procedures to govern its operations and proceedings, including Board investigations. Among the rights provided by the Board in its rules is the right to counsel. Nonetheless, the Board's Division of Enforcement and Investigations ("Division") refused to permit a technical expert consultant to assist Mr. Laccetti's counsel during his investigative

testimony. During such wide-ranging, complex, and specialized investigations, counsel must be able to consult with an accounting and auditing expert in order to make the right to counsel meaningful. The exclusion of Mr. Laccetti's technical expert consultant thus violated his right to counsel.

Although Mr. Laccetti was subjected to unfair procedures by an unconstitutional regulatory organization, the Board has refused to afford him any remedy. The unconstitutional structure of the Board and the violation of Mr. Laccetti's right to counsel each independently requires reversal and dismissal. Accordingly, the Board's Final Decision and Order Imposing Sanctions should be reversed and the Commission should dismiss these proceedings.

PROCEDURAL HISTORY

On June 29, 2007, the Division began investigating the audits and reviews of the financial statements of Taro Pharmaceutical Industries Ltd. ("Taro"), an Israeli public company, pursuant to an Order of Formal Investigation issued by the Board.[1] Those audits and reviews were performed by Ernst & Young's Israeli network firm, Kost Forer Gabbay & Kasierer, with Ernst & Young LLP ("E&Y"), the U.S. network firm, performing audit work on Taro's U.S.-based subsidiary, Taro Pharmaceutical U.S.A., Inc. ("Taro USA"). Mr. Laccetti was the engagement partner for E&Y's 2004 audit of Taro USA's financial information, and had also been involved with the 2003 audit of Taro USA as the E&Y team's senior manager.

The Division investigated for more than a year, and required Mr. Laccetti to testify. Following the investigation, on July 29, 2008, the Division notified Mr. Laccetti's counsel that it "intend[ed] to recommend that the Board commence a disciplinary proceeding to determine whether your client, Mark E. Laccetti, . . . violated certain laws, rules, or professional standards

[1] *See* Ex. A to Motion and Supporting Brief for Submission of Additional Evidence, filed contemporaneously with this brief ("Rule 452 Motion").

within the Board's jurisdiction," and advised that Mr. Laccetti had the option to submit a written statement of position to the Division pursuant to PCAOB Rule 5109(d).[2] The Division also noted that, should Mr. Laccetti choose to submit a written statement, he "should consider addressing with specificity the allegations described below."[3] The letter then stated, "[t]he Division intends to recommend commencement of a disciplinary proceeding based principally on the following allegations."[4] Mr. Laccetti's investigative testimony featured prominently as information in support of the Division's allegations.[5] Thereafter, the Division recommended that the Board commence a disciplinary proceeding against Mr. Laccetti.

On October 20, 2009, the Board issued an Order Instituting Disciplinary Proceedings pursuant to Section 105(c) of the Sarbanes-Oxley Act of 2002 and PCAOB Rule 5200(a)(1) against Mr. Laccetti and another individual. *See* Index for the Record on Review, Record Document ("R.D.") 1. In his Answer to the Order, Mr. Laccetti asserted as an affirmative defense that "[t]he PCAOB did not permit a technical expert consultant to attend Mr. Laccetti's initial testimony by the Staff, violating Mr. Laccetti's rights to counsel and to due process of law." R.D. 10 at 11. Mr. Laccetti also asserted, as another affirmative defense, that "[t]he proceedings against Mr. Laccetti are invalid because the establishment and structure of the PCAOB violates the U.S. Constitution." *Id.* at 13.

Mr. Laccetti's disciplinary hearing began on June 28, 2010. R.D. 134. That same day, the Supreme Court of the United States held that the Board was unconstitutional. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492, 496 (2010) ("*FEF*"). After a nine-day hearing in

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[2] Ex. E to Rule 452 Motion, at 1.

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.* at 7-10.

June and July 2010, the Hearing Officer issued an initial decision on April 20, 2011. Mr. Laccetti and the Division both petitioned for Board review of the Hearing Officer's initial decision. On January 26, 2015, nearly four years later—and nearly eight years after the investigation commenced—the Board issued its Final Decision and Order Imposing Sanctions (the "Decision").

Mr. Laccetti applied for Commission review of the Board's Decision on March 12, 2015.

FACTUAL BACKGROUND

As part of the Division's formal investigation of the audits and reviews of Taro's financial statements, the Division issued on July 27, 2007, an Accounting Board Demand to Mr. Laccetti, requiring him to produce documents and appear for sworn testimony in December 2007.[6] By letter dated September 20, 2007, Mr. Laccetti's counsel requested that an expert accounting consultant be allowed to attend and assist counsel at the investigative testimony of Mr. Laccetti and the other E&Y personnel who had received Accounting Board Demands. R.D. 182, at 96-99. As explained in Mr. Laccetti's counsel's letter, the expert consultant that counsel "had in mind" was an E&Y partner who worked in the firm's general counsel's office. *Id.* at 97.

The Division's Director, Claudius B. Modesti, denied the request by Mr. Laccetti's counsel in a letter dated September 26, 2007, stating that "the presence of a technical expert consultant at the testimony sessions of present and former E&Y personnel in the above-referenced formal investigation is not appropriate at this time." R.D. 180b at 2. The Division's ostensible reason for excluding Mr. Laccetti's expert consultant was PCAOB Rule 5102(c)(3)(iv) and the rationale set forth in PCAOB Release No. 2003-015. *Id.* PCAOB Rule 5102(c)(3)(iv) limits those who may attend investigative testimony to those whom the Division deems

[6] *See* Ex. B to Rule 452 Motion.

"appropriate to permit to be present." The Release, which contains a section-by-section analysis from the Board regarding its rules relating to investigations and adjudications, notes that the Board expects the Division to accommodate requests for technical expert consultants to assist counsel. It also cautions the Division "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 Release No. 2003-015 at A-2-18–19.

The Director's letter then stated that the Division had "provided ample notice of, and time to prepare for, the scheduled testimony." R.D. 180b at 2. The letter further stated, "[n]othing prevents a witness and counsel from consulting with technical experts before or after his testimony." *Id.* Moreover, if after testifying "a witness believes that his testimony should be clarified or corrected (whether on the basis of consultation with technical experts or otherwise)," the staff "is amenable to reasonable requests to resume the testimony for that purpose if necessary." *Id.* Thereafter, Mr. Laccetti provided four days of sworn investigative testimony on November 29, November 30, December 6, and December 7, 2007.[7]

During his investigative testimony, Mr. Laccetti was represented by counsel from the law firm Latham & Watkins LLP ("L&W").[8] During the investigative phase, the same firm also represented E&Y and the other E&Y personnel under investigation by the Division, and their lawyers were at the investigative testimony of each E&Y employee.[9] E&Y's in-house counsel

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[7] *See* Ex. C to Rule 452 Motion; *see also* R.D. 197 at 10 ("As is typically the case, the investigative testimony was developed almost exclusively by the Division.").

[8] *See* R.D. 137 at 508 (Laccetti represented by two L&W attorneys at his investigative testimony); Ex. C-1 to Rule 452 Motion, at 2-3 (L&W attorneys present during Mr. Laccetti's investigative testimony as counsel for Mr. Laccetti and E&Y).

[9] *See* D-303 at 2-3; L-180 at 3-4; Ex. D to Rule 452 Motion, at 2-3.

was also present at the testimony of all E&Y personnel.[10]

The Division's questioning of Mr. Laccetti covered two years of audits and reviews for Taro, a large pharmaceutical company, and its subsidiary Taro USA, and involved many complex accounting and auditing issues.[11] The Division's enforcement attorneys were assisted by two of the Division's accountants, who were present at the testimony: Marion E. Koenigs (Associate Director) and Kristin Van Fossen (Manager, Accounting).[12] Not only did they actively assist the Division's enforcement attorneys, the Division's accountants questioned Mr. Laccetti directly and extensively.[13] In contrast, no technical expert consultant was present to assist Mr. Laccetti's counsel.

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[10] The investigative testimony designations for E&Y personnel note that an Assistant General Counsel of E&Y was present during such testimony. *See* D-303 at 2-3; L-180 at 3-4; Ex. C-1 to Rule 452 Motion, at 2-3; Ex. D to Rule 452 Motion, at 3, 8-9.

[11] *See* R.D. 139a at 939-43 (in preparing for investigative testimony, Mr. Laccetti reviewed a "significant[]" volume of audit workpapers "for two years of audits," as well as "many other things"); R.D. 197 at 40 (during 2004 audit, E&Y engagement team "identified and did extensive work to address technical issues regarding a complex licensing agreement, tax issues, and a barter transaction," as well as "focus[ing] a good deal of attention on its assessment of Taro USA's accounts receivable reserves."); R.D. 197 at 38 (E&Y engagement team identified failure to adequately monitor inventory and ineffective controls over computer system as material weaknesses communicated to the company during 2004 Taro USA audit); *see generally* Ex. C to Rule 452 Motion.

[12] Ex. C-1 to Rule 452 Motion, at 2. *See also* http://pcaobus.org/About/Staff/Pages/MarionEKoenigs.aspx (PCAOB senior staff page for Ms. Koenigs). The Division's experts were also present during the investigative testimony of the other E&Y individuals. *See, e.g.*, D-303 at 2; L-180 at 3; Ex. D to Rule 452 Motion, at 2.

[13] Exs. C-1, C-2, C-3, and C-4 to Rule 452 Motion. *See, e.g.*, C-1 at 87-88 (Ms. Koenigs questioning Mr. Laccetti regarding whether chargebacks "would be more appropriately classified as a liability or reserve as opposed to a reduction in accounts receivable."); C-1 at 173 (Ms. Van Fossen questioning Mr. Laccetti regarding "what the charge-back line item in this roll forward means on page 3527?"); C-1 at 194-203 (Ms. Koenigs and Ms. Van Fossen questioning Mr. Laccetti regarding a 621-page exhibit of audit workpapers.); C-2 at 372 (Ms. Van Fossen questioning Mr. Laccetti regarding whether "debiting reserve would increase reserve?"); C-2 at 501-04 (Ms. Koenigs questioning Mr. Laccetti regarding how Taro USA "calculated its reductions or its adjustments to gross sales."); C-2 at 563-66

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ARGUMENT

I. The PCAOB's Unconstitutional Structure Requires That These Proceedings Be Dismissed.

A. The Board's Structure Was Unconstitutional When It Investigated And Initiated Proceedings Against Mr. Laccetti.

"Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary." *FEF*, 561 U.S. at 478-79. But Sarbanes-Oxley shielded the Board's members from accountability by making them removable only for good cause, and not by the President, but by the Commission, whose members are themselves removable only for good cause. *See id.* at 495. On June 28, 2010, the Supreme Court declared unconstitutional this grant of "executive power without the Executive's oversight," and severed the Act's removal restrictions. *Id.* at 498, 509.

It is indisputable that, before *FEF* cured the Board's unconstitutional structure, the Board impermissibly wielded executive power without executive oversight. The Supreme Court's decision came on the same day that Mr. Laccetti's disciplinary hearing began—June 28, 2010.

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(Ms. Van Fossen questioning Mr. Laccetti regarding "the first table of Exhibit 163 on page 437 where it says, 'U sales-M,'" "the procedures on the summary work plan" and when E&Y tested "the price reduction; that is reduced the revenue to net revenue?"); C-3 at 630-33 (Ms. Koenigs questioning Mr. Laccetti regarding his understanding, consideration, and testing of Taro USA's changing product mix.); C-3 at 636-39 (Ms. Koenigs questioning Mr. Laccetti regarding whether various analytical review procedures were performed on net sales by product, net sales by generic versus branded or by customer, components of net sales, or revenue adjustments by type.); C-3 at 645-52 (Ms. Van Fossen and Ms. Koenigs questioning Mr. Laccetti regarding the analysis of days sales in receivable and related information from management.); C-4 at 888-89 (Ms. Koenigs questioning Mr. Laccetti regarding whether E&Y "relied on the aged accounts receivable report in conducting its audit procedures?"); C-4 at 1049-50 (Ms. Van Fossen questioning Mr. Laccetti regarding the "sales in and sales out analysis."); C-4 at 1080-82 (Ms. Koenigs questioning Mr. Laccetti regarding whether E&Y performed "any procedures to look at the timing of how the company recorded the debit amounts that were recorded in the accounts receivable account?").

FEF, 561 U.S. at 477; R.D. 134. Prior to that date—and while unlawfully insulated from executive control—the Board investigated Mr. Laccetti for more than a year, and the Board ordered the institution of disciplinary proceedings against Mr. Laccetti. Those very activities were at the heart of the constitutional defect in the Board's structure: Congress granted the Commission general oversight over some of the Board's functions, but empowered the Board "to take significant *enforcement actions*," and to do so "largely independently of the Commission." *FEF*, 561 U.S. at 504 (emphasis added).

Specifically, the Commission lacked "effective power to start, stop, or alter individual Board *investigations*, executive activities typically carried out by officials within the Executive Branch." *FEF*, 561 U.S. at 504 (emphasis added). Without the power to remove Board members absent good cause, the Commission lacked authority to "govern and direct the Board's daily exercise of prosecutorial discretion." *Id.* Given this defect, the Board exercised unconstitutional "independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction." *Id.* at 505.

In recent litigation, the Commission has acknowledged that, before *FEF*, the Board operated outside of its control. During that period, the Board's members "possessed broad regulatory and enforcement powers (as well as adjudicatory powers), . . . [and] operated with little supervision" from the Commission. *Duka v. SEC*, 15 Civ. 357, SEC's Memorandum of Law in Opposition to Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction at 2, ECF No. 13 (S.D.N.Y. Jan. 28, 2015). Because its members "enjoyed extraordinary tenure protection," the Board "was in relevant respects outside of the

[Commission's] control." *Id.* at 2, 20; *see also id.* at 22 ("Certain activities of the [Board] were for all practical purposes outside of the [Commission's] control.").

Because the Board was not subject to the Commission's control, and exercised executive power without executive oversight, its pre-*FEF* enforcement activities against Mr. Laccetti were constitutionally flawed.

B. The Board's Unconstitutional Structure Tainted Its Enforcement Action Against Mr. Laccetti.

In this case, the Board's 2007 commencement of an investigation involving Mr. Laccetti, the Division's ensuing investigation in 2007 and 2008, and the Board's subsequent decision to institute disciplinary proceedings against Mr. Laccetti in 2009—all of which predated the Supreme Court's decision in *FEF*—were conducted without executive accountability or oversight, and therefore were unconstitutional.

The Board's unconstitutional structure tainted the entirety of this enforcement proceeding, not merely the events that occurred before *FEF*. Once a structural constitutional violation has been established, there is a fundamental flaw in the proceedings that must be remedied. As the D.C. Circuit has noted, "we are aware of no theory that would permit us to declare [an entity's] structure unconstitutional without providing relief" to the challengers. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). Unconstitutional structures "have some impact . . . on how the [unconstitutionally structured entity] decides matters before it." *Id.* at 825. That impact requires a remedy.

Despite the Board's statement to the contrary, *see* R.D. 220 at 80, it makes no difference that the Board has been subject to the Commission's constitutionally required oversight following the *FEF* decision. At the time of "legally cognizable action[s] that harmed" Mr. Laccetti—the investigation and the subsequent decision to commence disciplinary

proceedings against him—the unconstitutionally structured Board exercised executive power without executive oversight. *See Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (finding no Appointments Clause violation because officer was properly appointed *before* taking action).

The Board's actions while unconstitutionally structured are legally cognizable—and must be remedied—even if they caused Mr. Laccetti "no direct harm." *Landry v. FDIC*, 204 F.3d 1125, 1128, 1130-32 (D.C. Cir. 2000). This is because, when challenging unconstitutional removal provisions, a plaintiff "need not show that" a particular entity "would have acted differently if it were constitutionally composed." *NRA Political Victory Fund*, 6 F.3d at 825; *see also id.* (noting that the extent of an unconstitutional structure's impact "may be impossible to measure"); *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984) (explaining that litigants could "rarely or never" show that, "if the government had operated in accord with [the Constitution], it would not have taken adverse action against them").

The Board's Decision states that these enforcement proceedings were not unconstitutional because, even if the Commission had possessed the power to remove Board members throughout the pre-*FEF* period, it might not have "exercised" that power. R.D. 220 at 80. But whether and how the Commission would have *exercised* that constitutionally required oversight, up to and including removing Board members, is pure speculation. More fundamentally, the Board's unconstitutional structure affected these proceedings regardless of whether the Commission would have put a stop to them. In *Bowsher v. Synar*, the Supreme Court held that it was unconstitutional to subject an executive officer—in that case, the Comptroller General—to removal by Congress. 478 U.S. 714, 734 (1986). Rejecting the argument that there was no separation-of-powers violation until Congress attempted to remove

the officer, the Court reasoned that "it is the Comptroller General's presumed desire to *avoid removal by pleasing Congress*, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." *Id.* at 727 n.5 (emphasis added; quotation marks and citation omitted); *see also Landry*, 204 F.3d at 1131 (describing *Bowsher*'s presumption "that subtle variations in the quality of tenure would affect conduct"). Because the Board members were insulated from accountability when they investigated and initiated proceedings against Mr. Laccetti, they could pursue whatever enforcement action they wished free from any concern that it might displease the Commission. The Board's lack of there-and-then subservience during the pre-*FEF* period violated the Constitution and rendered its acts against Mr. Laccetti unconstitutional.

C. The Board's Past Unconstitutional Acts Have Not Been Remedied.

By severing the removal restrictions in *FEF*, the Court *prospectively* cured the constitutional violation; it did not cure the Board's *prior* acts undertaken in this proceeding when the Board's structure was unconstitutional. *See* R.D. 220 at 79 (acknowledging that the cure was prospective only). This is because the plaintiffs in *FEF sought* purely prospective remedies: "a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers." *FEF*, 561 U.S. at 487. Here, by contrast, Mr. Laccetti "raise[d] the constitutional challenge as a defense to an enforcement action." *NRA Political Victory Fund*, 6 F.3d at 828. In *NRA Political Victory Fund*, the D.C. Circuit held that such a challenge required retrospective relief, unlike a challenge seeking "declaratory and injunctive remedies," which can "have a purely prospective impact." *Id.* Because the Board's structure was unconstitutional, the Commission must afford Mr. Laccetti relief sufficient to cure the violation. *Id.* at 822, 828 (severing unconstitutional provision and reversing where the FEC "lack[ed] authority to bring th[e] enforcement action because its composition violates the Constitution's separation of

powers"). For example, the D.C. Circuit recently applied *FEF* to a case where the plaintiff challenged a final determination of the Copyright Royalty Judges. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012). Because the Judges, like the Board, were doubly insulated from the President's control, the court severed the unconstitutional removal provision *and* granted retrospective relief, vacating and remanding the Judges' determination. *Id.* at 1342. Here, too, retrospective relief is appropriate.

Intercollegiate Broadcasting Systems undermines the Board's reasoning that various statements in *FEF*—namely that the Board's members "have been validly appointed," that the work of officials like the Board's members would not "be put on hold," and that the statute "remains fully operative as a law"—imply that prior Board actions were valid or remedied by the Court's prospective cure. *See* R.D. 220 at 79 (citing *FEF*, 561 U.S. at 508, 509, 513). The Board misreads *FEF*, taking the first and third statements out of context. The first—that the Board's members "have been validly appointed"—addressed a challenge to the appointment (not removal) of the Board's members, and the third—that the statute "remains fully operative as a law"—concerned whether the removal provisions were severable. *See FEF*, 561 U.S. at 509, 513 ("In light of the foregoing" discussion of Appointments Clause challenges, "petitioners are not entitled to broad injunctive relief against the Board's continued operations."). These statements have nothing to do with validating or remedying the Board's prior actions. And the second statement merely explains that, after the constitutional violation is cured, the Board can act without being reappointed—not that its prior actions were valid. *See id.* at 508.

Mr. Laccetti is entitled to "relief sufficient to ensure that the reporting requirements and auditing standards to which [he was] subject" were "enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513. Prospective relief was sufficient for the *FEF*

plaintiffs—and all they requested—but retrospective relief is necessary for Mr. Laccetti. Nearly eight years ago, he was subjected to enforcement actions—an investigation and the institution of disciplinary proceedings—by an unconstitutionally unaccountable regulatory organization. These unconstitutional actions must be remedied.

D. The Only Appropriate Remedy Is Reversal And Dismissal.

Errors involving the "separation of powers, including Appointments Clause matters," are "structural" errors. *Landry*, 204 F.3d at 1131 (citation and punctuation omitted). Where an error is "'structural,'" it is "'subject to *automatic reversal*.'" *Id.* (emphasis added) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). Investigating and instituting proceedings against Mr. Laccetti, while the Board was unaccountable, were structural constitutional errors that must be undone. Accordingly, the Order Instituting Disciplinary Proceedings must be dismissed, and the subsequent proceedings that transpired only as a result of the investigation and Order must be reversed. *See Intercollegiate Broad. Sys.*, 684 F.3d at 1342 ("Because the Board's structure was unconstitutional at the time it issued its determination, we vacate and remand the determination."); *cf. Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (remedy for a constitutional violation "must neutralize the taint" of the error (internal quotation marks omitted)).

The Board held that the mere fact that Mr. Laccetti was afforded an administrative hearing before the Hearing Officer, *de novo* review by the Board, and appeal to the Commission cured any constitutional violation. R.D. 220 at 80-81. But none of these procedures constitutes a remedy to cure the unconstitutional conduct and its aftermath in this case: namely, the decision by an unconstitutionally structured Board to investigate Mr. Laccetti; the ensuing investigation that was unconstitutionally shielded from proper oversight—including the collection of evidence and testimony that formed the basis for the proceedings against Mr. Laccetti; and the unconstitutionally structured Board's ultimate decision to charge him.

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. In *Vasquez v. Hillery*, the Supreme Court held that a structural constitutional error in constituting a grand jury required "mandatory reversal" *despite* a later conviction by a petit jury. 474 U.S. 254, 264 (1986). "[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests" that the structural error "did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.* at 263. When a grand jury is unconstitutionally constituted, "we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted." *Id.* at 264. So too here. We simply cannot know whether a Board appropriately concerned with the Commission's approval would have formally charged Mr. Laccetti, or what the charges would have been. Subsequent proceedings cannot possibly sanitize this constitutional violation.

In essence, the Board has decided that Mr. Laccetti should bear the consequences of decisions it made and information it obtained when it was operating with no constitutional oversight, and then it labels the consequences a "cure." Such a purported remedy is no remedy at all. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753 (1995) (rejecting state court's "effort to fashion a remedy" that "would actually consist of providing no remedy for the constitutional violation").

To be sure, dismissal is not necessarily required where there exists "'an alternative way of curing the constitutional violation.'" *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (quoting *Reynoldsville Casket*, 514 U.S. at 759). In *Legi-Tech*, the FEC cured the constitutional violation by reconstituting itself and ratifying its previous actions. *Id.* at 708-09.

Here, the Board never ratified the decisions that it made and the actions that it took—including investigating and initiating proceedings against Mr. Laccetti—while unconstitutionally structured.

Doolin Sec. Savings Bank, F.S.B. v. OTS, on which the Board relies, R.D. 220 at 81 n.38, is inapposite not only because it involved subsequent ratification, but also because it involved a statutory challenge subject to harmless error review under the Administrative Procedures Act ("APA"). 139 F.3d 203, 212-13 (D.C. Cir. 1998). As discussed above, harmless error analysis is inappropriate where, as here, the error is a structural violation. *See Landry*, 204 F.3d at 1128, 1130-32.

* * *

To remedy the errors in this case—the Board's investigation and institution of proceedings against Mr. Laccetti without constitutionally required oversight—the Commission should reverse the Board's Decision and dismiss the proceedings.

II. The Division Violated Mr. Laccetti's Right To Counsel.

The Division violated Mr. Laccetti's right to counsel when it refused to permit a technical expert consultant—an accountant—to assist his attorneys during his investigative testimony, which preceded the Board's decision to institute disciplinary proceedings against Mr. Laccetti. The Division's refusal, which the Board subsequently approved, violated Mr. Laccetti's right to the meaningful representation and advice of counsel and cannot be condoned. Reversal and dismissal are therefore warranted.

A. PCAOB Rules Guarantee The Right To Be Accompanied, Represented, And Advised By Counsel, Which Necessarily Includes The Right To Meaningful Representation.

When Congress created the Board, Congress directed it to establish "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of

such firms." 15 U.S.C. § 7215(a). Congress endowed the Board with tremendous power: It may permanently suspend or bar "a person from further association with any registered public accounting firm"; it may demand monetary penalties of up to "$750,000 for a natural person"; or it may impose "any other appropriate sanction" provided by its rules. *Id.* § 7215(c)(4); *see also* PCAOB Rule 5300. Given those potential consequences, allowing witnesses in exhaustive, wide-ranging, extraordinarily complex investigations to be meaningfully assisted by counsel during investigative testimony is *essential* to making those proceedings fair.[14]

The Board, implicitly acknowledging as much, afforded the right to counsel in its rules. Following Congress's directive to establish fair procedures, the Board's rules provide that "[a]ny 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 . . . ." PCAOB Rule 5109(b). Importantly, this right to counsel in Board proceedings tracks, almost word-for-word, the right to counsel provided by the APA, which governs proceedings before the Commission. *Compare* PCAOB Rule 5109(b) ("Any person compelled to testify pursuant to a subpoena . . . or who appears pursuant to an accounting board demand or request, *may be accompanied, represented and advised by counsel* . . . ." (emphasis added)), *with* 5 U.S.C. § 555(b) (any "person compelled to appear in person before an agency or representative thereof is *entitled to be accompanied, represented, and advised by counsel*" (emphasis added)).

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[14] In similar contexts, a witness's right to counsel is an essential component of ensuring that agency proceedings are fundamentally fair. *See* 5 U.S.C. § 555(b) (guaranteeing that any "person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel"); *United States v. Charleswell*, 456 F.3d 347, 360 (3rd Cir. 2006) ("[A]n alien's right to counsel in an immigration hearing before an [Immigration Judge] is so fundamental to the proceeding's fairness that a denial of that right could rise to the level of fundamental unfairness.").

Courts have interpreted the terms that the Board used in providing a right to counsel—the right to be "accompanied, represented, and advised by counsel"—as incorporating the "regularly accepted connotation" of the "right to counsel guaranteed by the Sixth Amendment to the Constitution." *Backer v. CIR*, 275 F.2d 141, 144 (5th Cir. 1960) (internal quotation marks omitted) (refusing to enforce IRS subpoena for investigative testimony because, by depriving witness of his counsel of choice, IRS would have violated witness's right to counsel); *see also SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976) (conditioning subpoena enforcement on affording right to counsel to witness testifying before Commission); *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375, 380 (7th Cir. 1969) (finding NLRB violated right to counsel during hearing). That "guarantee, phrased . . . in unequivocal terms," *Csapo*, 533 F.2d at 10, is "much broader" even "than the right to have an attorney . . . under the Fifth Amendment," *Backer*, 275 F.2d at 143. And "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).[15]

B. To Offer Meaningful Representation And Advice During A PCAOB Investigation, A Witness's Counsel Must Be Permitted To Be Accompanied By A Technical Expert Consultant.

Enforcement investigations conducted by the Division regarding auditing and accounting issues involve wide-ranging, exhaustive inquiries into "complicated and difficult issues."[16] Like certain investigations by the Commission, they are marked by "extraordinary complexity." *SEC*

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[15] To be sure, the Sixth Amendment, which applies to "all criminal prosecutions," is not the source of Mr. Laccetti's right to counsel before the Board. But his right to counsel incorporates the meaning of the Sixth Amendment right. *See Backer*, 275 F.2d at 144 ("We recognize that what is in issue here is not the constitutional right to counsel. . . . [But t]he term 'right to counsel' has always been construed to mean counsel of one's choice." (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

[16] Jay D. Hanson, Board Member, Statement on Proposed Auditing Standards (Aug. 13, 2013), available at http://pcaobus.org/News/Speech/Pages/08132013_Hanson.aspx (noting the Board's view that "most audits involve consideration of complicated and difficult issues").

v. Whitman, 613 F. Supp. 48, 49, *reconsideration denied*, 625 F. Supp. 96 (D.D.C. 1985) (describing investigation involving "accounting and auditing issues"). Under PCAOB Rules, the Board and its designated staff "may require" testimony relating to "any matter that the Board considers relevant or material to an investigation." PCAOB Rule 5102(a). They may demand sworn testimony regarding whether specific accounting practices or particular features of an audit violated the Sarbanes-Oxley Act , the Board's rules, various "provisions of the securities laws" relating to accounting and auditing, the Commission's rules, or professional auditing standards. PCAOB Rule 5101(a)(1). And they may question witnesses about multiple years of audits and reviews based on "audit work papers or any other document or information" that they have received during an investigation. PCAOB Rule 5103(a).

1. Given the highly technical nature of such investigations and "the limits on a lawyer's expertise," *Whitman*, 613 F. Supp. at 50, the presence of a technical expert consultant—an accountant—to aid counsel is essential. Indeed, the Board has expert accountants on staff to assist Division counsel during investigative testimony and even question witnesses directly.[17] As described above, *see supra* 6, two of those experts were present during Mr. Laccetti's investigative testimony, advising counsel for the Division and questioning Mr. Laccetti at length.

An attorney who is not trained as an accountant, and who does not practice in the highly technical fields of auditing and accounting, cannot provide meaningful representation in a PCAOB investigation absent assistance from a technical expert. *See, e.g., United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (holding, in a complex fraud case, that "it should have been obvious to a competent lawyer that the assistance of an accountant [was] necessary"); *Knott*

[17] *See* http://pcaobus.org/About/Staff/Pages/default.aspx (PCAOB Senior Staff, noting that Division of Enforcement and Investigations has two Deputy Directors who are accountants).

v. Mabry, 671 F.2d 1208, 1212-13 (8th Cir. 1982) (noting that effective assistance of counsel may require consulting an expert where "there is substantial contradiction in a given area of expertise," or where counsel is not sufficiently "versed in a technical subject matter . . . to conduct effective cross-examination"); *Whitman*, 613 F. Supp. at 49 (holding that Commission must allow counsel to be accompanied by expert accounting consultant).

Indeed, interpreting the same language in nearly identical circumstances, *Whitman* held that the Commission could not exclude an attorney's accounting expert during the investigatory examination of the attorney's client. 613 F. Supp. at 49. Those testifying before the Commission have the right to be represented and advised by counsel. 5 U.S.C. § 555(b). But "[u]nless the lawyer can receive substantive guidance from an expert technician . . . his client's absolute right to counsel during the proceedings would become substantially qualified." *Whitman*, 613 F. Supp. at 49. Like the Division, the Commission's "own counsel rely heavily on the SEC accounting staff not only to provide advice and assistance but also to pose the questions." *Id.* at 50. Thus, the witness's "right to his counsel's *representation and advice* (not merely presence) at agency proceedings . . . calls for some means of narrowing the gap between his counsel's and the questioner's technical expertise." *Id.* "Granting permission to the witness' attorney to bring an expert of his own choosing to the agency proceedings as an extension of himself (as an assistant) . . . give[s] veritable meaning to the witness' right to counsel." *Id.* So, the court concluded, "it would be arbitrary and capricious to systematically deny a witness' counsel the assistance of a technical expert by his side in agency proceedings while his client testifies as to a subject matter beyond the able counsel's expertise." *Id.* The language providing a right to counsel in the Board's rules should be interpreted in the same way as the nearly identical language interpreted in *Whitman*.

2. Moreover, if denying the assistance of a technical expert is "arbitrary and capricious" under the APA, it cannot possibly be a "fair procedure[]" under Sarbanes-Oxley, 15 U.S.C. § 7215(a). *Whitman*'s logic applies just as fully to the Board's investigations as to the Commission's because it is based on fundamental notions of what constitutes a meaningful right to counsel. *See* 613 F. Supp. at 49 (refusing to uphold Commission rules that "impinge upon counsel's ability to adequately represent his client who has been called upon to testify"); *see also id.* at 50 (allowing expert witness was "simple and expedient way to give veritable meaning to the witness' right to counsel").

To ensure that the investigative process is fair, as Congress has required, counsel must be permitted to consult with a technical expert during his or her client's investigative testimony. Congress's directive in Sarbanes-Oxley cannot be interpreted to allow the Division, and only the Division, to be aided during investigative testimony by experts—particularly in a case such as this one, where those experts examined at length the individual under investigation. No one would call that inequality "fair." Counsel for the witness should have access to accounting and auditing expertise, just as the Division's counsel has such access.

By refusing to allow Mr. Laccetti's attorney access to a technical expert consultant during Mr. Laccetti's investigative testimony, the Division violated Mr. Laccetti's right to counsel. The process employed to elicit his investigative testimony was fundamentally unfair, in violation of Sarbanes-Oxley.

C. PCAOB Rules 5109(b) and 5102(c)(3)(iv) Cannot Be Interpreted To Provide The Board And The Division Discretion To Deny A Meaningful Right To Counsel.

The Division and the Board justified excluding any technical expert consultant from Mr. Laccetti's investigative testimony by invoking PCAOB Rule 5102(c)(3)(iv), which states that "[p]ersons permitted to be present at an examination pursuant to this Rule are limited to . . .

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." That rule cannot be interpreted to allow the Division or the Board to undermine the meaningful right to counsel provided by PCAOB Rule 5109(b).

In recent years, the Supreme Court has expressed concern over the possibility that rulemakers will adopt ambiguous rules, giving themselves unfair discretion to interpret those rules in a self-interested manner in the future. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).[18] In *Christopher*, the Court warned against the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Id.* A vague rule allows an agency to obtain a tactical advantage by offering an interpretation that "is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Id.* (quotation marks, brackets, and citations omitted).

PCAOB Rules 5102(c)(3)(iv) and 5109(b) are a textbook example of a rulemaker promulgating vague and ambiguous standards to secure for itself tactical advantages in the future. When the Board proposed this rule granting the Division staff discretion to permit other persons to attend investigative testimony as "appropriate," several "commenters suggested that

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[18] *See also, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (decrying "mischief" of agency's writing "rules more broadly and vaguely, leaving plenty of gaps to be filled in later"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."); *see generally* Stephenson & Pogoriler, *Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449, 1461-1462 (2011); Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 655-668 (1996).

the rules should allow a witness and his or her counsel to be accompanied by a technical expert consultant during testimony as a matter of right." PCAOB Release No. 2003-015, at A2-18; *see, e.g.*, Ltr. from ABA Section of Business Law to PCAOB (Aug. 21, 2003), at 2 ("Since the subject matter of the Board's investigations are likely to involve technical accounting issues, as to which legal counsel may lack appropriate understanding, we believe that *adequate representation may only be achieved* by allowing legal counsel to be assisted by an accounting expert." (emphasis added)); Ltr. from Am. Inst. of Certified Pub. Accountants to PCAOB (Aug. 18, 2003), at 2-3 ("We urge the Board to avoid any similar ambiguity in its rules by expressly providing that a nonlawyer technical expert may attend a witness's examination where the expert has been retained to assist the lawyer in the representation of the lawyer's client."); Ltr. from E&Y to PCAOB (Aug. 18, 2003), at 2 (stating concern "that the Board does not intend to permit lawyers who are representing accountants during testimony to be accompanied by accounting experts to assist the lawyer in a consulting capacity").[19] But in the final rules it adopted, the Board declined to limit the Division's discretion. The Board justified this decision by stating that the "rule provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony," and that it expected "the staff to be accommodating" with such requests. PCAOB Release No. 2003-015, at A2-18.

Similarly, when the Commission was determining whether to approve the Board's investigative rules, many commenters again expressed "concern about the rules' lack of specificity with respect to certain matters left to the discretion of the PCAOB and its staff," including "the determination as to which persons will be permitted to be present during an investigatory examination." SEC Release No. 34-49704. Recognizing that the rules granted

[19] Letters available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket005Comments.aspx.

broad discretion to the Board, the Commission reassured the commenters that it expected the Board and the Division "to exercise this discretion in a balanced and fair-minded fashion with due regard for both the purposes of [15 U.S.C. § 7215] and the legitimate concerns of the firms and individuals affected by the rules." *Id.*

Notwithstanding the Board's and the Commission's reassurance, however, the Division precluded any technical expert consultant from attending Mr. Laccetti's investigative testimony, thus securing for itself an enormous tactical advantage. Defying the Commission's stated expectations, and indeed the Board's own statements, the Board and the Division failed to act in a balanced and fair-minded fashion. Rather than exhibiting due regard for the firms and individuals affected by their rules, the Division acted in its own self-interest and the Board simply endorsed that action.

Because Sarbanes-Oxley's express purpose of guaranteeing fair procedures, Rules 5102(c)(3)(iv) and 5109(b) cannot be interpreted to permit the Division to undermine the right to counsel by excluding technical expert consultants from investigative testimony. Given that Sarbanes-Oxley requires fair procedures, that the Board—acknowledging that fair procedures include the right to counsel—provided such a right in its rules, and that an attorney in technical cases such as this one must be able to consult an expert in order to provide meaningful counsel, the Commission should make clear that technical expert consultants *must* be allowed to attend investigative testimony. Any other interpretation of the Board's rules would impermissibly undermine an individual's right to counsel and render such proceedings fundamentally unfair.

D. The Exclusion Of Mr. Laccetti's Expert Consultant Demonstrates Why The Limitations Placed On An Individual's Right To Counsel By PCAOB Rules 5102(c)(3)(iv) And 5109(b) Are Unlawful.

As Mr. Laccetti's case demonstrates, affording the Division discretion to preclude technical expert consultants from attending investigative testimony presents an unworkable

conflict of interest: The very investigative body conducting the inquiry is able to determine whether it wants to exclude an expert and thereby gain an unfair advantage during the testimony. This case further shows that the mere fact that a respondent may seek review by the Board does not ensure that the Division will exercise its discretion properly notwithstanding its conflict of interest: Here, the Board placed its imprimatur on the Division's actions, positing *post-hoc*, factually erroneous justifications to rationalize the Division's decision.

1. As described above, *see supra* 4-5, the Division determined that "the presence of a technical expert consultant" was "not appropriate at this time." R.D. 180b at 2. Without a technical expert consultant, Mr. Laccetti was not meaningfully "accompanied, represented, and advised by counsel," PCAOB Rule 5109(b), and the process of eliciting his investigative testimony was fundamentally unfair, *see* 15 U.S.C. § 7215(a). The Division provided no justification for excluding *any* technical consultant, beyond that its decision was "consistent" with PCAOB Release No. 2003-015, which notes that the Division should accommodate requests to permit technical consultants to attend testimony, but should prevent firms from monitoring the course of an investigation. *See* R.D. 180b at 2. The Division's decision, however, was *not* consistent with the Release: Although it was suggested that Mr. Laccetti's counsel "had in mind" a particular E&Y partner, the Division's letter made clear that *no* expert would be allowed, regardless of whether the expert was associated with E&Y. *See id.* (stating "the presence of a technical expert consultant" was "not appropriate at this time," and noting that consultation would be possible only *before and after* testimony).

The Division's suggested alternatives, in lieu of being permitted to have a technical consultant present during the investigative testimony, were insufficient to afford Mr. Laccetti the meaningful right to counsel to which he was entitled. Giving Mr. Laccetti "time to prepare" for

his testimony (R.D. 180b at 2) did not help his attorney become an expert in auditing and accounting standards and practices. *See Whitman*, 613 F. Supp. at 49 ("Given the extraordinary complexity of matters raised in agency investigations in this modern day, counsel trained only in the law, no matter how skillful, may on occasion be less than fully equipped to serve the client in agency proceedings."). Similarly, allowing Mr. Laccetti and his counsel to consult with an expert "*before or after* his testimony," R.D. 180b at 2 (emphasis added), does nothing to narrow the "gap between his counsel's and the questioner's technical expertise" *during* his testimony, *Whitman*, 613 F. Supp. at 50. Indeed *Whitman* held that allowing counsel "to consult with experts posted . . . just outside the door" during testimony was insufficient. *Id.* And forcing Mr. Laccetti to request permission to "correct" his testimony, R.D. 180b at 2, is obviously insufficient to render the proceedings "fair": It would do nothing to narrow his counsel's technical gap during the proceedings; it could require a person giving testimony essentially to impeach herself with corrections; and it would depend, once again, on the Division's discretion. Notably, *none* of the Division's alternatives included that Mr. Laccetti could simply find a different accounting expert to assist counsel who would be permitted to attend the testimony. In sum, the Board's finding that the Division merely informed Mr. Laccetti that he could not bring a particular consultant to assist his counsel during his investigative testimony is refuted by the factual record.

Even if the Division had told Mr. Laccetti's counsel that it was only objecting to his expert consultant of choice—which is not what it said in its letter—such an objection would not have been justified by the Board's Release. *Contra* R.D. 220 at 74. The Release instructs that the Division should be cautious to prevent a "firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel." PCAOB Release No. 2003-015 at

A2-18. But here, E&Y's internal and external counsel attended the investigative testimony of *all* E&Y personnel providing testimony. *See supra* at 5-6, nn. 9 & 10. The Division offered no explanation why, when the same counsel not only attended all testimony but also represented all E&Y individuals and E&Y itself, it was somehow "not appropriate" to allow any expert consultant to assist Mr. Laccetti's attorneys. Regardless of whether the Release's monitoring concern could ever be reasonable, the identity of the individuals actually present during the Division's investigative testimony demonstrates that it was not applicable to the Division's decision here.

2. The Board erroneously endorsed the Division's violation of Mr. Laccetti's right to counsel in its Decision, mischaracterizing the Division's decision and providing justifications for excluding an expert that do not reflect what the Division actually did. According to the Board, the Division refused to "allow *a particular partner* from Ernst & Young" to attend Mr. Laccetti's investigative testimony. R.D. 220 at 74 (emphasis added) (characterizing the Division's decision as merely refusing Mr. Laccetti's "request to permit *his chosen expert* to attend." (emphasis added)). The Division, however, forbade "the presence of a technical expert consultant," R.D. 180b at 2, not just one particular expert consultant.

The Board's mischaracterization of the Division's decision was central to its ruling that the prejudice to Mr. Laccetti was self-inflicted. "[T]he Division did not exclude all experts," wrote the Board, "but only one, whose attendance the staff identified as inappropriate based on his employment by Ernst & Young." R.D. 220 at 76. "Any prejudice" Mr. Laccetti suffered was because he decided "not to seek out another expert in the two months before his scheduled examination." R.D. 220 at 76. But nothing in the Division's letter suggests that Mr. Laccetti would have been allowed to seek out another expert, just as nothing in the Division's letter

singled out a particular expert as inappropriate. *See* R.D. 180b at 2. Indeed, the letter plainly states the opposite.

Seeking to justify the Division's decision, the Board cited the Release's monitoring concern in its Decision. R.D. 220 at 74. But the Board, just like the Division, failed to explain how any monitoring concern was relevant or applicable here, given the individuals who were actually present during the investigative testimony. Thus, the Board's justification for upholding the Division's decision to deprive Mr. Laccetti of this fundamental right is plainly erroneous, even if the Release's monitoring concern would ever be reasonable.

E. The Board Erred By Deeming The Exclusion Of Mr. Laccetti's Expert Consultant Harmless.

The Board erroneously concluded that Mr. Laccetti's right to counsel defense was "moot." R.D. 220 at 74. The Board claimed that Mr. Laccetti was not harmed by the denial of his right to counsel because the Board did not "rely on his investigative testimony." *Id.* This statement is not only legally irrelevant, it is factually erroneous, and, if allowed to stand, would eviscerate the right to counsel that the Board provides in its rules.

The alternative finding by the Board that the violation of Mr. Laccetti's right to counsel was harmless bespeaks their failure to acknowledge the irreparable violation of this right. It is impossible to determine what would have happened and how the course of these proceedings might have been altered if the Division had not violated Mr. Laccetti's right to counsel. Trying to determine whether the Division's error was harmless "in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). For that reason, the Supreme Court has held that the denial of the right to counsel is a structural error that does not require a showing of harm. *Id.* at 148-50 (noting that "structural defects" are those that "defy analysis by 'harmless-error'

standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself" (internal quotation marks, alterations, and citation omitted)). Indeed, the "doctrine of harmless error" "must be used gingerly, if at all, when basic procedural rights are at stake." *Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969). "[S]ome rights, like the assistance of counsel, are so basic to a fair trial that their infraction can never be treated as harmless error." *Id.*

In any event, Mr. Laccetti *was* harmed. Although the Board asserts that it did not rely on Mr. Laccetti's investigative testimony during its review of the Hearing Officer's decision, one thing is clear: Following the investigation, Mr. Laccetti was charged. The Division told Mr. Laccetti that it "intends to recommend that the Board commence a disciplinary proceeding . . . based principally on" allegations that referenced, cited, and quoted Mr. Laccetti's investigative testimony multiple times.[20] *See* PCAOB Rule 5109(d). Based on the investigative record, which included Mr. Laccetti's investigative testimony, the Board decided to commence a disciplinary proceeding against him. R.D. 1; *see also* PCAOB Rule 5200(a). Moreover, despite the Board's purported disregard of Mr. Laccetti's investigative testimony, the Board in its decision cited and relied upon at least one instance in which Mr. Laccetti was impeached during the hearing *with his investigative testimony. See, e.g.*, R.D. 220 at 10 (citing R.D. 135 at 266-67).

F. The Board Erred By Concluding That *Whitman* Does Not Apply.

Although *Whitman* held—in circumstances almost identical to those here—that the right to counsel would be rendered meaningless unless counsel could be assisted by an accounting expert, the Board rejected the applicability of *Whitman* out of hand as dealing only with the

[20] Ex. E to Rule 452 Motion, at 7-10 (identifying numerous examples).

APA, holding that "the APA does not apply to Board proceedings." R.D. 220 at 75. That was error, regardless of whether the APA applies—and it does—to Board proceedings.

First, *Whitman* was based on fundamental principles about what is necessary for the right to counsel to be meaningful; it was not limited to the context of the APA. *See* 613 F. Supp. at 49 (describing the issue as "whether counsel representing a witness may, *in order to fully (and thereby adequately) serve his client*, utilize the expertise of a technical adviser by his side at the agency proceedings" (emphasis added)). A technical expert was necessary, the court concluded, "to give veritable meaning to the witness' *right to counsel*." *Id.* at 50 (emphasis added).

Second, the Commission approved the Board's rules, which provide a right to counsel in language that mirrors, almost word-for-word, the APA's right to counsel provision. Although the Board's right to counsel in Rule 5109(b) is subject to the caveat in Rule 5102(c)(3)(iv), *nothing* on the face of either of these rules permits the Board to undermine the meaningful right to counsel. Applying the rules "in a balanced and fair-minded fashion" (SEC Release No. 34-49704) means that the Board may not undermine the right to meaningful counsel by disregarding the fundamental interests that (as *Whitman* recognizes) the right protects.

Third, the APA provides a broad right to counsel to any person who appears before "an agency or *representative thereof*." 5 U.S.C. § 555(b) (emphasis added). Although the Board is not an "agency" for statutory purposes, 15 U.S.C. § 7211(b), and is therefore not subject to the provisions of the APA on that basis, the Board *is* a "representative" of the Commission. The Commission appoints Board members, 15 U.S.C. § 7211(e)(4), removes them at will, and may "approve the Board's budget, issue binding regulations, relieve the Board of authority, amend Board sanctions, or enforce Board rules on its own," *FEF*, 561 U.S. at 504, 509 (internal

citations omitted). As a representative of the Commission, the Board must afford the APA's right to counsel to persons who appear before it in investigations and disciplinary proceedings.

Fourth, even if the Board is not bound by the APA, the SEC is—and the Commission cannot, consistent with *Whitman*, approve the use of procedures that it is barred from employing. Because the SEC cannot deny counsel the assistance of relevant expert consultants, it cannot tolerate the Board—a regulatory organization subordinate to the SEC and for which the SEC is fully responsible—doing so. Any contrary conclusion would permit the SEC to evade limitations on its own authority by delegating regulatory authority to others in the first instance.[21] If the Commission declines to set aside Mr. Laccetti's sanctions, Mr. Laccetti can seek judicial review of that decision in the federal courts of appeals. 15 U.S.C. § 78y(a)(1). The courts of appeals, in turn, may consider errors in proceedings even by non-governmental regulators "to the extent that they infected the Commission's action by leading to error on its part." *Schellenback v. SEC*, 989 F.2d 907, 909 (7th Cir. 1993) (quoting *Shultz v. SEC*, 614 F.2d 561, 568 (7th Cir. 1980)); *see also R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952) (same). The Commission cannot sustain the sanctions imposed by the Board where those sanctions are the product of a proceeding that violated the right to counsel as the Commission has (correctly) interpreted it.

G. The Commission Should Set The Sanctions Aside And Dismiss The Proceedings.

Because the Board applied its rules in a manner inconsistent with Congress's mandated "fair procedures," the Commission must "set aside the sanction imposed" by the Board on

[21] Indeed, because the federal securities laws "allow for concurrent enforcement jurisdiction over auditor conduct between the SEC and the PCAOB . . . [and] the PCAOB closely coordinates its enforcement efforts with those of the SEC," 2009 PCAOB Annual Report at 15, it would be especially incongruous for the Board to accord witnesses lesser rights than those afforded by the SEC in the same type of proceedings.

Mr. Laccetti, *see* 15 U.S.C. § 78s(e)(1)(B); 15 U.S.C. § 7217(c)(2), and dismiss these proceedings. Remand is not "appropriate" (15 U.S.C. § 78s(e)(1)(B)) here: Mr. Laccetti, who no longer serves as an auditor of public companies,[22] and who, "apart from this proceeding, . . . has [never] been found to have violated the securities laws or any applicable regulations or standards," R.D. 197 at 115, should not be subject to another investigation in a case that has lasted close to a decade. In this case, the Board "has violated provision[s] of [Sarbanes-Oxley], [and even] the rules of the Board"; and, lacking any "reasonable justification or excuse, [it] has failed to enforce compliance with [those] provision[s] or rule[s]." *Id.* § 7217(d)(2)) (allowing Commission to censure the Board). Instead of enforcing compliance with its rules, the Board rubber-stamped the Division's unfair tactical decision. Under the circumstances, remanding to the Board would be inappropriate.

III. The Board Is Unconstitutional Because Board Members Are Inferior Officers Who Neither Swear An Oath Of Office Nor Receive A Presidential Commission.

Article Six of the Constitution provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution." And Article Two commands that the President "shall Commission all the Officers of the United States." Board members are officers of the United States, albeit "inferior officers." *FEF*, 561 U.S. at 510. Yet there is nothing in the Board's Bylaws or PCAOB Rules—indeed, there is no public record at all—indicating that they have ever sworn an oath to support the Constitution, and they have not received commissions from the President. The Board's wielding of the authority of the United States under these circumstances is constitutionally intolerable: "Liberty requires accountability." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015)

[22] *See* R.D. 197 at 15 ("Laccetti left E&Y US in 2009 and became associated with a regional accounting firm, where he works in the corporate governance and risk management department. . . . Laccetti has not been involved in auditing issuers since joining that firm.").

(Alito, J., concurring). These structural constitutional errors also harmed Mr. Laccetti, and must be remedied.

Those "who have not sworn an oath cannot exercise significant authority of the United States." 135 S. Ct. at 1235 (citing 14 Op. Atty. Gen. 406, 408 (1874) ("[A] Representative . . . does not become a member of the House until he takes the oath of office."); 15 Op. Atty. Gen. 280, 281 (1877) (similar)).[23] Similarly, a commission from the President sets "[t]hose who exercise the power of Government" apart from "ordinary citizens." *Id.* at 1235 ("[The Supreme] Court certainly has never treated a commission from the President as a mere wall ornament."). The oath of office and a commission from the President ensure that there is no question "whether someone is an officer of the United States." *Id.* Beyond marking officers of the United States, the oath of office serves a deeper purpose: "[A]n officer bound by oath has 'special' reason to consider the law. . . . [T]he point of the oath is to create or intensify officers' sense of moral obligation to law." Re, *supra* n.23. Neither the oath nor a commission is a mere formality; they are "basic constitutional requirements." *Ass'n of Am. R.R.s*, 135 S. Ct. at 1235.

Because the Board members are inferior officers who wielded—and continue to wield—the authority of the United States without satisfying the constitutional prerequisites for that power, the Board's decision should be reversed and this proceeding dismissed.

CONCLUSION

For the reasons set forth above, the Commission should reverse the Board's Final Decision and Order Imposing Sanctions and dismiss this proceeding.

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[23] Indeed, President Obama re-took his oath of office when he was first inaugurated in 2009 because of the credible argument that "taking the precise presidential oath set out in Article II" was required before "the President-elect [could] exert the power of the Presidency." Re, Justice Alito on the Constitutional Oath in American Railroads, Re's Judicata (Mar. 21, 2015).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SEC Rule of Practice 450(d), I certify that this Brief Of Mark E. Laccetti In Support Of His Application For Commission Review complies with the length limitation set forth in Rule 450(c). Exclusive of the portions exempted by Rule 450(c), this brief contains 10,255 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

May 15, 2015

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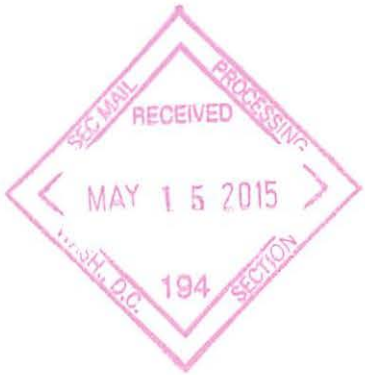

May 15, 2015

VIA HAND DELIVERY

Brent J. Fields
Secretary
Office of the Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1106

Re: *In the Matter of Mark E. Laccetti, CPA*, Admin. Proc. File No. 3-16430

Dear Mr. Fields:

Please find enclosed for filing in the above-referenced matter the original and three copies of Applicant Mark E. Laccetti's (1) Brief In Support Of His Application For Commission Review and (2) Motion And Supporting Brief For Submission Of Additional Evidence and attached exhibits. We have caused copies of the foregoing to be sent by electronic mail to the Secretary of the Public Company Accounting Oversight Board.

Respectfully submitted,

Lawrence J. Zweifach
Enclosures

cc: Phoebe W. Brown (*via email, w/ enclosures)*