SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62656 / August 5, 2010

Admin. Proc. File No. 3-13535

In the Matter of the Application of

GATELY & ASSOCIATES, LLC
and
JAMES P. GATELY, CPA

c/o Roddy B. Lanigan, Esq.
Lanigan & Lanigan, PL
222 S. Pennsylvania Ave., #101
Winter Park, FL 32789

For Review of Disciplinary Action by

PCAOB

OPINION OF THE COMMISSION

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD – REVIEW OF DISCIPLINARY PROCEEDINGS

Violation of Board Rule

Failure to Cooperate with Inspection

Registered public accounting firm and associated person failed to cooperate with board inspection. *Held*, findings of violation and sanction imposed are *sustained*.

APPEARANCES:

Roddy B. Lanigan, of Lanigan & Lanigan, PL, for Gately & Associates, LLC, and James P. Gately.

J. Gordon Seymour and *Mary I. Peters*, for the Public Company Accounting Oversight Board.

Appeal filed: June 26, 2009
Last brief received: October 14, 2009

James P. Gately and Gately & Associates, LLC, a registered public accounting firm (the "Firm" and together with Gately, "Applicants"), filed an application pursuant to Section 107(c) of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[1] for review of disciplinary action taken by the Public Company Accounting Oversight Board (the "Board" or "PCAOB"). The Board found that Applicants failed to cooperate with an inspection by the Board's Division of Registration and Inspections ("Inspections") and thereby violated Board Rule 4006 ("Rule 4006" or the "Rule"). The Board barred Gately from associating with any registered public accounting firm and permanently revoked the Firm's registration. We base our findings on an independent review of the record.

I.

BACKGROUND

Congress established the Board to "protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."[2] In furtherance of these goals, Sarbanes-Oxley requires the Board to conduct a "continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons . . . with [Sarbanes-Oxley], the rules of the Board, the rules of the Commission, or professional standards."[3] Highlighting the importance of these inspections, the statute establishes guidelines regarding the frequency, scope, procedures and reports for inspections.[4] In addition, recognizing that the effectiveness of the Board's inspections depends on full cooperation by the auditing firms, Section 102 of Sarbanes-Oxley requires any firm participating in the preparation of any issuer audit report to consent "to cooperat[e] . . . and compl[y] with any request for testimony or the production of documents made by the Board in furtherance of its authority and responsibilities under this title."[5] In order to secure cooperation with inspections on a going-forward basis, Section 102 also requires firms to acknowledge "that [the] firm understands and agrees that cooperation and compliance" with any such request for testimony or documents "shall

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[1] 15 U.S.C. § 7217(c).

[2] 15 U.S.C. § 7211(a).

[3] 15 U.S.C. § 7214(a).

[4] 15 U.S.C. § 7214(a)-(h). For example, the statute requires Board inspections every three years or annually, depending on the number of audit reports issued by the firm. 15 U.S.C. § 7214(b)(1)(B) (requiring triannual inspections for firms that regularly provide audit reports for 100 or fewer issuers); 15 U.S.C. § 7214(b)(1)(A) (requiring annual inspections for firms that regularly provide audit reports for more than 100 issuers).

[5] 15 U.S.C. § 7212(b)(3)(A).

be a condition to the continuing effectiveness of the registration of the firm with the Board."[6] The Board's periodic inspections, and full cooperation therewith by registered firms, are pivotal to the Board's ability to enhance investor protection and the accuracy of issuer auditor reports through its oversight of registered accounting firms.

This is the first litigated appeal of a PCAOB disciplinary decision, and will address the parameters of the Board's authority to discipline a failure to provide documents and information in connection with its inspections. Applicants do not contest the timing and content of the Board's inspection requests or their own longstanding delays in providing the requested information, but argue that their conduct should be excused based on Gately's personal circumstances and state of mind during the Board's attempted inspection. Given the Board's necessary reliance on the inspection process in order to inspect audit reports for informativeness, accuracy, and independence, disposition of these defenses will impact the Board's effectiveness in fulfilling this regulatory mandate.

II.

FACTS

Gately, a certified public accountant, is the Firm's managing member, president, and sole owner and employee. As required under Sarbanes-Oxley, the Firm's application for Board registration in 2003, which was completed by Gately, consented to cooperate with Board inspections and acknowledged that cooperation with such inspections was a condition to the Firm's continued registration.

Beginning in early 2007, Inspections attempted to contact Gately to initiate an inspection of the Firm. Between May and September 2007, Inspections made repeated attempts to schedule an inspection date. However, scheduling was difficult because Gately was receiving treatment in the Miami area for a chemical dependency (the "Condition"),[7] and had difficulty accessing Firm workfiles stored in Orlando, Florida.[8] As of September 12, the inspection was scheduled for October 1, 2007. On September 12, however, Gately informed Inspections that he would not be able to retrieve the files from Orlando in time for the scheduled October 1 inspection. Inspections

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[6] 15 U.S.C. § 7212(b)(3)(B). The applying firm must also agree to require a comparable agreement and acknowledgment from each person associated with the Firm. *Id.*

[7] On December 14, 2009, we granted in part Gately's request for a protective order regarding the discussion of the Condition. *Order Granting Partial Protective Order* (Dec. 14, 2009), Admin. Proc. File. No. 3-13535. Consistent with that order, this opinion discusses the Condition and treatment to the extent necessary to resolve the issues before us.

[8] The Firm was originally located in the Orlando area.

agreed to reschedule for November 5. Gately asserts that he discussed with Inspections staff the option of deregistering the Firm, but he ultimately decided against deregistration.

That same day, Inspections e-mailed Gately an Issuer Information Form ("IIF") and asked Gately to complete the IIF by September 20. The IIF required disclosure of the Firm's client names, locations, industries, and audit report release dates. Inspections told Gately that, once the staff received the completed IIF, "we will try to let you know which engagements we have selected as soon as possible so that you will have plenty of time before the November 5, 2007 planned inspection date to retrieve the work papers from storage." Noting the previous postponement, Inspections warned that "it is not likely that we will be able to accommodate a request to move the inspection to a date any later in the year."

Later that month, a Florida state court placed Gately on two years' probation for a traffic-related offense. The terms of probation required advance notice in order to travel outside of the Miami area, including to Orlando (the location of his audit files).

Gately did not meet the September 20 deadline for submitting the IIF. Throughout October, Inspections asked Gately for the IIF in multiple voice mail messages, e-mails, and letters. On October 15, Inspections sent Gately a Data Request form ("Data Request Form") listing documents to be prepared and available to be reviewed during the November 5 inspection. The Data Request Form asked for information about, among other things, the nature of the Firm's practice, quality control policies and procedures, any litigation against the Firm, communications with regulatory agencies, and professional education programs.

On October 17 and October 30, Gately notified Inspections that his computer had been stolen and that he would need to travel to Orlando to recreate the IIF information.[9] On October 31, Inspections warned Gately that:

> failure on your part either to provide all the information requested of you or to allow the inspection team to commence field work of the inspection of your firm on Monday November 5, 2007 may result in this matter being referred to the PCAOB's Division of Enforcement and Investigations. This could result in disciplinary action for failure to cooperate with an inspection as required by PCAOB Rule 4006, even if you later permit the inspection.

As of October 31, Inspections had not received the IIF from Gately. Inspections staff nonetheless sent Gately an October 31 e-mail identifying two audit engagements that had been selected for review (the "Selected Engagements"), and indicating that additional audit engagements might be selected for review during the course of the inspection. The e-mail further

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[9] Although Gately informed Inspections on October 17, 2007 that he had earlier returned the IIF, Inspections did not receive the form. He does not currently contend that he returned the IIF in 2007.

advised that the November 5 inspection would require Gately to make available all workpapers for the Selected Engagements, to "discuss [the Firm]'s quality control policies and practices," and to "schedule interviews/meetings related to each engagement to be inspected."

By e-mail on November 2, Gately stated that he was "not confirming" the November 5 inspection, and that he would be "preparing a deregistration form sometime next week." Referencing an earlier discussion with Inspections staff regarding the possibility of avoiding an inspection by deregistering from PCAOB, Gately stated:

> When I first spoke with [an Inspections staff member] I was going to deregister from the PCAOB as I was [undergoing treatment in Miami] and would be spending months there and not able to participate in an inspection. I then contacted [the staff member] later to see if she would give me a chance to have files collected for me and if it did not work out for the timetables I would deregister.

Gately's e-mail explained that he had again decided to deregister because he would not have time to make travel arrangements under the terms of his probation to gather his files, and that he "ha[d] been getting rid of the public companies due to [his] personal commitments."

Responding that same day, Inspections confirmed its understanding that Gately intended to file the deregistration form during the week of November 5. Inspections stated that it would postpone the inspection field work to allow Gately time to deregister, and that it would postpone the inspection itself if Gately in fact filed the deregistration form. It warned, however, that if the form was not filed by November 26:

> we will commence the inspection field work on that date. In that event, you should have the [IIF] and all of the other information we have requested available for us on November 26, 2007, as well as audit engagement file(s) for the two engagements previously communicated to you, including the audit work papers, permanent files and report files and any other relevant documentation supporting the firm's audit opinion.

Like the October 31 letter, this letter warned that failure to provide all requested information or to allow the inspection to begin as scheduled could result in disciplinary action.

The day after Gately sent his November 2 e-mail stating his intention to deregister, however, he sent another e-mail to Inspections stating that he had not received notice of the two Selected Engagements. In its reply, Inspections identified the Selected Engagements, but also asked Gately to clarify whether he still intended to deregister. On November 5, Gately replied, "If you are willing, I can go to Orlando to search the storage units for the files and give you an answer on withdrawal a week from today if the files are easily accessible."

Inspections replied by e-mail on November 7, declining to advise Gately on whether to deregister or prepare for inspection, stating "[b]ased on your facts and circumstances, you should determine how best to respond." It also reminded him that the inspection would take place on November 26, 2007 if the Firm did not deregister, reiterated the documentation required for the inspection, and again warned that failure to allow the inspection or to supply all requested documentation by the applicable deadlines could result in an enforcement action.

In response to these e-mails discussing deregistration as an alternative to the inspection, Gately responded, "Got it. Going to Orlando to pick up the files." On November 19, Gately again confirmed via e-mail that he would prepare the relevant documentation for the inspection, stating, "My intention is to have the two companies available on the 26th. I returned with them from Orlando this past Saturday."

Less than a week later, on November 22, Gately e-mailed Inspections that he would "not be available for the inspection." He briefly stated, "[w]hen arriving back to the Miami area I was confronted with . . . the old house having had fire damage," and that "unfortunately my stuff is in the old house." Gately's e-mails did not describe which, if any, of his audit files were damaged in the fire. Inspections expressed sympathy, and asked Gately to call the next day, Friday, November 23, to "discuss how to proceed." Applicants now contend that Gately "could not complete the [IIF] because the necessary files were destroyed" and that the fire "destroyed most of the necessary files requested in the PCAOB audit," but Applicants have not identified or described which files were damaged.

Although the inspection was scheduled to begin the following Monday, November 26, Gately had not called the previous Friday as requested by Inspections staff. Inspections sent Gately another message on the 26th again asking Gately to call. Gately finally responded that day with an e-mail stating, "I will call," but did not. Gately now asserts that he was preoccupied with finding a new home.

On November 27, Inspections staff sent Gately another letter, this time stating that it was "imperative" that he reschedule the inspection. The letter warned that failure to contact Inspections staff could result in disciplinary action. Gately rescheduled for December 10. Inspections agreed to conduct the inspection remotely – receiving all materials in the Board's Atlanta office prior to the inspection and conducting the inspection interview by telephone. On November 29, 2007, Inspections sent a letter confirming the December 10 inspection date and again requesting return of the IIF. The letter also requested by December 7, 2007: (a) copies of the audit engagement files for the two Selected Engagements and (b) other documents and information described in the Data Request Form. Although Inspections followed up with several messages, Gately did not provide the requested documentation.

On December 7, Inspections e-mailed Gately, pointing out that:

> the inspection leader . . . has called and left you two voice mail messages . . . to which you have not responded, to confirm the date of the inspection and to address any questions you may have concerning the inspection. Also, we have not yet received the copies of your audit work papers and other requested information, which were due to us today.

On December 10, the rescheduled inspection date, Gately emailed that he "[j]ust saw [the December 7 e-mail] message" from Inspections, that there had been an "[u]nexpected slow up on my side," and that he would call with an update. Gately did not call. Gately contends that he was planning another trip to Orlando to supplement and complete fire-damaged files.

When Inspections did not receive a further update from Gately, the Director of Inspections sent Gately a letter via e-mail and Federal Express on December 20. The letter recounted Inspections' longstanding efforts to schedule the inspection, reiterated Gately's obligation to supply the requested information, and gave a final deadline of December 28 (the "Final 2007 Deadline"). The letter stated that failure to meet the Final 2007 Deadline would be referred to the Board's Division of Enforcement and Investigations ("Enforcement") and could lead to disciplinary proceedings even if the requested information were provided after the Final 2007 Deadline. The letter stated, "Potential sanctions for [violations of Rule 4006] include, among other things, suspension or revocation of the firm's registration, a suspension or bar on your ability to be an associated person of a registered firm, a limitation on the activities or operations of the firm, or the assessment of monetary penalties."

On January 2, 2008, Gately informed Inspections that he had not received the December 20 letter because he had been traveling during the end of December, and no longer resided at the address to which the letter was sent. Gately requested another extension of the deadline and declared that his "intention was to cooperate with the team." By e-mail on January 3, Inspections declined to further extend the deadline, and advised Gately that the "demand for the requested materials . . . still stands, and we encourage you to provide the materials and permit the inspection as soon as possible."

The next day, Gately confirmed that he was able to open the January 3 e-mail message. Gately asserts that after receiving this January 3 message, he "understood that [the] matter would further be handled by [Enforcement] given that the deadline of December 28 had already [passed]." Applicants eventually returned an IIF on August 15, 2008, four months after these

proceedings were instituted.[10] However, Applicants never provided the requested documents for the Selected Engagements or the information identified in the Data Request Form.

Gately issued fourteen audit reports for public company clients between August 18, 2007 and February 25, 2008, each of which was included in filings with the Commission. Three of the fourteen reports were issued prior to the Final 2007 Deadline, and the remaining eleven reports were issued in January and February 2008, including audit reports for both Selected Engagements in February 2008.

III.

PROCEEDINGS BELOW

The Board's Order Instituting Disciplinary Proceedings charged that Applicants violated Board Rule 4006 "throughout much of 2007 and into 2008 by failing to provide requested . . . access to records" and by "failing to provide information by written responses, including information specified in an Issuer Information Form and a Data Request form." On summary disposition, the Board hearing officer (the "Hearing Officer") found that Gately's failure to submit timely the IIF, the audit engagement files for the Selected Engagements, and the Data Request Form violated Rule 4006, but declined to find that the agreed-upon inspection postponements prior to September 2007 had violated the Rule. Although the Hearing Officer held that a scienter finding is not required to find liability under the Rule, in determining sanctions he held that "any rational finder of fact would have to conclude that Respondents' failure to cooperate . . . was at least reckless." He noted Inspections' repeated warnings, and Applicants' failure to provide any "of the requested information . . . or any detailed explanation of their efforts to comply . . . or any colorable justification for failing to provide information after December 2007." The summary disposition order permanently revoked the Firm's registration and permanently barred Gately from association with any registered public accounting firm.

The Board affirmed the summary disposition order, finding that Applicants' failure to submit the IIF, the Data Request Form, and the files for the Selected Engagements violated Rule 4006. The Board held that Applicants failed to "demonstrate[] a genuine issue of fact about whether Gately was so incapacitated throughout the period in question as to be unable to provide any of the requested information." This appeal followed.

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[10] This August 15, 2008 submission was apparently sent in response to an e-mailed request from Inspections on June 5, 2008, but Applicants did not notify the Board hearing officer about this submission before the hearing officer issued the summary disposition order, and it is not included in the record.

IV.

STANDARD FOR SUMMARY DISPOSITION UNDER BOARD RULE 5427

Applicants challenge the appropriateness of the Board's resolution of the case by summary disposition. Applicants focus on Gately's Condition, treatment, and other obstacles to accessing his records. Applicants primarily argue that these circumstances made his compliance with Inspections requests "impossible" and demonstrate that he did not act with the requisite state of mind to establish liability under Rule 4006 or merit the sanctions imposed by the Board, claiming that they should have been afforded a hearing to develop those defenses.[11] Under Board Rule 5427(d), summary disposition is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law." Summary disposition "on the issue of liability alone" is authorized even when "there is a genuine issue as to a sanction." Our analysis of the summary disposition issue is guided by the Board's interpretation of its summary disposition standard.[12] As the Board noted, Rule 5427 mirrors the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure,[13] and accordingly federal court interpretations of Rule 56 are instructive in interpreting the Board rule.

Not every alleged factual dispute precludes summary disposition. To prevent summary disposition, the opposing party must present facts demonstrating a genuine issue of fact that is

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[11] Quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (stating that "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of a claim or defense").

[12] *Cf. Fogel v. Chestnutt*, 533 F.2d 731, 753 (2d Cir. 1975) (Friendly, J.) ("[A]n exchange has a substantial degree of power to interpret its own rules."), *cert. denied*, 429 U.S. 824 (1976); *Shultz v. SEC*, 614 F.2d 561, 571 (7th Cir. 1980) ("[B]ecause these are rules of the Exchange, the Exchange should be allowed discretion in determining their meaning." (internal citations omitted)); *Intercontinental Indus., Inc. v. Am. Stock Exch.*, 452 F.2d 935, 940 (5th Cir. 1971) ("Since these are the rules of the Exchange, it should be allowed broad discretion in the determination of their meaning and application."), *cert. denied*, 409 U.S. 842 (1972).

[13] Fed. R. Civ. P. 56(c), (d)(2) ("The [motion for summary judgment] should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. . . . An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.").

material to the charged violation.[14] In determining whether a genuine dispute has been identified, the record should be "viewed most favorably to the non-moving party," but the hearing officer "need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences."[15] As the Board noted, "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"[16]

Rule 56 guidance regarding the materiality of a factual dispute is also instructive.[17] Materiality analysis under Rule 56 is driven by the underlying "substantive law," *i.e.*, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[18] Similarly, the party opposing summary disposition in a Board disciplinary action should identify a factual issue meriting development at a hearing that is germane to the liability and/or sanctioning determination. Applicants' defenses were material for summary disposition purposes only if they were relevant to the Board's findings in support of the liability and sanctioning analysis.

V.

RULE 4006 VIOLATION

Pursuant to Section 19(e) of the Securities Exchange Act of 1934,[19] we will sustain the Board's finding of violation if the record shows that Applicants engaged in the conduct found by

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[14] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

[15] *Nat'l. Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

[16] Quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

[17] *Cf. Thomas W. Heath*, Securities Exchange Act Rel. No. 59223 (Jan. 9, 2009), 94 SEC Docket 3466 & n.64, *petition denied*, 586 F.3d 122 (2d Cir. 2009) (applying Rule 56 guidance to motion for summary disposition of a NYSE proceeding when the NYSE Rules did not include a legal standard for summary disposition); *Frank P. Quattrone*, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155 (applying Rule 56 guidance to an NASD proceeding when the NASD standard indicated that a motion for summary disposition "may [be] grante[ed] . . . if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law").

[18] *Anderson*, 477 U.S. at 248.

[19] 15 U.S.C. § 78s(e); 15 U.S.C. § 7217(c)(2).

the Board, that such conduct violated Rule 4006, and that the Rule was applied in a manner consistent with the purposes of the Exchange Act and Sarbanes-Oxley.[20]

A. Applicants Engaged in the Conduct Found by the Board

Undisputed record evidence establishes that Applicants failed to comply with multiple deadlines for written responses to the IIF, the information identified in the Data Request Form, and the audit records for the Selected Engagements. Applicants failed to comply or cooperate with the following deadlines that were scheduled, and then rescheduled, in 2007:

Deadline	**Information/records requested**	**Date request made to Applicants**
September 20, 2007	IIF	September 12, 2007
November 5, 2007	Data Request Form Selected Engagement records	October 15, 2007 October 31, 2007
November 26, 2007	IIF Data Request Form Selected Engagement records	November 2, 2007
December 7, 2007	Data Request Form Selected Engagement records	November 29, 2007
December 28, 2007 (Final 2007 Deadline)	IIF Data Request Form Selected Engagement records	December 20, 2007

Applicants further admit that when these proceedings were instituted in April 2008, four months after the Final 2007 Deadline, they still had not produced any of the information or records requested by Inspections and provided only the IIF in August 2008.

B. Applicants' Conduct Violated Rule 4006 and the Rule was Applied in a Manner Consistent with Sarbanes-Oxley

Rule 4006 requires every registered public accounting firm and every associated person of a registered public accounting firm to "cooperate with . . . any Board inspection." The Rule states that "[c]ooperation shall include, but is not limited to, cooperating and complying with any request, made in furtherance of the Board's authority and responsibilities under [Sarbanes-Oxley],

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[20] 15 U.S.C. § 7212(c)(2).

to – (a) provide access to, and the ability to copy, any record in the possession, custody, or control of such firm or person, and (b) provide information by oral interviews, written responses, or otherwise." The obligations under Rule 4006 are unequivocal, and apply to "any request[] made in furtherance of the Board's authority and responsibilities."

Applicants failed to comply with these requirements. They never provided the requested documents in connection with the Selected Engagements in violation of Rule 4006(a). Applicants also failed to provide the information requested in the IIF and Data Request Form in response to the September 20 and November 5 deadlines, violating Applicants' obligation to supply information to the Board under Rule 4006(b).

Applicants assert that they did not have access to unspecified records because they were damaged by fire in late November 2007. However, by that time they had already missed the November 5 deadline for producing the Selected Engagement records. Moreover, they failed to provide any records that remained in their "possession, custody or control" under Rule 4006(a) and failed to provide a detailed description of the destroyed documents or an explanation of steps taken to retrieve any missing records. These failures support a finding that Applicants violated the duty to comply with the Board's requests for records. As we have previously held in the context of self-regulatory organization ("SRO") requests, "if an associated person cannot provide the information sought by the [SRO], the associated person has the obligation to explain the deficiencies in his responses as completely as he is able" and be prepared to describe "any attempts he made to locate the records or the information they apparently contained."[21]

Applicants further assert that the Board improperly found liability without giving a full hearing to their defense that Gately did not act with the requisite state of mind, arguing that he was "mentally and physically unable to perform" as a result of his Condition. We conclude that the Board is not required to establish that Applicants acted with a particular state of mind in order to establish a violation of Rule 4006.[22] Nothing on the face of either the Rule or Section 102 of

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[21] *Robert A. Quiel*, 53 S.E.C. 165, 168 (1997) (rejecting claim that applicant "could not access readily the information that the NASD requested" when "he failed to explain the deficiencies in his responses or to answer as completely as he was able"); *see also Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998); *Robert Fitzpatrick*, 55 S.E.C. 419, 424 n.11 (2001).

[22] We note that this interpretation of the Rule is consistent with the obligations of other securities professionals to provide SROs with access to their books and records. *See, e.g.*, FINRA Rule 8210 (setting forth the right of FINRA staff to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding"). Scienter is not an element of the FINRA rule, *Howard Brett Berger*, Exchange Act Rel. No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11629-30 (affirming a bar for failure to appear for NASD interview), and we have specifically rejected

(continued...)

Sarbanes-Oxley refers to state of mind. Rather, auditing firms knowingly take on the burden of compliance with these inspections when they acknowledge that their registration is contingent on their "continued cooperation . . . and compliance with any request for testimony or the production of documents made by the Board." We also think this interpretation of Rule 4006 is consistent with the fact that Sarbanes-Oxley provides for an assessment of knowledge, recklessness and negligence in the Board's analysis of appropriate sanctions, and provides for certain Board penalties and other sanctions in the absence of such findings.[23] Given these guideposts for balancing state of mind evidence in the statute itself, we do not believe that the initial Rule 4006 liability determination must be based on a finding that Applicants "intentionally and recklessly disregarded any duty to follow the rule," as Applicants claim.

Applicants also assert that they are entitled to the defense of "impossibility of performance," which they argue was not, and could not have been, properly considered by the Board in the context of a summary disposition. While "impossibility" may be a common law defense to a breach of contract,[24] Applicants cite no authority, and we are aware of none, suggesting that this common law contract principle gives rise to an affirmative defense to a violation of the Board's rules. Nor do they adequately explain why their various justifications for their non-compliance would qualify for such a defense or how their completion of fourteen audits during the period at issue can be reconciled with such a defense.[25] In the proceedings below, Applicants cited a case analyzing and rejecting an impossibility defense to a failure to comply

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[22] (...continued)
contentions that violations of such rules must be based on "an intentional or deliberate effort to withhold information." *Quiel*, 53 S.E.C. at 168 (rejecting applicant's assertions "that he cooperated to the best of his ability and that lack of information and documentation prevented his more complete cooperation with the NASD's requests" when Commission decisions under the SRO rule "make clear that . . . it is unnecessary to find an 'intentional or deliberate effort to withhold information'" (quoting *Richard J. Rouse*, 51 S.E.C. 581, 585 (1993)). Both the Commission and the courts have recognized the authority of SROs to discipline persons for rule violations that are not predicated on state of mind findings, even when "the lack of a scienter requirement may make for a more flexible rule." *Heath*, 586 F.3d at 140. These principles are equally applicable to discipline by the Board.

[23] *See* 15 U.S.C. §§ 7215(c)(5) and 7215(c)(4)(D)(i), (E)-(G) (authorizing penalties up to $100,000 for individuals or $2 million for firms, censure, professional training or education and other appropriate remedies without mental state findings); *see also infra* Section VI. Sanctions.

[24] *See, e.g.*, Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Studies 83 (1977).

[25] This defense is discussed more fully *infra* in Section VI. Sanctions.

with a court order to produce documents, but they offer no explanation for why such analysis should be applied to Rule 4006.[26] Such an interpretation would be particularly inappropriate when we have rejected similar attempts to apply civil contempt principles to violations of the rules of SROs.[27]

In light of the unavailability of state of mind and impossibility as defenses to conduct violating the Rule, these claims were not material to the Board's findings in support of the violation, and Applicants were not entitled to a hearing exploring their merits in connection with the Board's liability analysis. Because undisputed record evidence establishes that Applicants failed to cooperate with the 2007 Board inspection, we find that Applicants violated Rule 4006.

VI.

SANCTIONS

Under Section 107(c)(3) of Sarbanes-Oxley, we review sanctions imposed by the Board to determine if, "having due regard for the public interest and the protection of investors," the sanction "(A) is not necessary or appropriate in furtherance of [Sarbanes-Oxley] or the securities laws; or (B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed."[28] Based on our review, we "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof."[29]

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[26] Citing *United States v. Plath*, 2003 WL 23138778 at *3 (S.D. Fla. 2003) (rejecting an "inability to comply" defense for a failure to comply with IRS subpoena in a civil contempt proceeding and stating that such a defense creates a "substantial" burden of establishing that the respondent has made "in good faith all reasonable efforts to comply" (internal citations omitted)).

[27] *Cf. Berger*, 94 SEC Docket at 11627-28 (finding that cases addressing "subpoena power, judicial enforcement of subpoena power, and civil contempt powers" do not apply to failures to cooperate with NASD investigations).

[28] 15 U.S.C. § 7217(c)(3).

[29] *Id.*

A. Sarbanes Oxley Authorizes Bars and Revocation Based on Reckless Conduct

Sarbanes-Oxley generally authorizes "such disciplinary or remedial sanctions as [the Board] determines appropriate" if the Board finds, "based on all of the facts and circumstances," that Applicants engaged in conduct violating a Board rule.[30] As apposite here, in order to impose a bar on future association and/or revocation of registration, Sarbanes-Oxley Section 105(c)(5) requires the Board to find that the conduct at issue was "intentional or knowing," which "include[s] reckless conduct," that results in a violation of the applicable regulatory standard. Here, the Board found Gately's conduct "at least reckless." Applicants challenge the Board's recklessness finding, arguing that their claims regarding Gately's state of mind and related circumstances created a material factual dispute precluding any finding of intentional or reckless conduct absent a hearing.

Although this is the first Commission case applying the knowledge, recklessness, and negligence standards in Section 105(c)(5), these standards are similar to the standards for Commission discipline of accountants under Rule 102(e) of our Rules of Practice (now also codified in Exchange Act Section 4C by Sarbanes-Oxley).[31] Given these similar formulations, our interpretations of the Rule 102(e) standards inform our analysis under Sarbanes-Oxley Section 105(c)(5).

Recklessness in this context, as under Rule 102(e), is an "extreme departure from the standards of ordinary care, . . . which presents a danger" to investors or the markets "that is either known to the (actor) or is so obvious that the actor must have been aware of it."[32] This standard

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[30] 15 U.S.C. § 7215(c)(4).

[31] 15 U.S.C. § 78d-3. For example, the Board's authority under Section 105(c)(5)(A) extends to "intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standards," 15 U.S.C. § 7215(c)(5)(A), and the Commission's authority under Section 4C covers "intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards." 15 U.S.C. § 78d-3(b)(1). Whereas Section 105(c)(5)(B) covers "repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standards," Section 4C covers "negligent conduct in the form of . . . repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." 15 U.S.C. §§ 7215(c)(5)(B) and 78d-3(b)(2)(B), respectively.

[32] *Amendment to Rule 102(e) of the Commission's Rules of Practice ("Amendment to Rule 102(e)")*, 63 Fed. Reg. 57,164, 57,166 (Oct. 26, 1998) (quoting *SEC v. Steadman*, 976 F.2d 636, 641 (D.C. Cir. 1992) (ellipsis in original) (quoting *Sundstrand Corp. v. Sun Chemical*

(continued...)

calls us to compare Applicants' violative conduct against the relevant professional standard of care and to assess evidence revealing Applicants' state of mind at the time they engaged in the violative conduct.[33]

B. Applicants' Failure to Cooperate with the Inspection Was Reckless

1. Extreme departure from the standard of ordinary care under Rule 4006

The first element of this recklessness standard considers whether Applicants' conduct departed from "applicable statutory, regulatory, or professional standard[s],"[34] in this case the standard for inspections under Rule 4006, and if so, the degree of such departure. As the hearing officer observed, the Rule requires "full and prompt cooperation" with Board requests,[35] and if Applicants "were unable to provide all of the information requested by Inspections within the time they were given," the duty to cooperate still "required [them] to provide as much responsive information as they could and to explain, as completely as possible, their efforts to obtain and provide the remaining information."[36]

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[32] (...continued)
Corp., 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977)). Although this framework for establishing recklessness was borrowed from the anti-fraud context, the other elements for a fraud-based violation are not imported to the recklessness standard under Rule 102(e), *Marrie v. SEC*, 374 F.3d 1196, 1205 (D.C. Cir. 2004), or by extension, Section 105(c)(5).

[33] *Michael J. Marrie*, 56 S.E.C. 760, 774 (2003) ("The definition of reckless conduct establishes the mental state that must be shown with respect to conduct that results in a violation of applicable professional standards. The question is not whether an accountant recklessly intended to aid in the fraud committed by the audit client, but rather whether the accountant recklessly violated applicable professional standards."), *rev'd on other grounds*, 374 F.3d at 1206.

[34] 15 U.S.C. § 7215(c)(5)(A).

[35] Citing *Michael David Borth*, 51 S.E.C. 178, 180 (1992) (finding that a "[f]ailure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate").

[36] *Cf. Rooney A. Sahai*, Exchange Act Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2407 ("We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability" and "we would have expected such an explanation . . . to detail his efforts to obtain the information requested") (internal citations omitted)); *Barry C. Wilson*, 52 S.E.C. 1070, 1073 n.14 (1996) (rejecting applicant's "contention (continued...)

Applicants' conduct was an extreme departure from this "full and prompt" standard of care. Not only did Applicants fail to provide the requested information and records in response to reasonable deadlines, but they also failed to make reasonable efforts to explain and remedy their ongoing failure. This failure continued for almost seven months between the first deadline for completion of the IIF in September 2007 and the institution of the Board disciplinary proceedings in April 2008. The e-mails and other correspondence in the record confirm that Gately knew of each of the deadlines before they passed, and that he disregarded multiple warnings and reminders by Inspections staff.

Any restrictions on Gately's access to stored records, limitations on his travel, or claimed fire damage of records do not outweigh the evidence establishing an extreme departure from the objective standard of care for inspections. Inspections tried to accommodate his circumstances and facilitate his cooperation by rescheduling deadlines, agreeing to conduct the inspection remotely, and accepting Gately's shifting explanations for his failures. Moreover, the e-mail correspondence between Gately and Inspections in early November 2007 confirms that Gately was aware that he could deregister the Firm if he were unable to cooperate with the inspection requirements. He had considered this option several times before confirming his intention to cooperate with the inspection later in November. Even after Gately stated on November 22 he would not be available for an inspection scheduled for November 26, Inspections again tried to initiate a discussion with Gately on "how to proceed." Rather than reciprocating Inspections' repeated attempts to accommodate his circumstances or clarify his intentions, Gately's responses to these efforts were intermittent, cryptic, and non-committal at best. Many times, he simply failed to respond. Even when Gately promised to call Inspections to discuss missed deadlines on November 26 and December 10, he did not call. In light of Gately's egregious refusal to respond to Inspections' efforts at accommodation, any accidental destruction of files or other difficulties in securing files do not justify Applicants' prolonged failure to produce any of those documents within their control, to respond to routine questions, or to provide a detailed account of the missing records together with steps taken to retrieve them.

Nor do Gately's Condition and treatment excuse the extreme departure from the standard of care in this case. Applicants issued fourteen audit reports during the same period for which they contend that it was impossible to meet the professional standard of care for inspections, and we are not persuaded by Applicants' attempt to reconcile their "impossibility" claim with this conduct. Applicants assert that the public audits were not compromised by the circumstances making cooperation with the inspection impossible because the audits presented limited challenges. But, as the Board pointed out, Applicants failed to produce *any* materials or

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[36] (...continued)
that 'he did his best'" to respond to NASD examination request when respondent "was unable to specify what documents he claims to have provided or when he provided them"); *see also supra* note 21 and accompanying text.

information in response to Inspections' requests before these proceedings were instituted. Applicants' failure means there is no basis on this record to assess whether the audit reports were in fact conducted in accordance with Board standards as Applicants represented in those reports. Applicants also assert that one of those audits was performed in order to secure audit files that had been damaged. However, the failure to cooperate persisted even after that audit. These facts compel the conclusion that Applicants' departure from the professional standard of care was extreme.

2. Risk of harm to investors and the markets

The second prong of the recklessness standard focuses on assessing the actor's state of mind based on evidence establishing what he or she knew or must have known when committing the violation.[37] But the actor cannot forestall a recklessness finding merely by denying that he or she knew of the risk posed by the violative conduct.[38] The recklessness standard is ultimately meant to identify conduct which, "under the circumstances of a given case, results in the conclusion that the reckless man should bear the risk of his" conduct.[39] Recklessness can be established by an "egregious refusal to investigate the doubtful and to see the obvious."[40] Courts have recognized that "[a]s a practical matter . . . knowledge is inferable from [the] gravity [of a danger]. . . . When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk."[41]

Applicants' prolonged failure to submit to Board inspection presented a risk of harm to investors and the markets that was so obvious that Applicants must have been aware of it. Applicants do not, and cannot credibly, claim that they "genuinely forgot" about the Board's unfulfilled inspection requests, or that their conduct resulted from "mere inexcusable neglect" of their inspection obligations.[42] In the Firm's registration application, Applicants themselves

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[37] *Sundstrand*, 553 F.2d at 1046.

[38] *See Sundstrand*, 553 F.2d at 1046, 1048 (finding that recklessness was "established as a matter of law" even when respondent "denie[d] actual knowledge of the danger" posed by his conduct).

[39] *Sundstrand*, 553 F.2d at 1045.

[40] *Marrie*, 56 S.E.C. at 793, *rev'd on other grounds*, 374 F.3d at 1206; *see also Potts v. SEC*, 151 F.3d 810, 812 (8th Cir. 1998).

[41] *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008).

[42] *See Sundstrand*, 553 F.2d at 1047 (indicating that the second prong of the recklessness standard would not be met in the anti-fraud context if the defendant "genuinely

(continued...)

knowingly agreed to cooperate with Board inspections and acknowledged that their continued registration was contingent on their cooperation with inspections. Although Gately claims that the Condition so "impaired his ability to engage in normal business and professional discourse" that he was simply unable to provide any information, records, or meaningful explanation in response to Board's inspection requests,[43] Applicants knew about each of the inspection deadlines that they missed, and also knew that deregistration was an option if Gately was unable to cooperate. Gately told Inspections staff at least twice in 2007 that he intended to apply to withdraw the Firm's registration due to his personal circumstances. In fact, his November 2 e-mail to Inspections stating his intention to deregister also stated that he had been "getting rid of the public companies." Moreover, Inspections repeatedly reminded Applicants that a failure to cooperate would violate Rule 4006 and warned that failures to meet inspection deadlines could result in discipline.

In light of this known failure to cooperate with the inspection or deregister, Applicants acted with reckless indifference to those relying on their audit reports when they continued to issue reports through 2007 and 2008. The risks to investors and markets posed by this conduct were so obvious that Applicants must have been aware of them, particularly given the Firm's statutorily-required acknowledgment that the inspections are a condition to registration.[44] Section 102 of Sarbanes-Oxley reflects Congress' judgment that auditing firms -- not public investors or

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[42] (...continued)
forgot to disclose information or that it never came to his mind" or if the conduct resulted from "mere inexcusable neglect").

[43] The record includes an affidavit from a licensed therapist describing Gately's treatment for the Condition in 2007 and describing Gately as having "a general inability to function in otherwise normal business circumstances, an inability to maintain focus, and an avoidance pattern when presented with stressful circumstances." Although it is unclear whether this affidavit was in fact admitted as part of the record below, both the Hearing Officer and the Board considered the affidavit in their opinions, and the affidavit was included with the record certified by the Board to the Commission. We accordingly accept it as part of the record. Gately has represented that the treatment described in the affidavit continued through February 29, 2008. The record evidence indicates, however, that the failure to cooperate continued past April 2008 – past the period described in the affidavit, and past the treatment period accounted for in the record, and while Respondents continued to perform audits of public companies.

[44] *See Inv. Registry of America, Inc.*, 21 S.E.C. 745, 760 (1946) (revoking registration of broker-dealer and investment adviser based on false and misleading statements in a registration statement and stating "even were we to assume the ignorance claimed by the [respondent's controlling persons], it would not follow that respondent should be permitted to continue its licensed activities. Such ignorance would amount to such a lack of necessary awareness and attention to responsibility as to establish in itself a disqualification to discharge the fiduciary duties which respondent has undertaken to perform for the public.").

markets -- should bear the consequences for any firm's inability to comply with inspections. Regardless of the reason for such inability or Applicants' characterization of the audits they conducted in 2007 and 2008 as routine, the statute makes it clear that failure to comply with this obligation presumptively disqualifies a firm from conducting public company audits. Permitting continued public audits under such circumstances would upend the regulatory framework -- forcing investors and the markets to bear the risks associated with public audits conducted without the benefit of Board oversight.

Applicants do not claim that they were not conscious of their repeated failures to cooperate and comply with the Board's inspection requests -- the facts that made obvious the risk of harm to investors and the markets. Nor have they argued that they would have presented evidence demonstrating that they lacked consciousness of these facts when they were violating Rule 4006. As such, Applicants have identified no evidence that might have been presented at a hearing that could have created a genuine issue of fact material to our findings, based on undisputed contemporaneous record evidence, that Applicants' conduct was an extreme departure from the standard for inspections under Rule 4006 and that the risk to investors and the markets posed by such conduct was so obvious that Applicants must have been aware of it.[45] Accordingly, we agree that the Board was entitled to conclude that this conduct was reckless within the meaning of Section 105(c)(5) without conducting a hearing.

C. Revocation of Registration and Bar from Association are Appropriate Remedial Sanctions

Having determined that Gately's conduct was reckless, the Board was authorized to select from any of the sanctions enumerated in Section 105(c)(4), including revocation and bar, "as it determine[d] appropriate." We review the Board's sanctions determination, "having due regard for the public interest and the protection of investors,"[46] based on both "the nature of the violation and the mitigating factors presented in the record."[47] We are mindful of the responsibility to be

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[45] *See Sundstrand*, 553 F.2d at 1047 (a hearing regarding subjective mindset is unnecessary where it is undisputed that the violator acted with a consciousness of the facts that made it obvious that the violative conduct presented a risk of harming investors).

[46] 15 U.S.C. § 7217(c)(2)-(3).

[47] *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005); *see also Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007) (stating that Commission review of sanctions under Section 19(e)(2) of the Exchange Act requires an inquiry into whether the sanctions serve a remedial purpose); *Assoc. Sec. Corp. v. SEC*, 283 F.2d 773, 775 (1960) (10th Cir. 1960) ("Exclusion from the securities business is a remedial device for the protection of the public.").

"particularly careful to address potentially mitigating factors"[48] and the "remedial and protective efficacy" of sanctions involving expulsion of a firm or individual from the securities industry.[49]

Applicants urge remand or reversal of the sanctions imposed by the Board. They challenge the bar and permanent revocation as "unduly harsh and draconian" and argue that "to deny [Gately] the right to permanently practice in his ch[o]sen profession as a result of his [treatment] runs contrary to the public interest." Applicants further argue that the summary disposition improperly denied them the opportunity to present testimony in support of mitigation of the sanctions.

Mitigating factors are among the mix of facts and circumstances considered by the Board in the exercise of its discretion under Section 105(c)(4). However, these factors and Applicants' desire to continue to participate in public audits, must ultimately be evaluated in light of their past conduct, which reflects "too great a risk to the markets and investors to be permitted"[50] in a registered accountant that issues audit reports that are relied upon by the public.

Here, the Board considered and rejected Applicants' argument that Gately's Condition was mitigative. The Board found that "this argument misapprehends the threat to the system of Board oversight posed by noncooperation with PCAOB inspections." The Board also rejected Applicants' attempts to downplay the seriousness of the violation, noting that the inspections "are fundamental to the Board's . . . protecti[ion] of the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." The Board also noted that "the absence of fraud or deceit does not . . . diminish the seriousness of Respondents' failure to cooperate in an inspection designed, among other things, to uncover any such misconduct," and cited "Congress['s] recogni[tion] that cooperation with the Board by registered public accounting firms and their associated persons was critical to the system of oversight it put in place" in Sarbanes-Oxley.

We find that Applicants have failed to demonstrate a genuine issue of material fact. Applicants argue that they were inappropriately denied the opportunity to present further testimony regarding "the devastating effect [Gately's Condition] had on [his] ability to perform," and supporting their claims that Gately "intend[ed] to cooperate with the PCAOB to the extent

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[48] *Paz*, 494 F.3d at 1065 (citing *Steadman v. SEC*, 603 F.2d 1126, 1137-40 (5th Cir. 1979)).

[49] *McCarthy v. SEC*, 406 F.3d at 190; *but see Paz v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (stating that the remedial analysis regarding a bar from association with any SRO member firm does not require the Commission to "state why a lesser sanction would be insufficient").

[50] *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5127.

possible under the circumstances" or "to the best of his ability." However, Gately has not identified any specific additional evidence that he might have adduced in support of these assertions warranting further development at a hearing.[51]

Applicants' claims regarding their purported intention to cooperate with the inspection process are not mitigating. We note that some of Inspections' requests covered routine information about, for example, Firm partners, affiliates, and litigation. Even viewing the record most favorably to Applicants, we cannot credit Applicants' assertions that they intended to cooperate given their longstanding failure to provide even the most routine information. We believe the Board evaluated Applicants' claims in accordance with the standard for summary disposition and properly concluded that "there is an absence of evidence to support [Applicants'] claim that Gately was so incapacitated as to be unable to cooperate with the inspection of Gately LLC," especially given the fact that the Firm continued to issue audit reports for public companies during this same period of time.

In fact, despite Inspections' diligent efforts to accommodate Gately's personal circumstances, as the Board observed, Applicants "have offered no representation or evidence that they made any efforts to comply with Inspections' requests between January 3, 2008 and well after the date this proceeding was instituted." If Gately intended to comply with the inspection and later became capable of such compliance, the record should reflect good faith attempts to remedy the past failures to cooperate. Gately does not point to evidence indicating that he did so.

Applicants' other attempts to downplay the seriousness of their conduct are similarly unavailing. They note that their conduct did not involve fraud or deceit. As the Board observed, however, "[t]he absence of fraud or deceit does not . . . diminish the seriousness of [Applicants']

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[51] Applicants also point to two SRO disciplinary cases in which efforts at rehabilitation were considered in mitigation, to argue that Gately's Condition, treatment, and other limitations on his access to his records should mitigate the sanction. *Lawrence R. Klein,* 52 S.E.C. 535 (1995); *Robin Earl Hayden*, 1988 WL 858046 (Board of Governors NASD Regulation, Inc. Apr. 28, 1998). Both *Klein* and *Hayden* involved isolated, one-time violations, whereas Applicants' violative conduct involved a failure to meet multiple deadlines over a period of months. In analogous circumstances, we have declined to hold personal circumstances mitigating when such delays continue over a protracted period of time despite reasonable efforts to accommodate such circumstances. *See, e.g., Toni Valentino*, 57 S.E.C. 330, 337, 339 n.12, 340 (2004) (affirming bar for failure to appear for SRO interviews "after numerous [scheduling] attempts" when applicant "engaged in dilatory tactics to evade questioning," and noting that SRO "members and associated persons may not impose conditions . . . under which they will respond to [SRO] requests for information").

failure to cooperate in an inspection designed, among other things, to uncover any such misconduct."[52]

Nor is the seriousness of the violation diminished by their eventual submission of an IIF to Inspections in August 2008 -- months after the institution of proceedings and the Final 2007 Deadline. In the context of SRO requests for information, we have long held that the institution of disciplinary proceedings should not be required in order to compel compliance with such requests,[53] and we think the same principles should apply to PCAOB Rule 4006 requests. Moreover, Applicants do not claim that they ever produced any of the information required by the Data Request Form or the records for the Selected Engagements. Given the protracted nature of the violation and Gately's continued issuance of public audit reports while the original 2007 inspection requests remained outstanding, Applicants offer no assurance that the underlying cause of such delays has been remedied or that this pattern will not be repeated in connection with future inspections mandated under Sarbanes-Oxley.[54]

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[52] *Cf. Paz*, 93 SEC Docket at 5131 ("[A] request for information is no less serious because NASD issues the request in an effort to prevent or uncover misconduct rather than to unearth the details of misconduct of which it is already aware."). Although Applicants argue that the bar and revocation are disproportionate in comparison to a settled case in which the Board imposed lesser sanctions for violations Applicants characterize as more serious, the appropriate sanctions in any case depend on the particular facts and circumstances presented rather than on a comparison with other cases involving different circumstances. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973); *see also McCarthy*, 406 F.3d at 188; *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970). We have previously pointed out, moreover, that comparisons to sanctions in settled cases are particularly inappropriate because "pragmatic factors may result in lesser sanctions" in settlements. *Anthony A. Addonino*, 56 S.E.C. 1273, 1295 (2003); *cf. Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5089, 5118 ("[I]t is well established that those who offer to settle may properly receive lesser sanctions than they otherwise might have based on 'pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings.'").

[53] *Cf., e.g., CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13810 ("[W]e have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests . . . ."). Applicants focus on the Hearing Officer's expressed willingness to consider whether subsequent submission of requested information or files could serve as a mitigating factor. The record suggests, however, that Applicants did not submit evidence of any late submission to the Hearing Officer before he issued the summary disposition order. *See supra* note 10.

[54] We note that a different record might yield a different conclusion concerning the need for a hearing to evaluate a defense based on a condition such as Gately's. *Cf. Frank P. Quattrone*, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155, 2166 (setting

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Applicants also attempt to shift blame for their own violative conduct to the Board. For instance, Applicants attempt to explain their failure to produce any audit records by claiming that Inspections' letters called for complete cooperation and did not notify them that partial compliance might mitigate sanctions in a future disciplinary action. However, Applicants cite nothing to support their premise that Inspections had any obligation to provide such notification, and we have long held that regulated persons cannot avoid responsibility for their own violative conduct by blaming the Commission or other regulators.[55] Their defense is particularly unconvincing in light of Applicants' failures to respond meaningfully to Inspections' other repeated attempts to accommodate Gately's circumstances, including when Inspections postponed deadlines, offered opportunities to withdraw registration, warned Applicants that missed deadlines could result in disciplinary action, and even encouraged Gately to comply after the Final 2007 Deadline had passed.[56] Applicants also claim that the disciplinary sanctions imposed in this case were motivated by a desire to target Gately for the Condition, but do not substantiate this claim, and we find no support for it in the record.

Applicants' continuing failure to acknowledge their responsibility for the 2007 inspection requests weighs heavily against permitting them to participate in future public audits. As the Board observed, any such participation would necessarily involve periodic inspections required under Sarbanes-Oxley, providing Applicants with opportunities for similar violations. Moreover, given the risk to markets and investors ultimately posed by Applicants' conduct,[57] we do not find

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[54] (...continued)
aside NASD action when "NASD improperly granted summary disposition on" the issue of liability). Here, however, the facts already in this record concerning Gately's misconduct and the risk of harm to investors overwhelmingly support the appropriately remedial nature of the revocation and bar.

[55] *Cf. Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2501 ("Applicants cannot blame NASD or their counsel for their failure to comply with the Suspension Order."); *Quest Capital Strategies*, 55 S.E.C. 362, 377-78 (2001) ("We have repeatedly pointed out that a broker-dealer cannot shift its responsibility for compliance with applicable requirements to the NASD or to [the Commission].").

[56] Applicants also suggest that a new inspection initiated in 2008 somehow was an "attempt to prevent Gately from mitigating possible sanctions" in connection with the 2007 requests, but do not explain the purport of this argument.

[57] *Cf. Paz*, 93 SEC Docket at 5131-32 (affirming bar of former president of NASD member firm from association with any NASD member in any capacity for failure to provide information requested by NASD), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

that the sanction must accommodate "some structured mechanism for . . . re-entry into the field of public accounting" as Applicants claim.[58]

Given the nature and pattern of violative conduct reflected in this case, the revocation of registration and bar imposed by the Board are appropriate to protect the public interest in securing regulatory oversight over the activities of registered accounting firms. We further find that Gately's state of mind and other claims do not justify mitigation, and that, in light of other record evidence, these claims did not present a genuine issue of material fact precluding summary disposition of the sanctions.

For these reasons, we sustain the Board's findings of violation and imposition of sanctions. An appropriate order will issue.[59]

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER and PAREDES); Commissioner AGUILAR not participating.

Elizabeth M. Murphy
Secretary

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[58] *Cf. Paz*, 566 F.3d at 1176, *supra* note 49.

[59] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62656 / August 5, 2010

Admin. Proc. File No. 3-13535

In the Matter of the Application of

GATELY & ASSOCIATES, LLC
and
JAMES P. GATELY, CPA

c/o Roddy B. Lanigan, Esq.
Lanigan & Lanigan, PL
222 S. Pennsylvania Ave., #101
Winter Park, FL 32789

For Review of Disciplinary Action by
PCAOB

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary actions taken by PCAOB against Gately & Associates, LLC, and James P. Gately, CPA, be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary