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

Admin. Proc. File No. 3-17936

In the Matter of the Application of

S. BRENT FARHANG, CPA

For Review of Disciplinary Action Taken By the

PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD

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

August 4, 2017

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The Public Company Accounting Oversight Board (Board or PCAOB) hereby opposes the application of S. Brent Farhang, CPA for review by the Securities and Exchange Commission (Commission or SEC) of sanctions ordered against him in this PCAOB disciplinary proceeding.

INTRODUCTION

One week after a supervisor at a registered public accounting firm that had formerly employed Farhang testified during a PCAOB investigation that the supervisor was "troubled" by evidence suggesting that Farhang may have altered work papers of an issuer audit in violation of PCAOB rules and auditing standards, Farhang backed out of his months-long agreement to appear for his own scheduled testimony in that investigation. He continued to refuse to appear for testimony even after the Division of Enforcement and Investigations offered to resolve all of the obstacles he raised to testifying—including financial inconvenience, unwillingness to travel, and being a non-native English speaker—by reimbursing his expenses, conducting the interview near his home, and providing an interpreter. Only then, long after receiving the PCAOB's accounting board demand (ABD) for documents and testimony (*see* PCAOB Rule 1001(a)(ix)), initially providing certain documents, and agreeing to testify, Farhang, represented by the same counsel, stated that he was "exercising his right to decline to testify in this matter." Without explanation, he broadly claimed at the time that "[a]ny person" who "does not wish to testify in response to" an ABD "has a right not to testify." Later, Farhang made no reference to this legal claim when taking advantage of the opportunity offered by the Division to state his position as to whether a Board disciplinary proceeding should be brought against him for refusing to testify. Essentially, his position was that he had "severely limited financial resources and more important financial obligations" than testifying and that "he cannot justify that expense."

The Division repeatedly cautioned Farhang—indisputably an associated person of a registered public accounting firm at all relevant times—that his refusal to testify was grounds for institution of a Board disciplinary proceeding against him under Section 105(b)(3) of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act or Act), 15 U.S.C. 7215(b)(3), and PCAOB Rule 5300(b). Section 105(b)(3) authorizes the Board to impose sanctions if a registered public accounting firm or an associated person of such a firm "refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation." Rule 5300(b) provides for sanctions if such a firm or person "has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation." After Farhang maintained his new, standing, blanket refusal to testify, the Board commenced a disciplinary proceeding against him. *See* Index to the Record, Record Document (R.D.) 1.

The Division and Farhang both sought summary disposition under PCAOB Rule 5427(d). *See* R.D. 15 at 4; R.D. 16b at 17, 28-29; R.D. 18 at 1; R.D. 22; R.D. 22a at 1, 23; R.D. 23; R.D. 23a at 12-15. After briefing, the hearing officer found it was undisputed that Farhang repeatedly refused to comply with an ABD to appear for testimony during the Division's investigation of the audit firm that formerly employed Farhang and of its associated persons. R.D. 27, Initial Decision (I.D.) 12. The hearing officer rejected Farhang's various litigation arguments that his refusal to testify was legally justified on statutory and constitutional grounds and concluded that it was "without a valid justification." I.D. 12-17. The initial decision ordered that Farhang be censured and barred from associating with a public accounting firm. The decision also determined that "Farhang will be ordered to pay a civil monetary penalty of $75,000," which was "appropriate" and reflected "the seriousness of noncooperation, including the harm to the public

when noncooperation prevents the Division from uncovering possible evidence of violative conduct." I.D. 19, 22. But the decision then held that "such payment will be waived" based on what the decision deemed "Farhang's demonstrated inability to pay a civil penalty." I.D. 22.

Farhang petitioned for Board review of the initial decision. R.D. 28. On September 21, 2016, the Board issued an order setting a briefing schedule and directing the parties to specifically address (in addition to or in the course of addressing the issues specified in the petition for review) the following matters: (1) "[a]ny relevance of inability to pay to the imposition of a civil money penalty in this case"; (2) the initial decision's statement that "Farhang has demonstrated an inability to pay a civil money penalty"; and (3) the decision's holding that the civil money penalty it had imposed "will be waived." R.D. 29. On March 16, 2017, the Board, after *de novo* review of the record and full briefing, issued a final decision concluding that "Farhang's arguments do not persuade us that the Board lacks statutory authority to sanction him for refusing to testify, including through the imposition of a civil money penalty, or that doing so is contrary to the Constitution." F.D. 11. The Board found that Farhang's "deliberate choice to avoid testifying displayed little or no regard for the Board's processes and, by extension, for its public-interest mandate" and that under the circumstances presented by the case it was appropriate and in the public interest to impose the sanctions of a censure, an associational bar, and a $50,000 civil money penalty. F.D. 21-24, 28. The Board determined that "[b]ecause of the egregiousness of the conduct,...we do not view information about Farhang's ability to pay as relevant to the question of what, if any, civil money penalty to impose in this case," citing both SEC and PCAOB precedent, and that, in any event, "the record here would not persuade us that Farhang is unable to pay the civil money penalty." F.D. 27.

Now on appeal to the Commission, Farhang offers again the same basic insupportable justifications for his refusal to testify that failed before the hearing officer and the Board. These indefensible excuses for Farhang's categorical refusal to testify in response to the ABD do nothing to detract from the fact that, under the standards governing Commission review of Board sanctions, his conduct "constitutes noncooperation for which the Board was authorized to impose sanctions pursuant to Section 105(b)(3) of the [Sarbanes-Oxley] Act and Rule 5300(b)." *See R.E. Bassie & Co.*, SEC Rel. No. AAE-3354, 2012 SEC LEXIS 89, *27 (Jan. 10, 2012); Order Approving Proposed Rules Relating to Investigations and Adjudications, 69 Fed. Reg. 29,150 (May 20, 2004), SEC Rel. No. 34-49704, 2004 WL 1439833 (May 14, 2004) (SEC order approving PCAOB Rule 5300). Nor does Farhang provide any basis for a finding that, "having due regard for the public interest and the protection of investors," the sanctions ordered are "not necessary or appropriate in furtherance of [the] Act or the securities laws" or are "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or basis on which" they were imposed. *See Bassie*, 2012 SEC LEXIS 89, *36-*37.

Farhang has never disputed that he refused to testify in connection with a Board investigation, and none of his excuses for that refusal are legally valid. His conduct directly undermined the Board's ability to protect investors and further the public interest by discovering and, where appropriate, sanctioning conduct that violates PCAOB rules and standards. His refusal to testify is "serious misconduct warranting strong sanctions." F.D. 21. The sanctions imposed by the Board in this case are fully appropriate and should be upheld by the Commission.

FACTS

The relevant facts about Farhang's conduct are straightforward and undisputed.

A. The PCAOB Opened an Investigation of the Registered Public Accounting Firm That Formerly Employed Farhang and of Associated Persons of That Firm.

On December 16, 2014, the Board issued an Order of Formal Investigation authorizing the Division to conduct a formal investigation of the registered public accounting firm Goldman Kurland and Mohidin, LLP (GKM or Firm) and its associated persons, including Farhang and Firm partner Ahmed Mohidin, into potential violations of PCAOB rules and auditing standards. R.D. 23d, Ex. 14. Pursuant to that order, the Division issued an ABD to the Firm in December 2014 requiring the production of documents and information that concerned, among other things, the "Issuer A" audit, on which Farhang and Mohidin had worked together. R.D. 23d, Ex. 15.[1/]

The Firm, Mohidin, and Farhang were all represented by the same attorney, and through that attorney they initially cooperated with the Division to discuss the investigation and related document productions, and to arrange mutually agreeable dates for Mohidin and Farhang to appear for testimony in New York. R.D. 23d, Ex. 26. Counsel and the Division agreed that Mohidin would testify on September 14-17, 2015 and that Farhang would testify shortly thereafter, on September 30 and October 1, 2015. R.D. 23d, Exs. 23, 25-26. The Division also agreed, at the request of counsel for Farhang and Mohidin, to reimburse them for reasonable costs associated with traveling to appear for testimony. R.D. 23d, Ex. 27.

[1/] Soon after GKM received the ABD, Farhang left the Firm, and from January 2015 through at least October 7, 2015, he was associated with another PCAOB-registered firm. R.D. 12c, Ex. 1 at PCAOB-FARHANG-5422-000033–000034. Farhang has never disputed that at all relevant times he was an associated person of a registered public accounting firm, as defined by Sarbanes-Oxley Act Section 2(a)(9), 15 U.S.C. 7201(a)(9), and PCAOB Rule 1001(p)(i).

On June 30, 2015, the Division formally issued ABDs to Farhang and Mohidin, requiring them to produce certain documents and information and appear for testimony at the PCAOB's New York office on the dates Farhang and Mohidin had already selected. R.D. 23d, Exs. 23-25. Along with the ABDs, the Division enclosed copies of PCAOB Form ENF-1, which informed Farhang and Mohidin of their rights and duties as witnesses and the consequences of a refusal to give testimony in connection with a Board investigation. R.D. 23d, Ex. 23 at PCAOB-FARHANG-5422-000013–000015. Farhang raised no concerns at the time about the authority of the Board to require him to comply with the ABD; to the contrary, shortly after finalizing arrangements to appear for testimony, on July 14, 2015, Farhang produced to the Division a handful of emails and a completed PCAOB Witness Background Questionnaire "in response to the ABD." R.D. 23d, Exs. 28-29.

B. Farhang Withdrew His Agreement To Provide Testimony After His Former Supervisor Gave Testimony Potentially Implicating Farhang in Misconduct.

As scheduled, the Division took testimony from Mohidin on September 14-17, 2015 at the PCAOB's New York office. R.D. 23d, Ex. 30. Counsel for Mohidin and Farhang attended. R.D. 23d, Exs. 30-31. During the testimony, the Division asked Mohidin about an issuer audit on which he had served as engagement partner and Farhang had worked as audit manager. *See* R.D. 12a at 3 ¶ 11; R.D. 23d, Ex. 32. When the Division showed Mohidin documents indicating Farhang may have violated PCAOB rules by improperly altering audit work papers in advance of a PCAOB inspection of the Firm, Mohidin testified that he was "troubled" by the information because he had specifically told Farhang not to make such changes without properly documenting them. R.D. 23d, Ex. 32 at PCAOB-FARHANG-5422-001367.

Approximately one week later, on September 25, 2015—five days before Farhang's testimony was scheduled to begin—Farhang's counsel abruptly emailed the Division stating that "Mr. Farhang has decided that he will exercise his right to decline to appear for testimony." R.D. 23d, Ex. 33 at 3. The Division informed Farhang's counsel that "[a] refusal to provide testimony as required by an Accounting Board Demand constitutes noncooperation under the Act and Board rules, and is grounds for instituting a disciplinary proceeding. *See* Board Rule 5110(a)." R.D. 23d, Ex. 33 at 3. In response, Farhang's counsel simply reiterated, "Mr. Farhang is exercising his right to decline to testify in this matter." *Id.* at 2. The Division asked counsel to explain why Farhang was refusing to testify and warned again that Farhang's conduct would constitute noncooperation, noting that "Mr. Farhang's rights with respect to his obligation to appear for testimony are set forth in the ENF-1 enclosed with his ABD, and in the Act and Board Rules, and those rights do not include the prerogative to simply refuse to appear for testimony at any time. We consider his refusal to constitute noncooperation with an investigation and will proceed accordingly." *Id.* at 1. In response to the Division's request for an explanation, Farhang's counsel replied, "The PCAOB cannot force any person to testify. Any person who does not wish to testify in response to an ABD has a right not to testify. The PCAOB might take the position, as it has in other cases, that there are consequences. If you reach that point, Mr. Farhang reserves the right to assert any defense or bring any claim, including a claim for lack of jurisdiction and constitutional claims." *Id.*

Farhang did not appear for his scheduled testimony on September 30, 2015. The same day the Division sent a letter to Farhang advising him that Division staff intended to recommend that the Board commence a disciplinary proceeding to determine whether Farhang had refused to

cooperate with a Board investigation. R.D. 23d, Exs. 34-35; R.D. 17, Answer 1 ¶¶ 1-3, 2 ¶ 7, 3 ¶ 18. On October 7, 2015, Farhang, through counsel, submitted to the Division a short statement of position in which he asserted, without mentioning the Division's agreement to reimburse his reasonable travel expenses or any legal objection to testifying, that he had "severely limited financial resources and more important financial obligations," could not "afford to retain counsel to represent him," and that "his native language is not English." R.D. 23d, Ex. 36-37. He also stated that he had provided some documents in connection with the investigation and that, as to "the audits and reviews" on which the Division sought information, he "was only a manager—not a partner." *Id.* When the Division followed up to ask if Farhang was now unrepresented, Farhang's counsel responded, "I still represent Mr. Farhang—which is why I sent the letter on his behalf—but he can no longer afford to have me do anything." R.D. 23d, Ex. 38.

On October 26, 2015, the Division sent Farhang's counsel a letter informing him that none of the reasons Farhang offered in his statement of position was a valid justification for refusing to testify. R.D. 23d, Ex. 40 at 1. The Division pointed out that PCAOB Rule 5401 permitted Farhang to represent himself. *Id.* And it noted that Farhang's "purported financial situation, for which he has provided no verifying documentation, is no bar to his providing testimony" because the Division had "offered to pay for his flight, hotel, and other reasonable expenses incurred in connection with giving testimony," and confirmed that this offer – accepted by Farhang months earlier—"still stands." *Id.* at 1-2. To address Farhang's suggestion that language presented an impediment to his testifying, the Division noted that documents produced to the Division by Farhang and the Firm "show that he can communicate fluently in English" but nonetheless offered, "if Mr. Farhang reasonably believes that an interpreter is

necessary," to "make one available." *Id.* at 2. The Division then confirmed—yet again—its willingness to reimburse Farhang for his reasonable expenses associated with appearing for testimony and offered, in the alternative, to take his testimony "in Los Angeles, California, where [Farhang] works and near where he lives, or at another convenient location." *Id.* The Division requested that Farhang inform the Division by November 2, 2015 whether he would agree to appear for testimony. *Id.* Having received no response by that date, the Division sent a follow-up email to Farhang's counsel on November 9, 2015. R.D. 23, Ex. 41 at 1.

Farhang's counsel responded to the Division with a brief email asserting that Farhang "cannot afford to take food out of the mouths of his minor children" in order to "pay the substantial cost of having me with him for testimony." *Id.* Relying on the October 7, 2015 statement of position, the email then stated that "for the cogent reasons we explained in our response, he cannot justify that expense." The email did not acknowledge or discuss the Division's point that PCAOB rules permit Farhang to represent himself, nor did it acknowledge or discuss any portion of the list of accommodations the Division had offered to minimize, if not entirely eliminate, any cost or inconvenience to Farhang for complying with his obligation to testify. Nonetheless, counsel stated that "Mr. Farhang is unable to testify." *Id.*

On January 12, 2016, the Board instituted a disciplinary proceeding against Farhang for refusing to testify. *See* R.D. 1. The Division litigated the case to an initial decision in its favor by the hearing officer in August 2016, while it also attempted to pursue its investigation. Ultimately, on September 13, 2016, without the benefit of any testimony from Farhang, the Board instituted and settled disciplinary proceedings against the Firm and Mohidin for violating PCAOB rules and auditing standards and federal securities laws and rules. *Goldman Kurland*

and Mohidin, LLP and Ahmed Mohidin, CPA, PCAOB Rel. No. 105-2016-027 (Sept. 13, 2016). Farhang sought Board review of the August 2016 initial decision. The Board issued its final decision on March 16, 2017, and this appeal followed.

ARGUMENT

Farhang has never disputed any of the foregoing facts or the simple conclusion to be drawn from them—that he refused to testify in a PCAOB investigation. Nor has Farhang disputed the Board's authority to open the investigation into GKM and its associated persons or to issue the ABDs related to that investigation or objected to the particulars of an information request. The statutory and constitutional arguments he belatedly offered as justifications for his refusal to testify are neither coherent nor supported by any on-point authority. Nonetheless, he now repeats to the Commission, as his only claims of error against the Board's sanctions, three of these purported legal challenges, while refusing to address the careful and detailed analysis in the Board's decision that identified the many failures in those arguments. Farhang's latest attempt to avoid the consequences of his refusal to testify thus fails a third time to dismantle the plain authority given to the Board by Congress to impose sanctions for such conduct, authority that the Board thoughtfully and fairly applied to the specific facts and circumstances of this case.

As explained in the Board's decision (F.D. 7), the Sarbanes-Oxley Act vests with the Board responsibility to "oversee the audit of public companies that are subject to the securities laws...in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." Section 101(a), 15 U.S.C. 7211(a). Among the "duties" given to it by Congress in furtherance of that mandate is to "conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such

firms, in accordance with section 105." Section 101(c), 15 U.S.C. 7211(c). In turn, Section 105(b) of the Act, authorizes the Board to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of [the Sarbanes-Oxley Act], the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under [the Sarbanes-Oxley Act], or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board." 15 U.S.C. 7215(b).

To empower the Board to conduct those investigations, the Act authorizes the Board to issue rules that, among other things, "require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation." Sarbanes-Oxley Act Section 105(b)(2)(A), 15 U.S.C. 7215(b)(2)(A). Pursuant to that authority, the Board promulgated, and the Commission approved, PCAOB Rule 5101(a)(2), which provides that when an investigation is formally authorized, PCAOB staff may be designated to "issue accounting board demands to, and otherwise require or request cooperation of, any person pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent the information sought is relevant to the matters described in the Board's order of investigation." *See* 2004 WL 1439833 (SEC approval order).

Attendant to the duty to conduct investigations into potential violations of PCAOB rules and standards and to the authority to request information from firms and associated persons with respect to such investigations is the authority, granted by the Sarbanes-Oxley Act, to sanction a firm or associated person if such firm or person "refuses to testify, produce documents, or

otherwise cooperate with the Board in connection with an investigation under this section." Section 105(b)(3), 15 U.S.C. 7215(b)(3). In that context the Act provides that "the Board may...suspend or bar such person from being associated...[and] invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board." *Id.* Pursuant to that authority, the Board promulgated, and the Commission approved, Rule 5300(b). That rule provides that the Board, if it "finds, based on all of the facts and circumstances, that a registered public accounting firm, or a person associated with such a firm, has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation," "may impose such disciplinary or remedial sanctions as it determines appropriate," including a bar, suspension, limitation on activities, civil money penalty, and censure. PCAOB Rule 5100(b); *see* 2004 WL 1439833; F.D. 17.

As the Board's decision explained (F.D. 7), and as the Commission has pointed out, "investigations play a crucial role in furthering the Board's goals of investor protection and the preparation of informative, accurate, and independent audit reports" (*Bassie*, 2012 SEC LEXIS 89, *38-*39). The authority to conduct those investigations would be imperiled without the corollary authority to sanction firms and persons for refusing to cooperate with them, an unremarkable fact that has long been acknowledged by the SEC and the courts in the context of securities industry self-regulatory organizations (SROs), on which the PCAOB is modeled. *See* F.D. 7 ("The government, to make best use of its limited resources, commonly relies on 'private organizations to effectuate the purposes underlying federal regulating statutes,' and the courts have recognized that with that responsibility must also fairly come the authority to sanction persons within their jurisdiction for noncooperation, for there would be 'a complete breakdown'

in regulation if those organizations did not 'carry most of the load of keeping [regulated persons] in line and have the sanction of discharge for refusal to answer what is essential to that end'" (quoting *United States v. Solomon*, 509 F.2d 863, 869-70 (2d Cir. 1975)). The Commission has similarly recognized that the Board's authority to sanction regulated persons for refusing to cooperate with a PCAOB investigation under Section 105(b)(3) of the Act is indispensable to the PCAOB's duty to investigate. *Bassie*, 2012 SEC LEXIS 89, *40 (concluding that "[i]mposing sanctions to deter noncooperation with PCAOB investigations" "clearly serves the public interest" and that, in this regard, "[t]he Board's power to impose appropriate sanctions in disciplinary proceedings is fundamental to its ability to act in the public interest").

Farhang challenges this authority, first by contending that it is implicitly dependent on a separate section of the Act and can be defeated in any instance in which an issuer audit firm does not collect from an associated person of the firm his or her advance written consent to cooperate with PCAOB investigations. Next, he makes a broad, unfocused, and unsupported constitutional attack on the Board's authority to impose sanctions for his refusal to testify. He makes no other arguments against the Board-ordered bar and censure. Finally, he asserts that, to him personally, the civil money penalty imposed by the Board is not a "lesser sanction[]" under the Act's provision authorizing sanctions for the refusal to cooperate with a PCAOB investigation. ¬

The Board correctly rejected each of these meritless challenges to the Board's sanctioning authority. As discussed in detail below, the Commission should reject Farhang's arguments and uphold the Board's sanctions to protect investors' interests and further the public interest in the preparation of informative, accurate, and independent issuer audit reports.

A. » The Board's Authority To Sanction Farhang for Refusing To Testify in Connection With a PCAOB Investigation Is Not Dependent on an Audit Firm Securing His Consent To Cooperate With an Investigation.

Farhang identifies "[t]he threshold issue of this case" as whether a "necessary precondition" of the Board's exercise of its authority under Sarbanes-Oxley Act Section 105(b)(3) to sanction an associated person of a registered public accounting firm for refusing to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation is that such a firm had secured a consent from the associated person to cooperate in and comply with PCAOB requests for testimony or the production of documents. Farhang concedes that Section 105(b)(3) "makes no mention" of consent. Appeal Brief (Br.) 3. Rather, the supposed "precondition"—which he asserts is not met in this case because he never provided such a consent (Br. 11-12)—appears in a separate provision of the Act, Section 102(b)(3), 15 U.S.C. 7212(b)(3), governing the form and content of a public accounting firm's application for PCAOB registration. Br. 6. As the Board's decision discussed, however, nothing in the Act suggests any connection between that firm registration provision and the distinct and unqualified authority, in Section 105(b)(3), as originally enacted or as its scope was clarified by amendment in 2010, to impose sanctions on "any associated person" of a registered public accounting firm who engages in the conduct specified in Section 105(b)(3). F.D. 11-12. Instead, that sanctioning authority "flows sensibly, directly, and unimpededly from Section 105(b)(3)." F.D. 13-14.

Farhang, to prevail in his challenge to the interpretation of the Act reflected in the Board's decision, must make good on his claim that his position is "[t]he sole and only way reasonably to interpret" the statute and there is "no other reasonable way" to do so (Br. 3, 11). *See generally, e.g., Gonzalez v. Reno*, 212 F.3d 1338, 1351 (11th Cir. 2000) (rejecting challenge

to a statutory interpretation that "comes within the range of reasonable choices"). But Farhang's would-be construction is not even reasonable, much less the only reasonable way to read the statute. None of his supporting arguments withstands the slightest scrutiny. *See* F.D. 11-14.

At the outset, Farhang's view of Section 102(b)(3) as a "precondition" to the operation of Section 105(b)(3) is based on the fallacy that "[t]here are only two provisions of the Act that speak to 'cooperation' or 'noncooperation.'" Br. 3, 5, 7 (these "two lone, related provisions"). In fact, as summarized above (pp. 10-12), and noted by the Board (*e.g.*, F.D. 7) and the SEC (*Bassie*, 2012 SEC LEXIS 89, *37-39), there are numerous statutory provisions, including those authorizing the Board to conduct investigations and to promulgate rules requiring testimony, that make clear that investigations "play a crucial role in furthering the Board's goals of investor protection and the preparation of informative, accurate, and independent audit reports" (*id.*). Thus, Farhang's attempt to frame the discussion to isolate Sections 102(b)(3) and 105(b)(3) and give outsize, controlling significance to Section 102(b)(3), in particular, founders from the start.

Unable to find any statutory language that purports to subordinate Section 105(b)(3) to Section 102(b)(3), Farhang is left to rely on what he calls "statutory purpose," statutory "context and structure," and "settled principles of statutory construction." Br. 3, 6-11. But this amounts to his own faulty, self-serving "assum[ption] and presuppos[ition]" (Br. 10) (emphasis omitted), imputed to Congress, from a series of unremarkable, if in some respects overstated, points in his brief. Those points are that: "[t]he prior written consent to cooperate requirement" is "contained in the registration section [of the Act] (Section 102(b)(3))" (Br. 4); registration "is the time that consents must first be obtained by a registrant (and at all times thereafter immediately for their employees (such as auditors))" (*id.*) (emphasis in original); the Act "structurally sought" in this

way "to assure that advance written consent had been obtained immediately upon an auditor's hiring (per Section 102(b)(3))" (Br. 10); such consent is a "strict requirement," "sternly" and "stringently" imposed by Congress, with the "stark and severe consequences" "when [consent] does not occur" of subjecting an associated person to the "risk of immediately losing his or her job and livelihood" and a firm to the "risk of losing its registration" (Br. 8-10);[2/] and Section 102(b)(3) is "an important part of the statutory regime" (Br. 10), described by the Commission as "underscor[ing] the seriousness with which [the Act] views cooperation with the Board in furtherance of the Board's statutory responsibilities" (*Bassie*, 2012 SEC LEXIS 89, *39, cited at Br. 10). Contrary to Farhang's contentions, however, those points do not even hint, let alone dictate, that the Board's authority under Section 105(b)(3) is contingent on a firm obtaining from an associated person the consent described in Section 102(b)(3).[3/]

[2/] In fact, Section 102(b)(3), by its terms, states that "[e]ach application for registration" with the PCAOB "shall include": (1) "a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title"; (2) "an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm"; and (3) "a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required [of the firm], and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board."

[3/] Farhang perhaps perceives the implausibility of Congress having left entirely "'implicit'" (*see* F.D. 12) such an important limitation as he posits on the plain language of Section 105(b)(3)—a limitation based on what he elsewhere claims is an "unconstitutional condition," no less. He contends that "there was utterly no need to reiterate in a redundant fashion the fact that consent was required as a condition of imposing discipline for noncooperation under Section 105(b)(3)" because Congress "structurally sought to assure that advance written consent had been obtained immediately upon an auditor's hiring (per Section 102(b)(3)." Br. 10. But Farhang's argument is circular. His contention depends entirely on whether the features of Section 102(b)(3) that he portrays as an obvious statement of intention about how Section 105(b)(3) is supposed to operate must be viewed that way, which he does not remotely establish.

If anything, Farhang shows by this no more than that Section 102(b)(3) is one means, through conditions on PCAOB registration and firm employment, of fostering cooperation with PCAOB investigations, which, again, "play a crucial role" "in furtherance of the Board's statutory responsibilities" (*see Bassie*, 2012 SEC LEXIS 89, *38-*39). He does not come close to establishing that, to be "important" and not "immediately [] rendered wholly superfluous and unnecessary" (Br. 10), Section 102(b)(3) must be legally indispensable to any other means of achieving compliance with PCAOB information requests, namely Section 105(b)(3).[4/]

According to Farhang, his points show that "it would be natural for Congress (and those interpreting the statute) to read Section 102(b)(3) and Section 105(b)(3) harmoniously to *assume* and presuppose that no person would ever be put in a position of being disciplined for failure to cooperate who had not already consented, in writing in advance, to cooperate," for "if they had not consented, then they would be expected to lose their job long before any noncooperation issue arose." Br. 10 (emphasis in original). But this absurdly assumes that Congress—in creating a law to protect investors and further the public interest, a crucial component of which is investigative authority—would place that authority at the mercy of a perfect record by the regulated industry in securing consents. This is plainly an unrealistic assumption, as illustrated

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4/ Relatedly, Farhang dismisses (Br. 9 & n.20), for no good reason, the Board's point that focusing a firm's and its associated persons' attention on, and encouraging them to consider, the potentially serious consequences of refusing to cooperate with an investigation under Section 105(b)(3) is an example of a useful purpose served by Section 102(b)(3) that has nothing to do with the Board's jurisdiction to sanction the firm and its associated persons (F.D. 13). Just because, in his opinion, fostering such awareness could be achieved in other ways does not begin to establish that Congress did not intend for Section 102(b)(3) to, and that the provision does not in fact, serve a useful purpose like this that in no way limits the Board's sanctioning authority.

by Farhang's very situation: he says he worked for years as an associated person on issuer audits at two separate firms without either one ever obtaining a consent from him (Br. 11).

Neither Congress nor the Board "assure" (Br. 10) that consents are always obtained. The agreement referenced in Section 102(b)(3) by a public accounting firm to secure consents from each of its associated persons as a condition of their continued employment is not self-enforcing. Associated persons join and leave audit firms all the time. Farhang's apparent suggestion (Br. 11 & n.22) that Congress mandated that the PCAOB inspect, and that the PCAOB should and realistically could inspect, any firm (let alone all registered firms) so continuously and with such a degree of granularity that those inspections should or could eliminate any possibility that an individual would function as an associated person of that firm without having a consent on file is insupportable. *See, e.g.,* Sarbanes-Oxley Act Section 104(a)(1), 15 U.S.C. 7214(a)(1) (Board is to "conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm" with the Act and various rules and standards) (emphasis added); Section 104(b)(1)(B), 15 U.S.C. 7214(b)(1)(B) (requiring PCAOB to conduct inspections not less frequently than once every three years for firms, like those at which Farhang worked, that issue audit reports for 100 or fewer issuers).[5/]

[5/] As supposedly relevant to Farhang's argument that a "consent to cooperate is required before an auditor may be sanctioned for noncooperation," Farhang broadly claims, without elaboration, that: (1) "[a]t no time before, during or after any of [the PCAOB's] three inspections [of GKM] did the PCAOB inspectors ask the Firm for consents from its associated persons"; (2) "[a]t no time did the inspectors tell the Firm that consents were necessary"; and (3) "at no time did the PCAOB ever advise the Firm that it was violating Section 102(b)(3)." Br. 3, 11. But a critical premise of his consent argument is that the "stark and severe consequences" of not providing a consent that are apparent on the face of the statute "assure," "ensure," and "make sure" that such consents are always furnished. Br. 3, 8, 9 10, 11 n.22. Yet, by Farhang's own account, in years of auditing issuers at multiple firms, he never provided a consent. Further, his broad claim about the inspectors makes the unfounded assumption that a regulated party could

Thus, it is not "irrelevant," as Farhang baldly asserts (Br. 11 n.22), that it is "the registrants" which "secure consents from their associated persons" in his theory of a "precondition" to the exercise of the Board's sanctioning authority under Section 105(b)(3). Rather, it is a fundamental flaw in his theory.

Moreover, Farhang offers no rationale for why Congress would have meant to effectively immunize associated persons from Section 105(b)(3) sanctions just because they made the personal choice to decline to provide a consent and worked for a registered firm that happened, for whatever reason, to fail to secure and enforce such consents. In his view of the Act, any gap between the time a firm hires an auditor and the time it collects a consent from that person—be it an hour or a year or more, and for any reason—creates an opportunity for that person to frustrate with impunity the investigative authority that Congress granted to the Board. Completely absent

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expect to escape the "stark and severe consequences" of the party's own conduct by shifting responsibility for that conduct to the regulator. *See, e.g., S.W. Hatfield, CPA*, SEC Rel. No. 69930, 2013 WL 3339647, *5 & n.35 (July 3, 2013) (SEC review of registration statements "may not be construed as Commission approval of those companies' practices"). More generally, the existence of an inspection program would not excuse Farhang's misconduct in refusing to cooperate with an investigation. *See generally, e.g., Bernerd E. Young*, SEC Rel. No. 33-10060, 2016 WL 1168564, *15 (Mar. 24, 2016) ("[I]t is well established that regulatory oversight and involvement does not excuse misconduct."); *James Lee Goldberg*, SEC Rel. No. 34-66549, 2012 WL 759397, *5 n.20 (Mar. 9, 2012) (SEC has "long held" that SRO members "cannot shift their burden of compliance" to the SRO); *CMG Inst'l Trading, LLC*, SEC Rel. No. 34-59325, 2009 WL 223617, *8 n.33 (Jan. 30, 2009); *Richard F. Kresge*, SEC Rel. No. 34-55988, 2007 WL 1892137, *9 & n.33 (June 29, 2007); *B.R. Stickle & Co.*, SEC Rel. No. 34-33705, 1994 WL 69413 (Mar. 3, 1994). Additionally, Farhang has not even established his factual claim about the inspectors. The sole support for his sweeping assertions is a declaration by one of the principals of GKM, one of the registered public accounting firms with which Farhang was associated prior to receiving the ABD. Br. 11; *see* R.D. 22e. In that declaration, the GKM principal importantly confines those three statements to "the best of [his] knowledge" (R.D. 22e at 2, ¶¶ 6-8), there is no suggestion he would have been the only person at GKM who would have interacted with the inspectors at all stages of the process, and there is no evidence in the record—such as statements from other personnel at GKM, much less at any other issuer audit firm with which Farhang was associated before receiving the ABD, who may have been involved in the inspection process—that permits the broad conclusions that Farhang makes here.

is any explanation of why Congress would have seen any positive value in this view or how it furthers any interest except Farhang's own specific and personal desire to avoid sanctions.[6/]

Additionally, Farhang seizes on Section 102(b)(3) as a "precondition" to the exercise of the Board's authority under Section 105(b)(3) because, in his view, "the power to impose sanctions for noncooperation" is a "draconian," "extraordinary power (in certain respects broader than the power of contempt exercised exclusively by Courts[] and Congress under the protection of full due process rights)," it is a power not possessed by the SEC "nor any other agency that is required to follow the United States Constitution," and it must be subject to "important limits." Br. 1, 8, 10. The Board's decision (F.D. 14-16) thoroughly addressed and correctly rejected Farhang's claim that there is some deficiency in the Board's investigatory or disciplinary processes, which we discuss later in connection with his constitutional arguments. There is thus no need on process grounds to contrive, by making Section 102(b)(3) a "precondition" to Section 105(b)(3), any "limit" that does not already exist on the Board's sanctioning authority.

Furthermore, the Board's authority under Section 105(b)(3) is not "extraordinary" or "draconian." Instead, as explained in the Board's decision, it is entirely consistent with the

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[6/] Furthermore, based on the language of Section 102(b)(3) and Farhang's theory of the relationship of that provision to Section 105(b)(3), even if a firm secured consents, the Board would have no Section 105(b)(3) sanctioning authority if the firm had not "enforced" the consents. Section 102(b)(3) refers not only to a firm "securing" consents from its associated persons, but in the same breath to "enforcement" by the firm of such consents, "as a condition of their continued employment by or other association with such firm" and as "a condition to the continuing effectiveness of the registration of the firm with the Board." Thus, if Section 102(b)(3) were a "precondition" to the operation of Section 105(b)(3), as Farhang claims, even an associated person who had provided a consent could continue working at the non-enforcing firm for as long as it remained registered and then move to other firms or pursue another line of work until the investigation ended, forever avoiding any sanctions for the "very serious misconduct" of "impair[ing] the Division's ability to investigate, which in turn impairs the Board's ability to identify violations and sanction violators" (*Bassie*, 2012 SEC LEXIS 89, *40).

power accorded to self-regulatory organizations, on which the PCAOB was modeled, to effectuate their investigative authority in the absence of the power to issue subpoenas by "impos[ing] appropriate sanctions in disciplinary proceedings" for the "very serious misconduct" of "failure to cooperate in an investigation" (*Bassie*, 2012 SEC LEXIS 89, *40). *See* F.D. 7 & n.2 (citing *Free Enterprise Fund v. PCAOB,* 561 U.S. 477, 484 (2010) and *Howard Brett Berger*, SEC Rel. No. 34-58950, 2008 WL 4899010, *7 (Nov. 14, 2008)), 23 ("the fundamentally serious misconduct of noncooperation with a PCAOB investigation").[7/] Farhang acknowledges at one point that "[u]nlike the SEC, the Board does not have the power to issue subpoenas in connection with its investigations" (Br. 7), but he then proceeds to ignore the implications of that fact.

If neither the SEC nor, as Farhang represents without citation, "any other agency" has direct sanctioning authority for refusals to provide information in connection with their investigations, they nonetheless have the ability to access the courts and their contempt powers to enforce subpoenas for such information. *See* F.D. 19-20; *Bassie*, 2012 SEC LEXIS 89, *46 n.47 ("when the recipient of an administrative subpoena requiring the production of documents or an appearance for the taking of testimony refuses to comply, the Commission has recourse to federal district court, which may issue an order enforcing the subpoena, 'and any failure to obey such order of the court may be punished by such court as a contempt thereof'") (quoting Section 21(c) of Securities Exchange Act of 1934, 15 U.S.C. 78u(c)). As explained in *Berger*, "judicial enforcement of subpoena power, and judicial contempt powers" are "powerful tools to obtain the

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[7/] Although Sarbanes-Oxley Act Section 105(b)(2)(D), 15 U.S.C. 7215(b)(2)(D), provides an avenue by which the Board could seek issuance by the Commission, in a manner established by the Commission, of a subpoena requiring persons to testify or produce documents that the Board considers relevant or material to an investigation, it is the Commission that would issue those subpoenas.

sought-after information." 2008 WL 4899010, *9. Farhang's attempt to minimize those "powerful tools," which are not directly available to the PCAOB, by focusing on the part of a statute from one state that provides for a monetary fine for criminal contempt of court of up to $1,000 (Br. 8 n.19), ignores the "potential jail time" (*id.*) also authorized by that statute. His attempt also ignores the potential magnitude of fines for civil contempt, as well as the availability of imprisonment as a civil contempt sanction. *See* F.D. 20 (citing *SEC v. Yuen*, SEC Lit. Rel. No. 18095, 2003 WL 1900835 (Apr. 18, 2003)); *see also, e.g., IBM Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973) (affirming civil contempt order imposing contingent fine of $150,000 per day until company complied with district court discovery order); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673 (D.D.C. 1995) (finding defendants in contempt for failing to comply with order requiring promoters of investments under SEC investigation to provide information about location of funds contributed by investors and to repatriate funds held overseas, and ordering imprisonment and escalating fines until contempt purged).[8/]

Furthermore, if federal agencies' organic statutes do not provide authority identical to what Congress provided to the Board in Section 105(b)(3), that does not mean that what Congress provided to the Board was anything other than, as the Commission has described it, the "power to impose appropriate sanctions in disciplinary proceedings" (*Bassie*, 2012 SEC LEXIS 89, *40) and that it must be trammeled by Farhang's self-styled "limit" (Br. 3, 4, 7, 8). *See* F.D.

[8/] Farhang declares, without any support, that "cases where courts have imposed monetary sanctions for not testifying are extraordinarily rare." Br. 8 n.17. Even if this bald assertion were true, Farhang ignores the obvious potential explanation that the threat of jail time and large fines for contempt could be expected to be sufficient to compel the sought-after testimony or documents, obviating the need to actually impose such imprisonment or fines.

19. Thus, Farhang's argument about the Board's "extraordinary" or "draconian" sanctions Ã authority is based on nothing but one faulty premise after another.

For the foregoing reasons, Farhang's arguments that the Board's authority to sanction him for refusing to testify in connection with its investigation is conditioned on his providing a consent to cooperate are meritless and were properly rejected by the Board.

B. Sanctioning Farhang's Refusal To Testify Did Not Violate the Constitution.

Farhang's challenge to the constitutionality of the Board's authority to sanction him for refusing to testify amounts to the same amorphous, ineffectual contentions that the Board correctly rejected. *See* Br. 4, 12-15; F.D. 14-16. According to Farhang, the Board's sanctioning authority under Sarbanes-Oxley Act Section 105(b)(3) violates the "doctrine of unconstitutional conditions." By this, he apparently means that, in his view, Section 102(b)(3) of the Act conditions his exercise of some self-declared "right" to employment or association with a registered public accounting firm[9/] on his "consent to cooperate" with PCAOB investigations. Br. 4, 12-13. As he sees it, such a condition is "unconstitutional" because the consent subjects him to "investigative procedures," or "the possible resulting loss of liberty or property from disciplinary proceedings and sanctions," that "deprive him of his full and undiluted due process rights" or are "bereft of full due process protection." Br. 4, 12-14. Also included in this

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9/ Farhang fails to define this claimed "right" with any clarity or to explain his legal basis for asserting it. He variously characterizes it as a "right" "of employment," "to employment as an auditor," to "work in his chosen profession as an auditor," to "continued employment with a registrant (auditing issuers)," "to associate with registrants," or "to audit." Br. 4, 12-13. As his only support, he cites, without discussion, three Supreme Court decisions. Br. 12, 14. The first case merely held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from [public] office." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). The other two cases involved states' administration of land-use permits.

muddled claim is the notion that there is something "constitutionally vague" about the Section 102(b)(3) consent and the "concept" of "cooperat[ion]" with an investigation. Br. 12-14. Farhang's constitutional challenge collapses at the outset because, as just discussed, the Board's sanctioning authority under Section 105(b)(3) does not depend in any way on the consent provisions of Section 102(b)(3). Farhang is not being sanctioned for failing to execute a consent but rather for refusing to testify. Further, there was no "due process" deprivation or "vagueness" problem in sanctioning Farhang. *See* F.D. 14-16.

Farhang makes no serious attempt to address any of the points made by the Board against his due process arguments. As the Board's decision discussed in detail, PCAOB rules, approved by the Commission, "establish 'fair procedures' for investigating and disciplining associated persons, as required by Sarbanes-Oxley Act Section 105(a)" and "comport with the due process requirements applicable to each function." F.D. 15-16. Throughout this case, Farhang has availed himself of the protections and allowances established for respondents under PCAOB procedural rules. For example, he has been represented by counsel, obtained the setting aside of a default, received documents from the Division, asserted affirmative defenses, joined with the Division in submitting the case for summary disposition, submitted materials to the hearing officer that were considered in the initial decision, and obtained Board review of that decision.

Farhang has had multiple opportunities over months of litigation to explain how PCAOB processes nevertheless deny his "full constitutionally protected due process rights" (Br. 13), but he has never done so. Instead, he offers a few theoretical "examples" that have no relevance to his own case and that, even if broadly applied to hypothetical respondents, still show no constitutional defect whatsoever.

Specifically, Farhang complains that PCAOB rules "severely limit[]" a respondent's "ability to summon people to testify," pointing to PCAOB Rule 5424(a) as "limit[ing]" a respondent's "right to compel the testimony of witnesses…—subject to the discretion of the Hearing Officer—to testimony only 'at the designated time and place of the hearing.'" Br. 14. This blinkered characterization of the Board's rules ignores important provisions that, in addition to giving respondents fairly refereed access to the Board's authority to issue demands or requests that witnesses appear at the hearing, also give respondents other avenues for accessing witness testimony—after a disciplinary proceeding is instituted—at times other than the hearing. PCAOB Rule 5425, for example, provides for the taking of testimony by deposition upon written motion by "[a]ny party" for the purpose of preserving testimony of a witness who would be unlikely to attend the hearing. Also, PCAOB Rule 5423, "[u]pon motion by any respondent in a disciplinary proceeding," authorizes the hearing officer to order the interested PCAOB division to "produce for inspection and copying," "at a time and place fixed by the hearing officer," "any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the Board were a governmental entity."

To the extent Farhang is suggesting that due process requires that he be permitted to compel the testimony of witnesses even before a disciplinary proceeding has been instituted, he is incorrect. He is likewise incorrect in asserting that the Board's investigative processes are constitutionally defective because, in his view, "should the [Division] summon the testimony of a third party, the respondent has no right to attend that person's interview" and PCAOB rules "limit the extent to which evidence that has been gathered by the [Division] would be disclosed

to the respondent." Br. 14. These complaints betray Farhang's utter (and continuing) disregard of the distinction between the Board's investigative and adjudicatory processes. As the Board explained, this distinction is "critical to identifying the procedural due process protections that apply in each context," for it is well settled that the level of due process required at the investigative stage is less than that required at the adjudicatory stage. F.D. 15; *see, e.g., SEC v. O'Brien*, 467 U.S. 735, 742 & 750-51 (1984) (holding that subjects of SEC investigations are not entitled to notice of third party subpoenas, noting that such an entitlement would "stultify" those investigations and that "an administrative investigation adjudicates no legal rights") (citing *Hannah v. Larche*, 363 U.S. 420, 440-43 (1960)).

Farhang also fails to identify any defect in the adjudicatory procedures that apply specifically to PCAOB noncooperation cases. He complains that because these proceedings are conducted on an expedited basis under PCAOB rules, a respondent "has only five days to answer a potentially complex order instituting proceedings, be subject to arbitrary limited discovery, have no right to submit post trial briefs, and be subject to harsh sanctions." Br. 14 n.23. He misses the point that, "[b]ecause of the nature of the conduct being sanctioned, ...a disciplinary proceeding for noncooperation will generally be a streamlined proceeding focused on a narrow issue," and where a noncooperation case presents complex legal issues or significant factual evidence, the Board's rules "provide sufficient flexibility to deal with complex noncooperation issues in an appropriate time frame." PCAOB Rel. No. 2003-015 (Sept. 29, 2003) at A2-52-53; *see Michael Nicholas Romano*, SEC Rel. No. 34-76011, 2015 WL 5693099, *5 & n.20 (Sept. 29, 2015) (determining that use of expedited disciplinary proceedings for violations of FINRA

noncooperation rule promotes an "efficient disciplinary process") (quoting 75 Fed. Reg. 167 (Jan.4, 2010), SEC Rel. No. 34-61242, 2009 WL 5125425, at *1 (Dec. 28, 2009)).

In particular, Farhang studiously ignores the fact that PCAOB rules permit the hearing officer to grant additional time to answer (Rule 5421(a)); permit respondents to inspect all but certain specifically described documents that the Division does not intend to introduce as evidence (Rule 5422(a)(2)), not, as Farhang claims, some "arbitrary" subset of discoverable materials (Br. 14 n. 23); and permit the hearing officer, in his discretion, not only to allow post-hearing briefs but "other submissions" as well (Rule 5445(b)). Farhang raised no complaints when he availed himself of a number of those provisions below—seeking and receiving an order setting aside a default and receiving additional time to file an answer (R.D. 14; R.D. 15; R.D. 16 at 22; R.D. 17); filing with the hearing officer submissions outside the regular course of litigation (R.D. 16 at 7-10, 31-32; R.D. 20; R.D. 22c); and moving for summary disposition (potentially obviating a hearing and post-hearing briefs) (R.D. 16 at 11). Farhang's own experience illustrates how the Board's rules provide ample flexibility to ensure fairness to respondents while also encouraging efficient resolution of less complex proceedings when possible.

Unable to demonstrate any specific deficiency in the Board's procedures, Farhang asserts generally that there must be a "sufficient level of due process commensurate with the potential penalties that the Board may impose on an associated person for noncooperation." Br. 14. Using this self-proclaimed standard, he then tries to create the impression that the "level" was not "sufficient" in this case by mischaracterizing the sanctions the Board may impose under Section 105(b)(3). *See, e.g.*, Br. 1, 13. Previously in this case, Farhang described the "potential penalties...for noncooperation" as "akin to criminal penalties." R.D. 22a at 13-14; R.D. 34 at

10. The Board rejected his attempt to impose an "elevated level of due process" on proceedings that are civil, not criminal. F.D. 15. It also noted the well-settled principle that "the constitutional requirements of procedural due process do not demand" the use of "'judicial-type procedures'" in administrative proceedings. F.D. 15 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)). Though in the present appeal, Farhang has deleted the words "akin to criminal penalties" from his due process argument, he continues to engage in other mischaracterizations.

As discussed, the Board's Section 105(b)(3) sanctioning authority is not "extraordinary" or "draconian." *See* pp. 20-23 above. Nor, as Farhang asserts without any support, is the civil money penalty imposed on him by the Board for his refusal to testify "arbitrary." Br. 13. As discussed more fully below (pp. 36-38), that assertion is irreconcilable with the detailed discussion in the Board's opinion of the legal standards and precedent that guided its sanctioning analysis and the ways in which the application of those standards to the specific facts and circumstances of this case led to its ultimate sanctions determination. *See* F.D. 21-24.

Equally unavailing are Farhang's remaining contentions that there is something "constitutionally vague, amorphous," "ill-defined," and "infirm" about the "consent to cooperate," as he calls it, in Section 102(b)(3), and the "concept" of "cooperat[ion]" with an investigation (Br. 13 & n.23, 14). Again, the consents described in Section 102(b)(3) have no bearing on the Board's sanctioning authority under Section 105(b)(3), even if they bore any resemblance to the caricature presented in Farhang's brief.[10/]

10/ *Compare, e.g.,* Br. 3 (the Section 102(b)(3) consent covers "'**any request**'—in advance, sight unseen, no matter what the request is for" (emphasis in original)), 9 (same), 12 ("a requirement that [Farhang] execute an advance, blanket, written consent to 'cooperate'" with "'any' request from the Board—sight unseen, regardless of its reasonableness or lack thereof, or its scope"), 13 ("absolutely 'any' request, sight unseen, regardless of its reasonableness or lack

As to Farhang's broad assertion that "cooperate" is "a highly amorphous and ill-defined concept" (Br. 12) and his speculation that a person could be subjected to sanctions for "objectively harmless conduct, such as an insignificant disagreement between an examinee and the Board's staff, or a good faith assertion of a privilege or position with which the Board or its staff disagree" (Br. 13 n.23), none of that has any relevance to this case. As the Board stated, "[t]he relevant statutory language here," in "a case in which Farhang admits that he refused to testify in connection with an investigation, is the language authorizing the Board to impose sanctions if an associated person 'refuses to testify...in connection with an investigation,'" language that "[p]lainly" is "not vague" and that "is all that is necessary to resolve this case." F.D. 14. Farhang asserted no privilege. *See* F.D. 15 n.7. He was given notice repeatedly by the Division that his blanket refusal to testify subjected him to disciplinary proceedings—warnings he acknowledged and accepted. *See* R.D. 23d, Ex. 33. Again, Farhang's contentions are irrelevant, even if they bore any resemblance to any actual facts.[11/]

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thereof, or its scope"; " '*any* request'—in advance, sight unseen, no matter what it requests" (emphasis in original)) *with, e.g.,* Sarbanes-Oxley Act Section 102(b)(3) (consent concerns "any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title" (emphasis added)); Section 105(b)(1) (authorizing the Board to conduct investigations and specifically defining which persons and which matters are subject to the Board's investigative authority); PCAOB Rule 5101(a)(2) (addressing issuance of ABDs under the statutory authority and providing that when an investigation is formally authorized by the Board, Board staff may be designated to "issue accounting board demands to, and otherwise require or request cooperation of, any person pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent the information sought is relevant to the matters described in the Board's order of investigation" (emphasis added)).

11/ The Board discussed its approach to noncooperation cases in promulgating its rules related to investigations, none of which discussion is addressed, much less contradicted, by Farhang. The Board stated that "we proceed from the premise that both the Board and the staff will act reasonably" and there is "no need to try to articulate by rule the line between noncooperation that warrants a disciplinary sanction and insignificant, technical shortcomings

In sum, Farhang's constitutional challenge to the Board's authority to sanction him for his refusal to testify is no impediment to the Board's imposition of sanctions in this case.[12/]

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that do not" nor a need to "set out every way in which a firm or associated person may fall short of its statutory obligation to cooperate with the Board in connection with an investigation." PCAOB Rel. No. 2003-015 at A2-11, A2-32, A2-51. The Board explained that good-faith disagreements between staff and a person from whom information is demanded or requested need not result in a sanction because there are several opportunities for staff and investigated persons to reconcile their positions (PCAOB Rel. No, 2003-015 at A2-25):

> A noncooperation proceeding will normally include an opportunity for a person to submit a statement of position under Rule 5109(d), explaining why the Board should conclude that the demand exceeds the permissible statutory scope of documents, testimony, or information that the Board may demand. The Board will take that submission into account in determining whether to institute noncooperation proceedings.
>
> If the submission does not persuade the Board, a noncooperation proceeding and sanction need not follow automatically. Some cases may involve a good faith assertion of a position that raises a genuine issue concerning the scope of the demand. In those cases, the Board might communicate its rejection of the person's position but also indicate that noncooperation proceedings will not be commenced if the person complies with the demand within a certain time. At that point, the person could comply or, at the risk of a sanction, could continue to contest the appropriateness of the demand in the hope of prevailing before a hearing officer, or on review by the Board, the Commission, or the court of appeals.

12/ Farhang frames his constitutional challenge with a confusing jumble of assertions. *See, e.g.*, Br. 12 ("Farhang cannot be forced to choose some rights (*e.g.*, the right of employment) over the other (*e.g.*, the right to be free from the potential deprivation of liberty (i.e., right to associate with registered accounting firms) and property (civil money penalties) without due process)."), 12-13 (circular statement that "Farhang has a constitutionally protected due process right to be free" from procedures, proceedings, or sanctions "that deprive him of his full and undiluted due process rights"), 14 ("The consent requirements of the statute, the imposition of noncooperation sanctions under the statute's constitutionally vague and infirm standard, and any attempt to compel Farhang to participate in an investigation or proceedings bereft of full due process protections or any attempt to punish Farhang for refusing to submit to unconstitutional processes, in addition to the rights listed above, are unconstitutional."). Having done so, he then declares "[t]he accepted test" for "this type of denial of a constitutional right" is that there must be "a compelling governmental interest," achieved through "the least restrictive means," citing an inapposite case involving government regulation of constitutionally protected speech. Br. 15. There is no need to address this cryptic last contention because Farhang has not established that

C. Ú By Statute and Commission-Approved PCAOB Rule, Applied in a PCAOB Case Upheld by the Commission, the Board Was Authorized To Impose the Fully Warranted Civil Money Penalty on Farhang for Refusing To Testify.

Sarbanes-Oxley Act Section 105(b)(3) provides that if "a registered public accounting firm or any associated person thereof refuses to testify...in connection with an investigation under this section, the Board may...suspend or bar such person from being associated...[and] invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board." As the Board's decision explained, the Board interpreted the "lesser sanctions" language to include civil money penalties and codified that interpretation in PCAOB Rule 5300(b), which identifies civil money penalties (after bar and suspension) as among the sanctions available for noncooperation with investigations. F.D. 17. That rule was approved by the Commission (SEC Rel. No. 34-49704, 2004 WL 1439833 (May 14, 2004)); has been applied in a series of settled and litigated PCAOB cases, in one of which (*Bassie*) the sanctions (including a civil money penalty) were appealed to, and sustained by, the Commission; is consistent with the order of sanctions set forth in Sarbanes-Oxley Act Section 105(c)(4), 15 U.S.C. 7215(c)(4), applicable to specified other conduct; and is consistent with the approach of SROs, whose rules and practice the Commission has considered in reviewing PCAOB disciplinary action and whose imposition of sanctions (including monetary fines) for failure to respond to information requests has been upheld by the Commission. F.D. 8-11, 17, 18-19 (citing *Robert Marcus Lane*, SEC

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sanctioning him for refusing to testify rests on the "condition" he claims is "unconstitutional," "deprive[s] him" of his "due process rights," or is "constitutionally vague" (*e.g.*, Br. 13). *See, e.g.*, F.D. 16 n.8. Much less has he shown, for example, that, in the words of a court case, the underlying "economic interest" he claims as a "right," which seems to be "to engage in particular employment" (auditing public companies, not any auditing at all), would require use of the test he proposes or that the extent of the claimed deprivation of "his occupation and skill" would pose any constitutional problem. *See, e.g.*, *U.S. v. Karnes*, 437 F.2d 284, 288 (9th Cir. 1971).

Rel. No. 34-74269, 2015 WL 627346, *1, *21-*22 (Feb. 13, 2015); *CMG Inst'l Trading, LLC*, SEC Rel. No. 34-59325, 2009 WL 223617, *1, *8-*10 (Jan. 30, 2009)).

Despite all of this, Farhang reasserts, as one of his "three reasons" for challenging the Board's decision, that "[t]he Board does not have the authority to impose a $50,000 civil money penalty on Farhang because it is not a 'lesser sanction.'" Br. 2, 15. He makes no argument that, if the Board has legal authority to sanction him for refusing to testify, a censure and associational bar are unwarranted.

As to the civil money penalty, he declares that "[w]hat is a 'lesser sanction' than a bar will necessarily depend on the facts and circumstances of each particular case." Br. 15. In his unsupported view, the standard for whether a civil money penalty is a legally available sanction here under Section 105(b)(3) is whether the particular penalty amount is a greater or lesser sanction than a bar "as a practical matter for Farhang." Br. 4. Thus, on his say-so, he proposes to discard an eminently reasonable, well-established "interpretation of Section 105(b)(3) as permitting the Board to identify civil money penalties as among the available categories of sanctions that, by nature, do not rise to the level of permanent or temporary removals from the practice of auditing public companies and broker-dealers" (F.D. 18). He would replace it with a subjective, diffuse, case-by-case approach to the Act's "lesser sanctions" language that would "require the statute to be re-interpreted anew with each case and impose a nebulous, difficult-to-administer construct for determining a threshold question of legal authority" (F.D. 20). *See* F.D. 20 ("Farhang's position would require consideration of whether the amount of a particular civil penalty is sufficiently great (by some undefined measure) compared to a revocation, bar, or suspension, in the context of all of the facts and circumstances of each individual case and each

respondent's personal situation, as to render it wholly unavailable as a sanction."). The Board properly rejected Farhang's approach. F.D. 17-20; *cf., e.g., Budinich v. Becton Dickinson & Co.*, 807 F.2d 155, 157 (10th Cir. 1986) (preferring a "uniform, unqualified" interpretation of jurisdictional rule over a "situational approach," which would require a "de facto, case-by-case analysis," and "the consequent uncertainty it would promote"), *aff'd*, 486 U.S. 196 (1988).

Not only is Farhang's approach legally unsupported and fundamentally unsound, but his attempt to apply his own standard to this case is fatally flawed. He claims that a $50,000 civil money penalty is "a 'greater sanction' than a bar" because it "is more than [he] makes in one year." Br. 4. But as the Board noted, citing court cases describing associational bars in the securities industry, a suspension or revocation of the registration of a firm or a suspension or bar of an individual from associating with a firm "can have a significant impact that, in terms of the damage to professional reputation and loss of gainful employment in the industry, exceeds a one-time civil money penalty." F.D. 18. Farhang asserts that the permanent bar imposed by the Board for his refusal to testify "will ruin his career, livelihood," and "ability to earn income." Br. 15. He makes no attempt to explain why a one-time $50,000 penalty is worse than that.

Farhang also claims that a $50,000 penalty would not "constitute a 'lesser sanction'" because he "has proven he is impecunious." Br. 16. There are two main problems with this argument. First, as the Commission held in *Bassie*, the Sarbanes-Oxley Act "does not recognize ability to pay as a factor to consider in determining whether to impose a civil money penalty" and even if inability to pay were to be considered, it would, at most, be a discretionary factor that

could be, and in a noncooperation case like this one is, rendered irrelevant in light of the seriousness of the misconduct. 2012 SEC LEXIS 89, *52 n.53; *see* F.D. 25-27.[13/]

Second, Farhang has not "proven he is impecunious." For the proposition that he has, his brief merely quotes a conclusory phrase in the initial decision, without any further discussion. Br. 2, 4 (quoting I.D. 22). But the Board rejected the initial decision's analysis and findings on inability to pay as not a proper basis for decision here. *E.g.*, F.D. 24-25. The Board noted that the initial decision "provided no explanation for...deeming Farhang's asserted inability to pay to be relevant to, indeed singularly determinative of, the ultimate ruling on a civil penalty." F.D. 27. The Board determined that the hearing officer "decided inability to pay in Farhang's favor without addressing the Division's hearing request, made overly general or conclusory observations, and did not discuss in any detail, for example, the Division's specific arguments about Farhang's showing and his concession that he could pay some civil money penalty." F.D. 27 n.13. Citing PCAOB and SEC precedent, the Board concluded that, "[b]ecause of the

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13/ To the extent Farhang means to contest these points by broadly asserting, without any citation to authority, that "[v]irtually every federal administrative agency (even the SEC post-*Bassie*) looks at a party's ability to pay when calculating civil money penalties" and that the Board "cannot fashion its own course ignoring over fifty years of precedent and practice in federal agencies" (Br. 16), his effort fails. Even when Farhang tried to support these assertions with an untimely submission to the Board, the Board noted that he made "no attempt to establish the relevance of the citations to the particular statutory regime under which the PCAOB operates or to the context of noncooperation with an investigation, nor is such relevance apparent" and that he conceded by the "virtually every" language that what he was describing was "not necessarily a universal practice even among agencies." F.D. 26 n.11. Equally unavailing as a response to *Bassie* is Farhang's bare assertion that he has a "constitutional right to be free from ruinous, and arbitrarily calculated civil money penalties imposed without regard for his ability to pay for any refusal to cooperate" (Br. 13). *See, e.g., J.V. Ace & Co.*, SEC Rel. No. 34-28716, 1990 WL 322554, *4 n.19 (Dec. 21, 1990) (rejecting argument that imposition of fine that applicants claimed they were unable to pay constituted cruel and unusual punishment in violation of 8th Amendment). Moreover, far from being "arbitrarily calculated," the $50,000 civil money penalty here was justified by pages of discussion and analysis, supported by specific record facts and citations to on-point authority. *E.g.*, F.D. 22-24.

egregiousness of the conduct,...we do not view information about Farhang's ability to pay as relevant to the question of what, if any, civil money penalty to impose in this case" and that "the record here would not persuade us that [he] is unable to pay the civil money penalty." F.D. 27.

It is the Board's decision that is on appeal here, not the hearing officer's. *Kabani & Co., Inc.*, SEC Rel. No. 34-80201, 2017 WL 947229, *8 n.7 (Mar. 10, 2017) (stating that the Commission "review[s] only the Board's decision on appeal") (citing *Fajardo v. INS*, 300 F.3d 1018, 1019 n.1 (9th Cir. 2002); *Philippe N. Keyes*, SEC Rel. No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006) ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review."); 15 U.S.C. 7217(c)(2) (outlining SEC review of "final disciplinary sanctions imposed by the Board")). Before the Board, despite the direction in its briefing order that the parties address inability to pay issues, "Farhang's briefing contain[ed] only a cursory discussion of the subject." F.D. 25. His opening brief to the SEC does not make any detailed argument that he is unable to pay a penalty. He has now forfeited any opportunity to do so. *See* SEC Rule of Practice 450(b), 17 C.F.R. 201.450(b) ("Reply briefs shall be confined to matters in opposition briefs of other parties; except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived."); *see also, e.g., AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 (D.C. Cir. 2000) (deeming argument made for first time in reply brief waived); *In re Sulfuric Acid Litigation*, 235 F.R.D. 646, 651 (N.D. Ill. May 24, 2006) ("an argument that is not developed or adequately supported until the reply brief is deemed waived") (*citing United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006)).

In addition, Farhang appears to claim that the civil money penalty ordered by the Board is not a "lesser sanction" within the meaning of Section 105(b)(3) because, in his view, the amount of the penalty is "completely lacking in relativity" to his conduct. Br. 4, 16. Devoting four sentences in his brief to stating "[t]he pertinent facts here," Farhang characterizes his conduct as "nothing more than 'not cooperating' with a PCAOB investigation." Br. 1, 4, 5. He also asserts that "[t]here is no proof of audit misconduct," "[t]here are no injured or misled investors," "[t]here are no false financial statements," and that on the particular matters under investigation he was only an "audit manager." Br. 4-5, 16; *see* R.D. 23d, Ex. 37 at 2.[14/]

Those contentions do not come close to capturing "the facts and circumstances" of the case—on which Farhang claims to base his approach to "[w]hat is a 'lesser sanction' than a bar." Br. 15. And his repeated suggestion that a "$983,888 civil money penalty for 'noncooperation'" might be imposed in some unspecified case (Br. 1, 4, 15) has nothing to do with the particulars of this case, in which the Board determined that a $50,000 civil money penalty was appropriate.

In applying PCAOB Rule 5300(b) in this case to determine which of the specified legally available sanctions were appropriate to protect investors' interests and further the public interest, the Board discussed in detail the particular facts and circumstances of this case. *E.g.*, F.D. 2-5, 20, 21-23. The Board also explained at length the basis for arriving at its determination that a $50,000 penalty—less than the amount found appropriate to impose by the hearing officer, whose ultimate ruling on the penalty Farhang purports to embrace (*see* Br. 2; R.D. 34 at 12

[14/] Although Farhang was an audit manager during the time the "Issuer A" audit under investigation was conducted at GKM, he was elevated to partner at GKM sometime after that audit was completed (R.D. 23d, Ex. 32 at PCAOB-FARHANG-5422-001365), and held the title of partner at his next firm, where he was employed when he refused to testify about the GKM audit (R.D. 23d, Ex.1 at PCAOB-FARHANG-5422-000033).

n.14)—and the other sanctions it imposed in this case were "sufficient to protect investors and ¤ further the significant public interest at stake without being in any way excessive or oppressive." *E.g.*, F.D. 21-24. This included noting that Farhang was "well-situated to provide potentially valuable information" to the investigation; that "[e]ven as to the documents he had provided, his refusal to testify deprived the PCAOB investigators of any opportunity to examine him about those materials and their relation to other documents or testimony, and to determine whether they truly comprise the total universe of relevant information in his possession"; that the circumstances under which he refused to testify and the excuses he offered for not testifying gave rise to concerns that "his noncooperation was designed to avoid responsibility for possible misconduct" and that he "is not willing or able to manage both his regulatory responsibilities and his personal obligations"; and that only belatedly did he "make any reference to legal objections to complying with Board requests for information" and even then he failed to "engage with the Division in any detail about the substance of his objections." F.D. 21-22. Moreover, although Farhang's brief makes no mention of it, the Board's analysis also included according some weight to certain points Farhang offered in mitigation, such as his argument that "he was not a controlling partner of a co-respondent firm, and thus his actions were not attributable to any firm," unlike the respondents in the three prior litigated PCAOB noncooperation cases. F.D. 22.

Furthermore, those contentions Farhang makes about the case, like his refusal to testify and his excuses for not testifying in the first place, "display[] little or no regard for the Board's processes and, by extension, for its public-interest mandate." F.D. 22. Instead, they demonstrate precisely the failure to appreciate the importance and consequences of noncooperation with a PCAOB investigation that makes the Board's sanctions fitting and necessary. As the Board

explained, refusals to cooperate with investigations "cause at least indirect harm to investors that it may never be possible to quantify and thwart our ability to identify and rectify violations of statutes, rules, and standards we are charged with enforcing." F.D. 23. Noncooperation "impairs the Division's ability to investigate, which in turn impairs the Board's ability to identify violations and sanction violators" and "deprives investors of an important protection that the Act was intended to provide." *Bassie,* 2012 SEC LEXIS 89, *40; *see, e.g., PAZ Secs., Inc.*, SEC Rel. No. 34-57656, 2008 WL 1697153, *6 (Apr. 11, 2008) ("Applicants prevented NASD from gaining a clear picture of the nature and breadth of any misconduct by failing to respond to its information requests."), *pet. denied*, 566 F.3d 1172 (D.C. Cir. 2009). That is why such refusals must be met with strong sanctions. *Bassie*, 2012 SEC LEXIS 89, *40, *40 n.38 ("failure to cooperate in an investigation is very serious misconduct" and the ability to enforce cooperation from regulated persons is "'at the heart of the self-regulatory system for the securities industry'") (quoting *Berger*, 2008 WL 4899010, *4); *see* F.D. 23 (refusal to cooperate with a PCAOB investigation is "fundamentally serious misconduct").

Finally, if Farhang intends for any of his civil money penalty arguments to go beyond a legal authority challenge based on the "lesser sanctions" language, on to a claim, for example, that, under general sanctions analysis, the penalty is "excessive" or without "basis" (*see* Br. 4, 5), any such arguments are fully addressed by the Board's decision and fail for reasons summarized above. The Board was authorized by Sarbanes-Oxley Act Section 105(b)(3) and PCAOB Rule 5300(b)(1) to impose a civil money penalty, and the $50,000 penalty the Board ordered is fully warranted by the facts and circumstances of the case and should be upheld by the Commission.

CONCLUSION

To protect investors and further the public interest, the Commission should sustain the Board's order imposing strong sanctions for Farhang's fundamentally serious misconduct of categorically refusing to testify in connection with a PCAOB investigation.[15/]

Dated: August 4, 2017

Respectfully submitted,

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15/ If the Commission does not, during the pendency of this appeal, in its "broad discretion" "'summarily'" lift the automatic stay under 15 U.S.C. 7215(e) on the Board's sanctions and reporting of them to the public, the Commission should lift the stay upon a "completion of [its] review" that is favorable to the Board. *Mark E. Laccetti, CPA*, SEC Rel. No. 34-79138, 2016 WL 6137057, *2 (Oct. 21, 2016) (quoting 15 U.S.C. 7215(e)(1) and 17 C.F.R. 201.401(e)(2)); *see Kabani*, 2017 WL 947229, *21.

CERTIFICATION OF COMPLIANCE WITH RULE 450(c)

I, Jodie Dalton Young, certify that the foregoing brief of the Public Company Accounting Oversight Board filed in opposition to Applicant's application for Commission review complies with the word count limitations set forth in Rule 450(c) of the Commission's Rules of Practice, 17 C.F.R. 201.450(c), and that the foregoing brief contains 13,228 words, exclusive of pages containing the Table of Contents and Table of Authorities, as counted by the word count feature of the Microsoft Word word-processing program used to prepare the brief.

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

Admin. Proc. File No. 3-17936

In the Matter of the Application of

S. BRENT FARHANG, CPA

For Review of Disciplinary Action Taken By the

PUBLIC COMPANY ACCOUNTING ƒ
OVERSIGHT BOARD ƒ

NOTICE OF APPEARANCE

Pursuant to Rule 102 of the Commission's Rules of Practice, J. Gordon Seymour, Luis de la Torre, and Jodie Dalton Young enter their appearances in the above-entitled matter representing the Public Company Accounting Oversight Board and hereby request that notice or other written communication in this proceeding be served upon them at the following mail address and email addresses below:

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th of August, 2017, I caused to be sent to Scott Vick via Federal Express a copy of the foregoing brief and accompanying notice of appearance (the original and three copies of which were filed today via hand delivery with the Commission's Office of the Secretary) addressed as follows:

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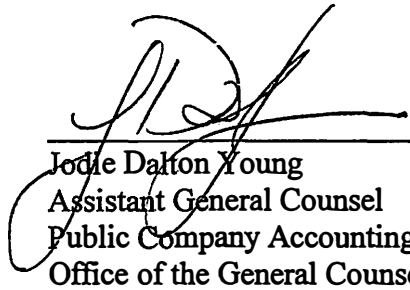
I have also transmitted today courtesy copies of the brief and notice of appearance to the above-named counsel at scott@vicklawgroup.com.



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