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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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 PCAOB

OPENING BRIEF OF S. BRENT FARHANG, CPA IN SUPPORT OF HIS APPLICATION FOR COMMISSION REVIEW

July 5, 2017

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The PCAOB[1] – an entity that shares "concurrent enforcement jurisdiction [with the SEC[2]] over auditor conduct"[3] – claims to have the power to permanently bar an auditor[4] and impose upon him or her a financially ruinous civil money penalty of up $983,888[5] for nothing more than "not cooperating" with a PCAOB investigation, regardless of whether the auditor executed a blanket, advanced written consent to "cooperate" or not.

The SEC – to whom the PCAOB reports – has no such power to impose draconian or even nominal civil money penalties on an auditor for "noncooperation." Thus, whether an "uncooperative" auditor is subject to financially ruinous civil money penalties could turn on nothing more than whether the investigation is launched by the PCAOB or SEC. Regardless, no government agency of which we are aware – or any entity, like the PCAOB that is considered a "government actor" for purposes of the United States Constitution – has any such power.

On January 12, 2016, the Board instituted disciplinary proceedings against S. Brent Farhang, CPA for failing to testify in response to an Accounting Board Demand ("ABD") (*i.e.*,

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1 "PCAOB" and "Board" refer to the Public Company Accounting Oversight Board.

2 "SEC" refers to the United States Securities and Exchange Commission.

3 2009 PCAOB Annual Report at 15.

4 A "bar" prohibits an auditor from being an associated person of a registered public accounting firm, as that term is defined in Section 2(a)(9) of the Act and PCAOB Rule 1001(p)(i). A "bar" also prohibits an auditor from "[becoming] or remain[ing] associated with any issuer, broker, or dealer in an accountancy or a financial management capacity, and for any issuer, broker, or dealer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission."

5 Section 105(c)(4)D) and 105(c)(5) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7512 *et. al* (hereinafter, the "Act"); 17 C.F.R. § 201.1001, *Adjustment of civil monetary penalties – 2016*, Subpt. E, Table I.

for "noncooperation").[6] Farhang and the PCAOB Division of Enforcement and Investigations ("DEI") each filed cross motions for summary disposition,[7] and on August 10, 2016, the Board's hearing officer issued his initial decision concluding that Farhang "failed to cooperate with a Board investigation without valid justification."[8] As a sanction, the Hearing Officer ordered that Farhang would be permanently barred, censured, and "ordered to pay a civil monetary penalty of $75,000, but such payment will be waived based on Farhang's demonstrated inability to pay a civil penalty."[9]

Farhang petitioned the Board for review of the initial decision.[10] After briefing, the Board ordered that Farhang be permanently barred, censured, and ordered to pay a civil money penalty of $50,000. Unlike the Initial Decision, the Board's decision did not waive payment of the penalty due to Farhang's "demonstrated inability to pay a civil penalty."

The Board's decision is incorrect and must be vacated or modified for three reasons.

A.

An Auditor's Advance Written Consent Is Required Before The PCAOB Can Sanction Him or Her For Noncooperation

At bare minimum, the PCAOB cannot sanction an auditor for noncooperation, as it seeks to do here, unless the auditor first executed a written consent to cooperate. Here, it is undisputed that Farhang did not provide any such advance written consent to cooperate, and therefore the Board may not impose noncooperation sanctions upon him.

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6 R.D. 1.

7 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. 23a at 12-15.

8 R.D. 27, Initial Decision (I.D.) at 12.

9 *Id.* at 22.

10 R.D. 28.

The context and structure of the Act shows why the advance written consent to cooperate is required before an auditor may be sanctioned for noncooperation. There are only two provisions of the Act that speak to "cooperation" or "noncooperation." Section 102(b)(3), 15 U.S.C. § 7212(b)(3) sets forth, *inter alia*, the requirement concerning the timing and method that auditors execute prior written consents to cooperate. In turn, Section 105(b)(3), 15 U.S.C. § 7512(b)(3) sets forth the disciplinary consequences for an auditor failing to cooperate.

Section 102(b)(3) – which concerns registration of firms – requires that, at the time an applicant firm applies for registration with the PCAOB, that firm, *inter alia*, must: (1) agree to and secure from its associated persons advance, blanket written[11] consents to cooperate in and comply with "***any* request**" – in advance, sight unseen, no matter what the request is for – "for testimony or production of documents" made by the Board; (2) ***as a condition of their continued employment***. *Id.* (emphasis added). Registrants must do this as a condition of the continuing effectiveness of their own registrations, and ability to audit issuers and/or broker dealers. Section 105(b)(3) makes no mention, one way or the other, about consent.

Why would Congress require auditors to consent to cooperate in writing, and make that an *ongoing* requirement of the auditor's employment, if an auditor's failure to provide prior written consent did not limit the Board's power to discipline the auditor for non-cooperation? Congress had to have contemplated that an auditor's advance written consent to cooperate would be provided before the auditor could ever be subject to sanctions for noncooperation. There is no other reasonable way to interpret this.

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11 Section 102(b)(3)'s mandate that the consent be "executed" and physically provided to the PCAOB by the applicant at the time it applies for registration indicates that the consent must be in writing. The fact that the registrant is required to "secure . . . similar consents" from associated persons, likewise indicates the statutory requirement that the advance consents provided by associated persons be "***executed***," *i.e.*, in writing. Thus, the "consent" contemplated by Section 102(b)(3) must be in writing, and cannot be oral or otherwise implied.

The prior written consent to cooperate requirement is contained in the registration section (Section 102(b)(3)), because that is the *time* that consents must *first* be obtained by a registrant (and at all times thereafter immediately for their employees (such as auditors)). Therefore, it was error for the Board to conclude that the placement of the prior written consent to cooperate requirement in Section 102(b)(3) places no limit on the Board's discretion to impose discipline for noncooperation under Section 105(b)(3) regardless of whether an auditor had previously consented in writing to cooperate.

B.

Noncooperation Sanctions Violate
The Doctrine of Unconstitutional Conditions

If Farhang's right to employment as an auditor is conditioned upon him being subject to financially ruinous civil money penalties of up to $983,888 – not for audit misdeeds, but for "noncooperation" with an investigatory process that lacks due process, then the Act violates the doctrine of unconstitutional conditions. In effect, Farhang can work in his chosen profession as an auditor only if he allows the PCAOB (a government actor for purposes of the Constitution) to subject him to investigations and proceedings that lack due process.

C.

A $50,000 Civil Money Penalty Should Be Set Aside Or Waived

Lastly, the $50,000 civil money penalty should be set aside or waived. Even if civil money penalties lawfully could be issued against Farhang (and they cannot), the Act authorizes the Board only to impose a "lesser sanction" than a permanent bar in cases of noncooperation. Here, a $50,000 civil money penalty – which is more than Farhang makes in one year – is not a "lesser sanction" than a bar – it is, as a practical matter for Farhang, a "greater sanction" than a bar. Moreover, in light of Farhang's "demonstrated inability to repay" (as noted by the Hearing Officer) a $50,000 civil money penalty is excessive and completely lacking in relativity. No

investors were harmed, no financial statements misstated, and no allegation was ever proven that Farhang violated any audit rule whatsoever. Unproven speculation and innuendo are not the basis for a civil money penalty.

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

The pertinent facts here are simple and not disputed. On December 16, 2014, the Board issued an Order of Formal Investigation authorizing the DEI to conduct a formal investigation of Goldman Kurland and Mohidin, LLP (the "Firm").[12] On June 30, 2015, the DEI issued an ABD to Farhang, the engagement manager on certain audits at issue, to produce documents and appear for testimony.[13] Farhang declined to, and did not appear for testimony.[14] The Board instituted disciplinary proceedings against Farhang for noncooperation arising from his failure to testify, the hearing officer granted the DEI's motion for summary disposition for noncooperation and issued an initial decision for sanctions, which Farhang appealed to the Board. The Board's final decision dated March 16, 2017 – to which Farhang appeals here – seeks to impose against Farhang a permanent bar, a censure, and a $50,000 civil money penalty.

III. ARGUMENT

The Act contains two provisions concerning cooperation. Section 102(b)(3) sets forth the requirement concerning the timing and method that auditors execute prior written consents to cooperate. In turn, Section 105(b)(3) sets forth the disciplinary consequences for an auditor failing to cooperate.

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12 R.D.23d, Ex. 14.

13 R.D.23d, Ex. 24.

14 R.D.23d, Ex. 33 at 3, Exs. 34-37.

Side-by-side, they provide as follows:

Section 102(b)(3)	Section 105(b)(3)
(3) CONSENTS. Each application for registration under this subsection shall include – (A) **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 (and 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 (B) a statement that such firm **understands and agrees that cooperation** and compliance, as described in the consent required by subparagraph (A), 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. *Id.* (emphasis added).	(3) NONCOOPERATION WITH INVESTIGATIONS. (A) IN GENERAL. If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may— (i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association; (ii) suspend or revoke the registration of the public accounting firm; and (iii) invoke such other ***lesser sanctions*** as the Board considers appropriate, and as specified by rule of the Board. *Id.* (emphasis added).

A. Because Farhang Did Not Consent To Cooperate (Under Section 102(b)(3)), He Cannot Be Sanctioned For Noncooperation (Under Section 105(b)(3))

The threshold issue of this case boils down to whether – applying the settled principles of statutory construction – the advance, written, blanket "consent" to cooperate requirement (of Section 102(b)(3)) is required as a necessary precondition to the Board's power to discipline Farhang (for noncooperation) under Section 105(b)(3). As further explained below, the answer to that question is "yes." Because Farhang indisputably did not provide any such prior written consent, he may not be sanctioned for noncooperation.

1. The Board's Power To Impose Noncooperation Sanctions Is Limited, At Best, To Those Who Provided Advance Written Consent

In arguing that the Board may impose sanctions on Respondent for noncooperation even though Respondent never provided prior written consent to cooperate, the Board wholly ignores the statutory purpose of the consent requirement, and the structural reasons why the Board's power to impose noncooperation sanctions is necessarily limited by Section 102(b)(3)'s consent requirement.

Unlike the SEC, the Board does not have the power to issue subpoenas in connection with its investigations.[15] However, as an apparent alternative to giving the Board subpoena power in furtherance of the Board's investigations, the Sarbanes-Oxley Act included two lone, related provisions – Section 102(b)(3) (concerning advance consents to cooperate in and comply with "***any***" Board request for testimony or documents) and Section 105(b)(3) (concerning the Board's authority to impose certain types of sanctions for noncooperation) – that jointly serve as a mechanism through which the Board can obtain testimony and documents in connection with its investigations.[16]

Under Section 105(b)(3) of the Act, 15 U.S.C. § 7215(b)(3), the Board has the power to impose certain (but expressly limited) types of sanctions on registrants and their associated persons for their failure to "cooperate" with "any request" of the Board for testimony or the

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15 Considering that the Board is a private "nonprofit corporation," 15 U.S.C. § 7211(a), it would be odd (perhaps unconstitutional) for Congress to give the Board subpoena power. Congress provided only that the Board may request that the SEC issue a subpoena, but only in the limited circumstances, in connection with "any *hearing* [as opposed to the DEI's underlying investigation] ordered by the Board." *See* PCAOB Rule 5424(b).

16 Apart from Section 102(b)(3) (and the Board rules enacted pursuant thereto) – and assuming consent has been executed in advance by an associated person pursuant to that section – an associated person has no independent legal "duty to cooperate" with any request by the Board for testimony or the production of documents.

production of documents in connection with a Board investigation.[17] *Id.* Section 105(b)(3) concerns only the sanctions the Board may impose for noncooperation, but does not concern any other violation, *e.g.*, for violation of the Exchange Act, 15 U.S.C. § 78, or violation of the Board's auditing standards.[18]

Needless to say, the power to impose sanctions for noncooperation is an extraordinary power (in certain respects broader than the power of contempt exercised exclusively by Courts[19] and Congress under the protection of full due process rights) that the SEC does not have, nor any other agency that is required to follow the United States Constitution.

As a result, the power has important limits. In particular, the structure and context of the statute confirms that, absent prior written consent to cooperate under Section 102(b)(3), the Board does not have the lawful Congressionally authorized power impose non-cooperation sanctions on Farhang under Section 105(b)(3).

2. The Context And Structure Of The Statute Confirm That The Consent Requirement Was Enacted To Ensure Consent Was A Precondition to Noncooperation Sanctions

The Board erroneously concludes that Section 102(b)(3)'s strict requirement for advance written consent to cooperate – with severe consequences when that does not occur – was

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[17] In contrast, while the failure of an accounting firm to provide information to the SEC's Enforcement Staff during an investigation may lead to a subpoena enforcement action in federal court, the Commission lacks similar express authority to impose sanctions on a firm for noncooperation during an SEC inquiry. *See, e.g., SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, File No. 1:11-MC-00512-DAR (D.D.C. filed Sept. 8, 2011). In the SEC enforcement context, the extent of a person's cooperation can be a consideration factoring into the SEC's charging decision and its view of the appropriate sanctions. Moreover, cases where courts have imposed monetary sanctions for not testifying are extraordinarily rare.

[18] The sanctions the Board may impose for other violations are set forth in a separate part of the Act at Section 105(c)(4).

[19] For example, the penalty for criminal contempt in California under California Penal Code § 166 (a misdemeanor) is potential jail time and ***a fine up to $1,000***, or both. *Id.* § 19.

intended merely to "foster[] awareness of both the possibility of being called upon to cooperate in the Board's processes and the potentially severe consequences of failure to do so."[20] Final Order at 12-13. The context and structure of the statute prove the Board wrong.

Section 102(b)(3) requires that, at the time an applicant firm applies for registration with the PCAOB that firm, *inter alia*, must: (1) agree to and secure from its associated persons advance, blanket written[21] consents to cooperate in and comply with "***any* request**" – in advance, sight unseen, no matter what the request is for – "for testimony or production of documents" made by the Board; (2) ***as a condition of their continued employment***. *Id.* (emphasis added). Registrants must do this as a condition of the continuing effectiveness of their own registrations, and ability to audit issuers and/or broker dealers.

On its face, contrary to the Board' contention – this provision is not about "fostering awareness." But "fostering awareness" can be achieved far short of sternly requiring a "***consent*** to cooperate." Why would Congress stringently require a "***consent***" to cooperate, if all it was trying to achieve was the "fostering of awareness" of the "possibility of being called to cooperate," as the Board contends?

Quite obviously, the consent requirement was enacted to make sure that anyone who would later be put in the position of having noncooperation sanctions imposed against them had, as a necessary precondition, first, provided a prior, written blanket consent to cooperate.

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20 Contrary to the Board's contention, absolutely nothing in the advance written consent language purports to advise auditors of the "potentially severe consequences" of not cooperating with the Board's investigation.

21 Section 102(b)(3)'s mandate that the consent be "executed" and physically provided to the PCAOB by the applicant at the time it applies for registration indicates that the consent must be in writing. The fact that the registrant is required to "secure . . . similar consents" from associated persons, likewise indicates the statutory requirement that the advance consents provided by associated persons be "***executed***," *i.e.*, in writing. Thus, the "consent" contemplated by Section 102(b)(3) must be in writing, and cannot be oral or otherwise implied.

A person in Farhang's position who did not provide advance written consent to cooperate to his or her firm was at risk of immediately losing his or her job and livelihood, and, the firm would be at risk of losing its registration. Given these stark and severe consequences, 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 into a position of being disciplined for failure to cooperate who had not already consented, in writing in advance, to cooperate. After all, if they had not consented, then they would be expected to lose their job long before any noncooperation issue arose.

Therefore, having structurally sought to assure that advance written consent had been obtained immediately upon an auditor's hiring (per Section 102(b)(3)) 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). By the same token, because consent to cooperate was assumed (and important), the Board cannot properly read the statute (as a whole) to disregard the requirement that an associated person must consent, in advance, to cooperate, before being subjected to noncooperation sanctions.

Thus, the context and structure of the statute confirm that Congress did not intend to subject persons to draconian noncooperation sanctions where they had not first provided prior, written consent to cooperate. If the Board had the power to impose noncooperation sanctions even if an auditor had not provided advance consent to cooperate in or comply with "any request" sight unseen by the Board for testimony or the production of documents, then Section 102(b)(3)'s consent requirement as to associated persons – indisputably, a very important part of the statutory regime – would immediately be rendered wholly superfluous and unnecessary. *In the Matter of R.E. Bassie & Co.*, SEC Rel. No. 3354 at p. 18 (January 10, 2012) (advance consents from associated persons and registrants was an important policy and objective of the

Sarbanes-Oxley Act). The canons of statutory construction simply do not permit that interpretation particularly where, as here, it is beyond dispute that the advance consent provisions of Section 102(b)(3) is an important part of the statutory regime.

The sole and only way reasonably to interpret these two provisions harmoniously – giving effect to each – is to conclude that an associated person must "execute[]" an advanced written consent to cooperate in and comply with "*any* request" of the Board for testimony or the production of documents (under Section 102(b)(3)) *before* the Board has authority to sanction that associated person for noncooperation (under Section 105(b)(3)).[22]

3. Because Farhang Did Not Consent To Cooperate, The Board May Not Impose Noncooperation Sanctions Against Him

Here, it is undisputed that Farhang did not provide advance, written consent to cooperate. The Firm filed its PCAOB registration on March 30, 2006. R.D. 22e at ¶ 2. Farhang was not an employee or associated person of the Firm at that time. R.D. 22e at ¶ 3. At no time before, during, or since then has Farhang ever executed a written consent of any kind to cooperate in or comply with "any request" for testimony or the production of documents by the Board under Section 102(b)(3). R.D. 22b at ¶ 16; R.D. 22e at ¶ 4. Since the date that the Firm became a registrant, the PCAOB Division of Registration and Inspections has inspected the Firm three times. (R.D. 22e at ¶ 5). At no time before, during or after any of those three inspections did the PCAOB inspectors ask the Firm for consents from its associated persons. R.D. 22e at ¶ 6. At no time did the inspectors tell the Firm that consents were necessary. R.D. 22e at ¶ 7. And, at no time did the PCAOB ever advise the Firm that it was violating Section 102(b)(3). R.D. 22e at ¶

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22 It is irrelevant whether the PCAOB relied on the registrants to secure consents from their associated persons. The only sensible reason for the consent is to ensure that the person subject to penalties for noncooperation consented to cooperate beforehand. Moreover, the Board had ample opportunity during its routine periodic inspections of registrants to determine whether registrants had obtained consents from its associated persons.

8. The Board cannot impose noncooperation sanctions against Farhang because he never consented to cooperate.

B. The Board Cannot Sanction Farhang For Noncooperation Based On Unconstitutional Statutory Provisions And PCAOB Processes That Would Deprive Farhang Of His Constitutional Due Process Protections

Here, the Board would have Farhang choose: (1) to not cooperate, and be subject to the deprivation of liberty and property through disciplinary proceedings and significant sanctions – including being barred from associating with a registered public accounting firm; or (2) to cooperate as that term is defined by the Board on the spot and subject oneself to administrative rules that deny Farhang of Constitutional due process with the specter of significant sanctions.

But 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). Neither the Act nor the Board can condition Farhang's right to employment as an auditor with the relinquishment of Constitutional rights. *Garrity v. New Jersey*, 385 U.S. 493 (1967) (state may not condition continued public employment on relinquishment of 5th Amendment right); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dollan v. City of Tigard*, 512 U.S. 374, 385 (1994).

Farhang has constitutionally protected due process rights to be free from statutory requirements or governmental actions that condition (or even prescribe against) his continued employment with a registrant (auditing issuers) and first amendment right to associate with registrants based on a requirement that he execute an advance, blanket, written consent to "cooperate" (a highly amorphous and ill-defined concept) with "any" request from the Board – sight unseen, regardless of its reasonableness or lack thereof, or its scope. Farhang has a constitutionally protected due process right to be free from investigative procedures of a

governmental actor, 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. Farhang has a constitutional right to decline to "cooperate" with the Board under a standard that requires him – subject to ruinous and arbitrary financial penalties imposed in proceedings bereft of full due process protections – to provide documents or testimony to the Board in response to absolutely "any" request, sight unseen, regardless of its reasonableness or lack thereof, or its scope. Farhang likewise 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.

1. Conditioning The Right To Audit On the Waiver Of Due Process Rights Violates the Doctrine Of Unconstitutional Conditions

As explained above, Section 102(b)(3) mandates that registrants require all of their associated persons execute broad blanket waivers to consent to cooperate in and comply with "*any* request" – in advance, sight unseen, no matter what it requests – of the Board for testimony or the production of documents as a condition of their continued employment with a registrant.

By providing such a consent to cooperate – under a constitutionally vague, amorphous, and ill-defined standard, with potentially ruinous sanctions and bar orders – an associated person would be asked to consent in advance to cooperate in a process where the Board can leverage its power to obtain documents or testimony with its authority to bring charges against an auditor in proceedings that deprive him of his full constitutionally protected due process rights.[23]

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[23] Signing a consent could subject a person to disciplinary proceedings and draconian 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. Moreover, auditors have no guidance as to when they may be deemed, after the fact, to have failed to cooperate. These vague standards fail to provide fair or discernable rules for instituting disciplinary proceedings for noncooperation. These concerns are amplified when considering that – while the DEI has ample time to conduct an investigation – the expedited procedures will govern disciplinary proceedings instituted for noncooperation.

The Board's procedural protections do not give respondents a fair opportunity to defendant themselves if the Board decided – under no guidance whatsoever – that the associated person was uncooperative, or if the Board decided to pursue substantive claims. While the Board grants the DEI broad power to compel testimony, a respondent's ability to summon people to testify is severely limited. For example, a respondent's right to compel the testimony of witnesses is limited – subject to the discretion of the Hearing Officer – to testimony only "at the designated time and place of the hearing." PCAOB Rule 5424(a). In addition, should the DEI summon the testimony of a third party, the respondent has no right to attend that person's interview. The rules also limit the extent to which evidence that has been gathered by the DEI would be disclosed to the respondent. These procedural provisions, among others, fail to provide sufficient level of due process commensurate with the potential penalties that the Board may impose on an associated person for noncooperation.

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 additional rights listed above, are unconstitutional. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dollan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see, e.g., Garrity v. New Jersey*, 385 U.S. 493 (1967) (state may not condition continued public employment on relinquishment of 5th Amendment right).

PCAOB Rule 5110(b). A respondent then 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.

2. The Board Has The Burden To Show That The Statute And Its Disciplinary Processes Satisfy A Strict Scrutiny Test

The accepted test for this type of denial of a constitutional right is that the government must have a compelling governmental interest and the courts will require the government to use the "least restrictive means" to achieve that government interest. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). This standard – often called strict scrutiny – is the most rigorous form of judicial review. Once it is determined that strict scrutiny must be applied, it is *presumed* that the law is unconstitutional. The burden then shifts to the government to prove that the law is constitutional in that it is based on a compelling government interest and is narrowly tailored to provide the "least restrictive means" to achieve the compelling government interest.

3. The Statute's Mandatory Cooperation Provisions and Penalties, And The Board's Processes Are Unconstitutional

Section 102(b)(3)'s consent requirements and Section 105(b)(3)'s punishment provision, in addition to the Board's investigative and disciplinary processes, devoid of full due process protections, are unconstitutional because they are neither narrowly tailored nor do they provide the least restrictive means to achieve any legitimate government interest.

C. The Board Does Not Have The Authority To Impose A $50,000 Civil Money Penalty on Farhang Because It Is Not A "Lesser Sanction"

The Board's Final Decision seeks to impose a permanent bar on Farhang that, as a Scarlett Letter, will ruin his career, livelihood, and, and ability to earn income. Even assuming the Board had the power to impose a bar in this case (and it does not), the statute would only permit a civil money penalty if it constituted a "lesser sanction."

What is a "lesser sanction" than a bar will necessarily depend on the facts and circumstances of each particular case. Would a $983,888 civil money penalty for "noncooperation" constitute a "lesser sanction" than a bar for someone who – after leaving the

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C. The Board Does Not Have The Authority To Impose A $50,000 Civil Money Penalty on Farhang Because It Is Not A "Lesser Sanction"

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What is a "lesser sanction" than a bar will necessarily depend on the facts and circumstances of each particular case. Would a $983,888 civil money penalty for "noncooperation" constitute a "lesser sanction" than a bar for someone who – after leaving the

auditing profession – barely earns any money? Of course not. Nor would a civil money penalty of $50,000 constitute a "lesser sanction" in this particular case where Farhang has proven he is impecunious – and the $50,000 fails the "relativity" test. There is no proof of audit misconduct. There are no injured or misled investors. There are no false financial statements. As serious as the Board may view "noncooperation" of an audit manager – is it so serious that it requires a civil money penalty in excess of a person's annual income and net worth? No. Virtually every federal administrative agency (even the SEC post-*Bassie*) looks at a party's ability to pay when calculating civil money penalties. The Board cannot fashion its own course ignoring over fifty years of precedent and practice in federal agencies.

IV. CONCLUSION

For each of the foregoing reasons, the Commission should, in its *de novo* review, vacate the Board's Final Decision.

DATED: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 2017, I caused copies of the following document to be sent to the recipients below via electronic mail:

OPENING BRIEF OF S. BRENT FARHANG, CPA IN SUPPORT OF HIS APPLICATION FOR COMMISSION REVIEW

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