

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 83494 / June 21, 2018

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

OPINION OF THE COMMISSION

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD — REVIEW OF  
DISCIPLINARY PROCEEDINGS

**Violation of Sarbanes-Oxley Act of 2002 and Board Rules**

**Failure to Cooperate with Investigation**

Associated person of registered public accounting firm refused to cooperate with a PCAOB investigation. *Held*, findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Scott Vick of *Vick Law Group, APC* for S. Brent Farhang, CPA.

*Luis de la Torre* and *Jodie J. Young* for the PCAOB.

Appeal filed: April 20, 2017

Last brief received: August 21, 2017

S. Brent Farhang, CPA, formerly associated with Goldman Kurland and Mohidin, LLP (“GKM”), a registered public accounting firm, appeals a disciplinary action taken by the Public Company Accounting Oversight Board (“PCAOB” or “Board”). Acting pursuant to Section 105(b)(3) of the Sarbanes-Oxley Act of 2002 and PCAOB Rules 5200(a)(3) and 5300(b), the Board found that Farhang refused to provide investigative testimony to its Division of Enforcement and Investigations (“Division”). The Board censured Farhang, barred him from associating with a registered public accounting firm, and assessed a \$50,000 civil money penalty. As explained below, we affirm the Board’s findings of violations and the sanctions imposed.

## I. Background

Farhang was associated with GKM from July 2007 to December 2014. It is undisputed that Farhang refused to appear for investigative testimony as part of the Board's formal investigation of audits that GKM and its associated persons, including Farhang, performed during this time, and that Farhang was an associated person of a registered public accounting firm at the time of the Division's request for testimony. Farhang contends that the Board lacked authority to discipline him for this refusal.

### A. The Board began an investigation of GKM audits.

In August 2013, the Board's staff conducted an inspection of GKM audits of the financial statements of four issuers. On December 16, 2014, the Board ordered a formal investigation of potential violations of PCAOB rules and auditing standards by GKM and its associated persons in connection with its preparation of audit reports for the issuers. As part of the formal investigation, the Board authorized the Division to issue Accounting Board Demands ("ABDs") and to otherwise request or to require the cooperation of persons associated with GKM.<sup>1</sup>

On June 30, 2015, the Division issued ABDs to Farhang, the audit manager, and Ahmed Mohidin, the engagement partner. The ABDs required Farhang and Mohidin to produce documents in connection with the Board investigation and to appear for investigative testimony at the Board's offices. The ABDs scheduled Mohidin's testimony for September 14 to 17, 2015, and Farhang's testimony for September 30 and October 1, 2015—dates to which counsel jointly representing Farhang and Mohidin had previously agreed. When they received these ABDs, Farhang was no longer associated with GKM and Mohidin was only providing non-audit services to GKM clients before transitioning away from GKM; at the time both were working for MJF & Associates, APC, another PCAOB-registered public accounting firm.

The ABDs enclosed copies of PCAOB Form ENF-1, which described the obligation of associated persons to cooperate with investigations and explained that a failure to cooperate could result in disciplinary consequences, including a suspension or bar. On July 14, 2015, in response to the ABD, Farhang supplied emails covered by the document request and completed and signed the PCAOB Witness Background Questionnaire. Like the Form ENF-1, the Questionnaire warned that failure to comply with an ABD or otherwise cooperate with the investigation could result in disciplinary proceedings.

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<sup>1</sup> See PCAOB Rule 5103(a) (stating that Board staff may, as part of a formal investigation, "issue an accounting board demand for the production of audit work papers or any other document or information in the possession of a registered public accounting firm or any associated person . . . that the . . . staff considers relevant or material to the investigation").

**B. Farhang refused to appear for investigative testimony.**

Farhang never appeared for investigative testimony and stopped cooperating with the Division on or about September 24, 2015. Mohidin testified before the Division on September 14-17, 2015, with counsel present.<sup>2</sup> During testimony, the Division asked Mohidin about certain workpapers that Farhang prepared for an issuer audit. Mohidin testified that he was “troubled” by information in the metadata that suggested that Farhang may have made improper modifications to those workpapers. Mohidin testified that he had specifically told Farhang not to make such changes without properly documenting them.

On September 25, 2015, approximately one week after Mohidin’s testimony concluded, Farhang’s counsel sent an email stating that Farhang “ha[d] decided that he will exercise his right to decline to appear for testimony.” In response, the Division noted that the Form ENF-1 explained the obligation to cooperate and reiterated that “[a] refusal to provide testimony as required by an [ABD] constitutes noncooperation under the Act and Board Rules, and is grounds for instituting a disciplinary proceeding.” Farhang’s counsel responded: “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.”

On September 30, 2015, Farhang failed to appear for his testimony. That same day, the Division advised him that it intended to recommend that the Board commence disciplinary proceedings to determine whether his failure to appear for testimony constituted a refusal to cooperate with a Board investigation. On October 7, 2015, Farhang’s counsel requested that the Board “defer” taking any disciplinary action even though Farhang was “declin[ing]” to testify. Counsel stated that GKM was no longer paying for Farhang’s representation, that Farhang’s “severely limited financial resources and more important financial obligations” prevented him from covering the cost himself, and that Farhang was unable to represent himself because he is not a native English speaker. The Division had previously agreed to reimburse Farhang for reasonable travel expenses. On October 26, 2015, the Division responded that Board rules permitted Farhang to represent himself, that it would provide an interpreter, and that it would reimburse Farhang for his travel expenses and relocate his testimony to a location convenient for Farhang. The Division also asked to be informed whether Farhang would testify pursuant to the ABD. On November 9, 2015, Farhang’s counsel responded that Farhang was “unable to testify.”

**C. The Board instituted disciplinary proceedings.**

On January 12, 2016, the Board commenced disciplinary proceedings against Farhang based on his refusal to appear for testimony.<sup>3</sup> After Farhang initially defaulted, his original

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<sup>2</sup> GKM, Mohidin, and Farhang were all represented by the same attorney.

<sup>3</sup> On September 13, 2016, the Board instituted and settled a disciplinary action, to which Farhang was not a party, against GKM and Mohidin without Farhang’s testimony in the

counsel agreed to represent him without charge. Counsel filed an answer admitting that Farhang “did not appear for testimony as scheduled and has repeatedly refused to appear for testimony on any other date” in connection with the Division’s investigation.

Farhang and the Division filed cross-motions for summary disposition. On August 10, 2016, in an initial decision, the hearing officer found that it was undisputed that Farhang had repeatedly refused to appear for testimony and to comply with the ABD. The hearing officer found that Farhang’s failure to appear for testimony constituted a failure to cooperate with the Division’s investigation. The hearing officer imposed a censure and a bar from associating with any registered public accounting firm. The hearing officer also imposed a \$75,000 civil money penalty, which he waived upon finding that Farhang was unable to pay. Farhang appealed the initial decision to the Board on August 22, 2016.

On September 21, 2016, the Board granted Farhang’s petition and directed the parties to address Farhang’s ability to pay and the hearing officer’s penalty waiver analysis. On March 16, 2017, the Board issued a decision affirming the hearing officer’s findings of liability and imposition of a censure and associational bar. The Board decreased the civil money penalty from \$75,000 to \$50,000, but declined to waive its payment. The Board found that any inability to pay was not relevant in light of the egregiousness of Farhang’s misconduct and that, in any event, Farhang had not established an inability to pay. This appeal followed.

## II. Analysis

In reviewing the Board’s disciplinary action, we must determine whether: (1) Farhang engaged in the conduct the Board found; (2) that conduct violates the statutes and rules specified in the Board’s decision; and (3) those provisions are, and were applied in a manner, consistent with the purposes of Sarbanes-Oxley.<sup>4</sup> We apply the preponderance of the evidence standard in our review of PCAOB disciplinary proceedings.<sup>5</sup> The record shows, and Farhang does not dispute, that he engaged in the conduct the Board found: he refused repeatedly to comply with an ABD to appear for testimony in a Board investigation. We also find that the provisions specified in the Board’s decision authorized it to discipline Farhang for that noncooperation.

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(...continued)

investigation. See <https://pcaobus.org/Enforcement/Decisions/Documents/105-2016-027-Goldman-Kurland-Mohidin.pdf> (last checked June 19, 2018). We take official notice of the settlement pursuant to Rule of Practice 323. 17 C.F.R. § 201.323.

<sup>4</sup> 15 U.S.C. § 7217(c)(2) (stating that Exchange Act §§ 19(d)(2) and 19(e)(1) “shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . .”).

<sup>5</sup> *S.W. Hatfield, CPA*, Exchange Act Release No. 69930, 2013 WL 3339647, at \*1 (July 3, 2013).

**A. Sarbanes-Oxley Section 105 and PCAOB Rules 5200 and 5300 authorized the Board to discipline Farhang for his refusal to testify.**

Sarbanes-Oxley Section 105(b)(3) and PCAOB Rules 5200(a)(3) and 5300(b)—the statute and rules specified in the Board’s decision—authorized the Board’s disciplinary action. Section 105(b)(3) authorizes Board discipline of any associated person of a registered public accounting firm who “refuses to testify, produce documents, or otherwise cooperate with the Board in connection with [a Board] investigation.”<sup>6</sup> PCAOB Rules 5200(a)(3) and 5300(b) authorize the Board to institute proceedings to sanction any associated person for failing to cooperate, including by failing to comply with an ABD.<sup>7</sup>

Farhang contends that Section 102(b) of Sarbanes-Oxley limits the Board’s authority to discipline noncooperation under Sarbanes-Oxley Section 105. However, nothing in Sarbanes-Oxley suggests that Section 102 limits the Board’s authority to discipline associated persons for noncooperation. Section 102(b) governs a public accounting firm’s application for PCAOB registration.<sup>8</sup> Under Section 102(b)(3), a firm applying to register with the Board must agree “to secure and enforce . . . consents from” its associated persons to cooperate “with any request for testimony or the production of documents made by the Board in the furtherance of its [statutory] authority and responsibilities” as “a condition of [the associated persons’] continued . . . association with such firm.”<sup>9</sup> A firm must also acknowledge that the “securing and enforcement of such consents . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board.”<sup>10</sup> Farhang contends that, because he did not execute a Section 102 consent with GKM, the Board is precluded from disciplining him under Section 105. We disagree.

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<sup>6</sup> 15 U.S.C. § 7215(b)(3).

<sup>7</sup> Rule 5200(a)(3) (providing that the Board may discipline a failure to comply with an ABD) (cross-referencing Rule 5110); Rule 5300(b) (enumerating possible sanctions for failing to comply with an ABD, providing false testimony, and other failures to cooperate with Board investigations); *see also* Sarbanes-Oxley Section 2(a)(9)(C)(ii)(II), 15 U.S.C. § 7201(9)(C)(ii)(II) (providing that for purposes of Section 105(b)(3) and PCAOB rules, the Board may commence disciplinary proceedings against “any person associated, seeking to become associated, or formerly associated with a public accounting firm [for] non-cooperation . . . with respect to a demand in a Board investigation for testimony, documents, or other information relating to a period when such person was associated or seeking to become associated” with such a firm). The PCAOB rules were approved by the Commission on May 14, 2004. *See Order Approving Proposed Rules Relating to Investigations and Adjudications*, Exchange Act Release No. 49704, 2004 WL 1439833, at \*3 (May 14, 2004) (“*Order Approving Rules*”).

<sup>8</sup> 15 U.S.C. § 7212(b).

<sup>9</sup> *Id.* § 7212(b)(3)(A).

<sup>10</sup> *Id.* § 7212(b)(3)(B).

As Farhang concedes, Section 105(b)(3) “makes no mention” of consents as described in Section 102 in authorizing the Board to sanction associated persons for noncooperation. Under Section 102(b)(3), an associated person’s failure to execute a consent to cooperate or to honor a previous consent to cooperate may result in registration consequences for the *firm* and employment consequences for the *associated person*. But Section 102(b)(3) does not indicate that the presence or absence of a consent has any effect on the authority of the *Board*. Indeed, Farhang conceded before the Board that no statutory provision renders the Board’s authority to impose sanctions under Section 105 subject to the existence of such consents. We agree with the Board that a firm’s “failure to secure and enforce consents from its associated persons does not immunize those associated persons from sanctions for noncooperation.”

**B. No principle of statutory construction limits Section 105 to associated persons who have executed consents as described in Section 102.**

Farhang contends that we should look beyond the text of the statute and apply other principles of statutory construction to limit Section 105. However, as the Supreme Court has stated, there is no need to invoke other principles of statutory construction “[w]hen the words of a statute are unambiguous.”<sup>11</sup> Farhang’s claims lack merit given the unambiguous statutory text supporting the Board’s authority to discipline Farhang under Section 105.<sup>12</sup>

Farhang claims that the “context” or “structure” of the statute support consent-based limitations on the Board’s investigative and disciplinary authority, but his claim is contrary to the context and structure of the statute. In Section 101(c)(4), Congress expressly authorized the Board 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].”<sup>13</sup> Nowhere did Congress state that the provisions of Section 102 were in any way relevant to the Board’s authority under Section 105.<sup>14</sup> There is no evidence that “the unadorned words” of Section 105 “are in some way limited by implication.”<sup>15</sup>

Nor is there any indication that Congress intended the consent requirements in Section 102 to shield employees of firms that fail to cooperate from disciplinary consequences. Farhang asserts that Congress must have “assume[d]” or “presuppose[d]” that no person would be subjected to Board discipline unless she had executed a consent as described in Section 102

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<sup>11</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted).

<sup>12</sup> *See id.* at 254 (quoting *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529 (1819)) (“It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation”).

<sup>13</sup> 15 U.S.C. § 7211(c)(4).

<sup>14</sup> *See* 15 U.S.C. § 7212(b)(3) (providing that consents are required “for registration”).

<sup>15</sup> *Conn. Nat’l Bank*, 503 U.S. at 254.

because it is the only other provision in the statute that addresses noncooperation. However, the fact that Section 102 provides another mechanism to secure cooperation with the Board's requests for testimony or documents in addition to Section 105(b)(3) does not mean that it limits Section 105(b)(3). Section 102 concerns the requirements for a firm to be registered with the Board. Section 105 concerns the Board's authority to investigate and discipline registered firms and their associated persons. There is no basis to conclude that Congress intended Section 102 to limit the Board's authority to impose discipline for noncooperation under Section 105.

Similarly unpersuasive is Farhang's claim that the Section 102(b)(3) consent requirement must limit the Board's authority under Section 105 because any other interpretation would render the requirement "redundant" or "superfluous and unnecessary." The Board's authority to discipline failures to cooperate with Board investigations under Section 105 does not render Section 102 superfluous. The two sections are not coterminous. Section 105 authorizes disciplinary proceedings for failures to cooperate. Section 102 governs a firm's registration with the Board, including conditioning a firm's registration with the Board on the firm's cooperation and compliance with Board requests for testimony or documents and on the firm's securing and enforcing consents from its associated persons to cooperate with the Board's future requests. Section 102 requires that the firm and its associated persons consent to cooperate not only with Board investigations under Section 105, but with "any request for testimony or the production of documents made by the Board in the furtherance of its [statutory] authority and responsibilities"<sup>16</sup>—which in addition to investigations includes, among other things, registrations and inspections.<sup>17</sup> There is nothing superfluous in providing independent mechanisms to secure cooperation.

Finally, Farhang suggests that the Board is foreclosed from disciplining his conduct because it conducted inspections of GKM without discovering that he failed to execute consents to cooperate upon becoming associated with the firm. However, a regulator's "failure to take early action neither operates as an estoppel against later action nor cures a violation."<sup>18</sup> Nor does Farhang offer any authority indicating that the absence of a consent as described in Section 102 limits the Board's powers under Section 105. Although Farhang cites our opinion in *Bassie & Company*,<sup>19</sup> that case does not stand for the proposition that the absence of such a consent excuses a failure to cooperate with a Board investigation. We stated that the consent requirements of Section 102 "underscore the seriousness with which Sarbanes-Oxley views

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<sup>16</sup> 15 U.S.C. § 7212(b)(3).

<sup>17</sup> 15 U.S.C. § 7211(c)(1)-(4).

<sup>18</sup> *William H. Gerhauser, Sr.*, Exchange Act Release No. 40639, 1998 WL 767091, at \*4 (Nov. 4, 1998).

<sup>19</sup> Accounting and Auditing Enforcement Release No. 3354, 2012 WL 90269 (Jan. 10, 2012).

cooperation with the Board in furtherance of the Board’s statutory responsibilities”<sup>20</sup>—not that such requirements limit the Board’s authority elsewhere in the statute.

**C. The requirement that associated persons cooperate with Board investigations does not impose unconstitutional conditions on their employment.**

Farhang argues that requiring him to cooperate in Board investigations imposes unconstitutional conditions on his “right to employment as an auditor.” The doctrine of unconstitutional conditions provides that “the government may not deny a benefit to a person because he exercises a constitutional right.”<sup>21</sup> Yet, Farhang fails to establish that requiring cooperation with Board investigations burdens his constitutional rights.

Farhang cites *Garrity v. New Jersey*, which held that the government may not condition public employment on the relinquishment of the Fifth Amendment privilege against self-incrimination.<sup>22</sup> Farhang could have asserted this privilege. Indeed, when the Board sent Farhang the ABD, it included PCAOB Form ENF-1, which informed Farhang that a “valid assertion[] of the privilege against self-incrimination . . . does not constitute noncooperation with a Board investigation.”<sup>23</sup> Farhang never asserted the Fifth Amendment privilege against self-incrimination when he refused to testify. The other cases Farhang cites involved the Fifth Amendment right to just compensation for property taken by the government when owners apply for land-use permits.<sup>24</sup> Farhang does not argue that the requirement that he cooperate with Board investigations implicates the Takings Clause of the Fifth Amendment.

Instead, Farhang argues that requiring that he cooperate with Board investigations deprives him of due process. According to Farhang, the Board’s “procedural protections do not give respondents a fair opportunity to defend themselves if the Board decide[s] . . . that the associated person was uncooperative.” We disagree. Sarbanes-Oxley Section 105(a) requires that the Board provide “fair procedures for the investigation and disciplining of registered public

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<sup>20</sup> *Id.* at \*11.

<sup>21</sup> *Koontz v. St Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (internal punctuation omitted).

<sup>22</sup> 385 U.S. 493, 499-500 (1967).

<sup>23</sup> The form cited the Board’s release adopting its rules on investigations and adjudications. *See Rules on Investigations and Adjudications*, PCAOB Release No. 2003-015, at A2-31–36 (Sept. 29, 2003), available at <https://pcaobus.org/Enforcement/Documents/Release2003-015.pdf> (last checked June 19, 2018) (“*Rules on Investigations and Adjudications*”).

<sup>24</sup> *See Koontz*, 133 S. Ct. at 2589-90 (stating that “[e]xtortionate demands . . . in the land-use permitting context run afoul of the Takings Clause”); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (finding that a government land use permit implicated the Takings Clause).

accounting firms and associated persons of such firms.”<sup>25</sup> The Board provides fair procedures for its investigations and for disciplining associated persons who fail to cooperate.

**1. Due process requires notice and an opportunity to be heard, and Farhang received notice and an opportunity to be heard in this case.**

The Supreme Court has held that “the central meaning of procedural due process has been clear” for over 150 years: “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”<sup>26</sup> In other words, procedural due process provides merely “a guarantee of fair procedures—typically notice and an opportunity to be heard.”<sup>27</sup> Farhang does not dispute that he received notice and an opportunity to be heard in this case. Indeed, the Board’s rules provide for notice and an opportunity to be heard in disciplinary proceedings based on a failure to cooperate.<sup>28</sup> The Commission approved these rules as “consistent with the requirements of [Sarbanes-Oxley] and the securities laws and . . . necessary and appropriate in the public interest and for the protection of investors.”<sup>29</sup>

Farhang argues that the PCAOB violated his due process rights by applying various procedural rules, limiting his discovery during the PCAOB investigation and disciplinary proceedings, and enforcing a purportedly vague requirement to cooperate with its investigation. Farhang objects to Board rules regarding expedited disciplinary proceedings, the deadline for filing an answer, and the submission of post-trial briefs. But Farhang cites no authority holding that such procedural rules are inconsistent with due process. In any case, Farhang cannot demonstrate prejudice because he was allowed to set aside his default, and he received additional time to file an answer. He also agreed that the matter could be determined on summary disposition and agreed to the briefing schedule set by the hearing officer. Farhang cannot complain about those rules now.<sup>30</sup>

Although Farhang also objects that Board rules regarding discovery and witness testimony are too limited, he again fails to identify how these rules violated due process. “There

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<sup>25</sup> 15 U.S.C. § 7215(a).

<sup>26</sup> *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)).

<sup>27</sup> *Kendall v. Baicerzak*, 650 F.3d 515, 528-529 (4th Cir. 2011).

<sup>28</sup> *See, e.g.*, PCAOB Rules 5110, 5200, 5201, 5300, 5302, 5421, 5422, 5445, and 5460.

<sup>29</sup> *Order Approving Rules*, 2004 WL 1439833, at \*3.

<sup>30</sup> *Cf. Urban v. Comm’r of Internal Revenue Service*, 964 F.2d 888, 890 (9th Cir. 1992) (rejecting due process challenge to summary disposition in the absence of any showing that it substantially prejudiced the defense); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 808 (9th Cir. 2002) (rejecting challenge to briefing schedule when there was no showing “that the district court’s scheduling order substantially prejudiced [the party’s] ability to present its arguments”).

is no basic constitutional right to pretrial discovery in administrative proceedings.”<sup>31</sup> And even in administrative proceedings under the Administrative Procedure Act, the APA “contains no provision for pretrial discovery in the administrative process and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings.”<sup>32</sup>

“Instead, ‘[t]he extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency.’”<sup>33</sup> “‘Nevertheless, the due process clause does insure the fundamental fairness of the administrative hearing.’”<sup>34</sup> “‘Consequently, ‘discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.’”<sup>35</sup> Here, PCAOB Rule 5422(a)(2) provides that the Division “shall make available for inspection and copying by any party to the proceeding all documents upon which the Division intends to rely in seeking a finding of noncooperation but shall not be required to make available any other documents.” PCAOB Rules 5423(a), 5424(a), and 5425(a) provide procedures for respondents to move to secure witness testimony at a hearing or a deposition, and to seek statements of a witness “that pertain[], or [are] expected to pertain, to his or her direct testimony . . . .” These procedures comport with due process, and Farhang does not allege, much less prove, that he was unable to obtain testimony or documents that he needed.<sup>36</sup>

No more persuasive is Farhang’s claim that the requirement that he cooperate with Board investigations is impermissibly vague because it does not provide “guidance as to when [auditors] may be deemed, after the fact, to have failed to cooperate.” “Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.”<sup>37</sup> Here, Section 105(b)(3) authorized disciplinary proceedings for “refu[sing] to testify . . . in connection with” a Board investigation, and PCAOB Rule 5110(a)(1) authorized disciplinary proceedings

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<sup>31</sup> *Silverman v. CFTC*, 549 F.2d 28, 33 (7th Cir. 1977) (internal citations omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (quoting *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)); accord *Jones Total Health Care Pharmacy, LLC v. DEA*, 881 F.3d 823, 834 (11th Cir. 2018) (quoting *McClelland*).

<sup>34</sup> *Mister Discount Stockbrokers*, 768 F.2d at 878 (citation omitted); accord *Jones Total Health Care*, 881 F.3d at 834 (citing *McClelland*, 606 F.2d at 1285-86).

<sup>35</sup> *Mister Discount Stockbrokers*, 768 F.2d at 878 (quoting *McClelland*, 606 F.2d at 1286); accord *Jones Total Health Care*, 881 F.3d at 834-35 (quoting *McClelland*, 606 F.2d at 1286).

<sup>36</sup> See, e.g., *Mister Discount Stockbrokers*, 768 F.2d at 878-879 (finding that petitioners “failed to demonstrate any prejudice arising from the discovery procedures of the NASD, let alone prejudice to a significant degree so as to result in a denial of due process,” and that “the Commission concluded properly that the numerous discovery opportunities afforded the petitioners certainly could not be held to have violated their rights to due process of law”).

<sup>37</sup> *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

for “fail[ure] to comply with an accounting board demand.” The text of these provisions notified Farhang that his refusal to testify was violative. Indeed, Farhang received repeated warnings both before and after he refused to appear for testimony that such a refusal could result in disciplinary consequences, and he acknowledged those potential consequences at the time.<sup>38</sup>

Finally, Farhang asserts for the first time in his reply brief that his due process challenges are “very similar” to “numerous cases currently pending in Courts of Appeal and District Courts around the country that challenge the constitutionality and due process protections afforded in the SEC’s administrative proceedings.” Farhang fails to explain how these relate to the Board’s decision. In any event, to the extent Farhang is attempting to raise additional due process arguments other than those addressed above, Farhang waived these arguments by not raising them in his opening brief.<sup>39</sup>

## **2. The First Amendment does not protect Farhang’s refusal to cooperate.**

Farhang also asserts that the requirement that he cooperate with Board investigations should be subject to the “strict scrutiny” standard applied to constitutionally protected speech under the First Amendment. Farhang cites no authority for the proposition that the First Amendment gave him a right to refuse to cooperate with Board investigations, and we are aware of none.<sup>40</sup> Indeed, “there is no [First Amendment] right to refrain from speaking when ‘essential

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<sup>38</sup> See *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at \*9 (Apr. 17, 2014) (rejecting vagueness challenge to FINRA rule requiring that associated persons cooperate with FINRA investigations because the rule “has discernible parameters and the material requested from Goldstein fell squarely within the Rule’s scope”).

<sup>39</sup> Rule of Practice 440(b), 17 C.F.R. § 201.440(b); see also *Timothy S. Dembski*, Exchange Act Release No. 80306, 2017 WL 1103685, at \*8 (Mar. 24, 2017) (“Arguments first developed in a reply brief are generally deemed waived.”), *petition denied*, 2018 WL 1057102 (2d Cir. Feb. 27, 2018); cf., e.g., *Steel Joist Inst. v. OSHA*, 287 F.3d 1165, 1166 (D.C. Cir. 2002) (rule challenges found waived because they were presented “for the first time in [a] reply brief”).

<sup>40</sup> See *United States v. Sindel*, 53 F.3d 874, 877-878 (8th Cir. 1995) (“A First Amendment protection against compelled speech . . . has been found only in the context of governmental compulsion to disseminate a particular political or ideological message . . . . The IRS summons requires Sindel only to provide the government with information which his clients have given him voluntarily, not to disseminate publicly a message with which he disagrees. Therefore, the First Amendment protection against compelled speech does not prevent enforcement of the summons.”); see also *Clark v. County of Tulare*, 755 F. Supp. 2d 1075, 1087 (E.D. Cal. 2010) (rejecting claim that government violated plaintiff’s first amendment rights when it “attempted to coerce plaintiff to speak with [it] during the investigation and he refused”).

operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court.”<sup>41</sup>

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Farhang engaged in the conduct the Board found, and this conduct violates the statutes and rules specified in the Board’s decision. Furthermore, we also find that those provisions, and their application to Farhang’s refusal to testify, are consistent with the purposes of Sarbanes-Oxley.<sup>42</sup> We have said previously that PCAOB rules requiring that associated persons cooperate with Board investigations are “consistent with the requirements of [Sarbanes-Oxley] and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.”<sup>43</sup> Because Sarbanes-Oxley Section 101(c) requires the Board to “conduct investigations and disciplinary proceedings . . . and impose appropriate sanctions . . . in accordance with [Section 105],”<sup>44</sup> the Board’s disciplinary proceeding against Farhang as a result of his failure to cooperate with a Board investigation was also consistent with Sarbanes-Oxley.

### III. Sanctions

Sarbanes-Oxley Section 107(c)(3) directs us to sustain a PCAOB sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction “is not necessary or appropriate in furtherance of [Sarbanes-Oxley] or the securities laws,” or “is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.”<sup>45</sup> We find that the censure, bar, and \$50,000 civil money penalty the Board imposed satisfy this standard.<sup>46</sup> We agree with the Board that Farhang’s refusal to testify “displayed little or no regard for the Board’s investigative processes and . . . its public-interest mandate” and reflected a “deliberate choice” that suggests Farhang’s “noncooperation was designed to avoid responsibility for possible misconduct.”

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<sup>41</sup> *Sindel*, 53 F.3d at 878 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

<sup>42</sup> *See supra* note 4 and accompanying text.

<sup>43</sup> *Order Approving Rules*, 2004 WL 1439833, at \*3.

<sup>44</sup> 15 U.S.C. § 7211(c)(4).

<sup>45</sup> 15 U.S.C. § 7217(c)(3)(A), (B).

<sup>46</sup> Farhang does not challenge the censure, and we sustain the censure for the same reasons that we sustain the bar and civil money penalty. *See infra* Section III.A-B; *see also, e.g., Vladislav Steven Zubkis*, Exchange Act Release No. 40409, 1998 WL 564562, at \*5 (Sept. 8, 1998) (sustaining a censure that NASD imposed for a failure to provide information).

**A. We sustain the bar from associating with a registered public accounting firm.**

Board investigations “play a crucial role in furthering the Board’s goals of investor protection and the preparation of informative, accurate, and independent audit reports.”<sup>47</sup> The cooperation of firms and associated persons is the linchpin of the Board’s ability to investigate potential violations of Sarbanes-Oxley, other securities laws, Board rules, and professional standards.<sup>48</sup> Because failing to cooperate in a Board investigation frustrates the framework of Board oversight and investor protection envisioned by the statute, such a violation merits serious sanctions.<sup>49</sup> Farhang’s refusal to testify impeded the Board’s investigation, which in turn interfered with its ability to protect investors by identifying and disciplining potential misconduct by a registered public accounting firm and its associated persons.

The Board is authorized to impose a bar for “intentional or knowing conduct, including reckless conduct, that results in a violation” of a statute, regulation, or professional standard.<sup>50</sup> Farhang’s intentional and knowing refusal to cooperate with the Board investigation merits a bar. He understood his obligation to cooperate when he received the ABD; indeed, multiple reminders and explanations of that obligation under Sarbanes-Oxley Section 105 and PCAOB Rule 5300 accompanied the ABD. Because these notices also included warnings of the potential disciplinary consequences for failing to cooperate, Farhang understood the risks of refusing to testify when he initially agreed to the scheduled investigative testimony. Indeed, when Farhang reversed course and refused to testify, his correspondence with the Board acknowledged that the PCAOB had imposed disciplinary sanctions for refusals to testify by others.

We do not find, and Farhang does not cite, any mitigating circumstances. While Farhang initially supplied some documents the Division requested, his subsequent refusal to testify frustrated the Board’s investigation, including with respect to the documents and information that it had received. Moreover, the circumstances of Farhang’s refusal to testify cast doubt on the validity of his reasons for refusing to testify. Farhang explained his decision not to cooperate

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<sup>47</sup> *Bassie*, 2012 WL 90269, at \*11.

<sup>48</sup> *See id.* at \*13 (“The Board’s investigatory power is central to its ability to carry out its statutory responsibilities and fulfill its goals in the public interest. Its ability to obtain documents from registered public accounting firms and their associated persons is, in turn, critical to the effective conduct of investigations.”); 15 U.S.C. § 7215(b)(1); *cf. Howard Brett Berger*, Exchange Act Release No. 58590, 2008 WL 4899010, at \*4 (Nov. 14, 2008) (characterizing NASD Rule 8210, which requires NASD members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding, as “at the heart of the self-regulatory system for the securities industry”).

<sup>49</sup> *See Bassie*, 2012 WL 90269, at \*11 (sustaining the Board’s imposition of a bar and civil penalties for noncooperation, and stating that “failure to cooperate in an investigation is very serious misconduct” because it “impairs the Division’s ability to investigate, which in turn impairs the Board’s ability to identify violations and sanction violators”).

<sup>50</sup> 15 U.S.C. § 7215(c)(5)(A).

by claiming that competing financial obligations prevented him from paying for legal representation and that he was unable to represent himself as a non-native English speaker. We do not find those explanations mitigating in light of the Board's efforts to address those concerns by reimbursing his travel expenses and offering to provide an interpreter. Rather, we find that Farhang's knowing refusal to testify demonstrates "a lack of sufficient regard for Board processes and authority designed by statute to protect investors" and warrants a bar to deny him future opportunities to engage in conduct that "undermine those processes and thus erode the investor protection that Congress intended the Board to provide."<sup>51</sup>

**B. We sustain the civil money penalty.**

We also sustain the \$50,000 civil money penalty. PCAOB Rule 5300(b)(1) provides that for a failure to cooperate a civil money penalty may be imposed in an amount not to exceed the maximum amount authorized by Section 105(c)(4)(D)(i)-(ii) of Sarbanes-Oxley.<sup>52</sup> Sarbanes-Oxley Section 105(c)(4)(D)(i) provides for a civil penalty for each violation in an amount not more than \$130,000 for a natural person.<sup>53</sup> Section 105(c)(4)(D)(ii) provides that in cases of intentional or knowing conduct the penalty may be not more than \$950,000 for a natural person.<sup>54</sup> Although Sarbanes-Oxley does not specify the factors to be considered in determining whether a civil money penalty is in the public interest, we have approved the Board's consideration of the public interest factors set forth in Section 21B(c) of the Securities Exchange Act of 1934.<sup>55</sup> These factors, which need not all be present, are whether there was fraudulent misconduct or deliberate or reckless disregard of a regulatory requirement; whether there was harm to others; whether there was unjust enrichment; whether the applicant had committed prior violations; the need for deterrence; and such other matters as justice may require.<sup>56</sup>

These factors support the \$50,000 civil penalty in this case. Farhang's deliberate and knowing refusal to cooperate interfered with the Board's ability to investigate auditing violations, including potential wrongdoing by Farhang himself. Although Farhang contends that his noncooperation did not "injure[] or misle[a]d investors" or involve "false financial statements" or "auditor misconduct," a refusal to cooperate with the Board is itself prohibited auditor misconduct. Such misconduct thwarts the Board's ability to investigate whether audits of

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<sup>51</sup> *Bassie*, 2012 WL 90269, at \*12 (sustaining a bar).

<sup>52</sup> PCAOB Rule 5300(b)(1) (cross-referencing PCAOB Rule 5300(a)(1)-(5)).

<sup>53</sup> 15 U.S.C. § 7215(c)(4)(D)(i); 17 C.F.R. § 201.1005 (adjusting for inflation).

<sup>54</sup> 15 U.S.C. § 7215(c)(4)(D)(ii); 17 C.F.R. § 201.1005 (adjusting for inflation).

<sup>55</sup> *See Bassie*, 2012 WL 90260, at \*13 n.45 (citing 15 U.S.C. § 78u-2(c)).

<sup>56</sup> 15 U.S.C. § 78u-2(c); *Bassie*, 2012 WL 90269, at \*13–14.

issuer financial statements comply with PCAOB standards.<sup>57</sup> As a result, Farhang “indirectly harmed investors by depriving them of important protection that they should have had.”<sup>58</sup>

The \$50,000 civil penalty also “acts as a necessary additional deterrent” given the importance of Board investigations and “the natural incentive for individuals to conceal” conduct “that could lead to disciplinary action.”<sup>59</sup> Otherwise, associated persons like Farhang might refuse to cooperate with investigations that have the potential to implicate their own conduct or to uncover conduct warranting an even steeper civil money penalty.<sup>60</sup> In light of these considerations, we believe that the \$50,000 civil money penalty is warranted.<sup>61</sup>

### **1. Sarbanes-Oxley authorized the imposition of a civil penalty.**

We reject Farhang’s claim that Sarbanes-Oxley does not authorize the Board to impose the \$50,000 penalty. According to Farhang, because Section 105(b)(3)(A) authorizes the Board to sanction noncooperation with a suspension or bar and “other lesser sanctions,” the Board must determine that the \$50,000 penalty is a “lesser sanction[]” in this case. Farhang claims that in this case a \$50,000 penalty is a “greater sanction” than a bar because he is “impecunious.”

Farhang misreads the statute. Section 105(b)(3)(A) states that for noncooperation the Board may “suspend or bar such person from being associated with a registered public accounting firm” and “invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.”<sup>62</sup> The Board specified that it may impose civil money penalties for noncooperation pursuant to Rule 5300 and that “an appropriately calibrated money penalty is a ‘lesser sanction’ than revocation of a firm’s registration or a bar on association with

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<sup>57</sup> Cf. *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at \*5 (Apr. 11, 2008) (observing that a failure to respond to NASD information requests will rarely “result in direct harm to a customer” but warrants serious sanctions because it undermines the NASD’s ability to detect conduct resulting in such harm), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

<sup>58</sup> *Bassie*, 2012 WL 90269, at \*13.

<sup>59</sup> *Kabani*, 2017 WL 947229, at \*17.

<sup>60</sup> See *Bassie*, 2012 WL 90269, at \*13 (noting that when “individuals are concerned that cooperation with an investigation may provide information that could lead to sanctions, those individuals—absent the threat of a civil penalty—could have an incentive to avoid cooperation in order to maximize their income from issuer audit work for as long as possible”).

<sup>61</sup> See *id.* at \*13, 14 (finding a civil penalty of \$75,000 imposed on an individual for a “deliberate or reckless” failure to cooperate “not excessive, oppressive, inadequate, or otherwise inappropriate” in addition to a bar from associating with a registered public accounting firm where the penalty was “far below” the maximum authorized by Sarbanes-Oxley, was a necessary deterrent, and the failure to cooperate “harmed the Board’s ability to carry out its investigation”).

<sup>62</sup> 15 U.S.C. § 7215(b)(3)(A)(i), (iii) (emphasis added).

a firm.”<sup>63</sup> We approved Rule 5300 as “consistent with the requirements of” Sarbanes-Oxley.<sup>64</sup> Rule 5300 is also consistent with courts that have described associational bars as more serious sanctions than civil penalties.<sup>65</sup> As discussed above, we find the \$50,000 to be appropriately calibrated to Farhang’s misconduct and therefore a lesser sanction within the meaning of Sarbanes-Oxley Section 105(b)(3)(A) and as specified by the rules of the Board.

## 2. Farhang has not established an inability to pay.

Likewise unpersuasive is Farhang’s claim that his financial circumstances merit waiver of the penalty. Farhang asserts that he is unable to pay the \$50,000 penalty because it exceeds his yearly income and net worth; indeed, Farhang claims that he “barely earns any money.” But the respondent bears the burden of establishing any inability to pay.<sup>66</sup> We agree with the Board’s finding that Farhang has not met this burden: the financial information that Farhang submitted to the Board in 2016 indicated that in 2014 and 2015 his income as well as his other assets exceeded the amount of the penalty.<sup>67</sup> Farhang has not supported his assertion that his income or other assets has declined since that time as he has not provided any updated financial information for the past two years. On appeal, Farhang offers no answer to the Board’s conclusion that the evidence he submitted does not establish a bona fide inability to pay a \$50,000 penalty.<sup>68</sup>

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<sup>63</sup> *Rules on Investigations and Adjudications*, at A2-77; *see also id.* at A2-76 (stating that Rule 5300(b) “identifies other sanctions, pursuant to the authority given to the Board in Section 105(b)(3)(A)(iii), including civil money penalties . . . .”); *see generally id.* at 2 (“The sanctions may be as severe as revoking a firm’s registration or barring a person from participating in audits of public companies. Lesser sanctions include monetary penalties . . . .”).

<sup>64</sup> *Order Approving Rules*, 2004 WL 1439833, at \*3.

<sup>65</sup> *See, e.g., Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010) (describing a possible sanction other than a bar as a “lesser sanction”); *Epstein v. SEC*, 416 F. App’x 142, 147, 2010 WL 4739749 (3d Cir. 2010) (describing an industry bar as “the most potent weapon in the Commission’s ‘arsenal of flexible enforcement powers’” (citations omitted)).

<sup>66</sup> *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at \*26 (July 2, 2013).

<sup>67</sup> *See, e.g., Ola Props. Inc. v. U.S. Dep’t of Hous. and Urban Dev.*, 336 F. App’x 419, 422 (5th Cir. 2009) (finding that individual with an income over \$100,000 and the “ability to raise money” had the ability to pay a \$40,000 civil money penalty); *see also SEC v. Aronson*, 665 F. App’x 78, 82 (2d Cir. 2016) (finding that district court “reasonably concluded” that defendant’s “monthly income of \$13,000 did not render a civil penalty” of \$250,000 inappropriate).

<sup>68</sup> The Board argues that it is permitted under Sarbanes-Oxley to disregard evidence of an inability to pay a penalty as “irrelevant” to the public interest in serious “noncooperation case[s] like this one.” We decline to reach this issue because Farhang has failed to substantiate an inability to pay a \$50,000 penalty. *Cf. Bassie*, 2012 WL 90269, at \*15 n.53 (noting that evidence of an ability to pay may be submitted by a respondent and may be considered by the Commission

(continued...)

Nonetheless, in light of the financial information in the record and the particular circumstances of this case—including that the hearing officer thought that Farhang lacked an ability to pay a \$75,000 penalty—we order that Farhang be allowed to pay the \$50,000 penalty in installments of \$25,000 a year over the next two years.<sup>69</sup>

\* \* \* \* \*

For the foregoing reasons, we sustain the Board’s disciplinary action and, as a result, order that the automatic stay under Sarbanes-Oxley Section 105(e) be terminated.<sup>70</sup>

An appropriate order will issue.<sup>71</sup>

By the Commission (Chairman CLAYTON and Commissioners STEIN, PIWOWAR, JACKSON and PEIRCE).

Brent J. Fields  
Secretary

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(...continued)

in its discretion in imposing monetary penalties in administrative proceeding under Exchange Act 21B, but that where “the conduct is egregious, inability to pay may be disregarded”).

<sup>69</sup> See 15 U.S.C. § 7217(c)(3) (stating that “[t]he Commission may enhance, *modify*, cancel, reduce, or require the remission of a sanction imposed by the Board”) (emphasis added); *cf.* *Russell C. Schalk, Jr.*, Exchange Act Release No. 78898, 2016 WL 5219501, at \*5 (Sept. 21, 2016) (ordering that respondent pay \$20,000 per year towards his liability for disgorgement of \$1,472,959, prejudgment interest of \$280,271.55, and a civil money penalty of \$1,600,000, even though respondent’s “sworn financial statements indicate that [his] liabilities exceed his assets by nearly \$200,000,” because defendant’s “future income, including the likelihood of earning commissions in addition to his \$65,000 annual salary, and adjustments to his spending habits would enable him to make the \$20,000 payments on an annual basis”).

<sup>70</sup> See 15 U.S.C. § 7215(e)(1) (stating that an “[a]pplication to the Commission for review . . . of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders . . . that no such stay shall continue to operate”).

<sup>71</sup> We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 83494 / June 21, 2018

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

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY PUBLIC COMPANY  
ACCOUNTING OVERSIGHT BOARD

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

ORDERED that the PCAOB's disciplinary action taken against S. Brent Farhang, CPA, is sustained; and it is further

ORDERED that the automatic stay of the PCAOB sanctions imposed on S. Brent Farhang, CPA, is terminated.

By the Commission.

Brent J. Fields  
Secretary