

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 78764 / September 2, 2016

Admin. Proc. File No. 3-16430

In the Matter of the Application of
MARK E. LACCETTI, 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 Board Rules

Improper Professional Conduct

Associated person of registered public accounting firm engaged in improper professional conduct in the audit of the financial statements of a public company. *Held*, findings of violations and sanction imposed are *sustained*.

APPEARANCES:

Lawrence J. Zweifach, Darcy C. Harris, Michael J. Scanlon, and Jacob T. Spencer, of Gibson, Dunn & Crutcher LLP, for Mark E. Laccetti, CPA.

J. Gordon Seymour, Luis de la Torre, and Jodie J. Young for the PCAOB.

Appeal filed: March 12, 2015
Last brief received: June 30, 2015

I. Introduction

Mark E. Laccetti (“Laccetti”), who was associated with Ernst & Young LLP, a registered public accounting firm (“Ernst & Young”), appeals a disciplinary action taken by the Public Company Accounting Oversight Board (“PCAOB” or the “Board”) finding that he violated PCAOB Rules 3100¹ and 3200T² by failing to adhere to professional auditing standards during the audit of a company’s financial statements. The Board found Laccetti’s conduct during the audit was reckless and barred him from associating with a registered public accounting firm, with leave to petition to associate after two years, and imposed an \$85,000 civil penalty.

Laccetti solely raises constitutional and procedural challenges to the Board’s proceedings. He does not challenge the Board’s findings of liability or imposition of sanctions. After an independent and *de novo* review of the record, we reject Laccetti’s arguments, and sustain the Board’s finding of violations and imposition of sanctions.

II. Facts

This matter stems from the audit of Taro Pharmaceutical Industries Ltd.’s (“Taro”) consolidated financial statements for the year ending December 31, 2004. As detailed in the Board’s final decision, the principal auditor of those financial statements, Kost Forer Gabbay & Kasierer (“Ernst & Young Israel”),³ assigned part of that audit—the audit of the issuer’s United

¹ PCAOB Rule 3100 requires registered public accounting firms and their associated persons to comply with the Board’s “auditing and related professional practice standards” in connection with the preparation or issuance of any audit report for an issuer, as defined in Sarbanes-Oxley. Rule 1001(a)(viii) defines the term “auditing and related professional practice standards” to mean “the auditing standards, related attestation standards, quality control standards, ethical standards, and independence standards (including any rules implementing Title II of Sarbanes-Oxley), and any other professional standards, that are established or adopted by the Board under Section 103 of the [Sarbanes-Oxley] Act.”

² In April 2003, the Board adopted certain preexisting standards as its interim standards. PCAOB Rule 3200T states that, “[i]n connection with the preparation or issuance of any audit report, a registered public accounting firm, and its associated persons, shall comply with generally accepted auditing standards, as described in the AICPA Auditing Standards Board’s Statement of Auditing Standards No. 95, as in existence on April 16, 2003 (Codification of Statements on Auditing Standards, AU § 150 (AICPA 2002)), to the extent not superseded or amended by the Board.” The interim standards are cited as “AU §__.”

³ Ernst & Young Israel is a public accounting firm organized under the laws of Israel and registered with PCAOB. Both Ernst & Young and Ernst & Young Israel are members of Ernst & Young Global Ltd., which is not registered with PCAOB.

States subsidiary, Taro Pharmaceutical U.S.A., Inc. (“Taro USA”)—to Ernst & Young.⁴ Accordingly, Ernst & Young was responsible for performing a “full scope . . . GAAS audit on the trial balances” of Taro USA. Taro USA’s trial balances were incorporated into Taro’s consolidated financial statements, which were included in its Annual Report filed with the Commission on Form 20-F.⁵

Laccetti was Ernst & Young’s audit engagement partner with ultimate responsibility for Ernst and Young’s report on Taro USA audit.⁶ Laccetti testified at the hearing that, when planning the Taro USA audit, he was aware that the company’s “accounts receivable allowances was an area of high risk and focus.” He acknowledged knowing, for instance, that Taro USA did not have formal processes for estimating sales allowances. The engagement instructions (which Laccetti signed) also identified “revenue recognition” as an area of “primary importance” and directed that “[s]pecial attention should be given to allowance for rebates, discounts and returns,” including chargebacks. Laccetti and the audit team also documented that “improper revenue recognition” and “manipulating significant accounting estimates” were “Identified Fraud Risks.”

During the audit team’s performance of audit procedures regarding Taro USA, Laccetti was aware of concerns encountered during the audit relating to Taro USA’s sales allowance estimates, chargebacks, and year-end reserves. The Board concluded that Laccetti failed to exercise due professional care related to those areas by, among other things, failing to obtaining sufficient competent evidence to support how those issues were resolved, if at all, and failing to address those issues in the memorandum he provided to the parent company’s principal auditor. According to the Board, for instance, Laccetti found that Taro USA’s process for preparing and reviewing accounts receivable allowance estimates was deficient, but Laccetti failed to address this deficiency. The Board found that Laccetti also failed to perform certain planned analyses of chargebacks and improperly raised the planned threshold for tolerable error for sales allowances without explanation.

The audit team requested from Taro USA, but never received, an analysis of the company’s accounts receivable reserves. While waiting for this information, Laccetti directed

⁴ See Final Decision, *Mark E. Laccetti, CPA*, No. 105-2009-007, slip op. at 2 (PCAOB Jan. 26, 2015).

⁵ Certain foreign private issuers may file a Form 20-F as a registration statement or annual report under specified provisions of the Exchange Act. See 17 C.F.R. § 249.220f. This matter concerns only Laccetti’s failures to comply with auditing standards. Our opinion, therefore, makes no determination about whether Taro USA’s or Taro Pharmaceutical’s financial statements complied with generally accepted accounting principles (“GAAP”).

⁶ Taro Pharmaceutical was a multinational, Israel-based company that issued audited annual financial statements incorporating its subsidiaries’ (including Taro USA’s) financial information.

the senior manager of the audit team to “[d]raft the [Summary Review Memorandum] right now with the a [sic] conclusion that [accounts receivable] reserves ok.” Despite never receiving the analysis from management, Laccetti approved and released the final audit memorandum to the principal auditor, Ernst & Young Israel, with the conclusion that the accounts receivable reserves appeared reasonable. The finalized audit memorandum, approved by Laccetti, reported that Taro USA’s “net accounts receivable is fairly stated,” that the audit team had “completed all planned work steps related to revenue,” and that “the scope of our audit was adequate and that the financial data of [Taro USA] for the year ended December 31, 2004 are presented fairly, in all material respects, in conformity with [U.S. GAAP].” Relying on Ernst & Young’s audit memorandum, Taro’s principal auditor, Ernst & Young Israel, expressed an unqualified opinion in its audit report on Taro’s 2004 consolidated financial statements. The principal auditor’s audit report was included in the Taro’s Annual Report, filed with the Commission on Form 20-F.

Taro USA subsequently determined that it did not adequately reserve for chargebacks from wholesalers. Specifically, Taro USA adjusted its chargebacks reserve as of December 31, 2004, from \$2.37 million to \$95.4 million, on a cumulative basis back to December 31, 2002, with a cumulative balance sheet effect as of year-end 2004 of \$93 million and an income statement effect for 2004 of \$9.8 million. As a result, in 2007, Taro filed restated financial statements for 2004, relating primarily to the correction errors concerning Taro USA’s chargeback estimates.

III. Procedural History

The Division of Enforcement and Investigations of the PCAOB (the “Division”) investigated the audits and financial statement reviews of Taro for more than a year. As part of that investigation, Laccetti gave investigative testimony to the Division, during which he was represented by outside counsel. Following the investigation, the Board issued an Order Instituting Disciplinary Proceedings (“OIP”) on October 20, 2009, alleging that Laccetti had violated PCAOB rules and auditing standards in connection with the Taro USA audit.

After a nine-day hearing,⁷ the PCAOB hearing officer issued an initial decision finding that Laccetti had violated PCAOB Auditing Standards (“AU”) § 150, *Generally Accepted Auditing Standards*, § 230, *Due Professional Care*, § 326, *Evidential Matter*, and § 342, *Auditing*

⁷ Laccetti’s hearing was initially scheduled to begin on June 28, 2010. That morning, the Supreme Court issued its decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), in which it struck down as unconstitutional Sarbanes-Oxley’s provisions restricting the removal of Board members by the Commission. Laccetti’s counsel successfully sought a one-day postponement of the hearing and, the following day, argued to the Board that the Court’s *Free Enterprise* decision required dismissal. The hearing officer rejected that argument, as well as Laccetti’s request, in the alternative, for expedited interlocutory appeal.

Accounting Estimates,⁸ in his examination of Taro USA’s chargebacks reserve by failing to exercise due professional care and skepticism, failing to obtain and properly evaluate sufficient competent evidential matter, and failing to properly audit a significant accounting estimate.⁹ The PCAOB hearing officer determined that Laccetti had committed these violations recklessly and ordered that he be suspended from association with any registered public accounting firm for six months and that he pay a \$25,000 civil penalty. The PCAOB hearing officer also concluded that Laccetti had violated AU § 316.64, *Consideration of Fraud in a Financial Statement Audit*, by failing to perform a retrospective review of Taro USA’s accounts receivable allowances, but found that this violation was only negligent and therefore did not impose additional sanctions.¹⁰ The PCAOB hearing officer further found that the Division had failed to prove violations of AU § 329, *Substantive Analytic Procedures*, § 333, *Management Representations*, § 560, *Subsequent Events*, and § 561, *Discovery of Facts Existing at the Date of the Auditor’s Report*.¹¹

Both Laccetti and the Division petitioned the Board for review of portions of the PCAOB hearing officer’s initial decision on May 20, 2011. Laccetti challenged the hearing officer’s

⁸ See, e.g., AU § 150.02, *Auditing Standards* (“Due professional care is to be exercised in the performance of the audit and the preparation of the report.”), § 230.01, *Due Professional Care in the Performance of Work* (same); § 326.01, *Evidential Matter* (“Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit.”); § 342.04, *Auditing Accounting Estimates* (“[W]hen planning and performing procedures to evaluate accounting estimates, the auditor should consider, with an attitude of professional skepticism, both the subjective and objective factors.”).

⁹ See Initial Decision, *Mark E. Laccetti, CPA*, No. 105-2009-007 (PCAOB Apr. 20, 2011).

¹⁰ See AU § 316.64, *Consideration of Fraud in a Financial Statement Audit* (“The auditor also should perform a retrospective review of significant accounting estimates reflected in the financial statements of the prior year to determine whether management judgments and assumptions relating to the estimates indicate a possible bias on the part of management.”).

¹¹ See, e.g., AU § 329.01, *Substantive Analytic Procedures* (“establish[ing] requirements regarding performing analytical procedures as a risk assessment procedure in identifying and assessing risks of material misstatement”); § 333.04, *Management Representations* (stating that “[i]f a representation made by management is contradicted by other audit evidence, the auditor should investigate the circumstances and consider the reliability of the representation made”); § 560.01, *Subsequent Events* (stating that that “events or transactions sometimes occur subsequent to the balance-sheet date, but prior to the issuance of the financial statements, that have a material effect on the financial statements and therefore require adjustment or disclosure in the statements”); § 561.01, *Discovery of Facts Existing at the Date of the Auditor’s Report* (establishing procedures that “should be followed by the auditor who, subsequent to the date of the report upon audited financial statements, becomes aware that facts may have existed at that date which might have affected the report had he or she then been aware of such facts”).

admission of the Division's expert witness's report and testimony, contended that PCAOB auditing standards did not require him to specifically assess chargebacks, and challenged the sanctions imposed by the hearing officer as excessive. He also challenged the hearing officer's rejection of his affirmative defenses, including that the Division violated his right to counsel at his investigative testimony and that the Board's structure during the initiation and investigation stage of the proceedings violated the constitutional doctrine of separation of powers. The Division challenged the hearing officer's dismissal of the alleged violations of AU §§ 329, 333, 560, and 561. It also asked the Board to bar Laccetti from associating with registered public accounting firms, with leave to petition to associate after three years, and to order a \$100,000 civil penalty.

The Board conducted a *de novo* review of the challenged findings and issued a Final Decision on January 26, 2015, in which it affirmed the hearing officer's findings of violations of PCAOB auditing standards, found additional violations of AU §§ 329, 333, and imposed sanctions. In conducting its review, the Board did not rely on any evidence for which admission or exclusion at the hearing had been challenged on review, and it did not rely on Laccetti's investigative testimony.

The Board concluded that Laccetti's violations of AU §§ 150, 230, 326, 329, 333, and 342 were committed recklessly. The Board also found that his violation of AU § 316.64 for failing to conduct a retrospective review of accounts receivable allowances was part of a reckless, or at least repeatedly negligent, course of conduct. Based on the seriousness of the violations, the harm to investors, Laccetti's failure to recognize the wrongful nature of his conduct, and the absence of assurances that he would not violate the PCAOB's rules in the future, the Board barred Laccetti from associating with a registered public accounting firm, with leave to petition the Board to associate after two years, and ordered him to pay an \$85,000 civil penalty.

IV. Analysis of Underlying Violations and Sanctions

Laccetti does not challenge the Board's underlying findings of violations or imposition of sanctions. Laccetti instead makes several procedural and constitutional arguments, which he contends require complete dismissal of the proceedings. We analyze those arguments below, but we first address our obligation under Sarbanes-Oxley § 107(c)(2) to sustain the Board's decision only if we find that the record shows that Laccetti engaged in the alleged violative conduct, that Laccetti's conduct violated PCAOB rules, and that those rules are, and were applied in a manner, consistent with the purposes of Sarbanes-Oxley.¹²

¹² 15 U.S.C. § 7217(c)(2) (stating that the provisions of Exchange Act §§ 19(d)(2) and 19(e)(1), 15 U.S.C. §§ 78s(d)(2) and (e)(1), "shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory

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We conducted a *de novo* review of the record to determine whether a preponderance of the record evidence supports the PCAOB’s findings.¹³ Based on this review, we find that the record supports the PCAOB’s findings, as detailed in its decision, that Laccetti repeatedly failed to adhere to the Board’s interim auditing standards and thus violated PCAOB Rules 3100 and 3200T for the reasons articulated in the Board’s decision.¹⁴ We further find that Rules 3100 and 3200T are, and were applied in a manner, consistent with the purposes of Sarbanes-Oxley. Both rules obligate persons associated with registered public accounting firms to comply with applicable auditing standards.¹⁵ The rules are thus consistent with Sarbanes-Oxley, which directs the PCAOB to, among other things, establish auditing and other professional practice standards “as may be necessary or appropriate in the public interest or for the protection of investors.”¹⁶ For the same reasons, PCAOB’s application of the rules—*i.e.*, finding that Laccetti failed to adhere to applicable auditing standards during the Taro USA audit—is also consistent with those purposes.

Sarbanes-Oxley § 107(c)(3) directs us to sustain the PCAOB’s sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or are not necessary or appropriate in furtherance of Sarbanes-Oxley or

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organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1)”).

¹³ See, e.g., *S.W. Hatfield, C.P.A.*, Exchange Act Release No. 69930, 2013 WL 3339647, at *1 (July 3, 2013) (applying preponderance of evidence standard in PCAOB disciplinary proceeding); *accord Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in NASD disciplinary proceeding).

¹⁴ We find that the record supports the extensive factual findings in the Board’s Final Decision. We also agree with the Board’s legal analysis supporting its findings of violations and sanctions. Given that Laccetti is not challenging any of those findings on appeal to the Commission, we do not detail our *de novo* review of those factual and legal findings.

¹⁵ See *supra* notes 1–2; see also *Order Approving Proposed Rules Relating to Compliance with Auditing and Related Practice Standards and Advisory Groups*, Exchange Act Release No. 48730, 2003 WL 22478774, at *1 (Oct. 31, 2003) (finding that “adoption of Rule 3100 would mean that any registered public accounting firms or person associated with such a firm that fails to adhere to applicable Standards could be the subject of a Board disciplinary proceeding”).

¹⁶ See, e.g., 15 U.S.C. § 7213(a)(1); *Order Approving Proposed Rules*, 2003 WL 22478774, at *2 (finding that Rule 3100 was “consistent with the requirements of the [Sarbanes-Oxley] Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors”).

the securities laws.¹⁷ Applying that standard, and based on our *de novo* review of the record, we find that, for the reasons stated in its decision, the Board’s imposition of a bar, with leave to petition to associate after two years, and \$85,000 civil penalty were not excessive, oppressive, or otherwise inappropriate because, among other things, “Laccetti’s reckless conduct ill-served the investor interests and public interest that an audit should serve, falling far short of the rigorous, objective inquiry and analysis required by PCAOB standards.”¹⁸ We also find for the same reasons no basis for concluding that the bar, with leave to petition to associate after two years, and \$85,000 civil penalty are not necessary or appropriate in furtherance of Sarbanes-Oxley and the securities laws.

V. Analysis of Constitutional and Procedural Challenges

Laccetti makes one procedural and two constitutional arguments, each of which he contends requires dismissal of the proceedings. First, he argues that the Board’s Final Decision must be dismissed because the Board’s structure during the Division’s investigation and institution of proceedings violated the Constitution’s separation of powers. Second, he argues that the Division violated his right to counsel by refusing to allow an accountant employed by Ernst & Young to accompany his outside attorney during Laccetti’s investigative testimony. Third, he argues that the Board lacked constitutional authority to impose sanctions because its members had not taken oaths of office or received Presidential commissions. Based upon our review, we conclude that none of these arguments has merit.

A. The Board’s Final Decision Is Not Invalid On Separation-of-Powers Grounds

Although the Division’s investigative proceedings against Laccetti began when the Board was subject to statutory removal provisions that were later held to be unconstitutional, the Board’s Final Decision was not “tainted” by the separation of powers problems identified (and corrected) in *Free Enterprise Fund*. The Board correctly concluded that the proceedings against Laccetti should not be dismissed on separation-of-powers grounds. The Board was subject to adequate executive oversight during Laccetti’s hearing and, more importantly, when the Board conducted a *de novo* review, found violations, and imposed sanctions.

¹⁷ 15 U.S.C. § 7217(c)(3) (stating that “the Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof . . . if the Commission, having due regard for the public interest and the protection of investors, finds . . . that the sanction—(A) is not necessary or appropriate in furtherance of [the Sarbanes-Oxley] Act or the securities laws; or (B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.”).

¹⁸ *Laccetti*, slip op. at 93.

1. *Free Enterprise Fund* does not mandate dismissal or reversal.

Laccetti’s separation-of-powers argument rests on the Supreme Court’s June 28, 2010 decision in *Free Enterprise Fund v. PCAOB*.¹⁹ That case involved a challenge to the removal provisions governing the PCAOB, under which the Commission could not remove Board members except “for good cause shown,” and “in accordance with” certain procedures.²⁰ Combined with the fact that Commissioners themselves can only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office,”²¹ the Court concluded that these dual for-cause removal provisions shielded the Board from executive oversight in violation of the Constitution’s separation of powers.²²

The Court did *not* hold that the constitutional violation necessarily invalidated any prior exercise of the Board’s authority. To the contrary, the Court rejected the petitioners’ contention that the Board and “all power and authority exercised by it” violated the Constitution.²³ And it clarified that “the existence of the Board does not violate the separation of powers,” and that restricting the Board members to a single level of insulation from removal “would have no effect . . . on the validity of any officer’s continuance in office.”²⁴ Instead, it concluded that the removal provisions were severable from the remainder of the Act; once those provisions were excised, the Board would be removable by the Commission at will and the separation-of-powers violation would be cured.²⁵ Accordingly, the Court immediately remedied the violation by invalidating the Sarbanes-Oxley removal restrictions.²⁶ Rather than ordering “broad injunctive relief against the Board’s continued operations” or dismissal of the Board’s proceedings, the Court remanded to the Court of Appeals to ensure that the appellants would no longer be subject to the enforcement authority of a Board that was unconstitutionally protected from executive oversight.²⁷

Unlike the petitioners in *Free Enterprise Fund*, Laccetti does not (and cannot) contend that he is currently subject to unconstitutional enforcement authority; the unconstitutional

¹⁹ 561 U.S. 477 (2010).

²⁰ *Id.* at 486.

²¹ *Id.*

²² *Id.* at 492.

²³ *Id.* at 508.

²⁴ *Id.*

²⁵ *Id.* at 509.

²⁶ *Id.* at 513–14.

²⁷ *Id.*

removal restrictions were struck down before the start of the PCAOB hearing and issuance of the Board’s Final Decision in Laccetti’s case. Instead, he contends that the entire proceeding must be dismissed because the Board lacked the necessary executive oversight when it investigated and initiated proceedings against him. Nothing in *Free Enterprise Fund* compels such a result. And, as discussed below, dismissal is not warranted in light of the Board’s ratification of its prior decisions.

2. The Board ratified its decisions to investigate and institute proceedings against Laccetti.

Even if we were to accept Laccetti’s argument that the Board’s pre-*Free Enterprise Fund* exercises of authority were necessarily invalid—a conclusion not reached by the Court in *Free Enterprise Fund*—that would not support the conclusion Laccetti urges: that the entirety of the proceedings against him was “fundamental[ly] flaw[ed]” and must be dismissed. Irregularities—even constitutional violations—that occur early in a proceeding and are remedied do not warrant reversal or dismissal.²⁸ “[A] remedy must ‘neutralize the taint’ of a constitutional violation while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources” already invested in the proceeding.²⁹

We conclude that the Final Decision, reached by a constitutionally accountable Board, ratified the Board’s pre-*Free Enterprise Fund* decisions. Accordingly, even if Laccetti were correct that the Board’s prior investigation and institution of proceedings were invalid, any violation was rendered harmless by the Board’s subsequent review. Consequently, Laccetti is not entitled to relief.

Laccetti’s hearing was conducted, and the decision he now challenges was reached by the Board in 2015, after the constitutionally required oversight of the Board had been established by *Free Enterprise Fund*. As soon as the removal provisions were severed by the Court in 2010, the Board had the ability—unaffected by any lack of accountability to the Executive—to dismiss the proceedings. It chose not to do so. Rather, the hearing officer rejected Laccetti’s motion to dismiss based on *Free Enterprise Fund* and went on to conduct a hearing while subject to proper oversight. The Board then—again, while subject to proper oversight—conducted *de novo* review of the hearing officer’s findings (including the decision not to dismiss the proceeding on separation-of-powers grounds) and issued the Final Decision imposing sanctions.

²⁸ See, e.g., *Doolin v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (administrative enforcement proceedings initiated by improperly appointed director of OTS did not invalidate final order); *Fed. Election Comm’n v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996) (civil enforcement action brought by unconstitutionally composed *FEC* did not warrant dismissal of the action).

²⁹ *Lafler v. Cooper*, 132 S. Ct. 1376, 1388–89 (2012) (internal citation omitted).

This process completely remedied any possible effect of the lack of executive oversight that existed before *Free Enterprise Fund*. The D.C. Circuit’s decision in *Doolin* is instructive.³⁰ There, the court held that a Notice of Charges filed by an invalidly appointed Director of the Office of Thrift Supervision was remedied by his successor’s decision on the merits of the charges.³¹ After the administrative enforcement action had proceeded under the improperly appointed director for years—including discovery and a hearing before an ALJ—the new director, “act[ing] in the normal course of agency adjudication,” issued a final order based on the ALJ’s findings and recommendation.³² The final order, the court held, “was necessarily an affirmation of the validity of the charges, and hence a ‘ratification,’ even though [the director] did not formally invoke the term.”³³

³⁰ 139 F.3d at 213–14.

³¹ *Id.*

³² *Id.* at 213.

³³ *Id.* (footnotes omitted). Laccetti tries to distinguish *Doolin* on the basis that it involved a *statutory* challenge—not a constitutional one—subject to the Administrative Procedure Act’s harmless error review. But harmless error was not the basis for *Doolin*’s holding. *Id.* at 212 (noting in dicta that “harmless error analysis may mean that irregularities regarding the Notice should also be disregarded,” but declining to decide the question because the parties had not raised it). Instead, *Doolin* relied on *Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996) (which it noted was “directly on point”), and cited *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987), both of which addressed constitutional violations. *Id.* at 213–14. Furthermore, although the alleged violation in *Doolin* was statutory, the question was whether an Officer of the United States had authority to act despite not having been appointed by the President and confirmed by the Senate, so the Appointments Clause was clearly implicated. Indeed, the D.C. Circuit has since distinguished *Doolin* when addressing a constitutional violation without relying on—or even mentioning—the fact that *Doolin* was a statutory challenge. *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000).

An agency’s affirmation of a decision preceded by a constitutional or statutory violation has repeatedly been found sufficient to remedy any infirmity.³⁴ In fact, ratification after even less than *de novo* review can suffice.³⁵

Laccetti asserts that the Board never “ratified” its earlier decision to institute proceedings against him and attempts to distinguish *Legi-Tech* and *Doolin* on that basis. However, we find his arguments to be without merit. Here, because the Board had the power to stop or modify the proceedings at the time the constitutional problem was remedied, there was no need for it to formally reconsider and ratify the OIP. Unlike the cases on which Laccetti relies—in which the agency was unconstitutionally composed or its officials improperly appointed—there was no need to reappoint or reconstitute the decision-making entity before it could make a new decision.³⁶ And under principles of agency law—which inform our analysis—ratification can be implicit.³⁷ Courts have frequently concluded that a final decision was, itself, an implicit ratification of earlier action.³⁸

³⁴ See, e.g., *Intercollegiate Broad. Sys., Inc., v. Copyright Royalty Bd.* (“*Intercollegiate II*”), 796 F.3d 111, 124 (D.C. Cir. 2015) (decision by improperly appointed Copyright Royalty Judges was remedied by *de novo* review by properly appointed judges); *Combat Veterans for Cong. PAC v. FEC*, 795 F.3d 151, 157–58 (D.C. Cir. 2015) (statutorily improper vote on reason-to-believe determination was remedied by vote imposing penalties); *Andrade*, 824 F.2d 1253 (planning of a reduction in force that occurred under an improperly appointed official was remedied by the actual implementation of the RIF by a properly appointed official); *FEC v. Club for Growth*, 432 F. Supp. 2d 87 (D.D.C. 2006) (failure to follow statutory procedure for filing lawsuit was remedied by agency’s subsequent vote to ratify its prior decision to file suit).

³⁵ See *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996). But see *Ryder v. United States*, 515 U.S. 177 (1995) (review by the Court of Military Appeals did not cure earlier violation because the review was not *de novo* and did not “g[i]ve petitioner all the possibility for relief that review by a properly constituted Coast Guard Court of Military Review would have given him.”).

³⁶ See *Andrade v. Lauer*, 729 F.2d 1475, 1495 (D.C. Cir. 1984) (noting that the Appointments Clause “would be a nullity if it could be assumed that these very officials *would* in fact have been properly appointed and . . . confirmed by the Senate”).

³⁷ See Restatement (Third) Of Agency § 4.01(2)(b) (2006) (a person can ratify a prior act by “conduct that justifies a reasonable assumption that the person” assents to the act); see also *Doolin*, 139 F.3d at 212–13 (citing principles of agency law although the situation was “not easily characterized” as a principal-agent relationship).

³⁸ See, e.g., *United States v. Mechanik*, 475 U.S. 66, 70 (1986) (petit jury’s guilty verdict cured error in grand jury proceedings because verdict confirmed that there was probable cause to bring the charges); *Doolin*, 139 F.3d at 213 (final decision reached “in the normal course of agency adjudication” “effectively ratified” the earlier Notice of Charges); *Combat Veterans*, 795 F.3d at 157–58 (FEC’s valid vote finding liability ratified its prior invalid reason-to-believe

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The fact that the Board had the opportunity to stop the proceedings once the separation-of-powers problem was resolved further distinguishes this case from two cases on which Laccetti relies. In *FEC v. NRA Political Victory Fund*,³⁹ the court ruled that the FEC’s composition violated the constitution’s separation of powers and dismissed the underlying enforcement action. Likewise, in *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd.* (“*Intercollegiate I*”),⁴⁰ the court reversed and remanded a final decision made by an invalidly appointed Copyright Royalty Board. In each case, the challenged decision was already before the court of appeals when the administrative entity that made the decision was declared unconstitutional. Unlike here, there was no opportunity for the entity to cure its constitutional defect and ratify the challenged decision.

In those cases, therefore, refusing to provide relief to the petitioners would have meant they would *continue* to be subjected to a decision made by an unconstitutional entity. Unlike here, ratification was not an issue. Indeed, these cases were in precisely the same posture as *Free Enterprise Fund*. Importantly, while it could have, the Court in *Free Enterprise Fund* neither found that the Board’s prior actions were invalid nor ordered dismissal of the proceedings.⁴¹

Other cases holding that an error was not cured by subsequent ratification are likewise distinguishable. In *Ryder*,⁴² the petitioner was convicted by an unconstitutional Coast Guard Court of Military Review, and the Court held that the subsequent review by the Court of Military Appeals did not cure the error because that review was too narrow—that is, it was not *de novo*—and it failed to give petitioner “a hearing before a properly appointed panel” of the Coast Guard Court of Military Review.⁴³ Here, by contrast, Laccetti has already had a hearing before a proper Board, and a final decision that constituted complete review of the Board’s earlier decision to institute proceedings.

In *SW General, Inc. v. NLRB*, an improperly appointed General Counsel of the NLRB issued an unfair labor practice complaint against the petitioner, and the D.C. Circuit held that the Board’s subsequent final order finding an unfair labor practice did not ratify the invalid

(...continued)

finding); *Stryker Spine v. Biedermann Motech GmbH*, 684 F. Supp. 2d 68 (D.D.C. 2010) (Board of Patent Appeal’s decision on rehearing ratified the Board’s prior panel decision).

³⁹ 6 F.3d 821, 828 (D.C. Cir. 1993).

⁴⁰ 684 F.3d 1332, 1342 (D.C. Cir. 2012).

⁴¹ *See supra* pp. 9–10.

⁴² 515 U.S. at 188.

⁴³ *Id.* at 187.

complaint.⁴⁴ Because the NLRB General Counsel is “statutorily independent from the Board,” and exercises prosecutorial discretion, the court concluded that “notwithstanding the final Board order, we cannot be confident that the complaint against Southwest would have issued under” a different General Counsel.⁴⁵ The court distinguished cases in which—much like here—the earlier decision is ratified by someone who is “similarly situated and ha[s] the same basic task” as the original decision-maker.⁴⁶ In those cases, the identity between the original decisionmaker, who was constitutionally infirm, and the subsequent decisionmaker, was sufficient to conclude that there was a ratification of the original action. Here, of course, the entity that instituted proceedings is *the same as* the one that ultimately found a violation. Because the Board found violations and sanctioned Laccetti while subject to proper executive oversight, the OIP would have issued if the Board had been subject to the same executive oversight at the time it instituted the proceedings.

And, unlike these cases in which remand was necessary to cure a constitutional violation, Laccetti’s proceeding was still before the Board when it began to function under the proper oversight—any error in the proceedings was thereby cured.

Notwithstanding the precedent establishing, in closely analogous circumstances, that irregularities can be cured by subsequent agency action ratifying the proceeding, Laccetti contends that the separation-of-powers violation early in his proceedings renders the ultimate decision subject to “automatic reversal.” He relies on *Landry*, in which the D.C. Circuit suggested that an Appointments Clause challenge could warrant reversal despite subsequent *de novo* review and therefore without a showing that the violation caused the petitioner any harm.⁴⁷

Landry does not compel such a result. As the D.C. Circuit recognized, “an important basis for [its] decision” in *Landry* was the “special problem” that case presented.⁴⁸ In *Landry*, the petitioner challenged an FDIC order because it was based on the recommendation of an ALJ whose appointment was allegedly unconstitutional.⁴⁹ The FDIC argued that any error was harmless because the agency had conducted a *de novo* review of the ALJ’s findings in reaching

⁴⁴ 796 F.3d 67, 80–81 (D.C. Cir. 2015).

⁴⁵ *Id.* at 80.

⁴⁶ *Id.* (distinguishing *Mechanik*, 475 U.S. at 70, where “a later conviction by a petit jury supplies *virtual certainty* that a properly constituted grand jury would have indicted”). The court further limited its holding by noting: “[O]ur conclusion does not control whether the ineligibility of an official with prosecutorial responsibilities in other contexts should be considered harmless.” *Id.* at 81.

⁴⁷ 204 F.3d at 1131.

⁴⁸ *Intercollegiate II*, 796 F.3d at 124 (quoting *Landry*, 204 F.3d at 1132).

⁴⁹ *Landry*, 204 F.3d at 1130.

its final decision.⁵⁰ However, if the actions of an invalidly appointed inferior officer—or any invalid entity—could be completely cured by the agency’s process of final *de novo* review, then the invalidity of the initial decision would forever “escape judicial review.”⁵¹ The court relied upon a line of Supreme Court cases that all raise the same “special problem”: a structural or fundamental constitutional violation that would evade judicial review if a showing of actual harm was required and such harm would be always be cured by the administrative body’s *de novo* review before the final decision was appealable.⁵²

Here, by contrast, the constitutionality of the Board is not shielded from review; it was reviewed in *Free Enterprise Fund* and is subject to further review in this case. Indeed, the “existence of the Board” was held to be fundamentally *valid* and its unconstitutional removal restrictions were remedied in *Free Enterprise Fund*.⁵³ The “special problem” present in *Landry* therefore does not exist here, and accordingly, we reject Laccetti’s argument that the proceedings are subject to “automatic reversal.” We conclude instead that even if the Board’s pre-*Free Enterprise Fund* actions were constitutionally flawed, those flaws were not present when a constitutionally proper Board issued its Final Decision.

3. The Board’s Final Decision was not “tainted” by the separation-of-powers violation

Acknowledging that the Board’s separation-of-powers infirmity had been cured by the time of its Final Decision, Laccetti contends that the constitutional violation at the outset of its investigation nevertheless “tainted” the rest of the proceedings. We conclude that there was no taint. Our conclusion is firmly supported by two decisions of the D.C. Circuit, which held that the final decision by a properly constituted body was not tainted by a constitutional violation earlier in the proceedings.

First, in *Legi-Tech*, the D.C. Circuit refused to dismiss an enforcement action that had been brought by the FEC while it was unconstitutionally composed.⁵⁴ While the enforcement

⁵⁰ *Id.* at 1131–32.

⁵¹ *Id.*

⁵² *Id.* (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); and *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952)). *Vasquez* was severely limited by *United States v. Mechanik*, 475 U.S. 66 (1986), where the Supreme Court explained that the reasoning in *Vasquez* “ha[s] little force outside the context of racial discrimination in the composition of the grand jury.” 475 U.S. at 70 n.1.

⁵³ 561 U.S. at 508–09; see *Intercollegiate II*, 796 F.3d at 124 (rejecting petitioner’s reliance on *Landry*, explaining that “[h]ere, however, the unconstitutional arrangement did not escape judicial review”).

⁵⁴ 75 F.3d at 709.

action against Legi-Tech was pending before the district court, the D.C. Circuit decided *NRA*, announcing the FEC’s unconstitutionality.⁵⁵ Shortly thereafter, the FEC reconstituted itself to comply with *NRA* and voted to continue the Legi-Tech litigation.⁵⁶ Legi-tech argued on appeal that the enforcement action should nevertheless be dismissed because of the earlier separation-of-powers violation, but the court disagreed. It rejected Legi-Tech’s argument that because the separation-of-powers violation was “structural,” “prejudice must be presumed.”⁵⁷ “To be sure,” the court explained, “Legi-Tech was prejudiced . . . when the FEC brought suit. But . . . the relevant issue is the *degree of continuing prejudice now*, after the FEC’s reconstitution and ratification, and whether that degree of prejudice—if it exists—requires dismissal.”⁵⁸ The court found that the FEC’s vote to continue the litigation—even if it was just a “rubberstamp”—adequately cured the constitutional violation.⁵⁹

Similarly, in *Intercollegiate II*, the D.C. Circuit upheld the final decision reached by the validly appointed Copyright Royalty Board on remand after *Intercollegiate I*.⁶⁰ *Intercollegiate* contended that the new decision was “tainted” by the earlier proceedings, in part because the new Board had not conducted an entirely new hearing but had only performed a *de novo* review of the written record.⁶¹ And *Intercollegiate* argued, relying on *Landry*, that it should not even have to demonstrate “taint” because “an Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.”⁶² The court rejected both arguments. It held that the new Board’s *de novo* review of the record cured the earlier Appointments Clause violation, relying upon the D.C. Circuit’s earlier decisions in *Legi-Tech* and *Doolin*.⁶³ The court rejected *Intercollegiate*’s reliance on *Landry*, explaining that “an important basis” for the result in that case was the fact that requiring a showing of prejudice there would have meant that “all

⁵⁵ *Id.* at 706.

⁵⁶ *Id.*

⁵⁷ *Id.* at 708.

⁵⁸ *Id.* (emphasis added). Legi-Tech, like Laccetti, was subject to an investigation before the FEC’s constitutional infirmity was remedied: the FEC had initiated an investigation in 1986 and engaged in statutorily required settlement negotiations before filing a civil enforcement action in 1991. *Legi-Tech*, 75 F.3d at 706. As the D.C. Circuit explained in *Doolin*, “[t]he Federal Election Commission must engage in a lengthy, elaborate series of administrative steps involving investigation and deliberation before it votes to bring an enforcement action in court.” *Doolin*, 139 F.3d at 213 n.9.

⁵⁹ *Legi-Tech*, 75 F.3d at 709.

⁶⁰ *Intercollegiate II*, 796 F.3d at 124; *see also supra* p. 13.

⁶¹ *Intercollegiate II*, 796 F.3d at 121.

⁶² *Id.*

⁶³ *Id.* at 118.

such arrangements would escape judicial review.”⁶⁴ By contrast, of course, the Copyright Royalty Board’s unconstitutionality did not escape judicial review—it had been reviewed (and remedied) in *Intercollegiate I*.⁶⁵

Like the *NRA* and *Intercollegiate I* courts, the Supreme Court in *Free Enterprise Fund* found a constitutional violation at the time of the challenged decision.⁶⁶ Rather than leaving the petitioners subject to an ongoing procedure at the hands of an unconstitutionally unaccountable entity, the Court concluded that reversal and remand were necessary.⁶⁷ In Laccetti’s case, however—just as in *Intercollegiate II* and *Legi-Tech*—the final decision was reached by a constitutionally valid Board. By reaching that decision after *de novo* review of its own earlier actions, the Board itself removed any conceivable taint from the earlier separation-of-powers violation. No further remedy is necessary or appropriate.

B. Laccetti was not denied the right to counsel at his investigative testimony, and any conceivable error was not prejudicial.

The Board concluded that Laccetti was not denied a right to counsel by the Division’s refusal to permit an accountant employed by Ernst & Young to sit in on Laccetti’s investigative testimony as a technical consultant. As an initial matter, no constitutional or statutory right to counsel exists in PCAOB investigatory proceedings; therefore, the only conceivable basis for Laccetti’s claimed right relates to a PCAOB rule providing that witnesses may be accompanied by counsel.⁶⁸ But that rule is expressly limited by the PCAOB’s discretion to exclude anyone other than certain enumerated individuals at the testimony.⁶⁹ In this case, Laccetti was represented by outside counsel at his testimony. The Division properly exercised its discretion to exclude another accountant employed by Ernst & Young, from Laccetti’s investigative testimony session given its concern about the potential for personnel from Laccetti’s employer to monitor or influence the investigation. And even if the exclusion of Ernst and Young’s accountant was in error, Laccetti was not prejudiced because the investigatory testimony was not a basis for the PCAOB’s Final Decision and Laccetti presented evidence and testified at the hearing.

⁶⁴ *Id.* at 124; *see also supra* at pp. 14–15.

⁶⁵ *Intercollegiate II*, 796 F.3d at 124.

⁶⁶ *Free Enter. Fund*, 561 U.S. at 513.

⁶⁷ *Id.* at 513–14.

⁶⁸ *See* PCAOB Rule 5109(b) (providing that a person appearing in a Board investigation “may be accompanied, represented and advised by counsel, subject to Rule 5102(c)(3)”).

⁶⁹ *See* PCAOB Rule 5102(c)(3) (limiting those who are permitted to be present at an investigatory examination); *see also supra* Section V.B.2 (discussing PCAOB Rules 5109(b) and 5102(c)(3)).

1. Laccetti did not have a constitutional or statutory right to an expert consultant at his investigative testimony.

There is no constitutional or statutory right to counsel during PCAOB investigative testimony. Laccetti has never argued that his asserted right to counsel arises from the Sixth Amendment, which applies only in criminal proceedings, and he has abandoned any argument that the Fifth Amendment establishes this right—which it does not.⁷⁰

Nor does the Administrative Procedure Act confer the right Laccetti claims. The APA does, to be sure, establish a right to counsel for “[a] person compelled to appear in person before an agency or representative thereof.”⁷¹ But Laccetti does not argue that the PCAOB is generally subject to the APA’s procedural requirements—including the right to counsel—by virtue of being an “agency” as defined in Section 551 of the APA. In any event, such an argument has no merit. The PCAOB’s enabling legislation explicitly provides that the Board “*shall not be an agency or establishment of the United States Government,*” and that “[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.”⁷²

Laccetti argues that the APA’s right to counsel nevertheless applies to PCAOB proceedings because the PCAOB, despite not being an “agency” or “agent” of the Federal Government, is a “representative” of an agency within the meaning of 5 U.S.C. § 555(b). But the plain meaning of the governing statutes forecloses that argument: if the PCAOB is not an “agent” of the government, it is also not a “representative”—the two terms are synonymous.⁷³

⁷⁰ *Hannah v. Larche*, 363 U.S. 420, 440–43 (1960) (Fifth Amendment does not guarantee the right to counsel in administrative investigative proceedings).

⁷¹ 5 U.S.C. § 555(b). Laccetti misstates the holding of *Backer v. Commissioner*, 275 F.2d 141, 143 (5th Cir. 1960), when he contends that the Administrative Procedure Act guarantees a right to counsel even *broader* than the one guaranteed by the Fifth Amendment. *Backer* held only that the subject of an administrative investigation has a right to counsel under the APA that encompasses more than the right to have an attorney advise him as to his Fifth Amendment rights. *Backer*, 275 F.2d at 143.

⁷² Sarbanes-Oxley Act § 101(b), 15 U.S.C. § 7211(b) (emphasis added); *see also* PCAOB Release No. 2003-015, A2-19 n.1 (Sept. 29, 2003), available at <http://pcaobus.org/Enforcement/Documents/Release2003-015.pdf> (noting that the APA does not apply to PCAOB proceedings).

⁷³ Black’s Law Dictionary 75, 1494 (10th Ed. 2014) (defining “representative” to mean “one who stands for or acts on behalf of another . . . See agent”); *see also All Party Parliamentary Grp. on Extraordinary Rendition v. U.S. Dep’t of Defense*, 754 F.3d 1047, 1050 (D.C. Cir. 2014) (holding that “representative” and “agent” are synonymous for the purposes of the Freedom of Information Act); *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (holding

(continued...)

Laccetti points out that the Commission has significant authority over the PCAOB, and states that the Board’s authority is “derivative” of the Commission’s, but does not explain how either might transform the PCAOB into a “representative” of the Commission. It is not.

Laccetti also contends that the *Commission* would violate the APA by approving the PCAOB’s use of procedures that do not conform to the APA. But he cites no authority for this proposition, and it is incorrect.⁷⁴ If it were true, not only the PCAOB but also every self-regulatory organization (SRO)—whose rules the Commission also must approve—would be required to conform its procedures to the APA. This is not the case; indeed, Congress created separate criteria for the Commission’s approval of both PCAOB and SRO rules, none of which requires consideration of the APA.⁷⁵

2. The PCAOB’s rules do not establish a right to a technical expert consultant during investigative testimony.

Laccetti next argues that the PCAOB’s rules providing a right to counsel also establish a right to a technical expert consultant (in this case an accountant employed by Ernst & Young’s General Counsel Office) during investigative testimony. Those rules provide only a *limited* right to counsel that is narrower than the APA’s and does not encompass the absolute right to a technical expert consultant.

PCAOB Rule 5109(b) provides that a person appearing in a Board investigation “may be accompanied, represented and advised by counsel, *subject to Rule 5102(c)(3)*.” (emphasis added). Rule 5102(c)(3), in turn, limits those who are permitted to be present at an investigatory examination to: the witness and his or her counsel, any Board member or staff of the Board, the reporter, and “such other persons as the Board, or the staff of the Board designated in the order of formal investigation, determine are appropriate to permit to be present; provided, however,

(...continued)

that “representative” means “agent,” citing definitions from dictionaries, including legal dictionaries, and statutory definitional provisions).

⁷⁴ Laccetti suggests that “even non-governmental regulators” are subject to the APA via the Commission’s approval of their rules because courts of appeals “may consider errors in proceedings even by non-governmental regulators” in certain cases. But that argument assumes that the regulator made an error in the first place, which is precisely the question before us.

⁷⁵ 15 U.S.C. § 7217(b)(3) (“The Commission *shall approve* a [PCAOB] proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.” (emphases added)); 15 U.S.C. § 78s(b)(2)(C)(i) (“The Commission *shall approve* a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.” (emphases added)).

that in no event shall a person other than the witness who has been or is reasonably likely to be examined in the investigation be present.” (underlining in original).

Rule 5109(b) does not entitle a witness to a technical expert at investigative testimony, — and 5102(c)(3) places that determination squarely in the hands of the Board or its staff. Laccetti reads Rule 5109(b)’s right to counsel as encompassing the right to have a technical expert consultant at his examination, based on a district court case, *SEC v. Whitman*, in which the court read the APA’s right to counsel to include a right for that counsel to be accompanied by an expert consultant, at least on “those limited occasions when a technical adviser is deemed by the witness’ attorney to be essential.”⁷⁶

Nothing in *Whitman* suggests that the PCAOB’s right to counsel should be read as broadly as the APA’s right to counsel. The statutory right to counsel in the APA that *Whitman* interpreted, quite unlike the PCAOB’s rule, is *not* subject to another rule limiting the types of people permitted to be present at the proceeding.⁷⁷ Laccetti ignores the limitation of Rule 5102(c)(3) in the PCAOB’s attendance rules, suggesting the rule is “nearly identical” to the APA rule.

3. The PCAOB properly applied its rules.

We conclude that the Division’s application of the PCAOB’s limited right to counsel in Laccetti’s case was not erroneous. As the Board correctly found, Laccetti’s counsel requested, and the Division rejected, the presence of an Ernst & Young accountant acting as Laccetti’s technical expert consultant, which was well within the scope of the discretion granted to the Division by Rule 5102(c)(3).

Laccetti’s contention that the Division’s application of PCAOB rules was incorrect rests entirely on a faulty premise: that the Division, without explanation, refused to allow Laccetti’s counsel to be assisted by *any* expert consultant during Laccetti’s investigative testimony. But the record supports the Board’s finding that Laccetti specifically requested an Ernst & Young accountant to act as a consultant and the Division denied only that request, not a general request for consulting advice.

Laccetti’s letter asked the Division to “approve our request to allow our witnesses to be accompanied during testimony by a technical expert consultant from E&Y’s [General Counsel’s

⁷⁶ 613 F. Supp. 48, 50 (D.D.C. 1985). Laccetti’s counsel’s letter requesting the presence of an Ernst & Young expert consultant did not assert that the presence of the consultant was “essential,” but merely that it was “appropriate.” R.D. 182 at 97–98.

⁷⁷ See 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”).

Office]”—specifying that the consultant it “ha[d] in mind” was a particular Ernst & Young partner. The letter explained that an internal consultant could consult “at substantially less cost” than an outside one, and that there should be no concern about permitting an internal consultant because other firm personnel—Ernst & Young’s internal counsel—would already be present at the testimony.

In rejecting the request, the Division cited the PCAOB release accompanying Rule 5102, which specifically addresses the situation in Laccetti’s case. The release notes that some commenters suggested, citing *Whitman*, “that the rules should allow a witness and his or her counsel to be accompanied by a technical expert consultant during testimony as a matter of right.”⁷⁸ The final rule did not incorporate that suggestion, but the release explains that the rule nevertheless “provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony, and we expect the staff to allow that presence in appropriate circumstances and on appropriate terms, including, for example, that the consultant *not* be a partner or employee of the firm with which the witness is associated.”⁷⁹ The release explained that PCAOB staff was expected “to be vigilant about not permitting a firm’s internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel.”⁸⁰

Citing those pages of the release, the letter to Laccetti’s counsel explained that “the staff’s decision to exclude [the E&Y partner that Laccetti had identified] is fully consistent with the rationale set forth in that release.” Laccetti contends that the Division banned *all* potential expert consultants because its letter stated that the “presence of a technical expert consultant . . . is not appropriate at this time.” The context of the Division’s letter, however, makes clear that it was not excluding *all* possible consultants. The letter named the E&Y partner specifically, and the rationale for excluding him was based on a release that specifically dealt with the presence of persons from within the witness’s firm.

The Division reasonably rejected Laccetti’s contention that because Ernst & Young attorneys would be present at the testimony, there could be no concern about an internal accountant acting as a consultant. Rule 5102(c)(3) gives the staff wide discretion to exclude such consultants, but *not* to exclude the witness’s counsel. In PCAOB proceedings, the presence of an accountant from the witness’s firm might raise concerns even where in-house counsel is already present. Even in civil litigation, courts have discretion to exclude individuals from depositions for good cause, where, for instance, an individual’s presence is likely to “have an

⁷⁸ PCAOB Release No. 2003-015, A2-18.

⁷⁹ *Id.* at A2-18 (emphasis added).

⁸⁰ *Id.* at A2-18–A2-19.

intimidating influence on the deponent's testimony."⁸¹ It was, therefore, reasonable for the Division to exclude Laccetti's requested Ernst & Young consultant.

4. Any error in excluding the technical expert consultant was not prejudicial.

In any event, even if he had such a right, the exclusion of Laccetti's expert consultant was not prejudicial because it did not affect the Board's ultimate decision.⁸² The Board explicitly disavowed any reliance on Laccetti's investigative testimony, and there was sufficient evidence to support the Board's decision without it.

We have held that errors in early stages of a proceeding—including, for instance, bias of the examiner or consideration of unfairly prejudicial evidence—do not necessarily invalidate the final decision.⁸³ In *mPhase Technologies*, for instance, mPhase contended that FINRA had improperly considered related allegations in a federal suit that was later dismissed.⁸⁴ We held that although the dismissed complaint had been considered by an examiner during the investigation of mPhase, there was no basis for reversal because it had not been a basis for FINRA's ultimate decision.⁸⁵

Likewise, the Board's Final Decision here was unaffected by the exclusion of Laccetti's expert during his investigative testimony. There is no indication that the Board considered his

⁸¹ *In re Shell Oil Refinery*, 136 F.R.D. 615, 616 (E.D. La. 1991) (excluding corporate representative from deposition where the deponent was "worried about Abatte's presence because even though Abatte is not his supervisor, he is in a position to talk with [the deponent's] supervisors and possibly affect his job security"); *see also, e.g., Beacon v. R. M. Jones Apartment Rentals*, 79 F.R.D. 141, 141–42 (N.D. Ohio 1978) ("It is clear that under Rule 26(c)(5) the Court has the authority to limit who may attend depositions even to the exclusion of parties to the suit."); Local Rules of the United States District Court for the District of Maryland, App'x A, at 6(h) (guideline providing that only "individual parties; a representative of non-individual parties; and expert witnesses of parties" may automatically attend a deposition; all other attendees require agreement of the parties or court permission).

⁸² *See mPhase Techs., Inc.*, Exchange Act Release No. 74187, 2015 WL 412910, at *8 (Feb. 2, 2015).

⁸³ *See, e.g., Dillon Sec., Inc.*, Exchange Act Release No. 31573, 1992 WL 383783, at *7 n.29 (because NASD examiners do not decide cases, the fact that an examiner was biased "does not suggest that the fairness of the hearing itself was compromised"); *Stephen Russell Boadt*, Exchange Act Release No. 32095, 1993 WL 365355, at *2 (Sept. 15, 1993).

⁸⁴ 2015 WL 412910, at *8.

⁸⁵ *Id.*

testimony in reaching its decision.⁸⁶ Rather, the Board disclaimed any reliance on the investigatory testimony and concluded that its final decision was supported by “other (and ample) record evidence,” a conclusion that Laccetti has not challenged and that we have affirmed based on our *de novo* review of the evidence.⁸⁷

The fact that Laccetti was charged after his investigative testimony—and that the decision to institute proceedings may have been based in part upon his investigative testimony—is not reason enough to assume that he was harmed by the exclusion of his expert consultant. This contention amounts to an assertion—which Laccetti also makes—that exclusion of the consultant was a “structural” error, and requires automatic reversal. That assertion fails because it is based entirely on case law applying the Sixth Amendment right to counsel, which is inapposite.⁸⁸ The Sixth Amendment undisputedly does not apply here, nor is it sufficiently similar to the right to counsel Laccetti claims that its strict standards should be imported from the criminal context. Sixth Amendment violations are considered structural because they “infect the entire trial process.”⁸⁹ By contrast, the violation Laccetti asserts applied *only* before any proceedings were instituted against him.

Neither dismissal nor remand would be appropriate remedies for the harm Laccetti alleges. By declining to rely on the investigatory testimony, the Board already afforded Laccetti

⁸⁶ Laccetti identifies only one instance in which the Board purportedly relied upon his investigative testimony. But the Board cited Laccetti’s *hearing* testimony, which in turn referred to his investigative testimony. Review of the hearing testimony and the proposition for which it was cited establishes that the Board was not referring to the investigative testimony, but rather to a different issue on that page.

⁸⁷ See *supra* pp. 6–8; see also, e.g., *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *19 (May 27, 2011) (“[O]ur *de novo* review of the evidence cures whatever bias, if any, that may have existed.”). We need not reach Laccetti’s argument that the Board has the burden to show that any error was harmless because we are convinced that the PCAOB has met that burden: it has shown that the Board did not rely on the investigative testimony, and that there was sufficient evidence without that testimony to support the Board’s final decision. But we doubt the burden lies with the Board. Laccetti’s only support for that argument, *Chapman v. California*, 386 U.S. 18, 24 (1967), is a criminal case addressing a constitutional error. In the much more analogous context of APA review, generally the burden is on “the party asserting error to demonstrate prejudice from the error.” *First Am. Disc. Corp., v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (quoting *Air Canada v. DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998)).

⁸⁸ See *Williams v. Wynne*, 533 F.3d 360, 369 (5th Cir. 2008) (“[T]he Sixth Amendment right to effective assistance of counsel is a criminal concept with no relevance to administrative or civil proceedings.”).

⁸⁹ *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993).

all the remedy to which he was entitled. Therefore, even assuming that it was an error to exclude the technical expert consultant, neither reversal nor dismissal is appropriate.

C. Laccetti’s Oath and Commission arguments are waived, and, in any event, those arguments are meritless.

Laccetti asserts that the PCAOB could not constitutionally impose sanctions on him because the members of the Board neither swore oaths of office nor received Presidential commissions. But because he failed to raise these objections before the Board, they are waived.⁹⁰ In any event, neither the oath of office nor the Presidential commission is a prerequisite to assuming office, so his challenge on these grounds is meritless.

1. Laccetti waived his Oath and Commission arguments by failing to raise them before the Board.

It is well established that petitioners challenging agency action must exhaust the agency’s review procedures before bringing their arguments to the courts.⁹¹ The same exhaustion requirement applies when a petitioner seeks Commission review of an SRO action,⁹² and, for the same reasons, should apply equally to our review of PCAOB decisions.⁹³ Additionally, Laccetti does not dispute that these arguments are affirmative defenses, which are waived if not raised in the answer to the Board’s OIP.⁹⁴

The requirement that arguments must be raised in a timely manner and first in the proper forum serve “numerous” purposes: they promote judicial and administrative economy, allow for the early resolution of errors, “promot[e] the development of a factual record in a forum particularly suited to create it,” and, in the case of Commission review of PCAOB decisions, “prevent[] circumvention of th[e] congressional scheme” for the PCAOB’s regulation of the

⁹⁰ See *Boadt*, 1993 WL 365355, at *2; *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *12 (Apr. 5, 1999).

⁹¹ See, e.g., *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006).

⁹² See, e.g., *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621–22 (2d Cir. 2004).

⁹³ See *Free Enter. Fund*, 561 U.S. at 484 (the PCAOB “was modeled on private self-regulatory organizations in the securities industry”).

⁹⁴ See, e.g., *Canady*, 1999 WL 183600, at *12; see also *Legi-Tech*, 75 F.3d at 707 (the “assertion that the FEC is unconstitutionally composed cannot be regarded as anything other than an affirmative defense against an enforcement proceeding,” which “must be raised in the pleading”).

accounting industry.⁹⁵ Each of these purposes is well served by a conclusion that Laccetti waived his Oaths Clause and Commission Clause arguments.

And these arguments can be waived despite Laccetti's assertion that they go to the Board's "authority" to impose sanctions. The principle that "a question of power or jurisdiction" cannot be waived is "limited to challenges to an agency's very 'constitution.'"⁹⁶ For example, in *Freytag v. Commissioner* the Supreme Court exercised its discretion to review an Appointments Clause challenge despite the appellant's failure to raise it below, but only because it was a structural separation-of-powers challenge.⁹⁷ Balancing the "disruption to sound appellate process" against "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers," the Court concluded "that this is one of those *rare cases* in which we should exercise our discretion to hear petitioners' challenge."⁹⁸ Laccetti's challenge, by contrast, raises technicalities relating to individual Board members, not the constitution of the Board itself.

Unlike here, the violation in *Freytag* would have required striking down a statute as unconstitutional, with far-reaching effects. Nor do Laccetti's untimely arguments implicate concerns about "the danger of one branch's aggrandizing its power at the expense of another," nor of eroding "the Constitution's structural integrity" in any way.⁹⁹ Most importantly, *Freytag*'s review of the arguably waived issue was discretionary, not mandatory.¹⁰⁰ Laccetti's failure to raise his Oaths Clause and Commission Clause arguments before the Board is reason enough not to reverse or dismiss on the basis of those challenges.

2. Neither the Oath of Office nor the Presidential commission is a prerequisite to assuming office.

Nevertheless, we address—and reject—Laccetti's Oaths Clause and Commission Clause arguments on their merits.

⁹⁵ See *MFS Sec.*, 380 F.3d at 621; see also *Boadt*, 1993 WL 365355, at *2 ("We are therefore not required to consider this objection because he failed to present it to the District Committee at a time when it could have been remedied, if appropriate.").

⁹⁶ *USAir, Inc. v. DOT*, 969 F.2d 1256, 1259 (D.C. Cir. 1992).

⁹⁷ 501 U.S. 868, 878–79 (1991).

⁹⁸ *Id.* at 879 (emphasis added).

⁹⁹ *Freytag*, 501 U.S. at 878.

¹⁰⁰ See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir. 2009) (holding that appellants' Appointment Clause challenge was forfeited and declining to address it under *Freytag*).

The principal authority on which Laccetti relies for both arguments, Justice Alito’s concurring opinion in *DOT v. Association of American Railroads*,¹⁰¹ does not definitively assert that an officer’s power to act is conditioned on a valid oath or a Presidential commission. Justice Alito merely raises, but does not resolve, questions about the Oaths and Commission Clauses as applied to Amtrak board members.¹⁰² And the concern he raises—the importance of public officers being “set apart from ordinary citizens”—is not implicated here, where there is no doubt that members of the PCAOB are officers who enforce the law.¹⁰³

a) The lack of an oath of office does not invalidate the Board’s Final Decision

Although Article VI, cl. 3, of the Constitution states that “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution,” neither the Constitution nor any other authority speaks to the consequences of a failure to take such an oath. Indeed, the Office of Legal Counsel (OLC) has opined that the oath “is not an indispensable criterion” of the office, but is instead “a mere incident and constitutes no part of the office.”¹⁰⁴

None of the authorities Laccetti cites are to the contrary. None state that even where an oath is required, official acts taken without an oath are invalid.¹⁰⁵

Indeed, acts by public officers have historically been upheld as valid despite the lack of an oath, confirming our conclusion that the failure to take an oath of office would not void the

¹⁰¹ 575 U.S. ---, 135 S.Ct. 1225, 1234 (2015).

¹⁰² *Id.* at 1235.

¹⁰³ *See Free Enter. Fund*, 561 U.S. at 485.

¹⁰⁴ Officers of the United States within the Meaning of the Appointments Clause, 2007 WL 1405459, at *36 (Apr. 16, 2007) (quoting 1 Floyd R. Mechem, *The Law of Public Offices and Officers* § 6 (1890)).

¹⁰⁵ *See, e.g.*, 14 U.S. Op. Att’y Gen. 406, 408 (1874) (for the purposes of the Article I requirement that an officer shall not simultaneously be a member of Congress, a person elected to Congress “does not become a member of the House until he takes the oath of office,” so he may retain his public office until that time); 12 Op. O.L.C. 18, 29 (1988) (the United States Sentencing Commission may be represented in court by private counsel, but “[d]epending on the role assumed by such private counsel . . . , they may have to be appointed as officers of the United States and take the requisite oath of office”); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618 (1935) (merely noting that Humphrey, “after taking the required oath of office, entered upon his duties”); *see also* 15 U.S. Op. Att’y Gen. 280, 281 (1877) (reaching the same conclusion for the purposes of a statute prohibiting members of Congress from having an interest in any contract with the federal government).

PCAOB's actions. In *Vaccari v. Maxwell*,¹⁰⁶ for example, the court held that a merchant appraiser's valuation, "done without the sanction of an oath, [was] both irregular and void," but expressly distinguished this result from the line of cases involving "those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office."¹⁰⁷ The court limited its holding to officials, like merchant appraisers, "who take no rank as public officers," but instead are "charged with the performance of a single act, or appointed to act in an individual case."¹⁰⁸ Members of the PCAOB, on the other hand, are among those whose position "has the character of a public office"; with respect to those officers, *Vaccari* confirmed that the oath has "not been regarded by the courts as conditions precedent to their rightful authorization."¹⁰⁹

b) The lack of Presidential commissions does not invalidate the PCAOB order

Article II, Section 3 of the Constitution lists certain duties of the President, including an obligation to "Commission all the Officers of the United States." But, just as with the Oaths Clause, the Constitution does not condition an officer's power on the President fulfilling his or her duty to issue commissions. In fact, it is well established that an appointment to office is effective when the appointing authority, "by an open and unequivocal act, expresses his will making an appointment."¹¹⁰

An officer's appointment is usually completed by the President's signature on a commission, which serves as "conclusive evidence" of the appointment.¹¹¹ But this does not mean, as Laccetti contends, that an officer without a commission lacks the power to act. To the contrary, the Supreme Court in *Marbury* noted that "if the appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer."¹¹²

¹⁰⁶ 28 F. Cas. 862, 865 (C.C.S.D.N.Y. 1885) (No. 16,810).

¹⁰⁷ *Id.* at 865.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; see also, e.g., *Johnson v. Sullivan*, 748 F. Supp. 2d 1, 13 (D.D.C. 2010) ("[T]he plaintiff cannot now be allowed to undermine the validity of the criminal proceedings on the ground that McCool had not taken a valid oath of office.").

¹¹⁰ *Bennett v. United States*, 19 Ct. Cl. 379, 385 (1884) (quotation marks omitted) (quoting *Marbury v. Madison* 5 U.S. (1 Cranch) at 157 (1803)).

¹¹¹ *Marbury*, 1 Cranch at 157.

¹¹² *Id.* (emphasis added).

Courts have long relied on *Marbury* to conclude that the lack of a commission does not deprive an officer of the power of the office, and that an appointment is effective upon any “open and unequivocal act.” In *Bennett*, for instance, the court held that an officer’s appointment was effective when the President followed the prevailing practice of recording the appointment in the War Department and, with the knowledge and consent of the President, the officer “was permitted to have and to hold” the office.¹¹³ Based on *Marbury*, the attorney general has opined:

To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being *the evidence* that the purpose of appointment signified by the nomination has not been changed.¹¹⁴

Laccetti can point to no contrary authority.¹¹⁵ Accordingly, we conclude that the PCAOB members’ appointments were complete when the Commission unequivocally provided notice to the Board that the appointments were effective.

c) The Board’s Final Decision is valid under the *de facto* officer doctrine.

Even assuming the Board members’ titles to their offices were defective, the Board’s order is valid under the *de facto* officer doctrine. That doctrine ensures that “where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.”¹¹⁶ The doctrine “seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.”¹¹⁷

¹¹³ 19 Ct. Cl. at 385.

¹¹⁴ 4 U.S. Op. Att’y Gen. 217, 219–20 (1843) (emphasis added); *see also, e.g., Dysart v. United States*, 369 F.3d 1303, 1311–12 (Fed. Cir. 2004) (“[T]he granting of a commission is not always required for a Presidential appointment”; appointment of a rear admiral is complete upon the transmission of a letter of appointment on the President’s behalf); *Nippon Steel Corp. v. ITC*, 26 C.I.T. 1025, 1031 (2002) (no commission was necessary to complete the appointment of the Commissioner of the International Trade Commission).

¹¹⁵ *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856), does not hold, as Laccetti asserts, that an appointment is not complete without a commission. Rather, it merely holds that delivery of the commission is not required, and does not address the effect of the existence (or non-existence) of the commission. *Id.*

¹¹⁶ *NRA*, 6 F.3d at 828.

¹¹⁷ *Ryder*, 515 U.S. at 180–81 (quoting 63A Am. Jur. 2d, Public Officers and Employees § 578, pp. 1080–1081 (1984)).

The *de facto* officer doctrine prohibits collateral attacks on the past actions of “a person acting with color of authority.”¹¹⁸ A prohibited “collateral attack” is one “in which plaintiffs attack government action on the ground that the officials who took the action were improperly in office.”¹¹⁹ By contrast, “direct” attacks are those “in which plaintiffs attack the qualifications of the officer, rather than the actions taken by the officer.”¹²⁰ Because the latter is “an extremely difficult and uncertain remedy,” courts recognize an exception to the prohibition on collateral attacks like Laccetti’s.¹²¹

A person collaterally attacking an official’s authority must jump two hurdles:

First, the plaintiff must bring his action at or around the time that the challenged government action is taken. Second, the plaintiff must show that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect in the official’s title to office. . . . These two requirements adequately protect citizens’ reliance on past government actions and the government’s ability to take effective and final action—the two interests served by the *de facto* officer doctrine.¹²²

Laccetti meets neither requirement. The first may be met by raising a challenge as a defense to an enforcement action, but *only* if it is timely raised and the challenger exhausts the available administrative remedies.¹²³ We have already concluded that Laccetti’s challenge was not timely raised, and that he failed to satisfy the rules of exhaustion by raising it in the proper course of administrative proceedings.¹²⁴

As to the second, the agency “must *actually know* of the claimed defect”—this “ensures that the agency has a chance to remedy any defects (especially narrowly technical defects)” as

¹¹⁸ *Id.* at 182.

¹¹⁹ *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984).

¹²⁰ *Id.*

¹²¹ Laccetti erroneously suggests that his challenge is not a “collateral attack” because he raises “a constitutional challenge as a defense to an enforcement action.” Reply at 22. To the contrary, his attack is collateral because it is an “attack [on] government *action*” rather than on the officer’s qualifications themselves. *Lauer*, 729 F.2d at 1496 (emphasis added). The fact that his argument is raised as a defense to an enforcement action does not, without more, exempt it from the *de facto* officer doctrine. See *infra* p. 30.

¹²² *Lauer*, 729 F.2d at 1499.

¹²³ *SW Gen., Inc., v. NLRB*, 796 F.3d 67, 81–82 (D.C. Cir. 2015) (citing *Legi-Tech*, 75 F.3d at 707).

¹²⁴ *Supra* pp. 24–25.

early as possible.¹²⁵ Laccetti does not even assert that the Board was aware of the alleged defects at the time of its decision; certainly, Laccetti did not bring them to the Board's attention.

Courts have recognized limited exceptions to this general rule, but Laccetti's challenge does not fall into any of those exceptions. In cases where the court declined to apply the general rule, the challenge involved "basic constitutional protections,"¹²⁶ a "fundamental" "question of judicial authority,"¹²⁷ or structural separation-of-powers principles.¹²⁸ Laccetti's challenge does not fall into any of these categories. To the contrary, the violations Laccetti asserts are precisely the kind of "technical defects in title to office" that the *de facto* officer doctrine was intended to forgive in the interests of finality and protecting the public's reliance on government actions.¹²⁹

For the foregoing reasons, we sustain the Board's findings of violations and imposition of sanctions.

An appropriate order will issue.¹³⁰

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

¹²⁵ *SW Gen.*, 796 F.3d at 82 (quoting *Andrade*, 729 F.2d at 1499).

¹²⁶ *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

¹²⁷ *Nguyen v. United States*, 539 U.S. 69, 79 (2003).

¹²⁸ *Ryder*, 515 U.S. at 182; *NRA*, 6 F.3d at 827.

¹²⁹ *Ryder*, 515 U.S. at 180–81.

¹³⁰ 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. 78764 / September 2, 2016

Admin. Proc. File No. 3-16430

In the Matter of the Application of
MARK E. LACCETTI, 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 actions taken against Mark E. Laccetti, CPA,
be sustained.

By the Commission.

Brent J. Fields
Secretary