

No. 08-861

IN THE

Morris Tyler Moot Court of Appeals at Yale

Spring 2009 Term

Free Enterprise Fund, et al.,
Petitioners

v.

Public Company Accounting Oversight Board, et al.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the
District of Columbia Circuit

Brief for the Respondents

Jill E. Habig
Rory Gillis
Counsel for the Respondents
127 Wall St.
New Haven, CT

QUESTIONS PRESENTED¹

- 1) Whether the Sarbanes-Oxley Act of 2002's mandate that Securities and Exchange Commissioners appoint and oversee Public Company Accounting Oversight Board (PCAOB) members violates the Constitution's Appointments Clause.
- 2) Whether the Act's provisions granting the PCAOB limited rulemaking and enforcement power violate the Constitution's separation of powers.

¹ The Petitioners in this action are the Free Enterprise Fund and Beckstead & Watts, LLP. The Respondents are the Public Company Accounting Oversight Board and the United States of America.

TABLE OF CONTENTS

Questions Presented..... ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory and Constitutional Provisions Involved..... 1

Statement of the Case 2

Factual Background 2

Procedural Background 3

Summary of Argument..... 4

Appointments Clause..... 5

Separation of Powers 7

Argument..... 10

I. The Act is valid under the Appointments Clause because it properly vests the SEC with power to appoint and supervise Board members 10

 A. Based on the statutory text and this Court’s precedent, Board members are inferior officers because they are subject to the SEC’s supervision 10

 i. Board members are Inferior officers under either the *Edmond* or *Morrison* test 11

 1. The SEC appoints Board members, controls when the Board begins operating, and approves its annual budget 13

 2. The SEC controls whether and in what form Board rules go into effect 14

 3. The SEC may conduct interim review over Board inspections 16

 4. The SEC has de facto control over Board investigations 16

 5. The SEC exercises *de novo* review over the Board’s adjudications 17

 6. The SEC can censure the Board, rescind its authority, or remove members for cause 17

 7. These powers amount to substantial SEC supervision over the Board and render Board members inferior officers 19

 ii. Board members need not be subject to at-will removal in order to be considered inferior officers 21

 B. SEC Commissioners are the heads of departments under the Appointments Clause 23

 i. The SEC is a department because it is cabinet-like 23

 ii. Commissioners are the collective head of the department 26

II. The Act is valid under separation of powers principles because the President retains sufficient control of the PCAOB to perform his constitutional functions 26

 A. Under this Court’s precedents, legislation satisfies the separation of powers if the president retains sufficient authority to perform his constitutional duties 27

 i. Executive functions need not be exclusively vested in the President 27

| | |
|---|-----------|
| ii. The President can retain sufficient power over executive functions without possessing direct removal power | 29 |
| iii. This Court has shown great reluctance to strike down limitations on the President’s removal power in the absence of congressional aggrandizement | 30 |
| B. The President retains sufficient control of the PCAOB to perform his constitutional duties | 31 |
| i. The SEC possesses comprehensive control over the PCAOB..... | 32 |
| ii. The President possesses substantial control over the SEC | 35 |
| iii. Precedent and practice show that the level of independent discretion vested in the PCAOB is constitutionally permissible | 37 |
| 1. Rulemaking | 37 |
| 2. Inspections | 37 |
| 3. Investigations | 38 |
| 4. Sanctions | 40 |
| C. Invalidation of the Board would require the invalidation of many other regulatory bodies..... | 41 |
| Conclusion | 44 |
| Appendix: Constitutional and Statutory Provisions..... | 45 |

TABLE OF AUTHORITIES

CASES

| | |
|---|---------------|
| <i>Arthur Andersen & Co. v. SEC</i> , 1976 WL 826 (N.D. Ill. Sept. 3, 1976) | 47 |
| <i>Bowsher v. Synar</i> , 478 U.S. 714 (1986) | passim |
| <i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) | 31, 41 |
| <i>Chabal v. Reagan</i> , 841 F.2d 1216 (3d Cir. 1988) | 34 |
| <i>Commodity Futures Trading Comm'n v. Schor</i> , 478 U.S. 833 (1986) | passim |
| <i>Crowell v. Benson</i> , 285 U.S. 22 (1932) | 32 |
| <i>Edmond v. United States</i> , 520 U.S. 651, 660 (1997) | passim |
| <i>Free Enter. Fund v. PCAOB</i> , 2007 WL 891675 | 1, 4 |
| <i>Free Enter. Fund v. PCAOB</i> , 537 F.3d 667 (D.C. Cir. 2008) | passim |
| <i>Freytag v. Comm'r</i> , 501 U.S. 868 (1991) | 7, 26, 27, 28 |
| <i>Gomez v. United States</i> , 490 U.S. 858 (1989) | 26 |
| <i>Hobson v. Hansen</i> , 265 F. Supp. 902 (D.D.C. 1967) | 13 |
| <i>Humphrey's Ex'r v. United States</i> , 295 U.S. 602 (1935) | passim |
| <i>INS v. Chadha</i> , 462 U.S. 919 (1986) | 30 |
| <i>Jota v. Texaco, Inc.</i> , 157 F.3d 153 (2d Cir. 1998) | 23 |
| <i>Landry v. FDIC</i> , 204 F.3d 1125 (D.C. Cir. 2000) | 14 |
| <i>Mistretta v. United States</i> , 488 U.S. 361 (1989) | passim |
| <i>Morrison v. Olson</i> , 487 U.S. 654 (1988) | passim |
| <i>Myers v. United States</i> , 272 U.S. 52 (1926) | 9, 24, 34, 35 |
| <i>Nixon v. Adm'r of Gen. Servs.</i> , 433 U.S. 425 (1977) | 8, 30, 32 |
| <i>Parsons v. United States</i> , 167 U.S. 324 (1897) | 34 |
| <i>SEC v. Blinder, Robinson & Co.</i> , 855 F.2d 677 (10th Cir. 1988) | 9, 35, 39, 40 |
| <i>Shurtleff v. United States</i> , 189 U.S. 311 (1903) | 34 |
| <i>Silver v. United States</i> , 951 F.2d 1033 (9th Cir. 1991) | 14, 29 |
| <i>United States v. Gantt</i> , 194 F.3d 987 (9th Cir. 1999) | 14 |
| <i>United States v. Germaine</i> , 99 U.S. 508 (1879) | 13, 27 |
| <i>United States v. Hartwell</i> , 73 U.S. 385 (1867) | 23 |
| <i>United States v. Libby</i> , 429 F. Supp. 2d 27 (D.D.C. 2006) | 25 |
| <i>United States v. Mouat</i> , 124 U.S. 303 (1888) | 27 |
| <i>United States v. Perkins</i> , 116 U.S. 483 (1886) | 24, 33 |
| <i>United States v. Salerno</i> , 481 U.S. 739 (1987) | 11 |
| <i>United States v. Solomon</i> , 216 F. Supp. 835 (S.D.N.Y. 1963) | 44 |
| <i>Wiener v. United States</i> , 357 U.S. 349 (1958) | passim |
| <i>Young v. United States</i> , 481 U.S. 787 (1987) | 11, 43 |

STATUTES

| | |
|--------------------------------------|-----------|
| 15 U.S.C. § 42 (2006) | 1, 27, 48 |
| 15 U.S.C. § 7202 (2006) | passim |
| 15 U.S.C. § 7211 (2006) | passim |
| 15 U.S.C. § 7214 (2006) | passim |
| 15 U.S.C. § 7215 (2006) | passim |
| 15 U.S.C. § 7217 (2006) | passim |
| 15 U.S.C. § 7219 (2006) | 2, 15, 65 |
| 15 U.S.C. § 78d (2006) | passim |
| 15 U.S.C. § 78o-4(c)(8) (2006) | passim |
| 15 U.S.C. § 78s (2006) | passim |
| 28 U.S.C. § 1254(1) (2006) | 1 |
| 28 U.S.C. § 1291 (2006) | 1 |
| 28 U.S.C. § 1331 (2006) | 1 |

| | |
|--|---------------|
| 28 U.S.C. § 593 (2006) | 2, 42, 66 |
| 28 U.S.C. § 594 (2006) | 2, 22, 41, 66 |
| 28 U.S.C. § 596 (2006) | 2, 21, 68 |
| 28 U.S.C. § 597 (2006) | 2, 41, 68 |
| 47 U.S.C. § 155 (2006) | 2, 27, 69 |
| 5 U.S.C. § 904 (2006) | 1, 29, 48 |
| 7 U.S.C. § 4a (2006) | 1, 27, 48 |
| Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 | 2 |

OTHER AUTHORITIES

| | |
|---|---------------|
| 148 Cong. Rec. S6327-06 (2002) | 13 |
| 15 U.S. Op. Off. Legal Counsel 8 (1991) | 23 |
| 20 U.S. Op. Off. Legal Counsel 124 (May 7, 1996) | 7, 14, 28 |
| 37 U.S. Op. Atty. Gen. 227 (1933) | 7, 27, 28, 29 |
| David M. Welborn, <i>Governance of Federal Regulatory Agencies</i> 141 (1977) | 40 |
| Deborah Solomon & Cassell Bryan-Low, <i>SEC Seeks Increase In Chairman's Power At Accounting Panel</i> , Wall St. J., April 25, 2003, at C1 | 15 |
| Exchange Act Release 49,884, 69 Fed. Reg. 35,083 (June 23, 2004) | 36 |
| Exchange Act Release No. 53,227, 71 Fed. Reg. 7082 (February 10, 2006) | 36 |
| Exchange Act Release No. 54,168, 71 FR 41,998 (July 24, 2006) | 38 |
| Exchange Act Release No. 56,152, 72 Fed. Reg. 42,141, (August 1, 2007) | 36 |
| FINRA, 2007 Annual Financial Report | 48 |
| PCAOB Release No. 104-2005-082 (Sept. 28, 2005) | 4 |
| S. Rep. No. 107-205 (2002) | 2, 12, 17 |
| S.E.C. Release AS-150 (Dec. 20, 1973) | 47 |
| S.E.C. Release No. 48506 (September 22, 2003) | 18 |
| S.E.C. Release No. 52990 (December 21, 2005) | 18 |
| S.E.C. Release No. 55912 (June 15, 2007) | 17 |
| SEC Approves PCAOB Appointment Procedures, SEC Press Release 2005-171 (Dec. 2, 2005) | 40 |

TREATISES

| | |
|--|----|
| 2 Story, <i>Commentaries on the Constitution of the United States</i> (5th ed. 1891) | 13 |
| Restatement (Third) of Foreign Relations § 311 (1987) | 23 |

REGULATIONS

| | |
|------------------------------|----|
| 17 CFR § 202.11(e)(1) (2006) | 15 |
|------------------------------|----|

CONSTITUTIONAL PROVISIONS

| | |
|---------------------------------|--------------|
| U.S. Const. art. I, § 8, cl. 18 | 2, 29, 47 |
| U.S. Const. art. II, § 2, cl. 2 | 2, 5, 13, 47 |
| U.S. Const. art. II, § 3 | 2, 8, 29, 47 |

LAW REVIEW ARTICLES

| | |
|---|---------------|
| Donna M. Nagy, <i>Playing Peekaboo with Constitutional Law</i> , 80 Notre Dame L. Rev 975 (2005) | 3, 45 |
| Harold J. Krent, <i>Executive Control Over Criminal Law Enforcement: Some Lessons from History</i> , 38 Am. U. L. Rev. 275 (1989) | 43 |
| Lawrence A. Cunningham, <i>The Sarbanes-Oxley Yawn</i> , 35 Conn. L. Rev. 915 (2003) | 3 |
| Lawrence Lessig & Cass R. Sunstein, <i>The President and the Administration</i> , 94 Colum. L. Rev. 1 (1994) | 9, 10, 34, 42 |
| Peter L. Strauss, <i>Formal and Functional Approaches to the Separation-of-Powers Questions</i> , 72 Cornell L.Rev. 488 (1987) | 9, 32, 46 |
| Peter L. Strauss, <i>The Place of Agencies in Government</i> , 84 Colum. L. Rev. 573 (1984) | 10, 34, 39 |

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 537 F.3d 667 (D.C. Cir. 2008). The opinion of the United States District Court for the District of Columbia is available at 2007 WL 891675 (D.D.C).

STATEMENT OF JURISDICTION

The district court (Robertson, J.) had subject matter jurisdiction under 28 U.S.C. § 1331 (2006). The district court granted Respondents' motions for summary judgment on March 21, 2007. Petitioner filed notice of appeal, and the Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 (2006). The Court of Appeals affirmed on August 22, 2008. Petitioners' motion for rehearing en banc was denied on Nov. 17, 2008. A timely petition for a writ of certiorari was filed, and certiorari was granted. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following is a list of the constitutional and statutory provisions involved in this case. For the text, in relevant part, of the constitutional and statutory provisions, please see the attached appendix.

U.S. Const. art. II, § 2, cl. 2
U.S. Const. art. II, § 3
U.S. Const. art. I, § 8, cl. 18
5 U.S.C. § 904 (2006)
7 U.S.C. § 4a (2006)
15 U.S.C. § 42 (2006)
15 U.S.C. § 78d (2006)
15 U.S.C. § 78o-4(c)(8) (2006)
15 U.S.C. § 78s (2006)
15 U.S.C. § 7202 (2006)
15 U.S.C. § 7211 (2006)
15 U.S.C. § 7214 (2006)
15 U.S.C. § 7215 (2006)
15 U.S.C. § 7217 (2006)

15 U.S.C. § 7217 (2006)
15 U.S.C. § 7219 (2006)
28 U.S.C. § 593(b) (2006)
28 U.S.C. § 594 (2006)
28 U.S.C. § 596 (2006)
28 U.S.C. § 597 (2006)
47 U.S.C. § 155 (2006)

STATEMENT OF THE CASE

FACTUAL BACKGROUND

In 2001 and 2002, the American public discovered massive accounting scandals at Enron and Worldcom that shocked the financial markets and led to urgent calls for government reform of the accounting industry. In response to this crisis in public confidence, Congress concluded, “[T]he current system of governance lacks sufficient public representation, suffers from divergent views among its members as to the profession's priorities, implements a disciplinary system that is slow and ineffective, lacks efficient communication among its various entities and with the SEC, and lacks unified leadership and oversight.” S. Rep. No. 107-205, at *5 (2002). Congress thus passed the Sarbanes-Oxley Act of 2002 ("the Act"). Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § § 7201-7219). The purpose of the Act was to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." *Id.*

Prior to 2002, the Securities and Exchange Commission (SEC) delegated standard-setting, inspections, and disciplinary proceedings in the industry to the American Institute of Certified Public Accountants (AICPA), a private professional association. From 1939-2002, the AICPA had responsibility for setting “authoritative auditing standards” through its Committee on Auditing Procedure and then later its Auditing Standards Board (ASB). Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn*, 35 Conn. L. Rev. 915, 919 (2003); Donna M. Nagy, *Playing Peekaboo with Constitutional Law*, 80 Notre Dame L. Rev 975, 989 (2005). At the

behest of the SEC in 1977, the AICPA also conducted peer-review inspections and investigations, and imposed sanctions on non-compliant firms.² *Id.* at 993-994. The SEC played a relatively passive role in this system of self-regulation; while it had similar oversight responsibilities with respect to AICPA's rulemaking powers, § 78s, it had no appointment or removal power over the Institute. AICPA's constitutionality was upheld upon challenge and widely accepted.

The central innovation of the Act was Title I's creation of the Public Company Accounting Oversight Board ("PCAOB" or "Board"), which was established to "oversee the audit of public companies that are subject to the securities laws." § 7211(a). Under the supervision of the SEC, the Board sets auditing and other standards "relating to the preparation of audit reports," conducts inspections and investigations of accounting firms that audit public companies, and enforces compliance with the Act and securities laws. § 7211(c).

PROCEDURAL BACKGROUND

The Free Enterprise Fund ("Fund") is a nonprofit organization that "promotes economic growth, lower taxes, and limited government." Beckstead and Watts, LLP ("B & W"), a member of the Fund, is an accounting firm based in Nevada. B & W is the subject of an ongoing Board investigation. *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 670 (D.C. Cir. 2008). After the Board conducted an inspection of B & W in 2005, it found numerous "matters that it considered to be audit deficiencies. The deficiencies identified in eight of the audits reviewed included deficiencies of such significance that it appeared to the inspection team that [B & W] did not obtain sufficient competent evidential matter to support its opinion on the issuers' financial

² The inspection and investigations were performed by two AICPA subcommittees: the SEC Practice Section and the Quality Control Inquiry Committee respectively. Nagy, *supra*, at 993.

statements.” PCAOB Release No. 104-2005-082, at 3 (Sept. 28, 2005), *available at* <http://www.pcaobus.org/Inspections/Public-Reports/2005/Beckstead-and-Watts.pdf>.

Free Enterprise Fund and B & W filed a complaint challenging Sarbanes-Oxley under the Appointments Clause and separation of powers principles. The District Court for the District of Columbia the Board’s motions for summary judgment. The District Court found, with respect to the Appointments Clause question, that Board members were inferior officers because PCAOB members because they “have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.” *Free Enter. Fund v. PCAOB*, 2007 WL 891675, at *4. The court held that Petitioners lacked standing to challenge the Act on other Appointments Clause grounds. *Id.* at *5. Regarding the separation of powers challenge, the court found that the “removal provisions [we]re sufficient to withstand plaintiffs' facial constitutional challenge.” *Id.*

Petitioners filed an appeal in the Court of Appeals for the District of Columbia Circuit, which upheld the constitutionality of the Act and affirmed the District Court's grant of summary judgment to the Board. The court found that the SEC’s “comprehensive control” of the Board rendered Board members inferior officers, and that the Act’s for-cause removal provisions “d[id] not strip the President of sufficient power to influence the Board and thus do not contravene separation of powers.” *Free Enter. Fund*, 537 F.3d at 669.

Following the denial of the petition for rehearing en banc, Petitioners filed a petition for writ of certiorari with this Court. Certiorari was granted by this Court.

SUMMARY OF ARGUMENT

Petitioner brings a facial challenge to the Act's provisions for appointing the PCAOB, alleging that no permissible interpretation of the Act exists that would comport with

constitutional requirements. This argument ignores the plain text of the Act as well as this Court's precedents on the Appointments Clause and separation of powers principles.

APPOINTMENTS CLAUSE

The SEC's appointment power over the PCAOB conforms to constitutional requirements because the Appointments Clause permits Congress to vest the appointment of inferior officers in a Department Head. U.S. Const. art. II § 2, cl. 2. Members of the PCAOB are inferior officers under the Appointments Clause because they are subject to the SEC's supervision. The SEC Commissioners, in turn, are the collective heads of a department, as they are the principal officers of a division directly beneath the President within the Executive Branch.

PCAOB members are inferior officers under any of the past tests this Court has used to determine an officer's status under the Appointments Clause. Given the practical purposes behind the Excepting Clause, this Court has employed a functionalist approach to the inferior officer analysis. In *Morrison v. Olson*, the Court identified four relevant factors that weighed in favor of finding the independent counsel to be an inferior officer: for-cause removal, limited duties, limited jurisdiction, and limited tenure. *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988). In *Edmond v. United States*, the Court announced an alternative test, concluding that "'inferior' officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. 651, 663 (1997). The Act's provision for appointing PCAOB members satisfies either test.

The Act's text demonstrates Congress's intent that the Board have specific, limited powers, and that the SEC exercise substantial supervision and influence over the range of the Board's powers. See 15 U.S.C. § 7217. The SEC appoints Board members, controls when the Board begins operating, and approves its annual budget. § § 7211, 7219. Proposed Board rules

cannot go into effect unless the SEC approves them. § 7217(b). The SEC may conduct interim review over Board inspections, § 7214, and it has de facto control over Board investigations. § 7215. It exercises de novo review over the Board's adjudications. § 7217(c). Finally, the SEC can censure the Board, rescind its authority, or remove members for cause. § 7217(d). Contrary to Petitioner's assertions, this Court's precedent does not require the SEC to have at-will removal power over the Board. Rather, the SEC's extensive control of the Board's composition, structure, and actions give it constructive removal power over the Board. The Act subjects the Board to more oversight than both the independent counsel in *Morrison* and the Coast Guard Court of Criminal Appeals in *Edmond*, and is therefore proper under the Appointments Clause.

The SEC is a department for purposes of the Appointments Clause because it is a division of the Executive Branch operating under the President. While not every component of the Executive Branch is a "department" for the purposes of the Appointments Clause, *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991), divisions need not be situated within the Cabinet in order to be "departments." Since the Constitution does not mention the term "Cabinet," and Congress has granted non-Cabinet officers appointment power since 1792, *Freytag*, 501 U.S. at 916-18 (Scalia, J., concurring in part and concurring in the judgment), to tie the Appointments Clause to the Cabinet's composition would be to change its meaning based on shifting nomenclature. *See* 37 U.S. Op. Atty. Gen. 227, 231 (1933). Furthermore, neither the constitutional text nor this Court's precedent support excluding independent agencies from "department" designation. *See Free Enter. Fund v. PCAOB*, 537 F.3d 667, 712 n.24 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); 20 U.S. Op. Off. Legal Counsel 124, at *17 (May 7, 1996).

Finally, SEC Commissioners are the collective head of a department, and are therefore authorized to jointly hold appointment and removal power over the Board. The statutory

authority of the Commissioners is not substantively different from that of the Chairman; rather, Congress granted power to the Commission as a whole. § 78d. Moreover, no branch of government has ever required the “head” of a department to be a single individual for purposes of the Appointments Clause. As Judge Kavanaugh acknowledged in the court below, “[B]oth text and longstanding Executive Branch interpretation confirm that the head of a department can consist of multiple persons.” *Free Enter. Fund*, 537 F.3d at 712 n.24.

SEPARATION OF POWERS

The Sarbanes-Oxley Act of 2002 does not “interfere impermissibly,” *Morrison v. Olson*, 487 U.S. 654, 693 (1988), with the President’s constitutional duty to “take care that the laws be faithfully executed,” U.S. Const. art. II, § 3. The SEC possesses comprehensive control of the PCAOB. The President, in turn, possesses substantial powers over the SEC that enable him to influence the Board. To the extent the PCAOB exercises discretion beyond the reach of the President, the discretion falls well within the range of permissible independence, as defined by precedent and practice.

In assessing separation of powers challenges, this Court has held that the “proper inquiry focuses on the extent to which [legislation] prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The Court’s application of this standard has been shaped by three principles. First, executive functions need not be exclusively or comprehensively controlled by the President. *Morrison*, 487 U.S. at 691-92. Second, the President can retain sufficient control of executive functions without possessing direct removal power over executive officers. The Court has rejected the use of “formalistic and unbending rules,” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986), in favor of “holistic” review. Peter L. Strauss, *Formal and*

Functional Approaches to the Separation-of-Powers Questions, 72 Cornell L.Rev. 488, 512 (1987). Direct removal power is merely one of many factors to consider. *Morrison*, 487 U.S. at 693. Third, this Court has shown great reluctance to invalidate restrictions on the President's removal power in the absence of congressional aggrandizement. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 115 (1994). Only those laws that have transferred the President's removal power to Congress have been invalidated. *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Myers v. United States*, 272 U.S. 52, 161 (1926).

A holistic review of the Sarbanes-Oxley Act shows that the President retains sufficient control of the PCAOB, through the SEC, to perform his constitutional duties. The SEC possesses an extraordinary range of powers over the PCAOB. It may invalidate the Board's rules and standards; reject its inspection findings, 15 U.S.C. § 7217(b)(3) (2002); coordinate, and determine the procedures for, its investigations, § 7215(b)(1); overturn its sanctions § 78s (d)(2); eliminate its enforcement authority, § 7217(d)(1); and limit its operations, § 7217(d)(1). The President can, in turn, direct the exercise of these powers in four ways. First, the President has broad authority to remove SEC Commissioners for "inefficiency, neglect of duty or malfeasance in office." SEC v. *Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988). Through this removal power, the President can direct the SEC's power to remove Board members. Second, the President appoints the SEC Commissioners, which allows him the opportunity to place the SEC's powers in the hands of individuals who share his policy preferences. *Id.* at 677. Third, the SEC is required by statute to consult with the Secretary of the Treasury, an alter ego of the President, before making appointments to the Board. § 7211(e)(4)(A)-(B). Finally, the President selects a Commissioner to serve as Chairman of the SEC and may remove him from his position at will. Peter L. Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 590-91

(1984). Through this appointment and removal power, the President has direct influence over the Chairman's substantial powers to set policy and guide enforcement.

To the extent that the PCAOB retains discretion over (1) rulemaking, (2) inspections, (3) investigations, and (4) sanctions, its degree of discretion falls well within the boundaries of permissible independence, as drawn by precedent and practice. (1) The Court has consistently held that rulemaking authority need not be exclusively vested in the President. *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989). The minimal rulemaking discretion vested in the PCAOB clearly falls within the permissible level of discretion envisioned in the Court's precedents, since the SEC must approve all proposed Board rules. (2) The Board's only true discretion with respect to inspections—its authority to schedule the days on which mandatory inspections occur within the one and three year inspection cycles—is not “central to the functioning of the Executive branch.” *Morrison*, 487 U.S. at 691-92. (3) Precedent and original practice approve of far greater attenuations of presidential authority over investigations and prosecutions than that posed by the PCAOB. *See* Lessig & Sunstein, *supra*, at 22. (4) The Court has held that adjudication is not an exclusively executive function. *Wiener v. United States*, 357 U.S. 349, 355 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

The extent to which Petitioner's challenge is inconsistent with precedent and practice is demonstrated by the widespread impact invalidation of the PCAOB would have on other regulatory agencies. The PCAOB's structure is not unprecedented; it is drawn from other regulatory agencies, such as the Municipal Securities Regulatory Board, the Financial Accounting Standards Board, and Financial Industry Regulatory Authority. Invalidation of the PCAOB would almost certainly render unconstitutional the system of securities regulation that has been widely accepted for over thirty-five years.

ARGUMENT

Title I of the Sarbanes-Oxley Act of 2002 (“the Act”) fulfills the requirements of the Appointments Clause and separation of powers principles because it grants the SEC sufficient power to direct and control the Board’s actions. Petitioners mount a facial challenge against the Act, and therefore the burden is on them to establish that the Act lends no permissible interpretation whatsoever under the Constitution. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The plain text of the Act and this Court’s precedent preclude such a result.

I. THE ACT IS VALID UNDER THE APPOINTMENTS CLAUSE BECAUSE IT PROPERLY VESTS THE SEC WITH POWER TO APPOINT AND SUPERVISE BOARD MEMBERS

The Act’s mandate that SEC commissioners appoint and remove PCAOB members conforms to the Appointments Clause provision that Congress may vest the appointment of inferior officers in a Department Head. Members of the PCAOB are inferior officers under the Appointments Clause because they are subject to the SEC’s supervision. The SEC Commissioners, in turn, are the collective heads of a department, as they are the principal officers of a division directly beneath the President within the Executive Branch.

A. BASED ON THE STATUTORY TEXT AND THIS COURT’S PRECEDENT, BOARD MEMBERS ARE INFERIOR OFFICERS BECAUSE THEY ARE SUBJECT TO THE SEC’S SUPERVISION

PCAOB Members are inferior officers under any of the past tests this Court has used to determine an officer’s status under the Appointments Clause. The Act’s text demonstrates Congress’s intent that the Board have specific, limited powers, and that the SEC exercise substantial supervision and influence over the range of the Board’s powers. *See* 15 U.S.C. § 7217 (2006). It has the power to both appoint and remove Board members, and possesses control over the PCAOB’s budget, jurisdiction, rulemaking, inspections, investigations, and adjudications. In addition, the Act contains an express provision specifying that it does not in any way limit the SEC’s power to regulate in this area. § 7202. These detailed and pervasive

provisions for SEC supervision led the D.C. Circuit to correctly conclude that the Board was subject to the Commission’s “comprehensive control.” *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 669 (D.C. Cir. 2008).

Beyond the statutory text, the Senate Banking Committee Report described the purpose of the Act as “provid[ing] for more effective oversight of the part of the nation’s accounting industry that audits public companies.” S. Rep. No. 107-205, at *4 (2002). To accomplish this goal, Senators highlighted the need to bring accounting oversight out of the private sector because it “lack[ed] sufficient public representation” and “lack[ed] unified leadership and oversight.” *Id.* at *5. The text and legislative history thus both describe the Act’s goals of creating a powerful Board, subject to the SEC’s authority, which would provide effective government oversight of the accounting industry.³

i. Board members are inferior officers under either the *Edmond* or *Morrison* test

While the Appointments Clause requires the President to nominate principal officers with the advice and consent of the Senate, it allows Congress to “vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” U.S. Const. art. II § 2, cl. 2. The primary purpose of this Excepting Clause is administrative convenience. *Edmond v. United States*, 520 U.S. 651, 660 (1997); *United States v. Germaine*, 99 U.S. 508, 510 (1879). In addition, the Clause was aimed at giving Congress the discretion and flexibility to vest the appointment power in the best entity for the particular time

³ Petitioner mistakenly contends that Senators’ floor statements reveal their intent to shelter the Board from government oversight. *See, e.g.*, 148 Cong. Rec. S6327-06, at S6331 (2002) (statement of Sen. Sarbanes) (commenting on the need to create a “truly independent oversight body”). However, Petitioner’s interpretation ignores the context of the Senators’ statements, which referred to the need to move accounting oversight away from the self-regulatory model the industry had been pursuing. Thus, “independence” referred to independence from the accounting industry. *See* 148 Cong. Rec. S6327-06, at S6339 (2002) (statement of Sen. Enzi) (“I agree that the board members should be full-time and independent from the accounting firms. I agree that they should be appointed by government and not by industry.”). The legislative history thus evinces Congress’s intent to allow for *more*, not less, Executive Branch control over the accounting industry.

and position. *Hobson v. Hansen*, 265 F. Supp. 902, 911-12 (D.D.C. 1967) (quoting 2 Story, Commentaries on the Constitution of the United States 360-62 (5th ed. 1891)). Thus, the Excepting Clause is not a rigid constraint on the appointment power, but rather a flexible allocation of congressional authority.

Given the practical purposes behind the Excepting Clause, this Court has employed a functionalist approach to the inferior officer analysis, acknowledging that “[t]he line between ‘inferior’ and ‘principal’ officers is ... far from clear, and the Framers provided little guidance into where it should be drawn.” *Morrison v. Olson*, 487 U.S. 654, 671 (1988). The Court identified four relevant factors that weighed in favor of inferior officer status: for-cause removal, limited duties, limited jurisdiction, and limited tenure. *Id.* at 671-72 (1988). Rather than lay out an “exhaustive or exclusive list,” this analysis is based on the peculiarities of each individual position. 20 U.S. Op. Off. Legal Counsel 124, at *16 (1996) (citing *Silver v. United States*, 951 F.2d 1033 (9th Cir. 1991)).

More recently, in *Edmond v. United States*, the Court announced a simpler, single-prong test for inferior officers, focusing on an officer’s degree of supervision. 520 U.S. 651, 662 (1997) (“Whether one is an ‘inferior’ officer depends on whether he has a superior.”). More specifically, “‘inferior’ officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond*, 520 U.S. at 663.

The relationship between the *Edmond* and *Morrison* tests remains uncertain, as this Court did not specify how they should interact.⁴ Indeed, the *Edmond* Court continued to use some of

⁴ For example, while *Morrison* lent weight to the fact that the independent counsel’s tenure and jurisdiction were both limited, *Edmond* dispensed with the notion that these factors are necessary for a position to be inferior. *Edmond*, 520 U.S. at 661. Indeed, as the Court acknowledged, the Coast Guard Court of Criminal Appeals possessed neither of those characteristics. *Id.*

the *Morrison* factors in its analysis under the new framework. *See id.* at 664-65 (discussing the removal power and limited duties).⁵ Due to the similarities and non-exclusivity of the two tests for inferior officer status, the following sections demonstrate that Board members fulfill the definition of inferior officers under both the *Edmond* and the *Morrison* tests.

1. The SEC appoints Board members, controls when the Board begins operating, and approves its annual budget

The SEC creates the Board, controls when and if it begins operating, and sets the parameters of its authority through its budget. First, the SEC is responsible for appointing all Board members for fixed terms of service (five years). 15 U.S.C. § 7211(e) (2006).⁶ In addition, it must declare when the Board is sufficiently organized to begin its official operations. § 7211(d). The SEC thus has power to force the Board to complete certain tasks before it can begin operating. Finally, the SEC possesses authority over the Board's budget, § 7219(b), including its proposed "annual accounting support fees," § 7219(d). Once it has approved the budget, the Board may not amend it during the year. 17 CFR § 202.11(e)(1) (2006).

These powers allow the Commission to exert initial control over the initial composition, structure, and actions of the Board, both in substance and in scope. For example, in 2003, the SEC requested and obtained changes to the Board's proposed bylaws before announcing that the Board was operational. *See* Deborah Solomon & Cassell Bryan-Low, *SEC Seeks Increase In Chairman's Power At Accounting Panel*, Wall St. J., April 25, 2003, at C1 ("The SEC ... has told the board it won't give its blessing until the body's bylaws are amended..."). The Board's foundation is thus rooted from the beginning in the power and supervision of the SEC.

⁵ In response, some lower courts have combined the *Edmond* and *Morrison* tests, reasoning that both are applicable and that neither is exclusive of the other. *See Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999); *United States v. Libby*, 429 F. Supp. 2d 27, 37 (D.D.C. 2006) ("Neither *Edmond* nor *Morrison* established a bright-line test under which Appointments Clause challenges are resolved. ... Neither case states explicitly, nor even suggests, that the factors relied upon are exclusive.").

⁶ The Act requires the Commission to consult with the Treasury Secretary, lending additional layers of executive influence to the appointment process. § 7211(e)(4)(A).

2. The SEC controls whether and in what form Board rules go into effect

The Board must submit all its proposed rules to the Commission, and “[n]o rule of the Board shall become effective without prior approval of the Commission.” § 7217(b)(2).⁷ The Board’s inability to enact rules without the Commission’s approval means the Board has “no power to render a final decision on behalf of the United States” without the SEC’s consent. *Edmond v. United States*, 520 U.S. 651, 665 (1997). The SEC has significant substantive involvement in reviewing proposed PCAOB rules, and has wide discretion in deciding whether to approve or reject them. § 7217(b)(3) (“The Commission shall approve a 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.”).

Petitioner adopts a narrow, rigid construction of the Act’s requirements for SEC review of proposed rules. In Petitioner’s view, the SEC must approve all PCAOB rules as long as they do not directly conflict with the Act; it thus seeks to portray the Commission’s review over proposed PCAOB rules as highly limited.

However, the plain meaning of the statute’s text allows for a more flexible reading of the SEC’s authority. First, the phrase “consistent with the requirements” of the law, § 7217(b)(3), does not require the SEC to grant deference to the Board’s interpretation of the Act or the securities laws. Therefore, if the Board and the SEC differ reasonably in their opinions about certain statutory requirements, the SEC’s interpretation would allow it to reject the proposed rule. Second, the “requirements of the Act” include the Act’s broader purposes, including “enhanc[ing] the standard setting process for accounting practices [and] ... increas[ing]

⁷ The Act permits only a limited exception to this standard for the Board’s “initial and transitional standards.” § 7213(a)(3).

corporate responsibility....” S. Rep. No. 107-205, at *1 (2002). The SEC thus has considerable discretion to determine whether to approve proposed rules.⁸

In addition, the SEC’s broad power to amend proposed rules belies a reading of the statute that would constrain its discretion over the Board. The SEC can “abrogate, add to, [or] delete from” the Board’s proposed rules whenever it determines that such an amendment is “necessary or appropriate.” § 7217(b)(5) (citing § 78s(c)). Specifically, the SEC may amend rules “to assure the fair administration of the [Board],” ... or [to] otherwise further the purposes of th[e] Act.” *Id.* This provision grants the SEC broad, near-plenary discretion to modify the Board’s rules, and therefore allows it to engage in hands-on supervision over the rulemaking process. In other words, even if the SEC had little power to directly reject Board rules, it would still be able to modify any such rules as it saw fit.

The practical realities of the SEC’s approval process indicate that it sees its rulemaking oversight role as far more substantive and discretionary than Petitioner would acknowledge. For example, in 2007, the SEC sought extensive comment on the PCAOB’s proposed Auditing Standard Number 5 (“AS5”). S.E.C. Release No. 55912 (June 15, 2007). The Commission requested comment on seven substantive aspects of the proposed rule, including whether “the communication requirement regarding significant deficiencies [would] divert auditors’ attention away from material weaknesses”; and whether “AS5 [would] reduce expected audit costs under Section 404 ... to result in cost-effective, integrated audits.” *Id.* These questions delve into the substantive merits of the proposed rule, rather than a narrow concern about its bare acceptability

⁸ Congress could have used far more restrictive language had it wanted to constrain the Commission’s authority. For example, it could have required the SEC to grant deference to the Board’s interpretation of the statute, and mandated that it approve all rules unless they are “plainly contradictory” to the Act or other securities laws. Instead, Congress adopted more flexible language to give the SEC leeway in determining whether to accept proposed rules.

under the letter of the Act. They demonstrate that the SEC sees its role as far more substantive than as a simple rubber-stamp for the Board.⁹

3. The SEC may conduct interim review over Board inspections

The SEC oversees the Board's inspection regime in three ways. First, in order to amend the inspections schedule laid out by the Act, the Board must promulgate a rule that, accordingly, is subject to SEC approval. § 7214(b)(2). Second, once it completes an inspection, the Board must submit a report to the SEC to update it on the Board's actions. § 7214(g). If an accounting firm disagrees with the Board's conclusions in its inspection report, the firm may seek interim SEC review of the inspection. § 7214(h). This process thus gives the SEC power to supervise and influence the Board's inspection work without having to wait to review the Board's sanctions.

4. The SEC has de facto control over Board investigations

While the SEC possesses no direct power to interfere with or halt a Board investigation, Congress nonetheless granted it three ways to oversee the process. First, the Board must develop its own investigation and disciplinary procedures, which, like all Board rules, are subject to SEC approval. § 7215(a). The SEC's power extends to the Board's rules regarding the process for requiring testimony or the "production of audit work papers," or any potential use of the SEC's subpoena power. *Id.* Thus, from the outset, the SEC exercises control and supervision over the Board's investigation and disciplinary process. Further, the Board must "notify the Commission of any pending Board investigation," and is required to coordinate such investigations with the

⁹ The degree of specificity in the SEC's requests for comment varies depending on the proposed rule. *Compare* S.E.C. Release No. 52990 (December 21, 2005) (asking specific questions about the proposed rules' potential effects on management), *with* S.E.C. Release No. 48506 (September 22, 2003) (providing the general request, "Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent with the requirements of Title I of the Act"). In each context, however, the Commission's questions reveal its concern over the quality and effectiveness of the proposed rule, beyond Petitioner's reading of the Commission's review authority.

SEC “as necessary to protect an ongoing Commission investigation.” § 7215(b)(4). Finally, if the Board imposes penalties for “noncooperation with investigations,” they are subject to plenary review by the SEC. § 7215(b)(3). The SEC thereby remains abreast of any developments in Board investigations, and may influence or discipline the Board accordingly. This, coupled with the threat of overturning any future sanctions based on a misguided investigation, allows the SEC to exercise *de facto* control over Board investigations.

5. The SEC exercises *de novo* review over the Board’s adjudications

The SEC exercises *de novo* review over any sanctions the Board imposes. The parties need not appeal the decision to the SEC; rather, the SEC may review any decision on its own initiative. The SEC can “enhance, modify, cancel, reduce, or require the remission of a sanction” merely upon the finding that such a sanction “is not necessary or appropriate in furtherance of” the Act or securities laws. § 7217(c)(3)(A). Under this section, the SEC can cancel a sanction based on a good-faith disagreement with the Board over a certain interpretation of the law.

The Board must notify the SEC immediately of any sanction imposed so that it can initiate review of the sanction if it so chooses. § 7215(d). Whenever the SEC undertakes review, it imposes a stay on the Board’s sanction, so that only its resolution of the matter will impose the sanction on the disciplined party. § 7215(e)(1). The Commission thus possesses power not only to comprehensively review the Board’s disciplinary decisions, but also to prevent them from ever going into effect while it determines whether to uphold them.

6. The SEC can censure the Board, rescind its authority, or remove members for cause.

The SEC possesses final authority over Board members’ positions; it may alter or remove the Board’s authority and jurisdiction “consistent with the public interest, the protection of investors, and the other purposes of [the] Act and the securities laws.” § 7217(d)(1). As the text

demonstrates, the SEC may remove any component of the Board’s enforcement authority without a prior determination that the Board has violated the law or engaged in other censure-worthy actions. Rather, the Act gives the SEC discretion to “relieve the Board of any responsibility to enforce compliance” with the law if it determines that such a change is in the public interest and consistent with the Act’s purposes. *Id.* Like the Special Division in *Morrison*, 487 U.S. 654, 661 (1988), the SEC thus has the power to define the Board’s jurisdiction by limiting its authority or removing any or all of its responsibilities.

In addition, if the Board violates the law or fails to “enforce compliance” with the law “without reasonable justification or excuse,” the SEC is empowered to hold hearings and “censure or impose limitations upon [the Board’s] activities, functions, and operations.” § 7217(d)(2). The Commission can thus discipline the Board for inappropriate behavior and remove some or all of its power without taking the full step of removing members entirely.

Finally, the SEC possesses removal power over members of the Board when they have a) “willfully violated” the law; b) “willfully abused [their] authority”; or c) “without reasonable justification or excuse, [] failed to enforce compliance with” the Act. § 7217(d)(3). The third for-cause provision is a catchall grant of discretion to the SEC to remove Board members for negligence or failure to perform their duties effectively. This removal provision is almost identical to the SEC’s power over the Municipal Securities Rulemaking Board (MSRB), which has been in place since for over thirty years.¹⁰ 15 U.S.C. § 78o-4(c)(8) (2006). Taken together, the rescission, censure, and removal sections of the Act give the SEC maximum discretion in its supervisory role by allowing many different degrees of disciplinary authority.

¹⁰ Though the language is not precisely the same, it also substantively mirrors other for-cause provisions this Court has validated. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 663 (1988) (stating that the Attorney General may only remove independent counsels “for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties”) (quoting 28 U.S.C. § 596 (2006)).

7. These powers amount to substantial SEC supervision over the Board and render Board members inferior officers

The powers described above are more than sufficient to render the Board inferior officers under the Appointments Clause. The SEC's ability to review the Board's proposed rules, budget, and sanctions allow it to "supervise[] at some level" the Board's actions. *Edmond v. United States*, 520 U.S. 651, 663 (1997). In addition, the Act satisfies each of the four *Morrison* factors, as the SEC appoints Board members for limited terms, restricts their jurisdiction to auditing standards for public companies, has power to limit the Board's duties, and may remove members for cause. *Morrison v. Olson*, 487 U.S. 654, 671 (1988). Indeed, the Act grants the SEC more extensive control over the Board than either the independent counsel in *Morrison* or the Coast Guard Court of Criminal Appeals in *Edmond*.

In *Morrison*, the independent counsel possessed "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employer of the Department of Justice." *Morrison*, 487 U.S. at 662 (quoting 28 U.S.C. § 594(a)). This authority even extended to suspending all other pending Justice Department proceedings. *Id.* at 662-63. By contrast, the SEC sets the rules by which the Board conducts its inspections and investigations, exercises interim review over inspections, and requires the Board to coordinate its investigations.¹¹

Similarly, in *Edmond*, the Coast Guard Court of Criminal Appeals's supervision was far more attenuated than that of the Board. First, the oversight power was split between three supervisory bodies, rather than concentrated in one superior entity such as the SEC. Thus, the

¹¹ Petitioners' contention that Board members are principal officers because they do not submit to direct investigatory oversight misreads the Court's established standard. The SEC need not manage every detail of the Board's actions in order to constitute a supervisor. *Edmond*, 520 U.S. at 661. The DC Circuit correctly stated that *Edmond* looks at the comprehensive picture of a position in order to determine an officer's status. *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 674 (D.C. Cir. 2008). The Court does not, as Petitioner contends, require the higher officer to supervise the inferior's work at every single level, or in the extreme manner Petitioner desires.

Secretary of Transportation appointed the court, the Judge Advocate General exercised oversight during the rulemaking process, and the Court of Appeals for the Armed Forces had power only to review decisions of the court. *Edmond*, 520 U.S. at 664. Secondly, the Court of Appeals' review power was far more constrained than the SEC's power over the Board, as it was obligated to grant deference to Court of Criminal Appeals decisions, and was not empowered to initiate its own review. *Id.* at 665. Nevertheless, the *Edmond* Court still found that this level of review vested final decision-making authority in the Court of Appeals. Under this standard, the SEC's plenary review over Board adjudications, notwithstanding its other powers, is more than enough to qualify the SEC, not the Board, as the final decision-maker.

Petitioners seek to portray any grant of discretion to the Board as an indication that its members must be principal officers. For example, Petitioners compare the SEC's review authority to mere appellate review over a lower court ruling. However, in addition to overlooking the SEC's self-initiated *de novo* review power, the federal court comparison ignores the myriad additional ways in which the SEC influences the Board beyond its review of disciplinary sanctions. Furthermore, this Court held that review of final decisions, as an appellate court would exercise over a lower court, is precisely the type of supervision that is relevant under the Appointments Clause. *Edmond*, 520 U.S. at 665; *see also* 15 U.S. Op. Off. Legal Counsel 8, 14 (1991) (concluding that secretarial review rendered Education Administrative Law Judges inferior officers under *Morrison* despite their significant discretion to "formulate policy" on behalf of the government with broad jurisdiction and unlimited tenure).¹²

¹² Petitioners' attempt to compare Board members to ambassadors and consuls – whom the Appointments Clause officially designates as principal officers – is similarly unpersuasive. First, ambassadors exercise far more discretion than does the Board, with no intermediary between the ambassador and the President. For example, ambassadors have the power to bind their government to agreements they make with other parties. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *see* Restatement (Third) of Foreign Relations § 311 (1987). By contrast, the Board has only limited jurisdiction over auditing standards, and its actions are subject to SEC review and oversight. Second, developments in modern technology make it reasonable to assume that ambassadors were much more independent in

Thus, the Board need not receive SEC approval at every single step.¹³

ii. Board members need not be subject to at-will removal in order to be considered inferior officers

Petitioners assert that the removal power is the lynchpin of the Appointments Clause analysis, and that Board members cannot be inferior officers unless they are removable at-will. However, this novel theory finds no support in this Court’s precedent. Indeed, this Court has never drawn the strict distinction between for-cause and at-will removal that Petitioner attempts to draw, and it has never cast doubt on Congress’s ability to restrict removal power with respect to inferior officers when it vests that power in the courts or heads of departments. *See Myers v. United States*, 272 U.S. 52, 159-60 (1926); *United States v. Perkins*, 116 U.S. 483, 485 (1886). Furthermore, the Act provides the SEC with numerous other avenues for exercising control over the Board, including vacating Board rules and sanctions, and stripping the Board of some or all of its power. These methods of supervision amount to constructive removal power even when the SEC does not make use of the statute’s explicit removal provision.

While “[t]he power to remove officers ... is a powerful tool,” it is not the only tool; indeed, the *Edmond* Court does not even suggest that it is the most important tool. *Edmond*, 520 U.S. at 664; *see also Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers*, 272 U.S. at 119. According to Petitioner’s argument, *Morrison’s* four factors and *Edmond’s* supervision test would be wholly unnecessary, as the only relevant question would be the officer’s removal

the eighteenth century than they are today. The Board thus occupies a wholly different, and much lower, level of power and discretion within the Executive Branch.

¹³ Similarly, the fact that Board members have significant powers does not mandate a finding that they are principal, rather than inferior officers. The level of responsibility one exercises does not demarcate the boundary between principal and inferior officer for Appointments Clause purposes, but rather ... the line between officer and nonofficer.” *Edmond*, 520 U.S. at 662. All officers therefore exercise “significant authority” on behalf of the United States government. *Id.*; *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *see also United States v. Hartwell*, 73 U.S. 385, 393 (1867) (describing the term “officer” as “embrac[ing] the ideas of tenure, duration, emolument and duties”). Petitioners’ references to the considerable power vested in the Board thus do not demonstrate that Board members are principal officers; they merely support the uncontroversial proposition that they are officers rather than employees.

provision. This Court's careful analysis refutes that position, as the Court has never single-handedly focused on the removal power; rather, it examines all components of an officer's position to determine his or her status.

In addition, when the Court has discussed the removal power's significance, it does not always distinguish between at-will and for-cause removal. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 671 (1988); *United States v. Libby*, 429 F. Supp. 2d 27, 37 & n.5 (D.D.C. 2006) (“[T]he *Morrison* Court characterized the [for-cause] removal authority as reflective of Morrison's inferior rank and authority despite her independence.”). Thus, even if this Court were to accept Petitioner's theory that removal is all encompassing, it does not follow that *at-will* removal is necessary. Indeed, as this Court has found, for-cause removal does not guarantee independence from one's supervisors; in fact, it is perfectly plausible that the supervisor will construe the removal power broadly enough to exercise substantive control over the subordinate's actions. *See Bowsher v. Synar*, 478 U.S. 714, 728-32 (1986) (for-cause removal terms “are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will”).

Furthermore, the SEC's significant authority to modify, limit, or vacate the Board's decisions and jurisdiction amount to constructive removal power over the Board. In other words, the SEC need not take the step of firing Board members in order to exercise the functional equivalent of removal. The SEC can invalidate the Board's rules and standards; reject its inspection findings; coordinate, and determine the procedures for, its investigations; overturn its sanctions; and eliminate its enforcement authority. Taken together, these constructive removal powers grant the SEC wide discretion to tailor its course of action appropriately to the circumstance at hand. As the *Edmond* Court noted, the crux of the inferior officer analysis is

whether the officer can make a “final decision” on behalf of the Executive Branch. *Edmond*, 520 U.S. at 665. Here, the SEC’s pervasive review over the Board’s actions grants the SEC, not the Board, that authority.

To the extent that any doubt remains over the SEC’s supervisory authority, the statutory canon of constitutional avoidance counsels the Court to broadly construe the SEC’s powers if necessary to avoid constitutional concerns about the Act. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986). In this case, if the Court has any doubts about the level of SEC discretion with respect to its powers over the Board, the text allows ample room to construe the statute in a way that avoids such concerns.

B. SEC COMMISSIONERS ARE THE HEADS OF DEPARTMENTS UNDER THE APPOINTMENTS CLAUSE

As Commissioners of an independent agency, who are appointed by the President with the advice and consent of the Senate, SEC Commissioners are the “heads of departments” for the purposes of the Appointments Clause. The SEC is a “department” because it is a division of the Executive Branch with Cabinet-like powers. Commissioners are the collective “head” of this department because they exercise joint control over the SEC and have collective power to supervise and oversee the Board. Thus, Congress’s decision to vest appointment power for the Board in the SEC is proper under the Appointments Clause.

i. The SEC is a department because it is cabinet-like

The primary purpose of the Appointments Clause is to promote accountability among those who exercise the appointment power. *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). To accomplish this objective, the Framers sought to avoid “excessively diffus[ing]” that power. *Id.* at 884. The Act fulfills this requirement by vesting the appointment power in the SEC, whose

commissioners are accountable to the President via the President's appointment and removal power. As the *Freytag* Court noted, the Appointments Clause requires "confining the term 'Heads of Departments' ... to executive divisions *like* the Cabinet-level departments." *Id.* (emphasis added); *see also United States v. Germaine*, 99 U.S. 508, 511 (1878); *United States v. Mouat*, 124 U.S. 303, 303-07 (1888) (describing *Germaine* as defining departments to mean "what are now called the members of the Cabinet").

While not every component of the Executive Branch qualifies, *Freytag*, 501 U.S. at 885, divisions need not be situated within the Cabinet in order to be "departments" under the Clause. Indeed, to tie the Appointments Clause to the Cabinet's composition would be to change its meaning based on shifting nomenclature, as the Constitution does not even mention the term "Cabinet" and the President retains discretion to determine what positions constitute his or her Cabinet at any given time. *See Freytag*, 501 U.S. at 916-17 (Scalia, J., concurring); 37 U.S. Op. Att'y Gen. 227, 231 (1933). Moreover, since the Second Congress, non-Cabinet members have been vested with the power to appoint inferior officers, *Freytag*, 501 U.S. at 917-18 (describing the creation of the Postmaster General's appointment powers in 1792), including the FCC, 47 U.S.C. § 155, the SEC, 15 U.S.C. § 78d(b), the FTC, 15 U.S.C. § 42, and the CFTC, 7 U.S.C. § 4a(c); *see also Freytag*, 501 U.S. at 918.

Given this longstanding practice and the textual silence on the meaning of "department," the best reading of the Appointments Clause interprets "heads of departments" to "include[] the heads of agencies immediately below the President in the organizational structure of the Executive Branch." *Freytag*, 501 U.S. at 918; *see also* 37 U.S. Op. Att'y Gen. 227, 231 (1933) (defining "departments" under the Appointments Clause to mean any "independent division of the Executive Branch of the Government with certain independent duties and functions."). To

read the clause otherwise would nonsensically require inferior officers of non-Cabinet departments to be appointed by either the President or a Cabinet officer wholly unconnected to the inferior officer's work, but would not permit the officer's actual supervisor – the head of the non-Cabinet department – to appoint her. *Freytag*, 501 U.S. at 918. Since the SEC sits directly beneath the President in the hierarchy of the administration, and reports to no other executive division in the performance of its duties, it is a department within the longstanding interpretation of the Attorney General. 37 U.S. Op. Att'y Gen. at 231.

This Court has never considered the status of independent agencies under the Appointments Clause, and *Freytag* explicitly left open the question whether the Clause permitted “the head of one of the principal agencies, such as ... the Securities and Exchange Commission” to appoint inferior officers. *Freytag*, 501 U.S. at 887 & n.4. However, this Court has never distinguished between independent agencies and other non-Cabinet agencies in such a way that would preclude vesting independent agencies with appointment power over inferior officers. Indeed, the *Freytag* Court listed independent and executive agencies together in reserving the question, suggesting that the Court did not draw a distinction on that basis for appointment powers. *Id.* Subsequently, the Office of Legal Counsel concluded that independent agencies were properly departments for purposes of the Appointments Clause. 20 U.S. Op. Off. Legal Counsel 124, at *17 (1996). In addition, Judge Kavanaugh, dissenting in the court below, agreed that there was no constitutional bar to vesting the appointment power in independent agencies. *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 712 n.24 (D.C. Cir. 2008). Therefore, Congress may properly grant the SEC power to appoint its inferior officers.

ii. Commissioners are the collective head of the department

Congress properly vested the appointment power in the SEC as a whole because the Commissioners are the collective head of the department. The Commissioners' formal authority is not substantively different from that of the Chair; rather, Congress granted power to the SEC as a whole. 15 U.S.C. § 78d. Indeed, this is especially true with respect to the Board. The SEC, rather than the Chair, appoints members of the Board. § 7211(e)(4)(A). Likewise, the entire Commission exercises power over the Board, determining when and how to exercise the oversight provisions granted by the Act. Thus, it is unnecessary to designate one individual Commissioner to exercise the appointment power.

No branch of government has ever required the "head" of a department to be a single individual for purposes of the Appointments Clause. *See Silver v. United States*, 951 F.2d 1033, 1037-38 (9th Cir. 1991) (finding that the Postal Service governors were the collective head of the agency); 37 U.S. Op. Att'y Gen. 227, 228 (1933) (Commissioners are collective head of Civil Service Commission); 5 U.S.C. § 904 (allowing the head of an agency to be an individual or a multi-member body).¹⁴ Judge Kavanaugh, dissenting in the court below, acknowledged as much when he noted, "[B]oth text and longstanding Executive Branch interpretation confirm that the head of a department can consist of multiple persons." *Free Enter. Fund*, 537 F.3d at 712 n.24. The SEC is thus able to appoint Board members collectively.

II. THE ACT IS VALID UNDER SEPARATION OF POWERS PRINCIPLES BECAUSE THE PRESIDENT RETAINS SUFFICIENT CONTROL OF THE PCAOB TO PERFORM HIS CONSTITUTIONAL FUNCTIONS

The Sarbanes-Oxley Act of 2002 does not "interfere impermissibly," *Morrison v. Olson*, 487 U.S. 654, 693 (1988), with the President's constitutional duty to "take care that the laws be

¹⁴ While Petitioner points to reasons why it may sometimes be prudent to vest that power in a single person, the Fund can identify no such requirement in either the text of the Clause or this Court's jurisprudence. Whatever the merits of Congress's decision as a matter of policy, then, the SEC may properly exercise the appointment power collectively.

faithfully executed.” U.S. Const. art. II § 3. The SEC possesses comprehensive control of the PCAOB. The President, in turn, possesses substantial powers over the SEC that enable him to influence the Board. To the extent the PCAOB exercises discretion beyond the reach of the President, the discretion falls well within the range of permissible independence, as defined by precedent and practice.

A. UNDER THIS COURT’S PRECEDENTS, LEGISLATION SATISFIES THE SEPARATION OF POWERS IF THE PRESIDENT RETAINS SUFFICIENT AUTHORITY TO PERFORM HIS CONSTITUTIONAL DUTIES.

Article I of the Constitution grants Congress the authority to make “all laws which shall be necessary and proper for carrying into execution [its] powers.” U.S. Const. art. I § 8, cl. 18. In assessing whether congressional legislation is consistent with separation of powers principles, the Court has held that the “proper inquiry focuses on the extent to which [legislation] prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *see also United States v. Mistretta*, 488 U.S. 361, 383 (1989); *United States v. Morrison*, 487 U.S. 654, 695 (1988); *INS v. Chadha*, 462 U.S. 919, 962 (1986) (Powell J., concurring). The Court’s application of this standard has been shaped by three principles: (1) the President need only maintain sufficient, rather than exclusive, control of executive functions; (2) there are multiple ways in which the President can exercise sufficient control; and (3) attenuation of executive power is less concerning in the absence of congressional aggrandizement.

i. Executive functions need not be exclusively vested in the President

This Court has held that the President may possess sufficient power to perform his constitutional duties even if he does not have comprehensive control of executive functions. In *Morrison*, the Court considered whether the appointment by a special court of an independent prosecutor, removable by the President for good cause, violated the separation of powers. 487

U.S. 654. The Court found that the independent counsel performed executive functions with some degree of independence from the President, *id.* at 691, but it nevertheless upheld the arrangement:

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of the discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will.

Id. at 691-92. Under the Court's holding, the President need only control the exercise of discretion if it is "central to the functioning of the Executive Branch."

The *Morrison* holding is consistent with the Court's other separation of powers precedents. The Court has upheld "statutory provisions that to some degree commingle the functions of the Branches," *Mistretta*, 488 U.S. at 382, and rejected the notion that the Constitution requires "a hermetic sealing of the branches of Government from one another." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). In *Mistretta*, for example, the Court upheld a statute creating the United States Sentencing Commission, even though the Commission vested rulemaking partially outside the executive branch. 488 U.S. at 386-387. In addition, the *Nixon* Court looked at "the extent" to which the legislation prevented the President from performing his constitutional duties, suggesting that at least some attenuation of presidential power is constitutional. 433 U.S. at 443. Similarly, when the *Morrison* Court asked whether the Independent Counsel "*interfere[d] impermissibly* with [the president's] constitutional obligation to ensure the faithful execution of the laws," it indicated that some level of "interference" is permissible. *Morrison*, 487 U.S. at 693 (emphasis added). The question in separation of powers cases is thus not whether the President has comprehensive or exclusive control over all executive functions, but whether he has sufficient control to perform his constitutional duties.

ii. The President can retain sufficient power over executive functions without possessing direct removal power

In determining whether a branch of government retains sufficient power to perform its constitutional functions, the Court's analysis has been case-specific. The Court has rejected the use of "formalistic and unbending rules," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), in favor of a "holistic" review of a statute's "functional" effect on the separation of powers. Peter L. Strauss, *Formal and Functional Approaches to the Separation-of-Powers Questions*, 72 Cornell L.Rev. 488, 512 (1987). The review considers "a number of factors," *Schor*, 478 U.S. at 851, and looks "not to mere matters of form but to ... substance," *Crowell v. Benson*, 285 U.S. 22, 53 (1932). In adopting this flexible approach, the Court has stressed that bright-line rules would "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Schor*, 478 U.S. at 851.

Contrary to petitioner's argument, the *Morrison* Court did not create a requirement that the President retain direct removal power over all inferior officers. In upholding the constitutionality of the Ethics in Government Act, the Court treated the President's removal power as one factor among many that may be considered when determining whether the Act "unduly trammel[s] on executive authority." *Morrison*, 487 U.S. at 691. If the Court intended to state or imply a removal-centric test, it would not have stressed its opposition to "rigid categories" or bright-line rules that are "incapable of being altered by law in the slightest degree, and applicable to ... holders of offices neither known nor foreseen by the Framers." *Id.* at 690 n.29. Nor would it have repeatedly endorsed the broad multi-factor "constitutional function" standard for adjudicating the case.

Petitioner is mistaken to rely on the *Morrison* Court's statement that the Ethics in Government Act would have been unconstitutional if the President had been "completely

stripped” of his removal power. *Morrison*, 487 U.S. at 692. In the context of the Act, removal power was necessary because the President had few other powers over the independent counsel. The Court did not hold, however, that removal power would always be necessary; in fact, its emphasis on considering the entire statute suggests the opposite. *Id.* at 693. The constitutionality of the PCAOB turns on whether the *range* of powers the President possesses over the Board enable him to “perform his constitutional duty.”

iii. This Court has shown great reluctance to strike down limitations on the President’s removal power in the absence of congressional aggrandizement

The holding in *Morrison* places a heavy burden on Petitioners. They must not only show that the limitations on the President’s removal powers over PCAOB Board Members diminish presidential authority, but that the discretion vested in the Board Members is “central to the functioning of the Executive Branch.” This Court’s removal power precedents show that these are difficult challenges to meet. Since *United States v. Perkins* in 1886, this Court has consistently upheld limitations on the president’s removal power over executive officers. 116 U.S. 483 (1886); *see also Morrison*, 487 U.S. 654; *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

The only two cases in which the Court found that limitations on the president’s removal power violated the separation of powers did so because the limitation vested removal power in Congress.¹⁵ In *Myers v. United States*, the Court struck down a statute that required the President to obtain the consent of the Senate before removing a postmaster from office because “the Court never has held, nor reasonably could hold...[that] Congress [may] draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power.”

¹⁵ In three cases, the courts have allowed the President to remove officers at will despite ambiguous statutory language that restricted removal. In each case, however, the holdings were for reasons of statutory interpretation, finding that in fact the statutes did not limit the President’s removal power. *Shurtleff v. United States*, 189 U.S. 311 (1903); *Parsons v. United States*, 167 U.S. 324 (1897); *Chabal v. Reagan*, 841 F.2d 1216 (3d Cir. 1988).

272 U.S. 52, 161 (1926). Similarly, in *Bowsher v. Synar*, the Court struck down a statute that gave the Comptroller General, an officer removable only by Congress, the authority to make budget cuts because “a direct congressional role in the removal of officers charged with the execution of the laws...is inconsistent with separation of powers.” 478 U.S. 714, 723 (1986). The Court has shown great reluctance to strike down removal limitations in the absence of congressional aggrandizement. “In the Court’s view, independence in administration is one thing, congressional encroachment ... is quite another.” Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 115 (1994); see also Peter L. Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 614 (1984).

Unlike *Myers* and *Bowsher*, this case does not present the risk of congressional aggrandizement. The Sarbanes-Oxley Act does not grant Congress the right to participate in the removal of PCAOB board members. A finding that the limitation on the President’s ability to remove board members is unconstitutional would be unprecedented.

B. THE PRESIDENT RETAINS SUFFICIENT CONTROL OF THE PCAOB TO PERFORM HIS CONSTITUTIONAL DUTIES

Since *Humphrey’s Executor*, this Court has upheld the constitutionality of independent agencies, such as the SEC. 295 U.S. 602 (1935); see also *Wiener*, 357 U.S. 349 (1958).

Although the characteristic feature of independent agencies—for-cause limitations on the President’s removal power— reduces presidential influence over executive functions, courts have found that the President retains sufficient control to satisfy the separation of powers. *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir. 1988).

The PCAOB poses no greater attenuation of presidential power than the typical independent agency. The SEC possesses extraordinary powers over the Board, powers that in their entirety are the functional equivalent of at-will removal authority. The President, in turn, possesses an

array of powers over the SEC that allows him to influence the PCAOB from his position atop the chain of command. To the extent that the PCAOB possesses discretion, the discretion falls well within the acceptable range of independence, as defined by precedent and practice.

i. The SEC possesses comprehensive control over the PCAOB

The Act does not displace SEC authority over the promulgation or enforcement of auditing and accounting standards. “Nothing in this Act or the rules of the Board shall be construed to impair or limit ... the authority of the Commission to regulate the accounting profession ... set standards for accounting or auditing practices ... [or] the ability of the Commission to take ... disciplinary action against public accounting companies.” 15 U.S.C. § 7202(c) (2006). As a result, the potential for decrease in SEC, and consequently presidential, authority over the auditing industry results only from the possibility that the PCAOB will exercise its concurrent jurisdiction in ways that conflict with the SEC’s regulation of the industry. The SEC’s extraordinary powers over the PCAOB, however, make it highly unlikely the PCAOB will act independently. The SEC possesses comprehensive controls over the PCAOB’s three major functions: standard-setting, inspections, and investigations and sanctions.

First, all rules and standards proposed by the PCAOB must be approved by the SEC before taking effect. § 7217(b)(3). The SEC has subjected PCAOB proposals to rigorous scrutiny under its notice and comment procedures, and has frequently instructed the PCAOB to modify its proposals. Exchange Act Release 49,884, 69 Fed. Reg. 35,083 (June 23, 2004) (PCAOB amends proposed Auditing Standard 2); Exchange Act Release No. 56,152, 72 Fed. Reg. 42,141, (August 1, 2007) (PCAOB amends proposed Auditing Standard 5); Exchange Act Release No. 53,227, 71 Fed. Reg. 7082 (February 10, 2006) (SEC instructs PCAOB to issue implementation guidelines for proposed Auditing Standard 4). At any time, the SEC may “abrogate, add to, and delete” the

rules and standards promulgated by the PCAOB “to assure the fair administration of the Public Company Accounting Oversight Board ... or otherwise further the purposes of [the] Act, the securities laws, and the rules and regulations thereunder.” § 7217(b)(5).

Second, the SEC controls the Board’s two major inspection powers. First, the frequency at which auditing companies are inspected by the PCAOB is determined by the Act. § 7214(b)(1). If the PCAOB wishes to alter inspection frequency, it must propose a rule and receive SEC approval. § 7214(b)(2). In addition, the SEC must approve the findings in the PCAOB’s inspection reports upon challenge by the inspected companies. § 7214(f).

Third, the SEC possesses several significant controls over the PCAOB’s investigation and sanctioning functions. The PCAOB must conduct all investigations in accordance with SEC-approved rules. § 7215(b)(1). It must coordinate its investigations with the SEC to “protect ... ongoing Commission investigation[s].” § 7215(b)(4)(A). And it must seek the SEC’s permission to issue a subpoena. § 7215(b)(2)(D). If the PCAOB decides to impose sanctions following an investigation, it can only do so for reasons authorized by the Act. § 7215(c)(4)-(6). The sanctions must be civil sanctions, and only those that are authorized by the Act or SEC-approved rule. § 7215(c)(4).

In addition, all sanctions are reviewable by the SEC, on its own initiative or on appeal. § 78s (d)(2). The SEC may “modify, enhance, cancel, reduce, or require the remission of a sanction” if it finds that the sanction “is not necessary or appropriate in furtherance of this Act of the securities laws” or “is excessive, oppressive, inadequate, or otherwise not appropriate,” § 7217(c)(3); the SEC effectively has plenary power to modify or nullify PCAOB sanctions. Finally, if despite these controls, the SEC is unsatisfied with the PCAOB’s investigations or sanctions it may rescind the PCAOB’s enforcement power entirely. § 7217(d)(1).

Beyond these function-specific powers, the SEC possesses several other controls over the Board. The SEC may censure the Board or impose “limits on its activities, functions, and operations.” § 7217(d)(1). It may remove board members for cause. § 7217(d)(3). And it must approve the annual Board’s budget, giving it power “to make its approval ... conditional on changes to amounts and other aspects of the budget.” Exchange Act Release No. 54,168, 71 FR 41,998 (July 24, 2006). In addition, “once a budget is approved by the Commission, the PCAOB cannot use its resources in a manner that is not fairly implied from the approved budget.” *Id.*

The SEC’s substantial powers over the Board make the present case indistinguishable from past cases. In *Humphrey’s Executor* and *Wiener*, the Court upheld the imposition of for-cause limitations on the President’s removal power over the heads of independent agencies. *Humphrey’s Ex’r*, 295 U.S. 602, 617 (1935); *Wiener v. United States*, 357 U.S. 349 (1958). The cases thus stand for the proposition that the actions of independent agencies do not violate the separation of powers. Under both cases, the functions performed by the PCAOB would not implicate separation of powers concerns if performed directly by the SEC. Since the SEC has substantial control over the Board, PCAOB regulation is essentially regulation by the SEC. The SEC’s control of the PCAOB is so complete that the Board’s actions should be afforded the protection under *Humphrey’s Executor* and *Wiener* that SEC regulation normally receives.

Similarly, the present case is governed by the holding in *Humphrey’s Executor*, *Wiener*, and *Perkins* that at least one level of for cause removal between the President and officials performing executive functions is constitutionally permissible. Although the SEC does not formally have at-will removal authority over Board members, it possesses the functional equivalent. In possessing the power to invalidate the Board’s rules and standards; reject its inspection findings; coordinate, and determine the procedures for, its investigations; overturn its

sanctions; and eliminate its enforcement authority, the SEC can effectively strip the Board of any meaningful authority. Functionally, there is only one level of for-cause removal between the President and the officials regulating the auditing industry—the for-cause limitations that apply to the President’s removal of SEC Commissioners.

ii. The President possesses substantial control over the SEC

In addition to the SEC’s powers over the PCAOB, the President possesses powers over the SEC that enable him to sufficiently control the Board. First, the President can remove SEC Commissioners for “inefficiency, neglect of duty or malfeasance in office.” SEC v. *Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988); see also, *Wiener v. United States* 357 U.S. 349 (1958). This Court has held that these terms are “very broad” and justify removal in a wide range of circumstances. *Bowsher v. Synary*, 478 U.S. 714, 729 (1986). The President’s removal power over SEC Commissioners allows him to control the use of the SEC’s removal power over Board members. The SEC can remove Board members who “willfully violate[] any provision of [the] Act, the rules of the Board, or the Securities Laws; [or] willfully abuse[] [their] authority; or without reasonable justification or excuse, [] fail to enforce compliance,” § 7217(d)(3). Any SEC Commissioners who refuse to remove Board members who willfully violate the law, willfully abuse their authority, or fail to enforce compliance are almost certainly guilty of “inefficient conduct” or “neglect of duty” themselves, and can therefore be removed by the President. While the President cannot directly remove Board members, his power to remove and replace SEC Commissioners who fail to do so grants him the functional equivalent of direct for-cause removal over Board members.

Second, the President can appoint like-minded SEC Commissioners who will exercise their powers over the Board in a manner consistent with his policy preferences. *Blinder, Robinson &*

Co., 855 F.2d at 677. As has often been noted, presidential appointments to independent agencies can quickly shift agency direction. David M. Welborn, *Governance of Federal Regulatory Agencies* 141 (1977).

Third, the President has direct influence over the appointment of Board members. The Act requires the SEC Commissioners to consult with the Secretary of the Treasury before appointing an individual to the Board. § 7211(e)(4)(A)-(B). Since the Secretary is the alter ego of the President, in that the President can remove him at will, he is likely to accurately represent the President's interests in the appointment process.¹⁶

Fourth, the President selects a Commissioner to serve as Chairman of the SEC, 15 U.S.C. § 78d note (2002), and can remove him from the chairmanship at-will. *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988); Welborn, *supra*, at 7; Peter L. Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 590-91 (1984). Through this removal power, the President has direct influence over the Chairman's substantial powers. 15 U.S.C. § 78d-2 (2002) (establishing Chairman's powers). "Chairmen almost completely dominate the administrative side of commission business ... and consequently command[] staff loyalties...[T]he chairmen also dominate commission policymaking" *Id.* at 592. As the Tenth Circuit Court of Appeals has held, "the Chairman exerts far more control than his one vote would seem to indicate." *Blinder*, 855 F.2d at 681.

The Chairman's powers are relevant to the constitutionality of the Board because of the key supervisory role the SEC performs. The SEC must approve all Board rules and sanctions, and the PCAOB must coordinate its investigations with the President. The Chairman's command

¹⁶ The SEC has established an appointment procedure in which it formally consults with the Secretary at two stages in the appointment process. SEC Approves PCAOB Appointment Procedures, SEC Press Release 2005-171 (Dec. 2, 2005). At the beginning of its search, it seeks recommendations of potential candidates from the Secretary. Once it has narrowed down its list to the final three candidates, the SEC then seeks the Secretary's recommendation on which candidate should be selected. *Id.*

over policy decisions and the staff allows him to play a key role in these functions, a role the President can supervise through his at-will removal power.

iii. Precedent and practice show that the level of independent discretion vested in the PCAOB is constitutionally permissible

The Court’s analysis of whether functions are “central to the functioning of the executive branch” has been case specific. To the extent the PCAOB retains discretion over rulemaking, inspections, investigations, and sanctions, its degree of discretion falls well within the boundaries of permissible independence, as drawn by precedent and practice.

1. Rulemaking

This Court held in *Mistretta v. United States* that rulemaking authority need not be comprehensively controlled by the President. “Our recent cases cast no doubt on the continuing vitality of the view that rulemaking is not a function exclusively committed to the Executive Branch.” 488 U.S. 361, 386 n.14 (1989). Similarly, in *Buckley and Humphrey’s Executor*, the Court distinguished rulemaking from functions that needed to be exclusively controlled by the President. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Humphrey’s Ex’r*, 295 U.S. 602, 617 (1935). The minimal rulemaking discretion vested in the PCAOB clearly falls within the permissible level of discretion envisioned in these cases, since the SEC must approve all proposed rules. While the statute imposes weak limitations on the SEC’s freedom to approve or reject rules, the SEC may “abrogate, add to, and delete from” the rules by proposing and approving its own rules, subject to notice and comment. 15 U.S.C. § § 7217(b)(5), 78s(c).

2. Inspections

The only independent power the PCAOB possesses with respect to inspections is the freedom to schedule the day within the one or three-year inspection rotations in which a public accounting company’s inspection begins. Clearly, this trivial scheduling power is not what the *Morrison*

Court had in mind when it wrote of “functions central to the functioning of the Executive Branch.” *Morrison*, 487 U.S. at 691-92. The PCAOB’s other inspection powers—the authority to write inspection reports and to actually conduct the inspection—are controlled by the SEC through its powers to revise inspection reports and promulgate rules governing the conduct of inspections.

3. Investigations

The PCAOB has far less independent authority over investigations than the Independent Counsel did under the Ethics in Government Act upheld in *Morrison*. 28 U.S.C. §§ 591-599. First, the Independent Counsel was granted “the full power and independent authority to exercise all investigative and prosecutorial functions and power of the Department of Justice and Attorney General.” § 594(a). The Board, however, is granted only a limited component of the SEC’s enforcement power, subject to comprehensive supervision. Second, the Ethics in Government Act required the Attorney General to suspend any investigation into a matter referred to the Independent Counsel. 28 U.S.C. § 597 (2006). By contrast, the SEC maintains concurrent jurisdiction over all matters within the jurisdiction of the Board, and the Board’s investigations must defer to SEC investigations. 15 U.S.C. § 7202(c) (2006). Third, the Independent Counsel was only required to comply “where ... possible” with the “written or other established enforcement policies of the Department of Justice respecting enforcement of the criminal law.” 28 U.S.C. § 597 (2006). The PCAOB, on the other hand, must always comply with the procedures governing investigations that are approved or promulgated by the SEC. § 7215(b)(1).

Fourth, the Independent Counsel could initiate criminal prosecutions and represent the government’s prosecutorial power in court. The PCAOB cannot enforce criminal sanctions. §

7215(c)(4). Fifth, the Independent Counsel had subpoena power and the power to determine whether the release of documents jeopardized national security. The PCAOB, however, must request that the SEC issue subpoenas on its behalf. § 7215(b)(2)(D). Finally, the Independent Counsel was appointed by a Special Division of the judiciary. 28 U.S.C. § 593(b) (2006). Board members, on the other hand, are appointed in consultation with the executive branch. 15 U.S.C. § 7211(e)(4)(A)-(B). When considered with the SEC’s functional at-will removal power over the Board, these factors suggest there was a far greater diminution of presidential prosecutorial authority in *Morrison* than in the present case; yet the *Morrison* Court was comfortable finding that the powers delegated to the Independent Counsel were not “central to the functioning of the Executive Branch.”

Similarly, courts have long been comfortable *completely* removing prosecutorial functions from the control of the President in other contexts. Courts may appoint private attorneys as prosecutors in judicial contempt proceedings, *Young v. United States*, 481 U.S. 787 (1987), and interim United States Attorneys in the case of vacancies, *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). These judicial precedents are consistent with historical practice. Contrary to Petitioners’ argument, the Framers’ conception of a unitary executive did not require comprehensive presidential control of investigations and prosecutions. “Original practice does not suggest a presidential monopoly over the power of prosecution. In a number of settings, enforcement of the criminal law was placed beyond the control of the president.” Lawrence Lessig & Cass. R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 22 (1994). First, until 1820, District Attorneys had no supervisors; they reported to neither the President nor the Attorney General despite several administrations’ requests for supervisory power.

Congress provided the Attorney General with no mechanism for supervising the federal district attorneys. The Attorney General might not learn of suits progressing in the newly created trial courts, had virtually no say in the positions taken by the district attorneys in such suits, and had little opportunity to coordinate the positions taken by the district attorneys.

Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 286 (1989). Second, in the decade following the enactment of the Constitution, Congress passed ten *qui tam* provisions that allowed private citizens to sue individuals on behalf of the United States for violations of federal criminal statutes. *Id.* at 301. The federal government could “not take charge of the civil *qui tam* action once filed” and the *qui tam* action precluded subsequent criminal prosecution by the government. *Id.* at 302. These provisions were widely accepted even though they “supplanted the Executive's role in enforcing criminal provisions.” *Id.* Third, Congress frequently allowed certain federal criminal proceedings to occur in state court and delegated certain law enforcement actions to state officials. For example, violations of the Post Office Act of 1799 could be prosecuted in state courts, *id.* at 306, and determinations regarding whether individuals should be deported were left to state officials. *Id.* at 305.

Measured against original practice and this Court’s precedents, the attenuation of presidential investigation and prosecution power in this case falls far short of the level required to implicate separation of powers concerns.

4. Sanctions

The SEC has authority to overturn or modify Board sanctions if it finds them “not necessary or appropriate in furtherance of this Act of the securities laws” or “excessive, oppressive, inadequate, or otherwise not appropriate.” § 7217(c)(3). This broad grant of authority ensures that the determination of final sanctions rests with the SEC. Petitioner argues that the Board’s power to impose even initial sanctions is impermissible because sanctions that are eventually

overturned may have a detrimental effect on an auditing company in the interim. This Court's jurisprudence, however, has never been concerned with the level of presidential control over adjudication. *See United States v. Mistretta*, 488 U.S. 361 (1989). In fact, this Court in *Wiener* stressed the need for adjudicatory independence as a justification for creating a for-cause limitation on the President's removal power over Commissioners in the War Claims Commission. *Wiener v. United States*, 357 U.S. 349, 355 (1958).

C. INVALIDATION OF THE BOARD WOULD REQUIRE THE INVALIDATION OF MANY OTHER REGULATORY BODIES

A holding that the Board violates the separation of powers would massively disrupt our system of financial regulation. If the Board is found unconstitutional, then almost certainly the Municipal Securities Rulemaking Board (MSRB), the Financial Accounting Standards Board (FASB), and the Financial Industry Regulatory Authority (FINRA) will be struck down as well. Petitioner's challenge threatens to unsettle the widely accepted understanding of the separation of powers upon which the system of securities regulation is based.

The MSRB, for example, was created by Congress in 1975 to regulate "transactions in municipal securities effected by brokers, dealers, and municipal securities dealers." 15 U.S.C.A. § 78o-4(b)(2) (2002). The MSRB sets licensing requirements, technical and ethical standards, and schedules for inspections. Like the PCAOB, the MSRB's standards and rules must be approved by the SEC after notice and comment. The organization is funded by fees imposed on municipal securities dealers.

The MSRB Board consists of 15 board members who serve staggered three-year terms. While the initial board was appointed by the SEC, appointments to replace outgoing members are now made by the 10 remaining board members. Importantly, the SEC can only remove

board members for cause, under a statutory provision that is almost identical to the one governing the removal of PCAOB board members.

The Commission is authorized, by order ... to remove from office any member or employee of the Board, who, the Commission finds, on the record after notice and opportunity for hearing, has willfully (A) violated any provision of this chapter, the rules and regulations thereunder, or the rules of the Board or (B) abused his authority.

§ 78o-4(c)(8.) For 34 years, the constitutionality of the MSRB has been unquestioned. If this Court upholds Petitioners' challenge, almost certainly the MSRB will have to be ruled unconstitutional. First, if the Court accepts the petitioner's argument that two levels of for-cause removal create a *per se* separation of powers violation, the MSRB will not withstand challenge. Second, if the Court invalidates the PCAOB using a multi-factor test, the MSRB is likely unconstitutional as well because the SEC lacks the power to appoint MSRB board members, a power it possesses over the PCAOB.

The FASB is a private rule-making body that promulgates "generally accepted accounting practices." Donna M. Nagy, *Playing "Peekaboo" with Constitutional Law*, 80 Notre. Dame. L. Rev. 975, 986-89. The SEC has formally delegated its authority to define acceptable accounting practices under the 1933 Securities Act and 1934 Exchange Act to the FASB since 1973. S.E.C. Release AS-150, 1973 WL 149263 (Dec. 20, 1973). Congress has also formalized by statute the SEC's reliance on the FASB. *See Nagy, supra*, at 988 n.64. As with the MSRB, all FASB rules must be approved by the SEC. 15 U.S.C § 78s(b). FASB board members are appointed to five-year terms by the Financial Accounting Foundation, a non-profit independent corporation comprised of industry leaders. The SEC has no removal power over FASB members.

The constitutionality of the FASB has been upheld on challenge, *Arthur Andersen & Co. v. SEC*, 1976 WL 826 (N.D. Ill. Sept. 3, 1976), and widely accepted since 1973. Yet, it too would be rendered unconstitutional by an invalidation of the PCAOB because the SEC lacks both

removal power over its board members and many of the other controls it possesses over the PCAOB, such as the power of appointment.

Finally, the Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization to which the SEC has delegated enforcement of MSRB rules. FINRA is also responsible for licensing securities dealers, setting industry standards, performing inspections and investigations, and disciplining traders through censure, license suspension, and fines. It operates on an annual budget of over \$800 million and governs nearly 5000 brokerage firms and 656,000 registered securities representatives. FINRA, 2007 Annual Financial Report, at ii, *available at* <http://www.finra.org/AboutFINRA/AnnualReports/index.htm>. Like the FASB, the SEC's powers over FINRA are defined by 15 U.S.C § 78s(b). The SEC must approve FINRA rules, may overturn its sanctions, and may suspend FINRA's operations. Unlike the PCAOB, however, the SEC does not appoint FINRA's board, cannot remove board members, and has no active involvement in FINRA's inspections and investigations. On direct comparison, the SEC has greater authority over, and involvement in, the operations of the PCAOB. FINRA would not survive PCAOB invalidation.

The broad impact of invalidating the PCAOB on other regulatory organizations shows how far Petitioners' argument deviates from the modern understanding of separation of powers. The structural features of the PCAOB are not unique or unprecedented. Instead, they are drawn from the regulatory structures that have been used to govern securities regulation for over three decades. The formalism advocated by Petitioners "is simply incapable of describing the government we have." Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions*, 72 Cornell L. Rev.488, 526 (1987).

CONCLUSION

For the foregoing reasons, Respondents Public Company Accounting Oversight Board and the United States respectfully request that this Court affirm the judgment of the District of Columbia Circuit granting Respondents' motion for summary judgment.

Respectfully submitted,

Rory Gillis
Jill E. Habig
Counsel for the Respondents
April 27, 2009

APPENDIX: CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Constitutional and statutory provisions are excerpted in relevant part.

U.S. Const. art. II, § 2, cl. 2

He shall ... nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 3

He shall ... take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. art. I, § 8, cl. 18 (NOT § 9 as on p. 25)

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

5 U.S.C. § 904 (2006). Additional contents of reorganization plan

A reorganization plan transmitted by the President under section 903 of this title--

(1) may, subject to section 905, change, in such cases as the President considers necessary, the name of an agency affected by a reorganization and the title of its head, and shall designate the name of an agency resulting from a reorganization and the title of its head;

(2) may provide for the appointment and pay of the head and one or more officers of any agency (including an agency resulting from a consolidation or other type of reorganization) if the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan the provisions are necessary;

....

7 U.S.C. § 4a (2006). Commodity Futures Trading Commission

(c) General Counsel

The Commission shall have a General Counsel, who shall be appointed by the Commission and serve at the pleasure of the Commission. The General Counsel shall report directly to the Commission and serve as its legal advisor. The Commission shall appoint such other attorneys as may be necessary, in the opinion of the Commission, to assist the General Counsel, represent the Commission in all disciplinary proceedings pending before it, represent the Commission in courts of law whenever appropriate, assist the Department of Justice in handling litigation concerning the Commission in courts of law, and perform such other legal duties and functions as the Commission may direct.

15 U.S.C. § 42 (2006). [Federal Trade Commission] Employees; expenses

Each Commissioner shall receive a salary, payable in the same manner as the salaries of the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive a salary, and it shall have authority to employ and fix the compensation of such

attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

15 U.S.C. § 78d (2006). Securities and Exchange Commission

(a) Establishment; composition; limitations on commissioners; terms of office

There is hereby established a Securities and Exchange Commission (hereinafter referred to as the “Commission”) to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable. No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this chapter. Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (1) any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the commissioners first taking office after June 6, 1934, shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after June 6, 1934.

(b) Appointment and compensation of staff and leasing authority

(1) Appointment and compensation

The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of Title 5.

....

Note:

....

Sec. 3. Designation of Chairman.--The functions of the Commission with respect to choosing a Chairman from among the Commissioners composing the Commission are hereby transferred to the President.

15 U.S.C. § 78o-4(c)(8) (2006). Municipal Securities

....

(c) Discipline of municipal securities dealers; censure; suspension or revocation of registration; other sanctions; investigations

(8) The Commission is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise, in furtherance of the purposes of this chapter, to remove from office or censure any member or employee of the Board, who, the Commission finds, on the record after notice and opportunity for hearing, has willfully (A) violated any provision of this chapter, the rules and regulations thereunder, or the rules of the Board or (B) abused his authority.

15 U.S.C. § 78s (2006). Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies

(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78o-3, or 78q-1 of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied.

The Commission shall grant such registration if it finds that the requirements of this chapter and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

....

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, ... the Commission shall--

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change.

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 thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3)

....
(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of Title 5.

....

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)

....

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this

chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5) of this section, the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

....

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or

practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding

In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance--

....

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 78o(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], this chapter, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 78o(b)(6) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to remove from office or censure any officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such officer or director has willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

15 U.S.C. § 7202 (2006). Commission rules and enforcement [over PCAOB]

(c) Effect on Commission authority

Nothing in this Act or the rules of the Board shall be construed to impair or limit--

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

15 U.S.C. § 7211 (2006). Establishment [of PCAOB]; administrative provisions

(a) Establishment of Board

There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors.

....

(c) Duties of the Board

The Board shall, subject to action by the Commission under section 7217 of this title, and once a determination is made by the Commission under subsection (d) of this section--

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 7212 of this title;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 7213 of this title;

(3) conduct inspections of registered public accounting firms, in accordance with section 7214 of this title and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms ...;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards ..., or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) Commission determination

The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after July 30, 2002, that the Board is so organized and has the capacity to carry out the requirements of this subchapter, and to enforce compliance with this subchapter by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board's operation.

(e) Board membership

(1) Composition

The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures

required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) Limitation

Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) Full-time independent service

Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose

(4) Appointment of Board members

(A) Initial Board

Not later than 90 days after July 30, 2002, the Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

....

(5) Term of service

(A) In general

The term of service of each Board member shall be 5 years

(B) Term limitation

No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) Removal from office

A member of the Board may be removed by the Commission from office, in accordance with section 7217(d)(3) of this title, for good cause shown

....

(g) Rules of the board

The rules of the Board shall, subject to the approval of the Commission--

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

....

(h) Annual report to the Commission

The Board shall submit an annual report (including its audited financial statements) to the Commission

15 U.S.C. § 7214 (2006). [PCAOB] Inspections of registered public accounting firms.

(a) In general

The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the

rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) Inspection frequency

(1) In general

Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and

(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) Adjustments to schedules

The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) Procedures

The Board shall, in each inspection under this section, and in accordance with its rules for such inspections--

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) Conduct of inspections

In conducting an inspection of a registered public accounting firm under this section, the Board shall--

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

....

(f) Procedures for review

The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft

report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) Report

A written report of the findings of the Board for each inspection under this section, subject to subsection (h) of this section, shall be--

(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 7215(b)(5)(A) of this title, and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) Interim Commission review

(1) Reviewable matters

A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm--

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f) of this section, to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2) of this section.

(2) Treatment of review

Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 78y of this title, or deemed to be "final agency action" for purposes of section 704 of Title 5.

....

15 U.S.C. § 7215 (2006). [PCAOB] Investigations and disciplinary proceedings

(a) In general

The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

(b) Investigations

(1) Authority

In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act....

(2) Testimony and document production

In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may--

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) Noncooperation with investigations

(A) In general

If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may--

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) Procedure

Any action taken by the Board under this paragraph shall be subject to the terms of section 7217(c) of this title.

(4) Coordination and referral of investigations

(A) Coordination

The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) Referral

The Board may refer an investigation under this section—

- (i) to the Commission;
- (ii) to any other Federal functional regulator (as defined in section 6809 of this title...; and
- (iii) at the direction of the Commission, to--
 - (I) the Attorney General of the United States;
 - (II) the attorney general of 1 or more States; and
 - (III) the appropriate State regulatory authority.

....

(c) Disciplinary procedures

(1) Notification; recordkeeping

The rules of the Board shall provide that in any proceeding by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall--

- (A) bring specific charges with respect to the firm or associated person;
- (B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and
- (C) keep a record of the proceedings.

....

(3) Supporting statement

A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth--

- (A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or omitted to engage), or that forms a basis for all or a part of such sanction;
- (B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and
- (C) the sanction imposed, including a justification for that sanction.

(4) Sanctions

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including--

- (A) temporary suspension or permanent revocation of registration under this subchapter;
- (B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;
- (C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);
- (D) a civil money penalty for each such violation
- (E) censure;
- (F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.

(5) Intentional or other knowing conduct

The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to--

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) Failure to supervise

(A) In general

The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that--

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

....

(d) Reporting of sanctions

(1) Recipients

If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to--

(A) the Commission;

....

(2) Contents

The information reported under paragraph (1) shall include--

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) Stay of sanctions

(1) In general

Application to the Commission for review, or the institution by the Commission of 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.

....

15 U.S.C. § 7217 (2006). Commission oversight of the [PCAOB]

(a) General oversight responsibility

The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 78q(a)(1) of this title, and of section 78q(b)(1) of this title shall apply to the Board as fully as if the Board were a “registered securities association” for purposes of those sections 78q(a)(1) and 78(b)(1) of this title.

(b) Rules of the Board

(1) Definition

In this section, the term “proposed rule” means any proposed rule of the Board, and any modification of any such rule.

(2) Prior approval required

No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 7213(a)(3)(B) of this title with respect to initial or transitional standards.

(3) Approval criteria

The Commission shall approve a 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.

(4) Proposed rule procedures

The provisions of paragraphs (1) through (3) of section 78s(b) of this title shall govern the proposed rules of the Board, as fully as if the Board were a “registered securities association” for purposes of that section 78s(b) of this title, except that, for purposes of this paragraph--

(A) the phrase “consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organization” in section 78s(b)(2) of this title shall be deemed to read “consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors”; and

(B) the phrase “otherwise in furtherance of the purposes of this chapter” in section 78s(b)(3)(C) of this title shall be deemed to read “otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002”.

(5) Commission authority to amend rules of the Board

The provisions of section 78s(c) of this title shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a “registered securities association” for purposes of that section 78s(c) of this title, except that the phrase “to conform its rules to the requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter” in section 78s(c) of this title shall, for purposes of this paragraph, be deemed to read “to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board”.

(c) Commission review of disciplinary action taken by the Board

(1) Notice of sanction

The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) Review of sanctions

The provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 7215(b)(3) of this title for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 78s(d)(2) and 78s(e)(1) of this title, except that, for purposes of this paragraph--

(A) section 7215(e) of this title (rather than that section 78s(d)(2) of this title) shall govern the extent to which application for, or institution by the Commission on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 78s(e)(1) of this title to “members” of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase “consistent with the purposes of this chapter” in that section 78s(e)(1) of this title shall be deemed to read “consistent with the purposes of this chapter and title I of the Sarbanes-Oxley Act of 2002”;

(D) references to rules of the Municipal Securities Rulemaking Board in that section 78s(e)(1) of this title shall not apply; and

(E) the reference to section 78s(e)(2) of this title shall refer instead to section 7217(c)(3) of this title.

(3) Commission modification authority

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, after a proceeding in accordance with this subsection, that the sanction--

(A) is not necessary or appropriate in furtherance of this 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.

(d) Censure of the Board; other sanctions

(1) Rescission of Board authority

The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) Censure of the Board; limitations

The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) Censure of Board members; removal from office

The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office or censure any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member--

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

15 U.S.C. § 7219 (2006). [PCAOB] Funding

(a) In general

The Board, and the standard setting body designated pursuant to section 77s(b) of this title, as amended by section 7218 of this title, shall be funded as provided in this section.

(b) Annual budgets

.... The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 7211(d) of this title.

....

(d) Annual accounting support fee for the Board

(1) Establishment of fee

The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board's first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

....

(e) Annual accounting support fee for standard setting body

The annual accounting support fee for the standard setting body referred to in subsection (a) of this section--

(1) shall be allocated in accordance with subsection (g) of this section, and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission....

....

28 U.S.C. § 593 (2006). Duties of the division of the court

(b) Appointment and jurisdiction of independent counsel.—

(1) Authority.--Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) Qualifications of independent counsel.--The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) Scope of prosecutorial jurisdiction.--In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) Disclosure of identity and prosecutorial jurisdiction.--An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

28 U.S.C. § 594 (2006). Authority and duties of an independent counsel

(a) Authorities.--Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include--

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;
- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;
- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and
- (10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

....

(c) Additional personnel.--For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants).

(d) Assistance of Department of Justice.--

(1) In carrying out functions.--An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties. At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.

....

(e) Referral of other matters to an independent counsel.--An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

(f) Compliance with policies of the Department of Justice.--

(1) In general.--An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (l)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

....

(g) Dismissal of matters.--The independent counsel shall have full authority to dismiss matters within the independent counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

....

(i) Independence from Department of Justice.--Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18.

....

28 U.S.C. § 596 (2006). Removal of an independent counsel; termination of office

(a) Removal; report on removal. –

(1) Grounds for removal. – An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) Report to division of the court and Congress. – If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in accordance with section 594(h)(2).

(3) Judicial review of removal. – An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

28 U.S.C. § 597 (2006). Relationship with Department of Justice

(a) Suspension of other investigations and proceedings.—

Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

47 U.S.C. § 155 (2006). [Federal Communications] Commission

(e) Managing Director; appointment, functions, pay

The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule.