IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DOE CORPORATION, *Plaintiff*, v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *Defendant*.	No. 4:24-cv-1103 **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiff John Doe Corporation[1] seeks declaratory and injunctive relief to stop defendant Public Company Accounting Oversight Board (the "Board") from enforcing an excessively intrusive and burdensome investigative "Accounting Board Demand" ("ABD") ostensibly authorized by the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). As explained herein, the Board's ABD—the sixth in a succession of similar demands issued by the Board's non-governmental staff employees over the course of a prolonged investigation—is not just abusive, retaliatory, and excessively burdensome; it is the most recent salvo in a secretive, unaccountable Board investigative process that (i) is the product of an unlawful delegation of legislative power to the Board; (ii) is structurally unconstitutional; and (iii) deprives Plaintiff of the due process of law mandated by the Fifth Amendment and the "fair procedures" mandated by Sarbanes-Oxley.

Through its most recent ABD, the Board yet again purports to command Plaintiff to turn over reams of private documents or suffer fines, debarment, additional punishment, and potentially even criminal prosecution for purported "noncooperation." Absent the declaratory and injunctive

[1] "John Doe Corporation" is a pseudonym used to protect Plaintiff's true identity. Accompanying this Complaint is a motion for leave to allow Plaintiff to prosecute this lawsuit pseudonymously.

relief sought herein, Plaintiff will have no opportunity to obtain pre-enforcement judicial review of the ABD and will be left with the Hobson's choice of either obeying the Board's unconstitutional demand or "betting the farm" on potential future judicial review that would occur, if ever, long after the Board has effectively put Plaintiff out of business.

The Court should declare the Board's investigative demand unconstitutional and enjoin its enforcement.

JURISDICTION AND VENUE

1. The Court has jurisdiction under Article III, section 2 of the United States Constitution and 28 U.S.C. §§ 1331, 1367, and 1651. *See also Free Enter. Fund v. Pub. Co. Acct'g Oversight Bd.*, 561 U.S. 477, 489-91 (2010) ("*Free Enterprise Fund*"); *Axon Enter., Inc. v. Fed. Trade Comm'n*, 143 S. Ct. 890, 897 (2023).

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims herein occurred in this District and because the Board is subject to the court's personal jurisdiction with respect to the claims asserted herein.

PARTIES

3. Plaintiff John Doe Corporation is registered with the Board as a "registered public accounting firm" within the meaning of Sarbanes-Oxley § 2(a)(12), 15 U.S.C. § 7201(a)(12).

4. Defendant Board is a private, nonprofit corporation created by Sarbanes-Oxley § 101, 15 U.S.C. § 7211 and organized under the laws of the District of Columbia. The Board is headquartered in the District of Columbia and has at least a dozen other offices across the United States, including at least two in Texas. The Board has more than 800 employees and claims regulatory jurisdiction over more than 1,500 registered public accounting firms worldwide, including 59 in Texas, along with innumerable individuals employed by and associated with those firms.

FACTS

A. "This Unprecedented Extra-Constitutional Stew"[2]

5. The Board is not a federal agency, although it is treated as such for constitutional purposes. Sarbanes-Oxley created the Board as a private, nonprofit, non-governmental corporation under the laws of the District of Columbia:

> The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

15 U.S.C. § 7211(b). As the Supreme Court noted in *Free Enterprise Fund*, this allows the Board to "recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale." 561 U.S. at 485.

6. The Board is led by five members whom the Securities and Exchange Commission ("SEC"), acting collectively as a "Head of Department" within the meaning of the Appointments Clause of the Constitution, appoints as "inferior" constitutional officers. 15 U.S.C. § 7211; *see generally Free Enter. Fund*, 561 U.S. at 484-87.

7. Notwithstanding its legal status as a private corporation, the Board "is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry." *Id.* at 484-85.

> Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of

[2] *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd* 561 U.S. 477 (2010).

> new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe."

Id. at 485 (internal citations omitted).

8. The Board's investigative, prosecutorial, and pseudo-judicial adjudicative powers are massive and largely unchecked. Although the Board may claim to be accountable to the SEC, the Board in fact operates as a rogue and secretive entity with a track record of suffocating and punishing small and mid-sized auditing firms. After years of investigation, the Board can impose severe punitive sanctions against individual accountants and accounting firms within its regulatory reach, up to the permanent revocation of a firm's registration, a permanent ban on an individual associating with any Board-registered accounting firm, and civil monetary penalties of up to $1.1 million per violation for natural persons and $22 million per violation for firms. 15 U.S.C. § 7215(c)(4); 17 C.F.R. § 201.1001. These felony-sized penalty amounts are *five times higher* for natural persons and *20 times higher* for firms than the maximum penalties SEC itself can impose. *See, e.g.*, 15 U.S.C. § 78u-2(b); 17 C.F.R. § 201.1001.

9. Employment bans, termed "bars from association," imposed by the Board on individual accountants can be extremely broad and onerous—and frequently career-ending. For example, the Board can bar individual accountants from being "associated with" registered public accounting firms in even a non-accounting capacity; bar them from associating with any issuer, broker, or dealer in any financial capacity; and even require them to obtain prior Board or SEC approval before taking any job whatsoever (professional or otherwise) with any issuer, broker, or dealer. 15 U.S.C. § 7215(c)(7)(B). Although a barred auditor may apply to the Board for reinstatement and the ability to resume association with a registered firm, it is widely known that a time-limited bar is illusory, as any "bar from association" functionally operates as a lifetime bar. Moreover, it is widely known that the Board, as currently constituted, rarely permits a barred

auditor to re-associate with a registered firm. Thus, the imposition of even a time-limited bar or suspension frequently operates as a lifetime deprivation of an auditor's ability to ever again audit financial statements of public companies. And only the fortunate few are able to sell their practices in a fire sale to meet the start-date of the bar or suspension.

10. As nominally private actors, the Board and its staff function beyond the purview of many of the basic checks, balances, and transparency requirements designed to protect individuals from overzealous governmental coercion and punishment. For example, upon information and belief, the Board and its staff are not constrained by the Administrative Procedure Act, the Sunshine Act, the Freedom of Information Act, the Advisory Committee Act, the Equal Access to Justice Act, the Paperwork Reduction Act, and countless other laws applicable to nearly all other regulators. Ironically, these constraints do apply directly to the SEC, which has limited oversight responsibility for the Board, but not to the Board itself. Upon information and belief, Board staff members (other than perhaps hearing officers), unlike their governmental counterparts, are not even required to take an oath to "support and defend the Constitution" and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331.

11. Congress has increasingly relied on various similar models of outsourcing vast governmental powers to private actors who are neither elected by the citizenry nor appointed by the President with the Senate's advice and consent. The trend has elicited understandable scorn from several current Supreme Court justices in cases involving other nominally private regulators:

> One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] not to be agencies or establishments of the United States Government."
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> . . . .

> When it comes to private entities . . . there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, § 1. Nor are they vested with the "executive Power," Art. II, § 1, cl. 1, which belongs to the President . . . . By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form."

Dept. of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 57, 62 (2015) (Alito, J., concurring) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995) and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)). *Accord Texas v. Comm'r of Internal Revenue*, 596 U.S. __, 142 S. Ct. 1308, 1308 (2022) (Alito, J., joined by Thomas, J. and Gorsuch, J.) ("To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity" (internal citations omitted)).

12. The Board is subject to at least *some* constitutional limitations, such as the requirement that its leadership be constitutionally appointed and accountable to the President. *See Free Enter. Fund*, 561 U.S. at 492. After all, the Board exercises vast powers that are "typically carried out" by governmental officials. *Id*. at 504-05. As one scholar explains, Congress initially considered creating the Board as a division or office within the SEC, a government agency; instead, Congress deliberately rejected that model because it wished to create a "strong, independent" private regulator that would wield "massive power, unchecked power, by design." *See* Donna M. Nagy, *Is the PCAOB a "Heavily Controlled Component" of the SEC?: An Essential Question in the Constitutional Controversy*, 71 U. Pitt. L. Rev. 361, 375-85 (2010) (quoting statement of Sen. Gramm). It is no surprise, therefore, that current Supreme Court justices have variously described the Board as "highly unusual," *Free Enter. Fund*, 561 U.S. at 505, "uniquely structured," *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 668 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), and an "unprecedented extra-constitutional stew," *id*. at 713.

B. The Board's Unsupervised Exercise of Executive and Pseudo-Judicial Powers

13. One of the few theoretical checks on the Board's autonomy and massive power is the direction, oversight, and supervision purportedly exercised by the presidentially appointed, Senate-confirmed SEC Commissioners who are "principal" constitutional officers under the Appointments Clause of the Constitution. When the Board flexes its delegated *legislative* muscle through rulemaking, for example, SEC Commissioners play a critical preemptive gatekeeper function: Before any Board rule can become effective and bind anyone, the SEC Commissioners first must approve the rule through the public rulemaking process. 15 U.S.C. § 7217(b).

14. But SEC Commissioners play no similar gatekeeper role when the Board flexes its enormous *executive* and *pseudo-judicial* powers—*i.e.*, the investigative and looming disciplinary and adjudicative powers challenged in this case. To the contrary, the Board wields those executive and pseudo-judicial powers autonomously and unilaterally, with *zero* real-time direction, oversight, supervision, or framework for prompt review by the Presidentially-appointed SEC Commissioners.

15. For example, upon information and belief, SEC Commissioners—the only "principal" constitutional officers anywhere in sight—play no role in deciding whom the Board will investigate; what should be investigated; what documentary evidence and testimony should be demanded; from whom documents and testimony should be demanded; how voluminous and burdensome those demands should be; whether to accomplish the request through voluntary means or by the threat-centered compulsory ABD process at issue here; whether formal disciplinary charges should be filed; if so, who should be charged and what charges should be alleged; what evidence should be admitted and considered; how to weigh that evidence; whether to accept a negotiated settlement; and what sanctions, if any, should be imposed in any settlement.

16. All those executive and pseudo-judicial powers are left to the largely unfettered discretion of the Board—or more precisely, as explained below, pushed down to the unfettered

discretion of wholly unaccountable private citizens employed by the Board. Upon information and belief, the Board has never rejected a recommendation by the Board's Division of Enforcement and Investigations ("DEI") to initiate a formal investigation or to institute a formal disciplinary (enforcement) action. Moreover, as explained below, the Board has adopted no formal rules or procedures through which recipients of ABDs and other DEI staff investigative demands can seek the Board's intervention to retract or limit the scope and burden of any unreasonable demands.

17. Upon information and belief, the only time SEC Commissioners play any meaningful role in a typical Board investigation or disciplinary proceeding is in the exceptionally rare case where the "target" of a Board investigation: (1) is charged formally with wrongdoing after investigation by DEI staff; (2) neither agrees to settle charges nor defaults; (3) is sanctioned after a full disciplinary proceeding, including an evidentiary hearing on the merits before a Board hearing officer; (4) appeals the hearing officer's decision to the Board members; (5) loses the appeal at the Board level; *and only then* (6) subsequently appeals the adverse result to the SEC Commissioners (or SEC reviews the sanctions on its own initiative—a theoretical possibility under the relevant statute but one that, to Plaintiff's knowledge, never has in fact happened). This full gauntlet typically takes many years and is extraordinarily punitive given the financial expense and stress for the exceptionally rare Board targets who endure the entire process. Moreover, DEI staff, as agents of the Board, take advantage of this imbalance, in particular against smaller and mid-sized audit firms and the persons associated with them, making it effectively impossible for a target to defend itself through the laborious, time-consuming, and cost-prohibitive process.

18. For these reasons among others, most Board investigative targets settle rather than defend themselves. Over the Board's entire 22-year history, only *eight* of the Board's several hundred disciplinary cases—about two percent—have ever been appealed to the SEC Commissioners. (A ninth appeal was filed on January 30, 2024, but it will likely be several

months—and perhaps a year more—before the SEC Commissioners decide that case.) The last time the SEC Commissioners decided such an appeal was nearly five years ago in May 2019. And only two of the eight Board cases ever reviewed by the SEC—that is, less than one half of one percent of all Board enforcement cases thus far made public—have ever been reviewed subsequently by any federal court of appeals.[3] In its hundreds of other enforcement cases, the Board has investigated, charged, and penalized its targets with no meaningful direction, oversight, supervision, or after-the-fact review by even the SEC Commissioners, much less by any Article III Judge.

19. This absence of SEC direction and supervision is especially problematic because even the five SEC-appointed Board members—the Board's only validly appointed constitutional officers—play only a limited, episodic role in typical Board investigative or disciplinary proceedings. Upon information and belief, those proceedings are conducted and supervised almost entirely by the Board's private staff employees within DEI, none of whom is constitutionally appointed even as an inferior officer. Upon information and belief, these non-governmental employees make countless significant, discretionary, legally binding decisions over the years-long course of typical Board investigations and disciplinary proceedings, without any day-to-day direction or supervision by even the SEC-appointed Board members, much less by the SEC's Commissioners. Also upon information and belief, rather than respect an investigative target's assertion of rights in response to investigative demands, DEI staff routinely react by threatening "noncooperation" either as a stand-alone or companion charge. To use a criminal law analogy,

[3] In one of the two cases to reach federal court, the court ultimately set aside the Board's sanctions and the charges were dismissed, but that result came more than *nine years* after the Board initiated the case. *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018). In the other, the court upheld the Board's sanctions in an unpublished order issued more than six years after the Board initiated the case. *Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018).

that reaction is akin to treating the assertion of rights by a criminal investigative target as obstruction of justice.

20. Upon information and belief, the SEC-appointed Board members are involved meaningfully at only three discrete points in a typical Board investigation and disciplinary proceeding: (1) they typically review and approve DEI staff's decision to commence a formal investigation, which then unleashes DEI staff's unfettered discretion to issue an unlimited number of investigative demands of any breadth and burden without further approval from Board members—and to threaten recipients with severe punishment for "noncooperation" if the recipients object to those demands or fail to comply; (2) after the staff's investigation is completed, they typically review and approve DEI staff's decision to file formal charges (and in most cases they approve one or more contemporaneous settlement agreements already negotiated and finalized by DEI staff); and (3) after a hearing officer has conducted any necessary hearings and issued a decision, they decide any appeals from that decision. With respect to appeals from hearing officer decisions, upon information and belief, the Board often overturns hearing officer decisions favorable to a charged firm or individual, but rarely (if ever) overturns hearing officer decisions favorable to DEI. At all other times throughout the years-long process, upon information and belief, Board members are largely oblivious to what private DEI staff are doing in any given investigation or disciplinary proceeding.

21. Yet the coercive and discretionary power wielded by these private Board employees is extraordinary. For example, when conducting investigations, DEI employees routinely issue multiple intrusive and burdensome ABDs that can force recipients to search for and produce troves of private documents and other information, and to submit to multiple days of interrogation under oath, all backed by the threat of punishment for "noncooperation"—which can include loss of livelihood, substantial monetary penalties, and even incarceration—if recipients fail to obey DEI

staff's commands. The cost and burden of complying with these demands can be staggering. And the Board allows no process by which recipients of these intrusive and coercive DEI staff demands can seek even the Board members' intervention (much less that of the SEC Commissioners or a court) to challenge the appropriateness or breadth of the demands. Unsurprisingly, most Board targets cannot afford to risk their livelihoods and life savings—not to mention the wrath of their principal regulator and potential incarceration—so they predictably choose to obey DEI staff's demands, thereby forgoing any meaningful opportunity to challenge those demands as unconstitutional or otherwise improper.

22. Board disciplinary proceedings that follow staff investigations are no less coercive and no less expensive to defend. The Board's procedural rules and hearing officer orders require respondents to comply with numerous commands and deadlines, again upon threat of punishment for noncooperation or being found in default. At the end of a process that typically involves voluminous briefing and live testimony at a hearing, the hearing officer is empowered to punish the accused with fines, industry suspensions or bars, and other potential sanctions, which become final and enforceable unless appealed to the Board members.

23. To reiterate, *all* of this core executive and pseudo-judicial activity is performed and superintended by *private* citizens, none of whom is constitutionally appointed as even an "inferior" officer of the United States. Upon information and belief, the activity is subject to only limited, sporadic direction and supervision by the Board members, while the SEC's Commissioners—the only principal constitutional officers in the vicinity—are entirely uninvolved and oblivious to the facts and proceedings as this vast and coercive power is wielded against regulated accountants and accounting firms over the course of a multi-year process.

24. The target of an investigation and disciplinary prosecution by the Board's private-sector employees theoretically has the right to appeal any sanction imposed by the hearing officer

to the SEC-appointed Board members (and then to the SEC Commissioners and, finally, to a federal appeals court, as previously noted), but for most targets that remote prospect of eventual appellate review is not only cost-prohibitive but also ephemeral. Of the several hundred targets investigated and prosecuted by Board staff members over the Board's 22-year history, very few have had the resources and perseverance to appeal their sanctions even to the Board members, much less to SEC or a federal court. As best Plaintiff can tell from the available public record, targets in only 12 Board enforcement cases have ever appealed their sanctions even to the Board members, and the last time Board members decided such an appeal on the merits appears to have been more than six years ago (in December 2017).

C. The Unavailability of a Venue, Process, or Mechanism to Challenge Board Staff-Issued ABDs

25. Sarbanes-Oxley authorizes the Board to investigate suspected violations of the Act, Board rules, the securities laws applicable to preparing and issuing audit reports, the obligations and liabilities of accountants concerning them (including SEC rules issued under Sarbanes-Oxley), and professional auditing standards. Sarbanes-Oxley § 105(b)(1), 15 U.S.C. § 7215(b)(1).

26. Sarbanes-Oxley further empowers the Board to: (a) compel testimony from a firm or its associated persons about any matter that the Board considers relevant to the investigation; (b) require a firm or its associated persons to produce audit work papers and other documents or information in their possession that the Board considers relevant to the investigation, and inspect the books and records of the firm or its associated persons to verify the accuracy of the documents or information supplied; (c) with appropriate notice, request testimony and document production from third parties, including a firm's audit clients, concerning any matter that the Board considers relevant to the investigation; and (d) establish procedures for seeking subpoenas from the SEC for testimony or documents. Sarbanes-Oxley § 105(b)(2), 15 U.S.C. § 7215(b)(2).

27. The Board also may punish firms and their associated persons for refusing to cooperate with investigations. Potential sanctions include public censures; draconian fines; industry bars or suspensions; and "other lesser sanctions." Any such sanctions can be appealed in the first instance only to the SEC, but only after the sanctions become "final" with the Board. Sarbanes-Oxley §§ 105(b)(3), 107(c)(2), 15 U.S.C. §§ 7215(b)(3), 7217(c)(2); 17 CFR § 201.440(a).

28. Sarbanes-Oxley also directed the Board to promulgate rules to provide "fair procedures" for investigating and disciplining registered public accounting firms and their associated persons. Sarbanes-Oxley § 105(a), 15 U.S.C. § 7215(a). But the statute did not define "fair procedures" and provided no intelligible principle to guide or constrain the Board in promulgating such rules. As a predictable result, the Board's investigative and disciplinary process is notoriously one-sided and abusive—and anything but fair.

29. As relevant here, for example, neither Sarbanes-Oxley nor Board rules impose any limit on the number of years DEI staff can investigate a targeted firm or individual. Unlike federal rules governing civil litigation, Board rules also do not limit the number of ABDs and other investigative demands DEI staff may issue during an investigation, nor the scope of those demands, nor the cost and burden inflicted upon recipients to comply with those demands. There are likewise no limits on the number of hours the recipient of an ABD may be interrogated under oath by the Board's DEI staff. Not surprisingly, therefore, the Board's overall investigative and disciplinary process typically takes many years to complete, features multiple successive ABDs requiring targeted firms and auditors to produce reams of private documents at great burden and expense, and compels witnesses to endure lengthy testimony sessions—often for several days on end. DEI's investigation of Plaintiff has been no exception.

30. Particularly troublesome is that neither Sarbanes-Oxley nor Board rules provide any process, procedure, or mechanism for a party to challenge the validity, scope, or legality of a Board investigation or of any ABD issued by DEI staff in connection with a Board investigation. This blatant denial of due process of law is sharply contrasts with the judicial relief available in the context of government investigations, particularly those conducted by the SEC.

31. Under the Securities Exchange Act of 1934 (the "Exchange Act"), the SEC must invoke the jurisdiction of a court of the United States to secure compliance with a subpoena issued in connection with one of its own investigations. 15 U.S.C. § 78u(c). Stated otherwise, "such subpoenas are unenforceable absent a court order." *Sprecher v. Graber*, 716 F.2d 968, 974 (2d Cir. 1983). Then, "[t]o win judicial enforcement of an administrative subpoena, the SEC 'must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required ... have been followed....'" *RNR Enters. v. SEC*, 122 F.3d 93, 96–97 (2d Cir. 1997) (quoting *United States v. Powell*, 379 U.S. 48, 57–58 (1964)).

32. This crucial constitutional safeguard—the availability of Article III judicial review *before* testimony or production of documents can be compelled—is completely absent in the context of Board staff-issued ABDs, which thereby become self-executing. Indeed, with staff-issued ABDs in Board investigations, Board rules do not even allow recipients to seek prior review of the ABD by the SEC-appointed Board members or the SEC Commissioners before obedience is compelled, much less by an Article III court. ABD recipients have only two options: (1) obey the staff-issued ABD, and thereby effectively forgo any meaningful opportunity to challenge it; or (2) disobey the ABD and be punished (and possibly even criminally prosecuted) for violating Board rules that prohibit "noncooperation." As previously discussed, punishment for

noncooperation could eventually be challenged through belated judicial review, but any such review comes far too late to provide meaningful relief or to satisfy the constitutional requirement of due process of law and the statutory requirement of fair procedures.

33. Another crucial due process safeguard is "fair notice," a "basic principle of administrative law." *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017). As the Fifth Circuit stated in an oft-cited case, "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). The agency "must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Id*. "In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp*., 867 F.3d 564, 578 (5th Cir. 2017) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)).

34. The Board's investigation of Plaintiff relates to the audit of cryptoassets. Despite the explosive growth of the cryptocurrency industry, prior to the audits now under scrutiny in the Board's investigation of Plaintiff, the Board never promulgated any auditing standards expressly governing crypto-related assets and issuers; so, auditors like Plaintiff had no fair notice of regulatory expectations for such audits. Of the Board's nearly 60 auditing standards, three quality control standards, and 17 Board staff interpretations, none expressly addresses audits of cryptoassets, cryptocurrency, or crypto-mining issuers. Without Board standards or rules providing fair notice, auditors are left only with the option of selecting from a wide range of

opinions on the best method of auditing assets of crypto-related issuers.[4] In fact, in November 2023, one SEC Commissioner criticized the practice of "regulation by enforcement," and focused precisely on the absence of notice in the cryptoassets arena.[5] Commissioner Mark T. Uyeda, "Remarks to the 2023 Conference on SEC Regulation Outside the United States: Fifth Annual Scott Friestad Memorial Lecture" (Nov. 6, 2023), https://www.sec.gov/news/speech/uyeda-remarks-sec-reg-outside-us-5th-annual-scott-friestad-memorial-lecture. Commenters have likewise recognized the "absence of recognized accounting standards for cryptoassets." *See* Elizabeth Chan, Nicole Tang, Edward Taylor, *Crypto Disputes: The Valuation Challenge*, 17 Disp. Resol. Int'l 21, 39 (2023).

35. Because there are no formal standards, rules, or regulations articulating any regulatory expectations related to cryptocurrencies, cryptoassets, or crypto-mining issuers, Plaintiff did not have fair notice of the audit expectations underlying DEI staff's now expanded substantive investigation through its new ABD and any potential future disciplinary proceedings. And, with the absence of such fair notice, the applicable auditing standards effectively are whatever the Board's DEI staff claim them to be.

D. Plaintiff's "Here-and-Now" Constitutional Injury

[4] In December 2023, well after the audits at issue, the Financial Accounting Standards Board ("FASB") issued ASU No. 2023-08, "Intangibles—Goodwill and Other—Crypto Assets (Subtopic 350-60): Accounting for and Disclosure of Crypto Assets." FASB makes clear that "[t]he FASB issues an Accounting Standards Update (ASU) to communicate changes to the FASB Codification, including changes to non-authoritative SEC content. ASUs *are not authoritative* standards." (emphasis added)

[5] "[O]ne of the most discussed areas of the U.S. federal securities laws when someone mentions regulation by enforcement [is] cryptocurrencies and digital assets. For years, market participants have expressed concern about a lack of regulatory guidance in the crypto space. Let's be clear about it—enforcement actions are not well-suited for providing guidance…. Accordingly, the Commission should consider proposing rules or issuing interpretive guidance with respect to cryptocurrencies and digital assets. It's unfortunate that, despite the large number of rule proposals issued by the SEC during the last two years, cryptocurrency was not among them. A responsible regulator considers how the laws and rules apply to new types of securities and then develops or modifies those provisions so that the regulatory requirements can be satisfied….The SEC could have proactively contributed to the creation of a body of law regarding cryptocurrencies and digital assets. Unfortunately, the SEC did not take this approach and instead is pursuing a case-by-case approach through enforcement actions."

36. Plaintiff's ongoing nightmare in the Board's enforcement maw is not atypical, with the exception that Plaintiff possesses the rare degree of fortitude and resolve necessary to fight back and challenge the Board.

37. Following an informal request in October 2021, non-compliance with which would have resulted in immediate entry of an order of formal investigation and the issuance of ABDs, DEI staff have issued Plaintiff and its personnel six compulsory ABDs (including the ABD of March 14, 2024 challenged by this Complaint) requiring them to produce tens of thousands of pages of documents in an onerous format not even required by the SEC, and to sit for seven full days of formal, on-the-record sworn testimony so far. Yet DEI staff remains unsatiated, so it now seeks to expand and prolong its investigation even further. DEI's most recent ABD demands audit documentation and information from an entirely different year's audit than what had consumed the preceding two-and-one-half years of investigation.

38. When the Board issued its Order of Formal Investigation on August 16, 2022, the Board set forth a kitchen-sink list of possible violations to investigate without providing any notice as to the precise issues under investigation. None of the auditing standards or quality control standards cited in the investigation order included the word "crypto," let alone cryptocurrencies, cryptoassets, or crypto-mining. Nevertheless, the investigation, in substance, was entirely about the audit of crypto-mining assets and cryptocurrencies.

39. Each ABD issued by DEI staff during its investigation—including the most recent one—has featured similar threats of punishment for "noncooperation":

> Noncooperation with the Board in connection with an investigation may result in the imposition of sanctions as described below. Conduct constituting noncooperation includes (1) failing to comply with an Accounting Board Demand….[I]f a *registered public accounting firm* refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation, the Board may suspend or revoke the registration of the firm, or invoke such lesser sanctions as the Board considers appropriate. Similarly, if a

> *person associated with* a registered public accounting firm refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation, the Board may suspend or bar such person from being associated with a registered public accounting firm, or may require the registered public accounting firm to end such association…."

40. In October 2023, DEI staff notified Plaintiff's counsel that DEI staff intended to recommend that the Board initiate a formal disciplinary proceeding that would charge various violations of Board rules.

41. In November 2023, Plaintiff's counsel submitted a formal written statement of position that vigorously challenged DEI staff's proposed charges and disputed the analysis underlying DEI's recommendation.

42. DEI staff subsequently informed counsel that DEI staff was not persuaded by the statement of position. Following several weeks of further discussion, DEI staff informed counsel, on February 8, 2024, that DEI staff would proceed with recommending to the Board the initiation of a formal disciplinary proceeding. DEI staff further informed counsel that the next notification to counsel would be upon the initiation of the formal disciplinary proceeding. At the time, DEI staff knew unequivocally that anyone accused in the anticipated proceeding intended to contest vigorously DEI's charges.

43. Over a month later, on March 14, 2024, rather than advising counsel of the initiation of a formal disciplinary proceeding, DEI staff issued *yet another* ABD compelling Plaintiff to produce *still more* documents within two weeks, under renewed threat of punishment for noncooperation. The newest ABD would expand DEI's endless investigation to probe an entirely different audit than the previous subject matter of the investigation.

44. Upon information and belief, DEI staff issued its latest ABD in the middle of March, with only a two-week compliance deadline, knowing that it would cause severe burden and disruption to Plaintiff during the busiest period of the year for Plaintiffs and most other audit

firms and auditors. Many year-end issuer audits need to be completed by mid- to late March to comply with SEC statutes and regulations, and tax season follows just around the corner in April. At a minimum, DEI staff's strategic timing shows little regard for the Board's professed mission to improve audit quality.

FIRST CLAIM FOR RELIEF

(Unlawful Delegation of Legislative Power Without an Intelligible Principle)

45. Plaintiff incorporates and realleges the allegations contained in the preceding paragraphs of this Complaint.

46. Article I of the Constitution vests all legislative powers in Congress. Under existing Supreme Court precedent, Congress may delegate its legislative powers only if it provides the delegatee with an "intelligible principle" to direct the delegatee in exercising those delegated powers.

47. Sarbanes-Oxley delegated vast legislative power to the Board, including the power to promulgate rules governing virtually every audit of every publicly traded corporation and broker-dealer with access to U.S. securities markets, and virtually every audit firm and individual participating in those audits.

48. Sarbanes-Oxley also delegated to the Board the legislative power and mandate to establish, by rule, "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms." As previously discussed, however, Congress did not define "fair procedures" and provided the Board with no intelligible principle to direct or constrain the Board in exercising this delegated legislative function. The Board's resulting rules for investigating and disciplining registered public accounting firms and their associated persons, including Plaintiff, are therefore constitutionally illegitimate and unenforceable.

49. By enforcing and continuing to exploit its illegitimate and unenforceable rules, thereby prolonging its investigation of Plaintiff with yet another compulsory ABD and threatening Plaintiff with punishment for "noncooperation" if it fails to comply with the ABD, the Board and its DEI staff are violating, and unless enjoined will continue to violate, Article I of the Constitution, inflicting substantial here-and-now injury against Plaintiff.

SECOND CLAIM FOR RELIEF

(Exercise of Private, Unsupervised Executive Power in Violation of Article II of the Constitution)

50. Plaintiff incorporates and realleges the allegations contained in the preceding paragraphs of this Complaint.

51. "A cardinal constitutional principle is that federal power can be wielded only by the federal government. Private entities may do so only if they are subordinate to an agency." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939); and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). "If it were otherwise—if people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Id*. at 880 (quoting THE FEDERALIST No. 51); *see also Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("When it comes to private entities . . . there is not even a fig leaf of constitutional justification" for delegation).

52. The Board's investigation of Plaintiff, including the succession of compulsory ABDs issued by the private citizens employed in the Board's DEI and the anticipated prosecution of Plaintiff in a forthcoming formal disciplinary proceeding, constitute exercises of core governmental executive power under color of federal law. However, as detailed above, these

exercises of core executive power are being performed, and continue to be performed, by private actors without any meaningful supervision, oversight, or direction by SEC or any other governmental agency within the Executive Branch led by principal officers of the U.S. government, much less by the President. Worse yet, they are being performed, and will continue to be performed, with only minimal, sporadic supervision and direction from the inferior officers who were appointed by the SEC to lead the Board.

53. By exercising core executive law enforcement power against Plaintiff without meaningful direction, oversight, and supervision by principal officers of the Executive Branch, the Board and its DEI staff are violating, and unless enjoined will continue to violate, Article II of the Constitution, inflicting substantial ongoing harm against Plaintiff.

THIRD CLAIM FOR RELIEF

(Denial of Due Process of Law in Violation of the Fifth Amendment to the Constitution)

54. Plaintiff incorporates and realleges the allegations contained in the preceding paragraphs of this Complaint.

55. Due process of law forbids a person from being compelled to produce personal papers or to provide involuntary testimony in a federal investigation or proceeding unless and until directed to do so by an independent court of law after notice and an opportunity to be heard.

56. In violation of these requirements, the Board threatens and imposes fines, debarments, and other punishments against those who do not obey Board staff-issued ABDs, including the one recently issued to Plaintiff as described herein. Board rules provide no guidelines or limits on the number of ABDs the Board's staff can issue, nor on the cost and burden that those ABDs can impose on their recipients. Board rules likewise provide no meaningful process or procedure for recipients of staff-issued ABDs to obtain Article III judicial review of those ABDs,

nor even administrative review by the Board members or the SEC Commissioners. By denying Plaintiff any opportunity to seek or obtain judicial review of the ABD recently issued to it by DEI staff before subjecting Plaintiff to fines, debarment, other sanctions, and potential criminal prosecution for "noncooperation," the Board is depriving Plaintiff of due process of law in violation of the Fifth Amendment, and will continue to do so unless enjoined.

FOURTH CLAIM FOR RELIEF

(Denial of Fair Procedures in Violation of Sarbanes-Oxley § 105(a))

57. Plaintiff incorporates and realleges the allegations contained in the preceding paragraphs of this Complaint.

58. Sarbanes-Oxley Section 105(a) requires the Board to establish "fair procedures" for its investigative and disciplinary proceedings.

59. In violation of this requirement, the Board threatens and imposes fines, debarments, and other punishments against those who do not obey Board staff-issued ABDs, including the one recently issued to Plaintiff as described herein. Board rules provide no guidelines or limits on the number of ABDs the Board's staff can issue, nor on the cost and burden that those ABDs can impose on their recipients. Board rules likewise provide no meaningful process or procedure for recipients of staff-issued ABDs to obtain Article III judicial review of those ABDs, nor even administrative review by the Board members or the SEC Commissioners. By denying Plaintiff any opportunity to seek or obtain judicial review of the ABD recently issued to it by DEI staff before subjecting Plaintiff to fines, debarment, other sanctions, and potential criminal prosecution for "noncooperation," the Board is depriving Plaintiff of fair procedures in violation of Sarbanes-Oxley § 105, and will continue to do so unless enjoined.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor granting the following relief:

(i) A declaratory judgment, pursuant to 28 U.S.C. § 2201(a), declaring that the ABD issued to Plaintiff on March 14, 2024 is unconstitutional, unenforceable, void, and quashed;

(ii) An injunction prohibiting the Board or its staff from (a) enforcing the ABD issued to Plaintiff on March 14, 2024; (b) threatening or imposing punishment or sanctions for "noncooperation" in connection with the ABD; and/or (c) issuing any further ABDs to Plaintiff in connection with its ongoing investigation unless and until it promulgates rules or other protocols disclaiming any power to sanction Plaintiff for failure to comply with the ABD before seeking judicial review and enforcement of the ABD;

(iii) An award of attorneys' fees and costs to Plaintiff; and

(iv) Such other and further relief as the Court deems just and appropriate.

Dated: March 27, 2024

Respectfully submitted,

By: /s/*John R. Nelson*

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