

[Securities Regulation Daily Wrap Up, ACCOUNTING AND AUDITING— N.D. Tex.: Texas lawsuit challenges PCAOB’s right to conduct non-public disciplinary proceedings, \(Jan. 23, 2023\)](#)

Securities Regulation Daily Wrap Up

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By [John Filar Atwood](#)

Plaintiff invokes *Lucia* decision in seeking to address a years-long argument about the transparency of the PCAOB’s administrative proceedings process.

In a new complaint filed in the Northern District of Texas, a plaintiff is seeking relief to stop the PCAOB’s disciplinary proceedings against him on the grounds that they violate the Constitution in several respects. Included among the plaintiff’s claims are that the Board’s disciplinary process is systemically biased, secretive, and unfair in violation of the Due Process Clause of the Fifth Amendment, and that the Board hearing officer assigned to adjudicate its disciplinary proceedings is an inferior constitutional officer who has not been lawfully appointed under the Appointments Clause of Article II ([John Doe v. Public Company Accounting Oversight Board](#), January 19, 2023).

The complaint is the latest move in a years-long attempt by multiple groups, including some U.S. Senators, to bring transparency to the PCAOB’s administrative proceedings process. A bill seeking such transparency has been [introduced](#) in multiple Congresses with provisions that would bring the PCAOB more in line with the SEC by making its hearings and related notices, orders, and motions, available to the public.

Facts. In the Texas case, the plaintiff John Doe is an accountant who previously worked as an auditor at an accounting firm in Colombia. The Colombia branch is part of a larger international network of accounting firms that are subject to PCAOB oversight.

The PCAOB initiated an investigation against the plaintiff in 2019 and in February 2022 informed him that the Board would begin disciplinary proceedings against him alleging that he failed to cooperate with the Board’s inspection and investigation of a component of a 2015 audit. The Board sought a settlement that included a lifetime bar, a \$150,000 penalty, and an admission of the alleged conduct. The plaintiff refused to settle and in December 2022 the Board instituted formal disciplinary proceedings against him.

Complaint. The New Civil Liberties Alliance (NCLA) filed the complaint on behalf of the plaintiff seeking declaratory and injunctive relief to stop the PCAOB’s prosecution of the plaintiff in secrecy. The NCLA [believes](#) that the PCAOB investigated and brought a secret prosecution without a jury trial, due process of law, an impartial adjudicator, or any constitutional accountability.

Specifically, the complaint alleges the following constitutional violations:

- the prosecution is being funded by money raised and spent in violation of the Appropriations, Taxing, and Spending Clauses of Article I;
- the Board, its prosecution staff, and its hearing officer are private citizens wielding punitive executive law enforcement power against the plaintiff under color of federal law without meaningful direction and supervision by any principal Officer of the Executive Branch in violation of Article II;
- the Board hearing officer assigned to superintend and adjudicate its disciplinary proceedings is an inferior constitutional officer who has not been lawfully appointed under the Appointments Clause of Article II;
- the Board hearing officer is also protected by multiple layers of protection from removal by the President in violation of Article II;

- the Board’s disciplinary process is systemically biased, secretive, and unfair in violation of the Due Process Clause of the Fifth Amendment; and
- the Board’s disciplinary process deprives Plaintiff of his right to a jury trial in violation of the Seventh Amendment.

No checks and balances. In support of these claims, the plaintiff notes that 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, as held in *Free Enterprise Fund v. PCAOB*. However, as nominally private actors, the PCAOB and its staff are exempt from many of the basic checks, balances, and transparency requirements designed to protect individuals from overzealous governmental coercion and punishment, the plaintiff argues.

The plaintiff further notes that unlike governmental agencies, the PCAOB is not funded through annual congressional appropriations but through accounting support fees paid by registered firms. Congress has no meaningful involvement in or oversight of the Board’s annual budget or spending, he states.

In addition, the plaintiff believes that the absence of meaningful SEC direction and supervision of the PCAOB is problematic because the five Board members—the only “inferior officers” at PCAOB who are appointed by the SEC—play only a limited role in typical Board investigative or disciplinary proceedings. Accordingly, the proceedings are conducted and supervised almost entirely by staff employees of the Board, none of whom are constitutionally appointed even as inferior officers. The plaintiff states that these employees make significant, discretionary decisions in Board investigations and disciplinary proceedings without any day-to-day direction or supervision by the Board members or SEC commissioners.

Application of *Lucia*. In the complaint, the plaintiff notes that PCOAB disciplinary hearings are adjudicated by a single hearing officer who has authority to make procedural and substantive determinations that impact the plaintiff. In the plaintiff’s opinion, however, the hearing officer lacks a constitutionally valid appointment to exercise such power.

The plaintiff argues that the hearing officer exercises authority comparable to that of an administrative law judge (ALJ) at the SEC who, according to *Lucia v. SEC*, exercises authority comparable to that of a federal district judge conducting a bench trial, and thus is an inferior officer requiring constitutional appointment pursuant to the Appointments Clause.

The plaintiff states that the PCAOB lacks constitutional or statutory power to appoint inferior constitutional officers with or without SEC approval, because the Appointments Clause authorizes the appointment of inferior officers only by the President, the courts, or “Heads of Departments.” The PCAOB is none of these, the plaintiff contends.

The Appointments Clause further allows for appointment of inferior officers only when Congress vests that power in a designated official or entity, according to the plaintiff. It notes that Congress has not vested in the PCAOB the power to appoint inferior officers, but only its own employees, accountants, attorneys, and other agents.

The Case is [No. 3:23-cv-00149](#).

Attorneys: Katherine Smith Addleman (Haynes and Boone, LLP) for John Doe.

Companies: Public Co. Accounting Oversight Board

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