No. 08-861

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,
v.
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

J. GORDON SEYMOUR
JACOB N. LESSER
MARY I. PETERS
PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD
1666 K Street, NW
Washington, D.C. 20006
(202) 207-9100

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MOLOLAMKEN LLP
The Watergate
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000

JAMES R. DOTY
BAKER BOTTS LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Respondents Public Company Accounting Oversight Board, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

The Sarbanes-Oxley Act of 2002 established the Public Company Accounting Oversight Board ("Board") and subjected it to the comprehensive oversight of the Securities and Exchange Commission ("SEC"). The questions presented are:

1. Whether petitioners' failure to invoke the exclusive statutory review procedures deprives this Court of jurisdiction.

2. Whether the court of appeals correctly held that Board members are inferior officers under the Appointments Clause because they are "directed and supervised" by the SEC.

3. Whether the court of appeals correctly held that the SEC is a "department" and that the Commissioners collectively constitute its "head" within the meaning of the Appointments Clause.

4. Whether the court of appeals correctly held that the Sarbanes-Oxley Act is consistent with separation-of-powers principles because—given the SEC's pervasive control over the Board and the President's oversight of the SEC—the statute preserves the President's ability to ensure faithful execution of the laws.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the Public Company Accounting Oversight Board states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

NO. 08-861

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

STATEMENT

I. STATUTORY FRAMEWORK

A. Background

Auditors play a crucial role in the federally regulated securities markets. To assure investors that annual financial statements filed with the Securities and Exchange Commission ("SEC") comply with accounting requirements, those statements must be audited. See 17 C.F.R. §§210.2-01 *et seq.* Auditors thus serve as "'public watchdog[s]'"—a role that "requires complete fidelity to

the public trust." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

Until recently, the SEC looked to private organizations affiliated with the accounting profession to set auditing standards. See S. Comm. Print No. 107-75, at 17-18 (2002). Accounting firms or their representatives controlled or funded those organizations. See *ibid.* As a result, "standards tend[ed] to be written to protect the accounting firms." *Accounting Reform and Investor Protection: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 217 (2002) ("*Senate Hearings*") (Turner). Enforcement was similarly ineffective. While the profession created a Public Oversight Board ("POB") in the 1970s to conduct "peer reviews," for more than 20 years "there ha[d] never been a negative review of a major firm." *Id.* at 76 (Williams). And when the POB sought to investigate several firms in 2000, the profession cut off its funding. *Id.* at 897 (Bowsher).

In 2001-2002, those shortcomings came home to roost as audit failures at Enron and other companies cost investors hundreds of billions of dollars. See 148 Cong. Rec. 12,113 (2002) (Sarbanes). Congress conducted two dozen hearings and considered more than 20 bills. See 1 *Corporate Fraud Responsibility*, at xi-xxi (Manz ed., 2003). Recognizing that auditor self-regulation had failed, Congress sought to "end the system of self-regulation in the accounting profession" and replace it with a "strong independent accounting oversight board"—"independent," that is, from the accounting profession. 148 Cong. Rec. 14,440 (2002) (Sarbanes); see *id.* at 14,444 (Enzi); *id.* at 14,487 (LaFalce); *Senate Hearings* 15-16 (Levitt); *id.* at 24 (Williams); *id.* at 106 (Volcker); *id.* at 245-246 (Turner); *id.* at 898-899 (Bowsher); *H.R. 3763*—

The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, Hearings Before the H. Comm. on Financial Services, 107th Cong. 50 (2002) ("*House Hearings*") (Roper); *id.* at 200 (Melancon).

Congress considered vesting the new regulatory responsibilities in the SEC itself. See Corporate Auditing Integrity Act of 2002, H.R. 5184, 107th Cong. (2002). But witnesses testified that the SEC was "already overtaxed" and could not "effectively discharge these additional responsibilities." *House Hearings* 157-158 (Walker); see *Senate Hearings* 38 (Levitt); *ibid.* (Hills); *id.* at 223 (Turner). Legislators wanted an entity "solely focused on companies that audit." 148 Cong. Rec. 12,943 (2002) (Snowe); see *id.* at 12,940 (Kohl). They also wanted to offer salaries "fully competitive with comparable private-sector positions in order to ensure a high-quality staff." *Id.* at 12,115 (Sarbanes); see S. Rep. No. 107-205, at 7 (2002). But witnesses advised that "attract[ing], competitively compensat[ing] and retain[ing] such staff * * * is probably easier accomplished in [a] private board as opposed to the SEC." *Senate Hearings* 246 (Turner); see *id.* at 1036 (Metzenbaum); *id.* at 1087-1088 (Pitt).

Congress nonetheless recognized a need for comprehensive SEC supervision. SEC authority over the new entity was necessary "to meet the constitutional test," 148 Cong. Rec. 12,120 (2002) (Gramm), and "SEC oversight and review" would ensure that the new entity's policies were "consistent with the administration of the federal securities laws," S. Rep. No. 107-205, at 12. The SEC's "comprehensive authority" would also prevent "duplicat[ion] [of] efforts," 148 Cong. Rec. 12,460 (2002) (LaFalce), and preserve "the benefit of [the SEC's]

nearly 70 years of public service," *House Hearings* 158-159 (Breeden).

B. The Sarbanes-Oxley Act

The product of Congress's deliberations was the Sarbanes-Oxley Act of 2002. The Act established the Public Company Accounting Oversight Board ("Board") to "oversee the audit of public companies," subject to the SEC's comprehensive control. See 15 U.S.C. §§ 7211(a), 7217. The Board registers accounting firms, promulgates auditing standards, conducts inspections, and investigates and disciplines violations. *Id.* § 7211(c).

Congress ensured the Board's independence from the accounting profession. The Board's five members are appointed not by the profession but by the SEC. 15 U.S.C. § 7211(e)(4). Only two may be accountants, and the Chairman cannot have been a practicing accountant for five years. *Id.* § 7211(e)(2). Board members cannot engage in professional activities or receive payments from accounting firms other than standard retirement benefits. *Id.* § 7211(e)(3). Finally, to address the funding problems that had compromised the independence of prior organizations, Congress established a support fee for the Board paid by public companies. *Id.* § 7219(c)-(d).

By assigning the Board only one duty—audit oversight—Congress created an entity focused exclusively on the problem it sought to remedy. See 15 U.S.C. § 7211(c). Congress addressed the need to attract experienced professionals by declaring the Board to be a private nonprofit corporation, *id.* § 7211(b), and empowering it to pay private-sector salaries, *id.* § 7211(f)(4).

Congress expressly granted the SEC "oversight and enforcement authority over the Board." 15 U.S.C. § 7217(a). It patterned that control in part on the SEC's

authority over self-regulatory organizations ("SROs") like the National Association of Securities Dealers. See S. Rep. No. 107-205, at 12. SROs have long helped oversee the securities industry, but always subject to pervasive SEC oversight: SROs "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)). Sarbanes-Oxley incorporates and supplements those oversight provisions.

SEC Control Over Rules. The SEC has plenary control over Board rules, including auditing standards. "No rule of the Board [is] effective without prior approval of the Commission * * * ." 15 U.S.C. § 7217(b)(2). (There is an exception for certain internal "housekeeping" rules, but the SEC can abrogate those "summarily." See *id.* § 78s(b)(3).) The SEC may also abrogate, delete from, or add to existing Board rules "to assure the fair administration of the [Board] * * * or otherwise further the purposes of th[e] Act, the securities laws, and the rules and regulations thereunder applicable to th[e] Board." *Id.* § 7217(b)(5).

SEC Control Over Sanctions. The SEC can review any Board sanction on its own initiative or upon request. 15 U.S.C. § 7217(c)(2). Findings are reviewed *de novo*, see *NASD*, 431 F.3d at 804, and the SEC can "enhance, modify, cancel, reduce, or require the remission of" any sanction it deems "not necessary or appropriate in furtherance of th[e] Act or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate," 15 U.S.C. § 7217(c)(3). Sanctions are automatically stayed pending SEC review unless the SEC orders otherwise. *Id.* § 7215(e)(1).

SEC Control Over Inspections, Investigations, and Disciplinary Proceedings. Board inspections, investiga-

tions, and disciplinary proceedings must be conducted according to SEC-approved rules. 15 U.S.C. §§7214(c), 7215(a). Investigations involving potential securities-law violations must be coordinated with the SEC. *Id.* §7215(b)(4)(A). The Board has no subpoena authority; it can only ask the SEC to issue subpoenas. *Id.* §7215(b)(2)(D). Disciplinary proceedings are not public unless a party consents, *id.* §7215(c)(2), and Board inspection reports are subject to SEC review, *id.* §7214(h).

SEC Control Over Registration. Registration of accounting firms is governed by SEC-approved rules. 15 U.S.C. §7212(b)(1). Denial of registration is subject to plenary SEC review. See *id.* §7212(c)(2).

SEC Control Over Board Members. The SEC appoints the Board's members for five-year terms, 15 U.S.C. §7211(e)(4)-(5), and can remove them "for good cause," *id.* §7211(e)(6). Cause exists where a Board member has "willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws"; has "willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard." *Id.* §7217(d)(3). The SEC can also censure Board members, censure the Board, or limit Board activities. *Id.* §7217(d)(2)-(3).

SEC Control Over Jurisdiction. The SEC has broad authority to "relieve the Board of any responsibility to enforce compliance with any provision of th[e] Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. §7217(d)(1). It can exercise that power whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Ibid.* The SEC can also add to the Board's duties. *Id.* §7211(c)(5).

SEC Control Over Finances. The Board's budget is subject to annual SEC approval. 15 U.S.C. §7219(b). Under the SEC's rules, the SEC can condition approval on specific changes. *PCAOB Budget Approval Process*, 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). The Board's support fee, and the rules for allocating, assessing, and collecting it, must also be approved by the SEC. 15 U.S.C. §7219(d).

SEC Control Over Internal Processes. The Board began operations only once the SEC found it ready. 15 U.S.C. §7211(d). The SEC can impose record-keeping and reporting requirements on the Board, and it can examine Board records. *Id.* §7217(a) (incorporating 15 U.S.C. §78q(a)(1), (b)(1)). Even the Board's ability to initiate or defend a lawsuit is subject to SEC approval. *Id.* §7211(f)(1). In granting approval to defend this very suit, the SEC required that its General Counsel oversee every aspect of the Board's defense—from selection of outside counsel to the content of all filings.

The SEC's Independent Authority. Sarbanes-Oxley preserves the SEC's pre-existing authority, 15 U.S.C. §7202(c), and authorizes the SEC to promulgate rules to implement the Act, *id.* §7202(a). The SEC can conduct its own investigations into potential violations of Board rules. *Id.* §78u(a)(1). And any violation is "treated for all purposes in the same manner as a violation of the Securities Exchange Act" subject to the SEC's own disciplinary authority. See *id.* §7202(b)(1). The SEC can thus "proceed under the bill's provisions directly if appropriate." S. Rep. No. 107-205, at 12.

II. THIS LAWSUIT

A. Proceedings in District Court

Petitioner Beckstead and Watts, LLP ("Beckstead") is a Nevada accounting firm registered with the Board. J.A. 64-65. After an inspection uncovered apparent deficiencies in several Beckstead audits, the Board initiated a formal investigation. *Id.* at 65-66. Beckstead, together with Free Enterprise Fund, responded by filing this suit alleging that Sarbanes-Oxley violates separation of powers and the Appointments Clause. Pet. App. 8a. The United States intervened to defend the Act. *Ibid.*

The district court granted summary judgment upholding the Act. It noted that Sarbanes-Oxley establishes an exclusive review scheme, and acknowledged a "colorable" argument that petitioners' failure to invoke that scheme deprived it of jurisdiction. Pet. App. 111a. But the court ultimately determined that it had jurisdiction. *Ibid.* The court nevertheless rejected all of petitioners' claims. *Id.* at 112a-116a.

B. The Court of Appeals' Decision

The court of appeals affirmed. After concluding that the district court had jurisdiction, Pet. App. 9a-11a, it held that Sarbanes-Oxley violates neither the Appointments Clause nor separation-of-powers principles, *id.* at 11a-40a.

1. While principal officers must be appointed by the President and confirmed by the Senate, Congress can "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, §2. The court of appeals rejected petitioners' argument that Board members are principal officers who must be appointed by the President rather than the SEC. Pet. App. 12a-20a. Under *Edmond* v. *United States*, 520 U.S. 651

(1997), "'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." *Id.* at 663. Board members, the court held, are inferior officers because their work is pervasively controlled by the presidentially appointed Commissioners of the SEC. Pet. App. 12a-13a.

All Board rules, the court explained, are subject to SEC approval, and the SEC can modify or abrogate them. Pet. App. 12a. The SEC has "plenary" authority over Board sanctions; it can appoint and remove Board members; and it can "relieve the Board of its enforcement authority altogether." *Id.* at 12a-13a. Like the coast guard judges found to be inferior officers in *Edmond*, moreover, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" *Id.* at 13a (quoting 520 U.S. at 665).

The SEC's pervasive control, the court held, extends to Board inspections, investigations, and disciplinary proceedings. Pet. App. 18a-20a. The Board must conduct those functions under SEC-approved rules that the SEC can alter at any time. See *id.* at 19a-20a. The SEC thus can "modify the Board's investigative authority as it sees fit"—such as by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission," "'affirmatively command[ing]' an investigation," or "micromanaging" Board operations. *Id.* at 19a-20a & n.6. Because the Board is "subject to comprehensive control by the Commission," the court held, "Board members are inferior officers." *Id.* at 20a.

The court also rejected petitioners' claims that the SEC is not a "department" within the meaning of the Appointments Clause and that the Chairman rather than

the Commission (*i.e.*, the five Commissioners collectively) is the SEC's "head." Citing uniform precedent, the court held that independent agencies like the SEC are "departments" and that the Commission is the SEC's "head." See Pet. App. 20a-25a.

2. The court similarly rejected petitioners' separation-of-powers challenge. Sarbanes-Oxley does not impermissibly intrude on the President's executive power, the court held, because the SEC has pervasive control over the Board and the President has constitutionally sufficient control over the SEC. See Pet. App. 26a-37a.

The court explained that even so-called "independent agencies" like the SEC have only limited autonomy. Pet. App. 28a. The President appoints SEC Commissioners and can remove them for cause. *Ibid.* Cause includes "'inefficiency, neglect of duty, or malfeasance in office,'" criteria this Court has described as "'very broad,'" authorizing removal "'for any number of actual or perceived transgressions.'" *Id.* at 28a & n.8 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 729 (1986)).

The SEC, in turn, has "'sweeping'" control over the Board. Pet. App. 29a. "No Board rule is promulgated and no Board sanction is imposed without the Commission's stamp of approval." *Id.* at 30a. And because the SEC can rescind the Board's enforcement authority and enforce the Act itself, it can "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time.'" *Ibid.* The SEC thus essentially wields "at-will removal power over Board functions." *Id.* at 35a. Properly construed, the Act leaves "no instance in which the Board can make policy that the Commission cannot override." *Id.* at 39a.

3. Judge Kavanaugh dissented in part. Construing the Act's oversight provisions narrowly, he argued that

the Act violates separation of powers and the Appointments Clause. Pet. App. 55a-97a. He agreed with the majority, however, that the SEC is a "department" and that the Commission is its "head." *Id.* at 97a n.24.

SUMMARY OF ARGUMENT

I. The Appointments Clause permits Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, §2. Congress complied with that provision here: Board members are "inferior officers," the SEC is a "department," and the Commission is its "head."

A. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'inferior officers' are officers whose work is directed and supervised at some level" by principal officers. *Id.* at 663. Here, Board members are comprehensively directed and supervised by the Commissioners of the SEC. No Board rule or sanction takes effect except as the SEC chooses to allow, and the SEC can modify rules or sanctions as it sees fit. The SEC also appoints the Board's members, controls the Board's budget, and can rescind the Board's enforcement authority.

Petitioners' contrary claims rest on factors such as salary level that have nothing to do with direction and supervision. Their contention that inferior officers must be removable at will ignores longstanding precedent. And their assertion that the SEC lacks control over inspections, investigations, and disciplinary proceedings ignores both the express statutory text and the settled principle that courts must construe statutes to avoid, not create, constitutional doubt.

B-C. For over 70 years, independent agencies like the SEC have been deemed "departments" capable of appointing their own inferior officers. Although petitioners

urge that "departments" must be "directly accountable to the President," that standard is met here: The President appoints the SEC's Commissioners and can remove them for cause. Moreover, the Commission, not the Chairman, is the SEC's "head." Although the Chairman has additional administrative duties, the Commission exercises all the SEC's important regulatory functions.

II. Sarbanes-Oxley is also consistent with separation-of-powers principles.

A. Congress did not violate separation of powers merely by granting the SEC rather than the President direct authority over the Board. Under *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), Congress can grant department heads sole authority to remove the inferior officers they appoint. That traditional arrangement does not undermine the President's executive power; it merely requires him to supervise inferior officers in customary "chain of command" fashion. Petitioners' attempt to carve out an exception from that rule for independent agencies lacks any support in precedent or practice.

B. Nor did Congress undermine the President's authority in any other way. Sarbanes-Oxley grants the SEC plenary control over the Board and does not reduce the President's control over the SEC one iota. The President can remove Commissioners for any neglect in supervising the Board. He thus has the same control here as in any other area under the SEC's jurisdiction.

C. Finally, Congress did not aggrandize its own powers. The Act does not increase Congress's powers in any way. And the claim that the Senate impermissibly participates in removal of Board members is incorrect.

ARGUMENT

The Constitution's "structural protections * * * [a]re critical to preserving liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 730 (1986). The Framers vested the "executive Power" in the President and charged him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. Consequently, all officers of the United States exercising executive power must ultimately be accountable to the President, see *Myers* v. *United States*, 272 U.S. 52, 135 (1926), and any statute purporting to grant Congress authority to execute the law would be unconstitutional, see *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991).

This case does not involve any genuine disagreement over those incontrovertible principles. Rather, it arises from petitioners' trumped-up claim that, in enacting Sarbanes-Oxley, Congress set out to deprive the President of executive authority. But Congress neither intended nor did any such thing. Congress designed the Board to be independent from the accounting profession, not to reduce the President's power or to aggrandize its own. To that end, Congress lodged comprehensive control over the Board in the SEC, while leaving the President's authority over the SEC undiminished.

Congress did not run afoul of the Constitution in doing so. The Appointments Clause expressly permits Congress to grant department heads like the Commission power to appoint their own subordinates. And longstanding precedent makes clear that, when Congress does so, it can also grant the department head sole power to remove its subordinates. That traditional arrangement in no way infringes the President's executive power. The Constitution does not require that the President have au-

thority to reach into an agency and remove inferior officers out from under the principal officers who supervise them. Instead, it contemplates that the President will supervise inferior officers in the same "chain of command" fashion in which he has supervised such officers since the dawn of the Republic: by supervising the principal officers to whom they report.

Here, those principal officers—the SEC Commissioners—have plenary control. While petitioners repeatedly quote one of the Act's few legislative *opponents* for claims about the Board's purportedly "'massive . . . unchecked power[s],'" Pet. 2, 35, the Act is unambiguous. The SEC not only controls Board rules and sanctions. It also can divest Board members of their job responsibilities (and paychecks) whenever it deems it appropriate. And it can impose rules requiring the Board to follow its directives and remove any Board member who refuses to comply. This case thus does not involve "double for-cause removal restrictions," "*Humphrey's Executor* squared," or the like. The Constitution protects the President's "executive Power" and duty to "take Care that the Laws be faithfully executed," not removal power for its own sake, and the SEC's plenary powers are no less effective than at-will removal authority in controlling the Board's operations.

The President, in turn, has constitutionally sufficient control over the SEC. Sarbanes-Oxley does not in any way *diminish* that control. To the extent he lacks *plenary* control over the SEC, that is a consequence of decisions of this Court that have stood for more than 70 years and which petitioners do not challenge here. The President has the same control over the SEC's supervision of the Board that he has over any other SEC function. And because the SEC has plenary control over the Board, the

President has the same control as he would have if Congress had lodged the Board's functions in the SEC's own staff. Whatever one thinks of independent agencies generally, "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." *Freytag* v. *Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in judgment). It is precisely that endeavor that petitioners ask this Court to pursue.[1]

I. SARBANES-OXLEY DOES NOT VIOLATE THE APPOINTMENTS CLAUSE

Under the Appointments Clause, principal officers must be nominated by the President and confirmed by the Senate. U.S. Const. art. II, § 2. Congress, however, may "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." *Ibid.* Congress complied with that clause when it authorized the SEC to appoint Board members: Board members are "inferior officers," the SEC is a "department," and the Commission is its "head."

A. Board Members Are Inferior Officers

1. *Board Members Are Directed and Supervised by the SEC*

The standard for distinguishing principal from inferior officers is clear. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662. Consequently, "'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." *Id.* at 663. Here, Board mem-

[1] The Board adopts the arguments of the United States on the jurisdictional issue. See also Board Br. in Opp. 12-15.

bers are comprehensively "directed and supervised" by the presidentially appointed Commissioners of the SEC.

As the court of appeals observed, "[t]he Commission's authority over the Board is explicit and comprehensive"—"[i]ndeed, it is extraordinary." Pet. App. 7a. The SEC appoints Board members and can censure them, remove them, or limit their activities. 15 U.S.C. §§ 7211(e)(4), (6), 7217(d)(2)-(3). "No rule of the Board"—no auditing standard or procedural rule—is "effective without prior approval of the Commission," and the SEC can abrogate, delete from, or add to Board rules. *Id.* § 7217(b)(2), (5). Board sanctions are subject to plenary SEC review and are automatically stayed pending review. *Id.* §§ 7215(e)(1), 7217(c). Inspections, investigations, and disciplinary proceedings cannot be conducted except under SEC-approved rules. *Id.* §§ 7214(c), 7215(a). The SEC controls the Board's budget. *Id.* § 7219(b). The SEC can impose record-keeping and reporting requirements on the Board, and can examine Board records. *Id.* § 7217(a). The SEC, moreover, can "relieve the Board of any responsibility to enforce" the Act. *Id.* § 7217(d)(1). The SEC thus wields a "vast degree of * * * control at every significant step." Pet. App. 36a.

Board members are subject to at least as much direction and supervision as the coast guard judges held to be inferior officers in *Edmond*. Just as the Judge Advocate General "exercise[d] administrative oversight" over the judges, 520 U.S. at 664, the SEC exercises administrative oversight over the Board, see 15 U.S.C. § 7217(a); p. 23, *infra*. Just as the Judge Advocate General could prescribe "'rules of procedure'" for the judges, 520 U.S. at 664, the SEC can prescribe rules to govern the Board, 15 U.S.C. §§ 7202(a), 7217(b)(5). Just as the Judge Advocate General could remove the judges, 520 U.S. at 664, the

SEC can remove Board members, 15 U.S.C. § 7217(d)(3). Most critically, like the judges, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Pet. App. 13a (quoting 520 U.S. at 665). "[A]ll Board functions are subject to pervasive Commission control * * * ." *Id.* at 30a-31a. Board rules, sanctions, and other determinations stand *only* if the SEC allows.

Indeed, Board members are subject to *greater* supervision than the coast guard judges in *Edmond*. In that case, review of the judges' factual findings was limited to whether there was "some competent evidence in the record." 520 U.S. at 665. Here, by contrast, the SEC reviews findings underlying Board sanctions *de novo*, see p. 5, *supra*, and can reject or modify any sanction it deems "not appropriate," 15 U.S.C. § 7217(c)(3). The SEC can reject proposed Board rules based on its independent judgment of whether a rule is "consistent with the statutes *and* the public interest," Pet. App. 15a, and can modify or abrogate existing rules to "further the purposes of th[e] Act" and the securities laws, 15 U.S.C. § 7217(b)(5).[2]

---

[2] Attempting to manufacture a constitutional violation out of a scrivener's error, petitioners argue that the SEC must approve any Board rule that is *either* "'consistent with the requirements of th[e] Act and the securities laws, *or* . . . necessary or appropriate in the public interest.'" Pet. Br. 55. But Congress obviously could not have intended to require the SEC to approve rules that *violate* the statute so long as they are consistent with the public interest, or vice versa. See *United States* v. *Fisk*, 70 U.S. 445, 447 (1866). The SEC approves rules after finding them both lawful *and* in the public interest. See, *e.g.*, *Order Approving Proposed Auditing Standard No. 4*, 71 Fed. Reg. 7,082, 7,083 (Feb. 10, 2006). Besides, even if the SEC were required to approve a rule it deemed improvident or unlawful, it could immediately *abrogate* the rule under the indisputably broad "further the purposes of th[e] Act" standard. 15 U.S.C. § 7217(b)(5). The notion that Congress would have required the SEC to approve

The SEC can monitor Board operations as "necessary or appropriate in the public interest." *Id.* §§ 78q(a)(1), (b)(1), 7217(a). Critically, moreover, it can *rescind the Board's enforcement authority* under the broadest of standards—whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Id.* § 7217(d)(1).

Citing the Act's provision designating the Board and its staff non-governmental, petitioners claim that Congress mistakenly believed it did not have to comply with the Appointments Clause. Pet. Br. 50-51. But legislators obtained legal guidance on that very issue. They were advised that the Act complies with the Appointments Clause because the SEC's comprehensive oversight renders Board members inferior officers—not because the Board is private. See Borrus, *Who Watches Accounting's Watchdog?*, Bus. Week Online, Feb. 8, 2006. Congress understood that the SEC needed control "to meet the constitutional test," 148 Cong. Rec. 12,120 (2002) (Gramm), and that the Board was private only "for purposes of [statutory] matters that are within Congress's control," *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

2. *Petitioners' Proposed Tests Flout* Edmond

Petitioners begin by invoking factors that have nothing to do with direction and supervision. For example, they urge the Court to look to Board members' salaries. Pet. Br. 49-50. But the test under *Edmond* is direction and supervision, not pay level. The SEC controls Board members' salaries just like every Board function, see 15

---

and immediately abrogate rules is absurd but, if Congress did so, the SEC would still have plenary control.

U.S.C. § 7219(b), and in fact has directly regulated those salaries, see *Order Approving PCAOB Budget*, 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007). Many of the SEC's *own staff* earn more than the Commissioners. See SEC Office of Inspector General, *2008 Audit of Sensitive Payments* 24 (2009). That does not convert them into principal officers. Here, Congress empowered the Board to pay its staff private-sector salaries to attract experienced professionals, see 15 U.S.C. § 7211(f)(4); p. 3, *supra*; Board members' salaries were formerly linked to those at the Financial Accounting Standards Board, see 72 Fed. Reg. at 73,052. A private-sector salary does not render an official a principal officer.

Petitioners stress that the Board sets auditing standards that apply nationwide and collects support fees from public companies. Pet. Br. 49. But "[t]he exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather * * * the line between officer and nonofficer." *Edmond*, 520 U.S. at 662. What matters here is not the scope of the Board's authority, but the fact that the SEC controls every exercise of it. Board auditing standards and support fees have *no effect* without SEC approval, and the SEC can revise them as it sees fit. See 15 U.S.C. §§ 7217(b)(2), (5), 7219(d).[3]

---

[3] The Board's funding structure is not novel. Other entities with similar support fees include the Municipal Securities Rulemaking Board, 15 U.S.C. § 78o-4(b)(2)(J), the Board of Governors of the Federal Reserve System, 12 U.S.C. § 243, the Office of the Comptroller of the Currency, *id.* § 482, the Office of Thrift Supervision, *id.* § 1462a(i), the National Credit Union Administration, *id.* § 1755, and various food marketing boards, *e.g.*, 7 U.S.C. § 610(b)(2)(ii).

Petitioners contend that "historical practice" makes Board members principal officers because "[t]he heads of *all* agencies or quasi-governmental corporations are appointed by the President with Senate confirmation." Pet. Br. 50. Not so. The Municipal Securities Rulemaking Board's members, for example, were initially appointed by the SEC. 15 U.S.C. §78o-4(b)(1). The Secretary of the Interior appoints 28 of the 30 directors of the National Fish and Wildlife Foundation. 16 U.S.C. §3702(a)-(b). Other similar examples abound, including the Federal Reserve Banks, 12 U.S.C. §302; the National Indian Gaming Commission, 25 U.S.C. §2704(b); the Securities Investor Protection Corporation, 15 U.S.C. §78ccc(c)(2); the Social Security Administration's Office of the Chief Actuary, 42 U.S.C. §902(c); the Postal Service's Office of Inspector General, 39 U.S.C. §202(e); the Board of Veterans' Appeals, 38 U.S.C. §7101A(a); and the Universal Service Administrative Company, 47 C.F.R. §54.703(c)(3). That the heads of those subordinate entities "run their own 'shops'" (Pet. Br. 50) does not make them principal officers; they are still "inferior" to the department heads that appointed them and supervise their work. The lieutenant may run his own platoon, but he is still subordinate to his own commanding officer.[4]

Ultimately, petitioners ask this Court to abandon *Edmond*'s clear "direction and supervision" test in favor of an amorphous standard that combines factors from *Morrison* v. *Olson*, 487 U.S. 654 (1988), with considerations of petitioners' own invention. As *Edmond* made clear, *Morrison* "did not purport to set forth a definitive test for

[4] The Appointments Clause's reference to consuls and ambassadors likewise does not help petitioners. Cf. Pet. Br. 47-48. Petitioners have not shown that the Secretary of State has the same comprehensive control over those officers that the SEC has over the Board.

whether an office is 'inferior.'" 520 U.S. at 661. *Edmond*, by contrast, does. While Board members are inferior officers under any plausible standard—including *Morrison*'s—*Edmond* should control.[5]

3. *Petitioners Misapply* Edmond *and Misread the Statute*

a. Petitioners ultimately make only a half-hearted effort to show that Board members are not "directed and supervised" by the SEC. They claim that Board members are not inferior officers because they are removable only for cause. See Pet. Br. 53. But this Court has repeatedly found for-cause removal restrictions consistent with inferior-officer status. See, *e.g.*, *United States* v. *Perkins*, 116 U.S. 483, 485 (1886). "[C]ase law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise." *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993). In *Edmond* itself, the superior did not have true at-will removal power; he could not "attempt to influence (by threat of removal or otherwise)" the primary thing

[5] Petitioners note that *Morrison* relied on the independent counsel's limited tenure and jurisdiction. Pet. Br. 48. But Board members serve only five-year terms, 15 U.S.C. § 7211(e)(5), and regulate only one narrow subject-matter: public-company auditing, a mere subset of the SEC's broader jurisdiction. Any differences in tenure and jurisdiction, moreover, pale compared to the differences in oversight. The independent counsel had "'independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice'" without the Attorney General's permission—including indicting and trying cases—and was required to comply with Department policies only "to the extent possible." *Morrison*, 487 U.S. at 671-672. The Board, by contrast, cannot take any action except as the SEC chooses to allow, and must comply with *all* SEC rules. See pp. 15-18, *supra*; p. 22, *infra*.

the coast guard judges did—decide "the outcome of individual proceedings." 520 U.S. at 664. Indeed, an officer's lower grade has traditionally been thought to *strengthen*, not diminish, the case for civil-service or other tenure protections. See, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 74 (1990). For that reason, even *Myers* recognized that department-head-appointed inferior officers "could be entirely removed from politics" by granting them such protections. 272 U.S. at 173-174; see also 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1531-1538, at 388-397 (1833).

The SEC's broad for-cause removal power under Sarbanes-Oxley is not limited to "true miscreants." Pet. Br. 40. The SEC can remove Board members for *any* failure to enforce the Act "without reasonable justification or excuse." 15 U.S.C. § 7217(d)(3)(C). The SEC can also remove Board members for "willful[ ]" violations or abuses of authority. *Id.* § 7217(d)(3)(A)-(B). "[W]illfulness" in the securities context requires only volitional conduct, not knowing violation of the law. See *Wonsover* v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000).

Besides, while "[t]he power to remove officers * * * is *a* powerful tool for control," it is not the *only* such tool. See *Edmond*, 520 U.S. at 664 (emphasis added). U.S. Attorneys are inferior officers because of the Attorney General's "broad array of supervisory powers," even though the Attorney General has no formal power to remove them *at all*. *United States* v. *Hilario*, 218 F.3d 19, 25-26 (1st Cir. 2000). The SEC's supervisory powers are even broader: No Board rule or sanction takes effect except as the SEC chooses to allow. The SEC can modify rules and sanctions as it sees fit; the SEC appoints the Board's members and controls its budget; and the SEC can monitor the Board's operations and rescind its enforcement

authority. See pp. 15-18, *supra*. Indeed, the SEC has powers equivalent to at-will removal authority. See p. 46, *infra*. But even if it did not, the SEC would still have ample means to direct and supervise the Board.

b. Focusing on only a subset of the Board's functions, petitioners insist that Board inspections, investigations, and disciplinary proceedings are "subject to no SEC oversight at all." Pet. Br. 53. But that is not true. The SEC not only can review any inspection reports or sanctions that result. 15 U.S.C. §§ 7214(h), 7217(c). It also controls the Board's enforcement functions because the Board must conduct them according to SEC-approved rules that the SEC can modify at any time. See *id.* §§ 7214(c), 7215(a), 7217(b). The SEC can also promulgate its own rules in furtherance of that authority. See *id.* § 7202(a). It can use its reporting and examination power to monitor the Board's operations, *id.* § 7217(a), and in fact does so: "As part of the Commission's oversight of the PCAOB, the Commission staff inspects aspects of the PCAOB's operations, including its inspection program," to "examine whether the PCAOB inspections of audit firms have been effective." *SEC Announces Next Steps for Sarbanes-Oxley Implementation*, Press Release No. 2006-75 (May 17, 2006), http://www.sec.gov/news/press/2006/2006-75.htm. The SEC has also conditioned budget approval on the Board's ongoing submission of information regarding its inspections. *Order Approving PCAOB Budget*, 73 Fed. Reg. 78,861, 78,862 (Dec. 23, 2008). And it can remove Board members for any unreasonable failure to investigate or impose sanctions. See 15 U.S.C. § 7217(d)(3)(C).

Critically, Section 7217(d)(1)—a provision petitioners fail to cite—authorizes the SEC to "relieve the Board of *any responsibility* to enforce compliance" with the Act

whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." 15 U.S.C. § 7217(d)(1) (emphasis added).[6] The SEC can thus rescind all, or any part, of the Board's investigative and disciplinary power at any time. The SEC also has independent authority to investigate and sanction violations, and can thus reassign rescinded functions to its own staff. See *id.* §§ 78u(a)(1), 7202(b)(1). Because the SEC controls Board members' salaries, moreover, it can revoke their compensation upon rescinding their authority (by revising the Board's budget or amending its bylaws). See *id.* §§ 7201(13), 7217(b)(5), 7219(b).

The SEC can also impose rules enabling even more direct control. As the court of appeals recognized, because the SEC controls the rules governing the Board's enforcement functions, it can "modify the Board's investigative authority as it sees fit." Pet. App. 19a. It could "mandate that all decisions regarding investigation * * * be approved by the Commission," empower itself to "'affirmatively command' an investigation," or otherwise "micromanag[e]" the Board. *Id.* at 19a-20a & n.6. Any refusal to follow the SEC's directives would be grounds for removal. See 15 U.S.C. §§ 7201(15), 7217(d)(3)(A) (allowing removal for any "willful[ ] violat[ion] * * * [of] the rules of the Board, or the securities laws," including SEC rules).

Petitioners claim those control mechanisms are inadequate because they are "unexercised." Pet. Br. 56 (emphasis omitted). Oversight powers, however, enable control by their existence, not just their exercise. For ex-

---

[6] Although the SEC must exercise that power "by rule," 15 U.S.C. § 7217(d)(1), it can forgo notice and comment if necessary in the "public interest," 5 U.S.C. § 553(b)(B).

ample, an officer's "'presumed desire to avoid removal'" creates a "'here-and-now subservience'" even if the superior never exercises the removal power. *Bowsher*, 478 U.S. at 727 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)). Merely keeping the power "*in terrorem* over the heads of the officers * * * stimulate[s] [them] to do their duty to the satisfaction of the principal." 1 Annals of Cong. 495 (Gales ed., 1834) (Ames). Likewise here, the SEC need not rescind the Board's authority and salaries or impose a rule to micromanage the Board. The mere threat to do either would suffice. Indeed, the Board's mere awareness of the SEC's powers ensures day-to-day compliance. Petitioners cannot challenge the Act's constitutionality merely because they disagree with how the SEC has chosen to exercise its oversight powers (particularly in this facial challenge).

For the same reasons, petitioners err in suggesting that the Act authorizes only "after-the-fact" or "passive" review. Pet. Br. 54-55. Even assuming inferior officers must be subject to ongoing day-to-day supervision, the SEC has that authority: It can use its rescission or rule-modification powers to compel compliance at any time. Even the SEC's nominally "passive" review powers enable day-to-day control. Because Board rulemaking is conducted in the shadow of the SEC's ultimate review, for example, the SEC can—and does—manage development of Board rules simply by indicating what it will or will not approve. "To facilitate the Commission's oversight responsibilities in this area, the [SEC] staff meets regularly with the PCAOB staff to discuss and provide input on the PCAOB's standard-setting activities." SEC Staff Speech, *Considering Audit Regulation Under SOX* (Dec. 10, 2007), http://www.sec.gov/news/speech/2007/

spch121007zvp.htm. Because "the SEC is [the Board's] oversight body," rulemaking can involve "frequent—if not daily—dialogue with the SEC at all levels of both organizations." *Chairman Mark Olson's Remarks on the Proposed New Standard Concerning the Audit of Internal Control* 1-2 (Dec. 19, 2006), http://www.pcaob.org/Rules/Docket_021/2006-12-19_Statement_Olson.pdf.

Petitioners insist that *Morrison* proves that the SEC's rescission and rule-modification powers do not enable supervision. In *Morrison*, they urge, the D.C. Circuit's Special Division could "terminate" an independent counsel's office, yet the Court held that the Division lacked ability to "supervise" the counsel. Pet. Br. 55-56. *Morrison*, however, undermines petitioners' claim. *Morrison* recognized that judicial supervision of an executive officer would raise substantial separation-of-powers concerns. See 487 U.S. at 682. Consequently, it construed the statute at issue narrowly to allow the Special Division to "terminate" an independent counsel's office only *after* completion of his duties. *Id.* at 682-683. *That* is why the Court refused to equate the Division's termination power with "the power to *remove* the counsel while an investigation or court proceeding is still underway." *Id.* at 682. The SEC, by contrast, can rescind or modify the Board's authority at any time. *Morrison* makes clear that those ever-present powers matter precisely because they *do* enable supervision. See *id.* at 680-682.[7]

---

[7] Petitioners compare the SEC's rescission and rule-modification powers to Congress's power to amend a statute. Pet. Br. 55. But Congress's amendment power *is* an effective means of control; it is constitutional because Congress exercises it *through legislation*. See p. 53, *infra*. That some of the SEC's control mechanisms can be analogized to powers exercised by a powerful coordinate branch of government merely underscores their potency.

c. Petitioners attempt to construe the Act narrowly to minimize the SEC's control. But they misread the statute and ignore basic principles of constitutional avoidance. Petitioners essentially assume that Congress intended the Board to be independent from the SEC and then distort or ignore the statutory provisions and legislative history that undermine that claim. The SEC's pervasive control mechanisms under the Act are impossible to reconcile with petitioners' theory of independence. Congress made the Board independent from the accounting profession, not the SEC. Congress made the Board *separate* from the SEC. But it did so for practical reasons such as salaries and focus, not to free the Board from SEC control. See pp. 3-4, *supra*.

Petitioners thus err in asserting in their petition that the only way the SEC may limit Board functions is as a sanction for Board misconduct pursuant to Section 7217(d)(2). Pet. 36-37. Petitioners do not reassert that claim in their brief, and with reason: The fact that Congress authorized limitations as a disciplinary sanction does not mean it restricted the SEC's broad authority to regulate Board functions under other provisions in the public interest. See *Shurtleff* v. *United States*, 189 U.S. 311, 317-318 (1903). Congress required the Board to conduct inspections, investigations, and disciplinary proceedings pursuant to SEC-approved rules that the SEC can modify as it sees fit. 15 U.S.C. §§ 7214(c), 7215(a), 7217(b). Congress obviously contemplated that those rules would impose "limitations" on how the Board performs those functions.

The dissent below claimed that the SEC could not promulgate rules requiring the Board to follow its directives because such rules would not be "in furtherance of th[e] Act," and that the SEC's power to amend the

Board's rules was not a "backdoor grant of authority to exercise direction and supervision." Pet. App. 93a-96a. Petitioners do not defend that theory either. The Act unambiguously authorizes the SEC to control Board inspections, investigations, and disciplinary proceedings by amending the Board's rules, and to promulgate its own rules "in furtherance of" that authority. See 15 U.S.C. §§ 7202(a), 7214(c), 7215(a), 7217(b)(5). A rule requiring the Board to obtain SEC approval before initiating an investigation, or to initiate or terminate an investigation as the SEC may direct, is no less a "rule * * * for the investigation * * * of registered public accounting firms" than any other. *Id.* § 7215(a). The Department of Justice uses its rulemaking authority to impose detailed notification, coordination, and approval requirements in certain categories of prosecutions. See, *e.g.*, U.S. Attorney's Manual §§ 9-2.136 *et seq.*, 9-10.010 *et seq.*; *Delegation of Authority To Publish a U.S. Attorney's Manual*, 41 Fed. Reg. 46,598, 46,598 (Oct. 22, 1976) (citing, *inter alia*, 5 U.S.C. § 301). The SEC's authority here is no different.

Such rules would not "destroy the independence * * * Congress sought to ensure." Pet. App. 94a. The "independence" Congress sought was independence from the accounting profession, not the SEC. See pp. 2-4, *supra*. Congress made the Board structurally separate from the SEC because it wanted to create a separately funded entity that was focused *solely* on audit regulation, and because it wanted the Board to pay private-sector salaries. See p. 3, *supra*. Congress did not make the Board independent from the SEC's *control*. Whatever inference one might draw from the for-cause removal restriction in isolation is plainly overcome by the countless other statutory provisions granting the SEC unqualified control. The fleeting mentions of the removal provision in the leg-

islative history merely note the SEC's power to remove for cause as an example of its *control*. See S. Rep. No. 107-205, at 12 (2002); *Senate Hearings* 584 (Coffee).

Petitioners quote Senator Gramm's assertion that the Board would exercise "'massive . . . unchecked power, by design.'" Pet. Br. 2. But Senator Gramm was the bill's "main critic" who "decided at the last minute to vote for it." Cornwell, *U.S. Congress Sends Corporate Reform Bill to Bush*, Reuters News, July 26, 2002; see S. Rep. No. 107-205, at 2, 66-67. The views of legislative opponents are hardly authoritative. See *Bryan* v. *United States*, 524 U.S. 184, 196 (1998). And it is not even clear what Senator Gramm meant—he recognized in the same speech that the Board "me[t] the constitutional test" because "the SEC * * * ha[d] authority over it." See 148 Cong. Rec. 12,120 (2002). The General Accounting Office report that petitioners quote (Pet. Br. 48) likewise states in the same sentence that the Board is "subject to SEC oversight." GAO, *Actions Needed To Improve PCAOB Selection Process* 6 (2002). This Court should not construe the Act's facially broad oversight provisions narrowly to vindicate a nonexistent mandate of "independence" from the SEC.

Petitioners' effort to manufacture a constitutional violation also ignores the fundamental principle that courts must construe statutes to avoid rather than create constitutional doubt. See *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009). That canon applies with "especially great" force in separation-of-powers cases. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Even if petitioners' countertextual interpretations were plausible in the abstract—and they are not—this Court must adopt any reasonable construction necessary to uphold the Act. *Ibid.* The court of appeals

properly did so. Petitioners urge the Court to do the opposite.

B. The SEC Is a "Department"

Petitioners argue that independent agencies like the SEC are not "departments" capable of appointing their own inferior officers. That claim defies more than 70 years of settled tradition. In 1933, the Attorney General ruled that the independent Civil Service Commission was a "department." *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933). Congress routinely grants independent agencies authority to appoint their subordinates. See *Freytag* v. *Commissioner*, 501 U.S. 868, 918 (1991) (Scalia, J., concurring in judgment). While the majority in *Freytag* declined to address "appointment of an inferior officer by the head of one of the principal agencies, such as * * * the Securities and Exchange Commission, " 501 U.S. at 887 n.4, Justice Scalia's concurrence (joined by Justices O'Connor, Kennedy, and Souter) concluded that "so-called 'independent regulatory agencies'" like the SEC are "departments," *id.* at 918-922. And the Executive Branch has reaffirmed that Congress may "vest the power to appoint inferior officers in the heads of the so-called independent agencies." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 152-153 (1996).

Petitioners urge that "departments" include only agencies "directly accountable to the President." Pet. Br. 57. But that standard is met here. While independent agencies are sometimes referred to pejoratively as part of a "headless Fourth Branch," cf. *id.* at 59 n.8, "agencies, even 'independent' agencies, are more appropriately considered to be part of the Executive Branch." *Fed. Maritime Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 773

(2002) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); see *Mistretta* v. *United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) ("[A]n 'independent agency' * * * [is] an agency *within* the Executive Branch * * * ."); 37 Op. Att'y Gen. at 231. The Constitution contemplates only three branches of government, and the SEC is not part of Congress or the judiciary.[8]

The President appoints SEC Commissioners, 15 U.S.C. §78d(a), and can remove them, *MFS Sec. Corp.* v. *SEC*, 380 F.3d 611, 619 (2d Cir. 2004). No statute restricts his removal authority.[9] While Commissioners are customarily understood to be removable only for "'inefficiency, neglect of duty or malfeasance in office,'" *ibid.*, this Court has stated that those terms are "very broad and * * * could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729. Presidents have, in fact, removed independent agency board members for cause, either expressly or by forcing their resignation. See Breger & Edles, *Established by Practice*, 52 Admin. L. Rev. 1111, 1144-1151 & nn.197-198 (2000). The President oversees the SEC in other ways as well.[10] Whatever "degree" of independence

---

[8] Petitioners' suggestion that independent agencies could be "'agent[s] of Congress'" (Pet. Br. 20) is irreconcilable with the rule that Congress and its agents may affect private rights only through legislation. See *Metro. Wash. Airports Auth.*, 501 U.S. at 276 (Stevens, J.).

[9] Because the SEC was created in the years between *Myers* and *Humphrey's Executor*, Congress likely believed it lacked authority to restrict removal. See Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 610 & n.147 (1984).

[10] The President appoints the SEC's Chairman from among the five Commissioners, and can remove him at will by appointing a replacement. See Reorganization Plan No. 10, §3, 15 Fed. Reg. 3175, 3175 (May 25, 1950). The Chairman's authority over administrative matters gives the President a means of control. See Strauss, *supra*, at

agencies like the SEC have, see *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1829 (2009) (Breyer, J., dissenting), they are not unaccountable to the President. Petitioners concede that independent agencies are "constitutionally compliant because their commissioners are appointed and removable by the President." Pet. Br. 22. Those presidential powers matter precisely because they ensure accountability.

The SEC is also *directly* accountable to the President. "Departments" include only agencies immediately below the President, not subordinate divisions *within* those departments. *United States* v. *Germaine*, 99 U.S. 508, 511 (1879). The Commissioners answer to the President alone; there is no larger organization of which the SEC is merely a subpart. Petitioners thus err in arguing that the SEC does not "resemble [a] cabinet department[]." Pet. Br. 58. The SEC resembles a cabinet department in the respect that matters: It is a standalone executive agency directly accountable to the President. Unlike the highly specialized and relatively small tax court in *Freytag*, moreover, the SEC oversees an important part of the national economy.

Neither precedent nor logic justifies allowing the SEC to exercise far-reaching regulatory powers but denying it the customary executive authority to appoint its own subordinates. "It makes no sense to create a system in which the inferior officers of [an agency] * * * must be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Freytag*, 501 U.S. at 919-920

590-591; p. 34, *infra*. The President also exercises various degrees of oversight under other provisions. See, *e.g.*, Exec. Order No. 12,866, § 4(c), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993); 44 U.S.C. §§ 3502(1), 3507(a), (f); cf. Strauss, *supra*, at 592-593, 646.

(Scalia, J., concurring in judgment). Yet that is what petitioners advocate.

C. The Commission Is the SEC's "Head"

Petitioners assert that Congress cannot lodge appointment power in the Commission because the Chairman, not the Commission, is the SEC's "head." Even apart from the district court's holding that petitioners lack standing to raise that claim, see Pet. App. 114a; J.A. 74-75, the argument fails. For as long as independent agencies have been deemed "departments," the multimember commissions in charge of them have been their "heads." The Attorney General ruled in 1933 that "the three Commissioners, who constitute the [Civil Service] Commission, are the 'head of [the] Department.'" 37 Op. Att'y Gen. at 231. Congress has declared that "the head of an agency [may] be * * * a commission or board with more than one member." 5 U.S.C. § 904. And "many independent regulatory agencies are headed by groups with no apparent constitutional infirmity." *Silver* v. *U.S. Postal Serv.*, 951 F.2d 1033, 1044 n.3 (9th Cir. 1991) (O'Scannlain, J., dissenting).[11]

The Commission exercises the SEC's important powers as a collective body. The Commission, not the Chairman, promulgates rules. 15 U.S.C. § 78w(a)(1). The Commission, not the Chairman, authorizes enforcement proceedings. *Id.* § 78u(d). The Commission, not the Chairman, reviews sanctions. *Id.* § 78d-1(b). And the Commission, not the Chairman, supervises SROs. *Id.*

---

[11] That dictionaries define "head" as "'*one* who has the *first* rank or place'" (Pet. Br. 60) does not resolve whether the "one" must be one person rather than one committee. And petitioners' historical authorities relate to the decision to vest appointment of principal officers in a single *President*. See *ibid.* The Framers entrenched *that* preference in constitutional text.

§ 78s. The SEC, moreover, is surely in the best position to know who its own head is. The United States has argued throughout this litigation that the Commission is the SEC's head. See, *e.g.*, Gov't C.A. Br. 33.

Petitioners contend that President Truman made the Chairman the SEC's "head" when he issued Reorganization Plan No. 10 in 1950. Pet. Br. 60-61. But that plan merely transferred to the Chairman administrative duties concerning "day-to-day direction and internal administration"; "the substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases * * * [we]re left in the * * * commission as a whole." *Special Message to the Congress Summarizing the New Reorganization Plans*, 1950 Pub. Papers 195, 197 (Mar. 13, 1950). "The fact that * * * the commissions retain[ed] all substantive responsibilities deserves special emphasis." *Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950*, 1950 Pub. Papers 199, 202 (Mar. 13, 1950). The plan itself provided that "the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make." Reorganization Plan No. 10, § 1(b)(1), 15 Fed. Reg. 3175, 3175 (May 25, 1950).

The Reorganization Act, moreover, required any new agency "head" created by a plan to be either a civil-service or Senate-confirmed position. 5 U.S.C. § 904. The Chairman's position is neither. See p. 31 n.10, *supra*. Petitioners' argument thus rests on the implausible premise that President Truman made the Chairman the SEC's head in violation of the Act's express requirements.

That the SEC's website describes the Chairman as its "'top executive'" (Pet. Br. 61) proves nothing. As the Office of Legal Counsel has explained, even if a board's chairman is designated "Chief Executive Officer," he exercises authority "subject to [b]oard oversight," and the board has "ultimate authority to manage [agency] business." *Division of Power and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, Op. Off. Legal Counsel, 2000 WL 33952881, at *2, *5 (June 26, 2000).

Petitioners suggest that recognizing the Commission to be the SEC's "head" would imperil the SEC's division heads and general counsel because those individuals "were appointed by the Chairman *alone*." Pet. Br. 62. But those staff members are not appointed "by the Chairman *alone*." Under Reorganization Plan No. 10, "[t]he appointment[s] by the Chairman of the heads of major administrative units under the Commission *[are] subject to the approval of the Commission*." §1(b)(2), 15 Fed. Reg. at 3175 (emphasis added). That Commission approval is sufficient to render them Commission appointees for Appointments Clause purposes. See *United States* v. *Hartwell*, 73 U.S. 385, 393-394 (1868); *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888); *Germaine*, 99 U.S. at 511.

II. Sarbanes-Oxley Does Not Violate Separation Of Powers

This Court has repeatedly and properly emphasized the indispensable role of separation of powers in preserving individual liberty. Petitioners appeal to those principles in the abstract but ignore two centuries of precedent governing the precise question at hand. Petitioners claim that Congress violated separation-of-powers principles

by giving the SEC rather than the President authority to remove Board members. But the settled rule since the Framing has been that, when Congress grants a department head authority to appoint its own subordinates, Congress can also grant the department head sole authority to remove them. Congress followed that rule to the letter in Sarbanes-Oxley by granting the SEC sole authority to appoint and remove its new subordinates. That traditional arrangement does not undermine the President's "executive Power" or duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. It merely requires him to supervise inferior officers the same way he normally supervises such officers—by supervising the principal officers to whom they report. Petitioners attempt to carve out from that settled rule a novel exception for independent agencies, but their exception has no foundation in precedent, practice, or logic.

Petitioners complain that the standards for removing and supervising Board members are too restrictive. But that claim has no merit either. The Act grants the SEC expansive control mechanisms that are equivalent to at-will removal power, and the President has the same authority over the SEC here as elsewhere. The Act thus does not diminish the President's control in any way.

A. Congress Can Grant Department Heads Sole Authority To Remove the Subordinates They Appoint

1. Petitioners' premise that the President must have authority to remove all executive officers—even inferior officers appointed by department heads—defies 170 years of precedent. In *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), this Court held that "the power of removal [i]s incident to the power of appointment," upholding a district court's removal of a clerk it had appointed.

Id. at 258-262. That same rule, the Court explained, governs executive officers as well: "[P]ower is given to the secretary, to appoint all necessary clerks; and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department." *Id.* at 259 (citation omitted). The Court made clear that, when the department head appoints, *only* the department head—and *not* the President—can remove: "*[T]he President has certainly no power to remove*." *Id.* at 260 (emphasis added). In short, "all inferior officers * * * hold their office at the discretion of the appointing power." *Ibid.*[12]

That rule traces back to the Republic's earliest days. In the legislative Decision of 1789 (which petitioners invoke as "'weighty evidence of the Constitution's meaning,'" Pet. Br. 28), speakers on both sides of the debate acknowledged more than 20 times that the power to remove follows the power to appoint.[13] The issue there was whether a *presidentially appointed* principal officer could be removed by the President alone or only with the Senate's consent. 1 Annals of Cong. 473. "It was agreed * * * [that] the power of appointment carried with it the

---

[12] At one point the Court prefaced its holding with the phrase "[i]n the absence of all constitutional provision, or statutory regulation." 38 U.S. at 259. That comment followed the observation that Article III grants judges life tenure, and was directed to such "express limitation[s] in the Constitution." See *id.* at 258-259. By contrast, when the Court addressed inferior executive officers appointed by department heads, it made clear that the President "has certainly no power to remove" them. *Id.* at 260.

[13] See 1 Annals of Cong. 388-389, 396-397 (Bland); *id.* at 389, 508, 577 (Jackson); *id.* at 391, 473, 485, 537-538 (White); *id.* at 393, 584 (Sylvester); *id.* at 395-396, 596 (Gerry); *id.* at 396, 566 (Livermore); *id.* at 484 (Vining); *id.* at 502-503 (Lawrence); *id.* at 510-511 (Sherman); *id.* at 511-512 (Stone); *id.* at 526 (Benson); *id.* at 542 (Sedgwick); *id.* at 548 (Boudinot); *id.* at 561 (Ames). But see, *e.g.*, *id.* at 579 (Baldwin).

power of removal"; "the real point which was considered and decided" was whether the Senate's authority to confirm nominees made the Senate part of the "appointing" power for removal-follows-appointment purposes. *Myers*, 272 U.S. at 119. Congress concluded that it did not, so that the President had sole power to remove his appointees. *Ibid.* By the same logic, where a *department head* appoints, only the *department head* can remove. Thus, when Congress granted the Postmaster General authority to appoint subordinates shortly after the Framing, it was understood that he also had "sole and exclusive authority" to remove them. 3 Story, *supra*, § 1530, at 387.

In *United States* v. *Perkins*, 116 U.S. 483 (1886), this Court held that Congress's authority to vest appointment in a department head implied a more general authority to regulate removal. "'We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may *limit and restrict the power of removal as it deems best for the public interest*.'" *Id.* at 485 (emphasis added). "'The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.'" *Ibid.* Justice Story stated that same rule: "As far as congress constitutionally possess[es] the power to * * * delegate the appointment of 'inferior officers,' so far they may prescribe the term of office, the manner in which, and the persons by whom, the removal * * * shall be made." 3 Story, *supra*, § 1531, at 388. That congressional authority necessarily encompasses authority to lodge removal power in the department head that made the appointment.

Myers expressly reaffirmed *Hennen*, holding that "as a constitutional principle the power of appointment carrie[s] with it the power of removal." 272 U.S. at 119. *Myers* also cited *Perkins* for the proposition that "Congress [has] the power to limit and regulate removal of * * * inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them." *Id.* at 127, see also *id.* at 160-161. *Myers* invalidated a restriction on removal of a *presidentially appointed* inferior officer because it deprived the President of authority to remove an officer *he appointed*. "[S]o long as Congress does *not* exercise th[e] power" to vest appointment in a department head, the Court explained, "the power of removal must remain * * * with the President." *Id.* at 161 (emphasis added).

This Court has reaffirmed *Hennen*'s removal-follows-appointment rule more than a half-dozen other times.[14] The courts of appeals follow it. See, *e.g.*, *Nat'l Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 247-248 (D.C. Cir. 1981). And it is followed in practice: When President Nixon sought to terminate the Watergate investigation, he understood he could only direct the Attorney General to fire the Special Prosecutor; he could not fire the Prosecutor himself. See *Nader* v. *Bork*, 366 F. Supp. 104, 107 (D.D.C. 1973). OLC agrees: "[I]nferior officers appointed by a department head [a]re not removable by the President * * * but by the secretary who appointed

---

[14] See *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974); *Burnap* v. *United States*, 252 U.S. 512, 515 (1920); *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903); *Reagan* v. *United States*, 182 U.S. 419, 424 (1901); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Parsons* v. *United States*, 167 U.S. 324, 331 (1897); *United States* v. *Allred*, 155 U.S. 591, 594 (1895).

them," and "*Hennen* [and] *Perkins* * * * remain good law." 20 Op. Off. Legal Counsel at 166.

2. Petitioners respond to that longstanding precedent by ignoring it. They do not cite *Hennen* at all, and cite *Perkins* only in a parenthetical in their description of the decision below. Pet. Br. 6. Instead, petitioners urge that the President must have power to remove executive officers because Article II vests him with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." See Pet. Br. 25-28. But those separation-of-powers principles in no way conflict with *Hennen*'s removal-follows-appointment rule. The "heads of departments" that can appoint and remove inferior executive officers pursuant to *Hennen* serve directly under the President and are accountable to him for their supervisory decisions no less than for any other decisions. See pp. 30-33, *supra*; pp. 50-51, *infra*; *Reagan*, 663 F.2d at 247-248. The removal-follows-appointment rule thus does not deny the President authority to ensure faithful execution of the laws. It merely requires him to supervise inferior officers in traditional "chain of command" fashion, by supervising the principal officers to whom they report.

As the Attorney General explained in 1823, if "the postmaster should make a corrupt appointment, * * * the power of correction which the President holds is not to supersede such appointment by one made by himself." *The President and Accounting Offices*, 1 Op. Att'y Gen. 624, 626 (1823). "He is to take care, in such a case, that the Postmaster General be punished * * * : he has power to remove him—to appoint a successor; *and through the medium of such successor, and by his instrumentality*, to remove the deputy, and to see that his place be honestly supplied." *Ibid.* (emphasis added).

Contrary to petitioners' suggestion in the court of appeals, nothing in *Morrison* undermines *Hennen* or *Perkins*. *Morrison* specifically reaffirmed *Perkins*. See 487 U.S. at 689-690 nn.27, 29. The Court observed that it did not confront a situation in which "the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 692. But the Court did not suggest that the President must be able to supervise inferior officers directly rather than through their superiors. *Hennen*'s rule preserves a "means for the President to ensure the 'faithful execution' of the laws" because the President supervises the department head responsible for the subordinate. Besides, the notion that one ambiguous sentence in *Morrison*—an opinion *upholding* the Ethics in Government Act—overruled two centuries of settled law is fanciful.[15]

3. Apparently recognizing the insurmountable obstacles to their original theory that the President *himself* must have power to remove all inferior executive officers, see Pet. Dist. Ct. Br. 14-18, petitioners suggest that Congress can vest removal power in a department head, but

---

[15] Petitioners also relied below on *Morrison*'s statement that *Hennen* was "'not intended to define the constitutional power of Congress.'" 487 U.S. at 673-674. But that comment related to a different issue: the permissibility of inter-branch appointments. See *ibid.* *Hennen* assumed that principal officers would appoint only their *own* subordinates, 38 U.S. at 257-258, a view the Court rejected in *Ex parte Siebold*, 100 U.S. 371, 397-398 (1880). But that post-*Hennen expansion* of Congress's authority hardly supports petitioners' position. And while courts have not traditionally applied *Hennen*'s removal-follows-appointment rule to inter-branch appointments—an application that would raise serious constitutional questions, cf. *Morrison*, 487 U.S. at 682-683—that does not diminish *Hennen*'s force in the traditional context that case addressed: a principal officer's appointment of his *own* subordinates.

only if he is a presidential "alter ego" removable at will. See Pet. Br. 25-26 n.3. Petitioners thus propose a specially gerrymandered rule that, while the President must supervise inferior officers through their superiors in all other contexts, a different rule of direct presidential supervision applies to inferior officers in independent agencies.

That proposed exception ignores the reasoning of this Court's cases. *Hennen*'s rationale for the rule that department heads have sole authority to remove the subordinates they appoint—and the rationale of every case since—is that the power to remove follows the power to appoint. It is *not* that department heads are presidential alter egos. See pp. 36-40, *supra*. That removal-follows-appointment rationale does not depend on whether the department head is removable for cause or at will. The department head must be sufficiently accountable to the President that the department is, in fact, a "department" capable of appointing inferior officers. See pp. 30-33, *supra*. But neither the Constitution nor precedent supports a further requirement that the department head be removable at will. Petitioners do not cite a single case ever suggesting such a requirement, even though independent agencies have been around for over 120 years. See Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).[16]

---

[16] Petitioners cite *Myers*, Pet. Br. 25 n.3, but that case nowhere suggests that *Hennen*'s removal-follows-appointment rule depends on whether a department head is an "alter ego." See 272 U.S. at 119. It merely refers to department heads as "alter ego[s]" in an unrelated discussion 14 pages later. See *id.* at 133. And even that unrelated discussion does not say that department heads are alter egos generally—only that they are alter egos when engaged in "political" functions such as foreign affairs as opposed to statutorily assigned administrative functions of the sort at issue here. See *id.* at 132-135.

Congress has repeatedly lodged removal power—both at-will *and for-cause*—in the heads of independent agencies. The Commodity Futures Trading Commission appoints a General Counsel who "serve[s] at the pleasure of the Commission." 7 U.S.C. §2(a)(2)(A), (4). The National Archives and Records Administration's Deputy Archivist is "appointed by and * * * serve[s] at the pleasure of the Archivist." 44 U.S.C. §§2102, 2103(c). The Consumer Product Safety Commission appoints and removes several inferior officers. 15 U.S.C. §2053(a), (g)(1)(A), (B)(ii). The Postal Service's Inspector General is appointed by, and removable only for cause by, the Postal Service's Governors, who are removable only for cause. 39 U.S.C. §202(a)(1), (e). Two of the three members of the Foreign Service Labor Relations Board are appointed by and removable only for cause by the Federal Labor Relations Authority's Chairman, who is removable only for cause. 5 U.S.C. §7104(b); 22 U.S.C. §4106(a), (e). The Social Security Administration's Chief Actuary is removable only for cause, and is "appointed by, and in direct line of authority to, the Commissioner," who is removable only for cause. 42 U.S.C. §902(a)(3), (c)(1). The Municipal Securities Rulemaking Board's initial members were appointed by the SEC, which could remove them only for cause under a standard similar to the one governing Board members. 15 U.S.C. §78o-4(b)(1), (c)(8). Government corporations like Amtrak and the Tennessee Valley Authority appoint and remove inferior officers. 16 U.S.C. §831a(h)(1), (3); 49 U.S.C. §24303(a). And many administrative law judges in independent agencies are inferior officers who can be removed by their agency heads only for cause. 5 U.S.C. §7521; see, *e.g.*, 30 U.S.C. §823(b), (d)(1), (2)(A)(ii)(I); *Freytag*, 501 U.S. at 880-882; cf. *Landry* v. *FDIC*, 204 F.3d 1125, 1132-1134 (D.C. Cir. 2000). That the political branches have

long seen no distinction between independent and cabinet agencies in this regard weighs heavily against creating such a distinction now. See *Freytag*, 501 U.S. at 918 (Scalia, J., concurring in judgment).[17]

Petitioners premise their alter-ego theory on the claim that vesting removal power in a presidential alter ego is no different from vesting it in the President himself. Pet. Br. 25-26 n.3. But even a principal officer removable at will may refuse to carry out an order to fire a subordinate. See, *e.g.*, *Nader*, 366 F. Supp. at 107. The President can remove the principal officer for refusing to comply, but he may have to obtain Senate confirmation for a replacement willing to carry out his bidding. That Senate confirmation requirement reflects a deliberate design: The President's power to remove does not mean he has free rein in appointing successors. See *The Federalist No. 76* (Hamilton); *Weiss* v. *United States*, 510 U.S. 163, 184-186 (1994) (Souter, J., concurring). And while Congress has authorized "acting" department heads in some cases, see 5 U.S.C. §§3345, 3349c, it can constitutionally prohibit them, see 20 Op. Off. Legal Counsel at 163-164; *Authority of the President To Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director*, Op. Off. Legal Counsel, 2001 WL 34815748, at *2 (Mar. 30, 2001).

Petitioners essentially seek to do what members of this Court have deemed a "fruitless endeavor"—"adjust[ ] the remainder of the Constitution to compensate for *Humphrey's Executor*." *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in judgment). Under this Court's prece-

---

[17] Statutes typically do not expressly deny the President removal authority; they do so implicitly by lodging the removal power elsewhere. Sarbanes-Oxley is written the same way. See 15 U.S.C. §§7211(e)(6), 7217(d)(3).

dents, independent agencies exercise far-reaching executive powers by promulgating rules, investigating violations, and adjudicating disputes nationwide. It makes no sense to give them *those* executive powers but deny them the customary and relatively pedestrian authority to appoint, supervise, and remove the subordinates who assist them in those functions. Petitioners effectively argue that, although the President supervises inferior officers in all other departments—diplomats in the State Department, prosecutors in the Department of Justice—through their superiors in traditional "chain of command" fashion, for independent agencies he is constitutionally entitled to remove inferior officers out from under the principal officers that supervise them. If that is not "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor*," nothing is.

B. The Act Does Not Impermissibly Restrict the President's or the SEC's Authority

Sarbanes-Oxley does not unconstitutionally restrict the President's traditional chain-of-command authority. The SEC controls each and every exercise of the Board's authority. And the President has constitutionally sufficient control over the SEC. Indeed, the Act does not diminish the President's authority over the SEC in the slightest.

1. Sarbanes-Oxley does not merely prevent the Board's actions from having any effect except as the SEC chooses to allow. See pp. 15-18, *supra*. Nor does it merely grant the SEC broad for-cause removal power together with plenary control over the Board's regulatory functions and budget. See *ibid.*; p. 22, *supra*. It also grants the SEC multiple powers that are equivalent to at-will removal authority.

First, at any time, based on a mere public-interest finding, the SEC can strip Board members of any or all enforcement responsibilities and reassign those functions to its own staff. See pp. 23-24, *supra*. That unqualified power to abolish an officer's authority is equivalent to at-will removal power. In *Morrison*, for example, Justice Scalia contrasted the independent counsel with the Watergate Special Prosecutor on the ground that "the Attorney General could have removed [the Special Prosecutor] at any time, *if by no other means than amending or revoking the regulation defining his authority*." 487 U.S. at 721 (Scalia, J., dissenting) (emphasis added); see also *United States* v. *Libby*, 429 F. Supp. 2d 27, 44 (D.D.C. 2006) (special counsel was "essentially removable at will" because "the Deputy Attorney General * * * has complete discretion to take [his] authority away"); cf. *In re Sealed Case*, 829 F.2d 50, 56-57 & n.34 (D.C. Cir. 1987); 20 Op. Off. Legal Counsel at 171. The Board likewise exercises executive authority only as the SEC chooses to allow. The SEC, moreover, can revoke Board members' salaries upon rescinding their authority. See p. 24, *supra*. Those combined powers are plainly equivalent to at-will removal authority. A threat to revoke an officer's job responsibilities and paycheck is no less effective in ensuring day-to-day compliance than a threat to remove him from office.

The SEC can also micromanage the Board by imposing rules that require the Board to follow its directives, and it can remove any Board member who refuses to comply. See pp. 23-24, *supra*. That power—to instruct an inferior officer and then remove the inferior for refusing to comply—is also just as potent as at-will removal power in ensuring control. See *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Rather than address those potent control mechanisms, petitioners urge the Court to consider the Act's for-cause restrictions on formal removal in isolation. Pet. Br. 39-41. But that makes no sense. The Constitution vests the President with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. Removal power is a means to those ends. See, *e.g.*, *Myers*, 272 U.S. at 135. The Constitution does not require that "'every officer * * * be removable * * * at will'"; it requires only "control over all exercises of [the officer's] executive power." *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting); see also *id.* at 689-690 (majority opinion). Sarbanes-Oxley provides mechanisms that ensure that "control" as effectively as formal at-will removal power would. The Board cannot exercise any executive authority free of the SEC's control.

Quoting *Bowsher*, petitioners assert that "removal is key because '[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.'" Pet. Br. 27 (quoting 478 U.S. at 726). But petitioners omit the phrase "and not the authority that appointed him." 478 U.S. at 726. *Bowsher* was merely observing that removal power, unlike appointment power, is a tool for ongoing control—not that there are *no* effective alternatives. Petitioners also rely on *Morrison*. Pet. Br. 38-39. But *Morrison* noted only that a statute can violate separation of powers for two reasons—because its removal restrictions *plus other limitations* on oversight impermissibly interfere with the President's functions; or because the removal restrictions, even apart from other *limitations*, have that effect. See 487 U.S. at 685. *Morrison* did not suggest that, in analyzing a removal restriction, courts

must ignore equivalent mechanisms of oversight and control.

Under *Perkins*, Congress could have "'limit[ed] and restrict[ed]'" removal of Board members "'as it deem[ed] best for the public interest.'" 116 U.S. at 485. Congress imposed only modest limitations, granting the SEC broad for-cause removal power that falls well within the bounds of the traditional civil-service protections for inferior officers that *Myers* specifically approved. See p. 22, *supra*. But even those modest restrictions are beside the point. Sarbanes-Oxley grants the SEC such pervasive means of control, and empowers the SEC to exercise that control under such broad standards, as to eliminate any conceivable concerns over its removal provision. This case thus presents no opportunity to "extend[ ]" *Humphrey's Executor* or to approve "double for-cause removal provisions." Pet. App. 47a, 66a (dissent). The SEC has as much control over the Board as it would have with at-will removal power. Congress "essentially grant-[ed] [the SEC] at-will removal power over Board functions." Pet. App. 35a.[18]

If the Act's removal restrictions were problematic, moreover, they should be severed. Even absent a sever-

[18] The dissent below questioned why Congress would grant Board members for-cause removal protection if the SEC had comprehensive and pervasive control. Pet. App. 96a. But removal for cause carries the stigma of having committed misconduct. See *Shurtleff*, 189 U.S. at 317-318. Congress rationally could have granted the SEC unqualified control over the Board's regulatory authority while reserving formal removal for cases of personal misconduct—an approach consistent with Congress's parallel treatment of the SEC's censure power. See 15 U.S.C. § 7217(d)(3). The Act's broad for-cause removal standard, moreover, is not novel. It is the same standard under which the SEC can remove the heads of other entities it supervises. See *id.* § 78s(h)(4); cf. *id.* § 78o-4(c)(8).

ability clause, "the unconstitutional provision[s] [of a statute] must be severed unless the statute created in [their] absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685-686 (1987). Given the crisis Congress confronted, it is inconceivable that Congress would have declined to enact Sarbanes-Oxley if it could not have included a removal limitation. The removal provision is scarcely mentioned in the legislative history—and even then only as an example of the SEC's *control*. See pp. 28-29, *supra*. In *Myers*, this Court remedied the constitutional defect by striking out the removal restriction, not by abolishing the Post Office. 272 U.S. at 176. If the Court were to find a defect in Sarbanes-Oxley, it should follow the same course here.[19]

2. Sarbanes-Oxley does not diminish the President's authority over the SEC one bit. Petitioners' concession that the SEC itself is constitutional (Pet. Br. 22)—a necessary concession absent a request to overrule *Humphrey's Executor*—thus controls this case. The President has the same control over the SEC's supervision of the Board that he has over any other SEC function. Because the SEC's control over the Board is plenary, the President has the same control as he would have if Congress had lodged the Board's functions in the SEC's own staff. If the President has constitutionally adequate control over the SEC, he has constitutionally adequate control over the Board as well.

---

[19] The Court should also follow its usual practice of declaring any adverse decision to be prospective only, to avoid casting doubt on the Board's past actions. See *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976); *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982).

As explained above, see p. 31, *supra*, the President can remove SEC Commissioners for "'inefficiency, neglect of duty or malfeasance in office,'" *MFS*, 380 F.3d at 619, terms that are "very broad" and "could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729. Such "transgressions" could plainly include neglect in supervising the Board. "A public officer in charge of an office is removable for such inefficiency, neglect of duty, or wrongdoing of subordinates over whom he or she has supervisory control as reasonably indicates inefficiency, neglect of duty, or wrongdoing of the supervising officer herself or himself." 63C Am. Jur. 2d *Public Officers and Employees* §179, at 610 (1997); see also *Inefficiency or Misconduct of Deputy or Subordinate as Ground for Removal of Public Officer*, 143 A.L.R. 517 (1943). Tenured federal superiors have repeatedly been removed or demoted for inadequately supervising subordinates. See, *e.g.*, *Holder* v. *Dep't of Army*, 670 F.2d 1007, 1009 (Ct. Cl. 1982); *Della Valle* v. *United States*, 231 Ct. Cl. 818, 820, 822-823 (1982). And a superior's neglect to remove an inferior—like any other neglect—could be grounds for the superior's removal: "[T]he power to suspend or discharge * * * subordinates * * * carries with it the correlative duty to vigilantly exercise the power * * * ." *Fernelius* v. *Pierce*, 138 P.2d 12, 14 (Cal. 1943); see also *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984); *Fiacco* v. *City of Rensselaer*, 783 F.2d 319, 328-332 (2d Cir. 1986).

It therefore is not true (much less "concededly" true) that the President "has no power to influence the Board's appointments, budget, work product or existence." Pet. Br. 33. The SEC has ample means to control the Board, including its control over rules and sanctions, its rescission power, its budget control, and its for-cause removal

power. If the SEC failed to use any of those myriad tools appropriately, the President could remove the Commissioners for neglect in supervising the Board—just as for any other "inefficiency, neglect of duty or malfeasance in office." That the SEC's powers are "discretionary" (Pet. Br. 29) does not mean the SEC is unaccountable for inefficiency, neglect, or malfeasance in their exercise. A trial judge can be reversed for failing to exclude unduly prejudicial evidence even though the relevant rule states only that he "may" exclude it. Fed. R. Evid. 403.

Whatever the precise scope of the President's authority to remove SEC Commissioners, it is capacious enough to enable constitutionally adequate control. It must be, because no statute restricts the President's authority to remove Commissioners. See p. 31 & n.9, *supra*. The rule that courts must construe removal restrictions to avoid constitutional doubt surely applies with even more force to restrictions that are a product of conventional wisdom rather than statutory text.

Petitioners' assertion that Congress impaired the President's authority is also belied by the views of those best positioned to know. President Bush signed the Act into law without separation-of-powers objection (despite identifying other, unrelated concerns, see *Statement on Signing the Sarbanes-Oxley Act of 2002*, 2002 Pub. Papers 1322 (July 30, 2002)), and two consecutive Administrations have now defended it in court. While this Court cannot simply defer to the Executive, see *Freytag*, 501 U.S. at 879-880, the fact that two Presidents have concluded that Sarbanes-Oxley does not undermine their authority surely "detracts from the weight of [the] contention that the Act impermissibly intrudes into * * * the needs of the Executive Branch," *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 449 (1977).

Petitioners raise the specter of a "Criminal Prosecution Board." Pet. Br. 36-38. But this Court has never allowed Congress to vest permanent authority over core executive functions such as criminal prosecution in an independent agency or its subordinates. Even *Morrison* recognized that "some 'purely executive' officials * * * must be removable by the President at will." 487 U.S. at 690. The Board regulates public-company auditing—precisely the sort of technical function Congress could have assigned to the SEC itself. Congress did not violate the Constitution by vesting that authority in a board that is subject to the SEC's comprehensive control instead.

C. Sarbanes-Oxley Does Not Aggrandize Congress's Power

Throughout years of litigation in the courts below, petitioners urged that Sarbanes-Oxley impermissibly limited the President's control. Not once did they argue that it aggrandized Congress's *own* power. That petitioners failed to make that argument before now is no surprise. It is insubstantial.

Sarbanes-Oxley does not grant Congress any power to appoint Board members. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 118-124 (1976). It does not grant Congress any power to remove Board members. Cf. *Myers*, 272 U.S. at 161. It does not grant Members of Congress any power to veto Board decisions. Cf. *Metro. Wash. Airports Auth.*, 501 U.S. at 276. And it does not grant agents of Congress any power to execute the law. Cf. *Bowsher*, 478 U.S. at 732. The Act does not increase Congress's power in any way. The Act actually *reduces* Congress's control by authorizing the Board to collect support fees outside the congressional appropriations process. See 15 U.S.C. § 7219(d), (i). That provision is hard to square with peti-

tioners' theory that Congress set out to aggrandize its powers.

Petitioners complain that Congress could "reassign the Board's functions to the SEC," "terminate the [Board] and deprive it of funding," or reduce Board members' salaries. Pet. Br. 31. But the Constitution does not prohibit Congress from "control[ling] the execution of [the law] * * * by *passing new legislation*" (subject, of course, to presidential veto). *Bowsher*, 478 U.S. at 733-734 (emphasis added); see *INS* v. *Chadha*, 462 U.S. 919, 955 n.19 (1983). And if petitioners' argument is only that Congress's legitimate controls are more significant in relative terms because the President does not have unfettered authority over the SEC, that is a complaint about *Humphrey's Executor*, not Sarbanes-Oxley. It is at most a reason to construe broadly the President's power to remove Commissioners for neglect in supervising the Board—not a reason to strike down an Act that does not reduce the President's control one iota.

Petitioners also claim that Congress gave itself a "veto power over any Board member's removal" because, to effect a removal, the President would have to fire multiple SEC Commissioners and obtain Senate confirmation for replacements willing to fire Board members. Pet. Br. 31-33. But SEC Commissioners, like all officers, have a "'presumed desire to avoid removal'" regardless of any issues of succession. *Bowsher*, 478 U.S. at 727 n.5; see pp. 24-25, *supra*. The President thus would not have to remove *any* Commissioners to effect a Board member's removal. In all but extraordinary cases, the President's mere *threat* of removal would suffice.

Besides, the Senate cannot "veto" the President's removal of a Commissioner or the SEC's removal of a Board member. It can only refuse to confirm replace-

ment Commissioners—a power the Constitution intentionally grants it. See p. 44, *supra*. The effect of that veto is no different here than elsewhere. If the President determined that the SEC Commissioners were neglecting their duty to regulate the securities markets, he could remove the Commissioners, but the Senate could prevent him from appointing successors. If the President removed a *cabinet secretary* for refusing to remove a subordinate (and Congress had forbidden an "acting" secretary to perform his duties), the Senate could veto a successor. In all those cases, the Senate's confirmation power gives it some measure of authority. But that does not mean the Senate is impermissibly participating in the execution of the laws.

Ultimately, petitioners' "aggrandizement" theories collapse into their limitation-on-presidential-authority theories. Petitioners recognize that this Court has viewed congressional aggrandizement as a more serious threat to separation of powers than mere limitations on executive authority. See Pet. Br. 17. But, unable to show that Congress would actually execute the law—as opposed to merely exercising its *own* constitutionally assigned functions of passing legislation and confirming appointees—petitioners are reduced to arguing that limitations on executive authority necessarily render Congress's own powers more significant by comparison. See Pet. Br. 30-34. That theory renders aggrandizement meaningless as a constitutional category because it transforms *any* restriction on executive authority into an expansion of Congress's own. In any event, Sarbanes-Oxley does not restrict the President's authority in any

way. Petitioners' aggrandizement theory thus fails even on its own misguided terms.[20]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

J. GORDON SEYMOUR
JACOB N. LESSER
MARY I. PETERS
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
1666 K Street, NW
Washington, D.C. 20006
(202) 207-9100

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MOLOLAMKEN LLP
The Watergate
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000

JAMES R. DOTY
BAKER BOTTS LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Respondents Public Company Accounting Oversight Board, Bill Gradison, Daniel L. Goelzer, and Charles D. Niemeier

OCTOBER 2009

[20] Because Sarbanes-Oxley neither diminishes the President's authority nor aggrandizes Congress's, this Court need not address whether Congress had an "overriding need" to enact the statute. Pet. Br. 34-35. But Congress did have a compelling need to create the Board, and legitimate and important reasons for structuring the Board the way it did. See pp. 2-4, *supra*.

APPENDIX
RELEVANT STATUTORY PROVISIONS

The Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 *et seq.*, provides in relevant part:

§ 7201. Definitions

In this Act, the following definitions shall apply:

(1) Appropriate State regulatory authority

The term "appropriate State regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) Audit

The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 7213 of this title, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) Audit committee

The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) Audit report

The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) Board

The term "Board" means the Public Company Accounting Oversight Board established under section 7211 of this title.

(6) Commission

The term "Commission" means the Securities and Exchange Commission.

(7) Issuer

The term "issuer" means an issuer (as defined in section 78c of this title), the securities of which are registered under section 78*l* of this title, or that is required to file reports under section 78o(d) of this title, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

(8) Non-audit services

The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) Person associated with a public accounting firm

(A) In general

The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—

(i) shares in the profits of, or receives compensation in any other form from, that firm; or

(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) Exemption authority

The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) Professional standards

The term "professional standards" means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 77s(b) of this title, as amended by this Act, or prescribed by the Commission under section 77s(a) of this title or section 78m(b) of this title; and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 7213(a) of this title, or are promulgated as rules of the Commission.

(11) Public accounting firm

The term "public accounting firm" means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) Registered public accounting firm

The term "registered public accounting firm" means a public accounting firm registered with the Board in accordance with this Act.

(13) Rules of the Board

The term "rules of the Board" means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 7217 of this title), and those stated policies, prac-

tices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) Security

The term "security" has the same meaning as in section 78c(a) of this title.

(15) Securities laws

The term "securities laws" means the provisions of law referred to in section 78c(a)(47) of this title, as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) State

The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

§ 7202. Commission rules and enforcement

(a) Regulatory action

The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) Enforcement

(1) In general

A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to

the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

(2) to (4) Omitted

(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.

§ 7211. Establishment; 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. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) Status

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.

(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, in accordance with section 7215 of this title;

(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 among, and improve the quality of audit

services offered by, registered public accounting firms and associated persons thereof, 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, under standard arrangements for the retirement of members of public accounting firms.

(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.

(B) Vacancies

A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) Term of service

(A) In general

The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(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 before the expiration of the term of that member.

(f) Powers of the Board

In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 7217 of this title—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the

approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange, or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 7219 of this title, for the Board, and other fees and charges imposed under this subchapter; and

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this subchapter.

(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;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) Annual report to the Commission

The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs

of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission.

§ 7212. Registration with the Board

(a) Mandatory registration

Beginning 180 days after the date of the determination of the Commission under section 7211(d) of this title, it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) Applications for registration

(1) Form of application

A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) Contents of applications

Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;

(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) Consents

Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this subchapter (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) Action on applications

(1) Timing

The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) Treatment

A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 7215(d) and 7217(c) of this title.

(d) Periodic reports

Each registered public accounting firm shall submit an annual report to the Board, and may be required to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2) of this section.

(e) Public availability

Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the

Board, shall be made available for public inspection, subject to rules of the Board or the Commission, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) Registration and annual fees

The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

§ 7213. Auditing, quality control, and independence standards and rules

(a) Auditing, quality control, and ethics standards

(1) In general

The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) Rule requirements

In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 7262(b) of this title, and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accor-

dance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, requirements for every registered public accounting firm relating to—

(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;

(ii) consultation within such firm on accounting and auditing questions;

(iii) supervision of audit work;

(iv) hiring, professional development, and advancement of personnel;

(v) the acceptance and continuation of engagements;

(vi) internal inspection; and

(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1) of this section.

(3) Authority to adopt other standards

(A) In general

In carrying out this subsection, the Board—

(i) may adopt as its rules, subject to the terms of section 7217 of this title, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional

groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and

(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) Initial and transitional standards

The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the Commission under section 7211(d) of this title, and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 7217 of this title that otherwise would apply to the approval of rules of the Board.

(4) Advisory groups

The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) Independence standards and rules

The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) Cooperation with designated professional groups of accountants and advisory groups

(1) In general

The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) of this section and advisory groups convened under subsection (a)(4) of this section in the examination of the need for changes in any standards subject to its authority under subsection (a) of this section, recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) Board responses

The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) Evaluation of standard setting process

The Board shall include in the annual report required by section 7211(h) of this title the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a) of this section, and its pending issues agenda for future standard setting projects.

§ 7214. 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 associ-

ated 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.

(e) Record retention

The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 7213 of this title or the rules issued thereunder.

(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.

(3) Timing

Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

§ 7215. 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, 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, regardless of how the act, practice, or omission is brought to the attention of the Board.

(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 investiga-

tion 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), in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of such regulator; 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.

(5) Use of documents

(A) Confidentiality

Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 7214 of this title or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of

an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c) of this section.

(B) Availability to Government agencies

Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and

(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) the appropriate Federal functional regulator (as defined in section 6809 of this title), other than the Commission, and the Director of the Federal Housing Finance Agency, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

(III) State attorneys general in connection with any criminal investigation; and

(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) Immunity

Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(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.

(2) Public hearings

Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(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, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(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.

(B) Rule of construction

No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) Effect of suspension

(A) Association with a public accounting firm

It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) Association with an issuer

It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(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;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(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 (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) that no such stay shall continue to operate.

(2) Expedited procedures

The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

§ 7216. Foreign public accounting firms

(a) Applicability to certain foreign firms

(1) In general

Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 7212 of this title shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) Board authority

The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this subchapter.

(b) Production of audit workpapers

(1) Consent by foreign firms

If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) Consent by domestic firms

A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) Exemption authority

The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public

accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) Definition

In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

§ 7217. Commission oversight of the Board

(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 appro-

priate 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.

§ 7218. Accounting standards

(a) Omitted

(b) Commission authority

The Commission shall promulgate such rules and regulations to carry out section 77s(b) of this title as it deems necessary or appropriate in the public interest or for the protection of investors.

(c) No effect on Commission powers

Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) Study and report on adopting principles-based accounting

(1) Study

(A) In general

The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) Study topics

The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) Report

Not later than 1 year after July 30, 2002, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

§ 7219. 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 Board and the standard setting body referred to in subsection (a) of this section shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). 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.

(c) Sources and uses of funds

(1) Recoverable budget expenses

The budget of the Board (reduced by any registration or annual fees received under section 7212(e) of this title for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a) of this section, for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e) of this section. Accounting support fees and other receipts of the Board and of such standard-setting body shall not be considered public monies of the United States.

(2) Funds generated from the collection of monetary penalties

Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i) of this section, all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be administered by the Board or by an entity or agent identified by the Board.

(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.

(2) Assessments

The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g) of this section, allowing for differentiation among classes of issuers, as appropriate.

(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; and

(2) may differentiate among different classes of issuers.

(f) Limitation on fee

The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1) of this section.

(g) Allocation of accounting support fees among issuers

Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the

Board or the standard setting body referred to in subsection (a) of this section shall be allocated among and payable by each issuer (or each issuer in a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) Omitted

(i) Rule of construction

Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a) of this section, or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) Start-up expenses of the Board

From the unexpended balances of the appropriations to the Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

* * * * *

The Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a *et seq.*, provides in relevant part:

* * * * *

§ 78q. Records and reports

(a) Rules and regulations

(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Any report that a nationally recognized statistical rating organization is required by Commission rules under this paragraph to make and disseminate to the Commission shall be deemed furnished to the Commission.

* * * * *

(b) Records subject to examination

(1) Procedures for cooperation with other agencies

All records of persons described in subsection (a) of this section are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the

Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter * * * .

* * * * *

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

* * * * *

(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, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding

or as to which the self-regulatory organization consents, 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 may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

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)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) consti-

tuting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(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 re-

viewed 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)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of Title 5 for rulemaking not on the record.

(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

* * * * *

(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.

* * * * *

§ 78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

* * * * *

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers

appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k-1, 78o(c)(5) or (6), 78o-3, 78q, 78q-1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materi-

als set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Un-

til the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of Title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

* * * * *