

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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)	PCAOB File No. 105-2009-001
In the Matter of R.E. Bassie & Co.)	
and R. Everett Bassie, CPA)	
)	FINAL DECISION
Respondents.)	
)	October 6, 2010
_____)	

Appearances

Robert A. Berger, Esq., Washington, DC, for the Division of Enforcement and Investigations.

Dwight E. Jefferson, Esq., Houston, TX, for Respondents.

Petition for review filed: April 20, 2009

Last brief received: June 19, 2009

I.

R.E. Bassie & Co. ("REB"), a registered public accounting firm, and R. Everett Bassie ("Bassie") (collectively, "Respondents") appeal from a Hearing Officer's decision revoking REB's registration with the Public Company Accounting Oversight Board and permanently barring Bassie from association with any registered public accounting firm. The Hearing Officer ordered the sanctions after finding, in ruling on a motion for summary disposition, that Respondents failed to cooperate with a Board investigation. Our decision is based on a *de novo* review of the record, except as to those findings not challenged on appeal. We find that Respondents engaged in conduct constituting noncooperation with an investigation. Because of that conduct, we permanently revoke REB's registration, we permanently bar Bassie from being an associated person of a registered public accounting firm, and we impose a civil money penalty of \$75,000 on Bassie.

II.

REB is a public accounting firm located in Houston, Texas and organized as a sole proprietorship under Texas law. It has been registered with the PCAOB pursuant to Section 102 of the Sarbanes-Oxley Act of 2002 (the "Act") and PCAOB Rules since October 2003. Bassie is a certified public accountant licensed in Texas. At all relevant times, Bassie was the sole proprietor of REB, and an associated person of a registered public accounting firm as defined in Section 2(a)(9) of the Act and PCAOB Rule 1001(p)(i).

On January 10, 2006, the Board issued an order of formal investigation ("OFI") pursuant to PCAOB Rule 5101(a)(1). The OFI stated that the Board had received information indicating that REB and one or more of its associated persons may have violated PCAOB Rules 3100 and 3200T by failing to comply with certain PCAOB standards in auditing and reviewing the financial statements of a company specified in the OFI ("Issuer A"). The OFI authorized an investigation to determine whether REB or any associated person of REB had engaged in the specified acts or practices or in "acts or practices of similar purport or object." The OFI authorized the Division of Enforcement and Investigations ("the Division") to issue Accounting Board Demands ("ABDs") for documents and testimony that was "relevant to the matters described in this Order of Formal Investigation."

A. The ABDs Related to Issuer B

In the period shortly following issuance of the OFI, the Division issued at least two ABDs to Respondents requiring the production of documents concerning Issuer A.^{1/} On at least three days in March and May 2006, Bassie provided testimony in the investigation. Excerpts of Bassie's testimony contained in the record include descriptions of relationships between Bassie, Issuer A, individuals associated with Issuer A, and other entities and individuals.

On November 17, 2006, the Division sent an ABD requiring REB to produce documents relating to an issuer whose financial statements REB had audited and one of that issuer's subsidiaries (collectively, "Issuer B"), neither of which is identified in the OFI. On February 16, 2007, the Division sent an ABD to Bassie, requiring production of essentially the same documents as described in the November 17 ABD to REB.

^{1/} The Division has not alleged noncooperation by Respondents with respect to those ABDs.

Respondents never produced any documents in response to those two ABDs (collectively, the "Issuer B ABDs").

From December 2006 to June 2007, the Division made repeated efforts to obtain compliance with the Issuer B ABDs and regularly reminded Respondents of the possibility of sanctions for noncooperation if they failed to produce the documents. In that period, Respondents retained new counsel who, in a letter to the Division dated January 12, 2007, requested the November 17 ABD and represented that previous counsel had failed to provide it to Respondents. After receiving the ABD, Respondents' new counsel sent the Division a letter dated January 23, 2007, stating, among other things, that his client "is cooperating with your request and is in the process of locating said information" (emphasis in original), but also noting that because Respondents had very limited staff and were in the middle of tax season, it was "going to take some time to locate all of the information that you are requesting." The letter also raised a question about the fact that the OFI mentioned in the Division's letter with the ABD identified only Issuer A, and that the information being requested was for Issuer B. The letter requested copies of the Board's formal orders concerning Issuer A and Issuer B.

The Division responded in a letter dated February 2, 2007, which stated that it was confirming a January 30 telephone discussion with Respondents' counsel. In response to counsel's point about the OFI, the Division stated that "the OFI expressly provides that the Division may investigate not only matters involving the audits and reviews of [Issuer A], but also may investigate any acts or practices of similar purport or object."

By letter dated March 3, 2007, Respondents' counsel told the Division that he had reviewed provisions of law to which the Division had directed him concerning the authority to require production of documents related to Issuer B, and that he had "not found a section in the code that provides you the authority to request the information concerning the companies listed above, under an order of investigation for an entirely unrelated company and order." The March 3 letter also stated, however, that it was "requiring a considerable amount of time to collect [the documents] and then to prepare them for inspection according to your request," and that it was unreasonable to "require Mr. Bassie to halt his practice in the middle of tax season" in order to gather the documents "at the pace that you are requesting." The letter reiterated that "[w]hat we have and continue to ask for is additional time until the end of the tax season to complete your request."

Letters from the Division to Respondents' counsel dated March 27, May 17, and June 1 of 2007 all repeated the demand for production. After the March 3 letter

discussed above, however, there is no record evidence of any communication from Respondents concerning the Issuer B ABDs.

By letter dated September 10, 2007, the Division informed Respondents that it intended to recommend that the Board institute a disciplinary proceeding to consider whether to impose sanctions on Respondents for, among other things, failing to comply with the Issuer B ABDs. Pursuant to PCAOB Rule 5109(d), the letter allowed Respondents an opportunity to submit a written statement of position on whether a disciplinary proceeding should be instituted and gave them until September 25, 2007 to do so. Through counsel, Respondents requested, and the Division granted, an extension of that deadline to October 2, 2007. Respondents then changed counsel again, and new counsel requested and obtained further extensions of the deadline, first to November 1, and finally to December 3, 2007. Despite requesting and receiving those extensions, Respondents neither submitted a statement of position nor produced documents responsive to the Issuer B ABDs.

B. Procedural History

The Board issued an Order Instituting Disciplinary Proceedings ("OIP") against Respondents on January 9, 2009. The OIP alleged, among other things, that Respondents engaged in conduct constituting noncooperation with an investigation by failing to comply with the Issuer B ABDs. Respondents filed a timely answer in which they denied the allegations that they had failed to cooperate with the investigation.

On April 8, 2009, the Hearing Officer issued an initial decision granting the Division's motion for summary disposition on the noncooperation allegations. The Hearing Officer found that each Respondent had failed to cooperate with the investigation by failing to comply with the Issuer B ABD directed to that Respondent. The Hearing Officer concluded that those failures warranted revocation of REB's registration and a bar on Bassie's association with a registered public accounting firm, and the Hearing Officer ordered those sanctions.

Respondents filed a timely petition for Board review of the initial decision on April 20, 2009. On May 5, 2009, Respondents filed an amended petition for review to which they attached an affidavit of Bassie. On June 5, 2009, the Division filed a motion to strike Bassie's affidavit. The parties also filed briefs on the merits of the case, with briefing completed on June 19, 2009, pursuant to the Board's briefing schedule.

III.

A. Summary Disposition Standard

Rule 5427(d) provides that "[t]he hearing officer shall promptly grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law." This rule, in substance, parallels Rule 56 of the Federal Rules of Civil Procedure, as well as Rule 250 of the SEC Rules of Practice. Under these provisions, the ultimate question is whether the record as a whole demonstrates the existence of any factual disputes that must be resolved through a hearing. "[A] party seeking summary judgment [must] make a preliminary showing that no genuine issue of material fact exists. Once the movant has made this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

To preclude summary disposition, any unresolved factual issues must be both genuine and material – "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242-247-48 (1986) (emphasis in original). In considering a motion for summary disposition, the record will be viewed most favorably to the non-moving party, but "we need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences." National Amusements, 43 F.3d at 735. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

B. Noncooperation with the Investigation

It is undisputed that in the period between the first Issuer B ABD on November 17, 2006, and the institution of disciplinary proceedings on January 9, 2009, Respondents produced no documents responsive to the Issuer B ABDs. It is also undisputed that, during that period, Respondents possessed documents responsive to those ABDs.^{2/} In addition, Respondents do not dispute in their briefs before us, and did

^{2/} This point is acknowledged by Respondents' counsel in various places, including in letters to the Division dated January 23, 2007 (noting that "my client is in the process of obtaining your requested information") (emphasis in original) and March 3,

not dispute in the proceedings before the Hearing Officer, that the Issuer B ABDs are within the scope of the ABDs authorized by the OFI.

Respondents argue, however, that summary disposition was inappropriate because a genuine issue of material fact exists concerning whether they relied on legal advice to the effect that they were not obligated to produce documents concerning companies not specified in the OFI.^{3/} Before the Hearing Officer, Respondents raised this point only by saying, in their opposition to the Division's motion for summary disposition, that they "submit as their defense . . . their reliance on advice of counsel in failing to produce documents" Respondents proffered no evidence of such advice and, instead, tried to suggest that the record already contained evidence of it:

[B]y letter dated January 23, 2007, Respondent's counsel noted to Enforcement that the documents requested by the ABD related not to [Issuer A], the company that was the source of Respondents' work and the object of the OFI, but rather the requested documents identified [Issuer B], an unrelated entity. . . . It was evident to Enforcement that by Respondents' failure to respond to Enforcement's letter of May 17, 2007, demanding compliance with the ABDs was because counsel for Plaintiff [sic] was in fact objecting to the requests for [Issuer B] documents in the [Issuer A] investigation.^{4/}

In briefing before us, Respondents more directly assert that the passages concerning the OFI in counsel's January 23, 2007, and March 3, 2007, letters are evidence of the legal advice. Respondents argue that counsel's assertion in the March 3 letter that he found no authority for the Division to seek the Issuer B documents "is the

2007 (noting that "the documents that you are requesting are several years old and it is requiring a considerable amount of time to collect them and then to prepare them for inspection"), and in Respondents' brief before us on review (noting "the voluminous nature of the records" and suggesting that they could be made available now).

^{3/} During the investigation, Respondents were represented by different counsel than the counsel who has represented them before the Hearing Officer and before us in this review.

^{4/} Respondents' Response to the Division of Enforcement and Investigations' Motion for Summary Disposition (March 24, 2009), at 2.

advice on which Bassie reasonably relied"^{5/} and therefore is sufficient to show that there is a genuine issue of fact concerning whether Respondents received and reasonably relied on such advice.

We do not view the letters as sufficient for that purpose. Without a doubt, the letters reflect that counsel thought about the scope of authority provided by the OFI. In their totality, though, the letters cannot fairly be viewed as evidence that counsel had advised Respondents that they were not obligated to produce the documents and that Respondents were relying on that advice. Each letter stated that Respondents were cooperating with the request and were in the process of gathering the information, and each letter expressed a need for additional time, until after tax season, to complete the task. Indeed, Respondents' petition for Board review of the Initial Decision emphasized that the letters stood for those latter points and that the Division had "unreasonably interpreted Respondents' requests for additional extensions of time due to tax season as intentional non-cooperation with the investigation."^{6/}

Respondents have now attempted to supplement the record with an affidavit from Bassie that they did not provide to the Hearing Officer.^{7/} On the advice-of-counsel point, Bassie's affidavit states that "I reasonably relied in good faith on counsel's advice that Enforcement did not have the authority to demand documentation regarding [Issuer B] because [Issuer B] was not the subject of the Board's investigation," and provides no further detail.

Under PCAOB Rule 5464, a party may file a motion for leave to adduce additional evidence at any time before issuance of a decision by the Board. The rule requires the movant to "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." No such motion accompanies Bassie's affidavit.

^{5/} Respondents' Opening Brief (May 29, 2009) at 6; see also Respondents' Reply Brief (June 19, 2009) at 1.

^{6/} Respondent's Petition for Review of the Initial Decision of the Hearing Officer (April 20, 2009), at 1.

^{7/} The affidavit is an exhibit to Respondents' First Amended Petition for Review of the Initial Decision of the Hearing Officer (May 5, 2009).

Without reaching the question of whether the additional evidence would make a difference to the outcome,^{8/} we have determined not to allow the additional evidence on this point because Respondents have not filed a motion describing any grounds for their failure to adduce it in the proceedings before the Hearing Officer,^{9/} and it is not apparent from anything in the record what possible grounds there could be.^{10/} In reaching this determination, we have considered the ease with which Respondents could have presented the same evidence to the Hearing Officer, the ample notice Respondents had of the need to do so,^{11/} and the importance to our process of having parties present all relevant evidence to the Hearing Officer in the first instance.

^{8/} Even if we were to allow the additional evidence, there would be a significant question about whether Bassie's affidavit alone is sufficient to make out the existence of a genuine issue of fact that precludes summary disposition. At a hearing, Bassie would not be able to establish the fact of reliance on advice of counsel based on "nothing other than his say-so," but would need to introduce an opinion letter or other "evidence of actual advice from an actual lawyer." SEC v. McNamee, 481 F.3d 451, 456 (7th Cir. 2007). Accordingly, it is far from clear that Bassie's mere assertion, in the most conclusory and vague terms possible, would be sufficient to create a genuine issue of fact for purposes of precluding summary disposition. Moreover, even if we were to determine that a genuine issue of fact exists, we would need to consider whether reliance on legal advice is material to the question of whether Respondents' conduct constituted noncooperation and, even if not material to that question, whether it is material to the question of sanctions. Because we do not allow the additional evidence, we do not reach these questions.

^{9/} Rule 5464 is substantively identical to Rule 452 of the Securities and Exchange Commission's Rules of Practice. Under Rule 452, the Commission has declined to allow additional evidence in circumstances where the evidence was not accompanied by a motion that described the grounds for failing to adduce the evidence earlier. See, e.g., Warwick Capital Management, Inc., Investment Advisers Act Rel. No. 2694 (Jan. 16, 2008), WL 149127 at *5 nn.12-13; Harold F. Harris, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 2006 WL 307856, at *5, n.23.

^{10/} On June 5, 2009, the Division filed a Motion to Strike Affidavit of R. Everett Bassie, noting that if Respondents had complied with Rule 5464 by filing a motion, the Division would have opposed the motion. In light of our ruling on the additional evidence, the Division's motion to strike is moot.

^{11/} The Hearing Officer's February 6, 2009, Case Management Order stated that if a party opposes a summary disposition motion and contends that material facts

In addition, although not dispositive of the question, in considering the fairness of not allowing the late submission of Bassie's affidavit on this point, we have taken into account two related points. First, the affidavit is at odds with what Respondents repeatedly told the Division during the investigation – that they were gathering the documents, intended to cooperate, and just needed an extension until after tax season. Second, the affidavit is also at odds with what Respondents asserted in their petition for Board review of the Hearing Officer's decision – that "Respondents' request for an extension until after tax season was a reasonable request" and the Division had "unreasonably interpreted Respondents' requests for additional extensions of time due to tax season as intentional non-cooperation with the investigation."^{12/}

Section 105(b)(3) of the Act, captioned "Noncooperation with Investigations," authorizes the Board to impose sanctions if a registered firm or associated person "refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation" and PCAOB Rule 5300(b) similarly provides for sanctions if such a firm or person "has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation." There is no genuine issue of material fact concerning whether Respondents failed to produce documents in response to the Issuer B ABDs. Nor is there evidence in the record sufficient to indicate a genuine issue of material fact bearing on an asserted defense based on reliance on legal advice.

Although section 105(b)(3) of the Act authorizes the Board to impose sanctions for noncooperation with an investigation if a registered firm or associated person "refuses" to testify, produce documents, or otherwise cooperate, we do not understand that provision to limit our sanctioning authority to cases involving an express refusal. To hold otherwise would render section 105(b)(3) a dead letter, since any noncooperating registered firm or associated person could then avoid section 105(b)(3) sanctions merely by refraining from expressly articulating a refusal to cooperate.

In this case, Respondents received repeated demands to comply with the Issuer B ABDs, including demands that described the risk of sanctions for failing to comply.

are in genuine dispute, "the party shall cite and submit supporting evidence in the same manner as required of the moving party."

^{12/} Respondents' petition for Board review separately includes, as its fourth and final point, reference to Bassie's purported reliance on advice of counsel in not producing the documents, but it makes no attempt to reconcile that point with the petition's first point, described in the text above.

Respondents' failure to produce the demanded documents continued for approximately 10 months between the initial production deadline and the Division's letter advising Respondents that the Division intended to recommend disciplinary proceedings, and continued thereafter, up to and following the institution of disciplinary proceedings. After initial attempts to postpone production deadlines, Respondents simply stopped responding to the Division's continuing demands for compliance. On these facts, even in the absence of an express refusal to cooperate, we conclude that summary disposition was appropriate and that each Respondent's conduct constitutes noncooperation for which we may impose sanctions.

IV.

For noncooperation with an investigation, the Board is authorized to revoke or suspend a firm's registration, to bar or suspend an individual from association with any registered public accounting firm, or to impose certain lesser sanctions as the Board considers appropriate and as specified by rule of the Board.^{13/} The Hearing Officer found that the appropriate sanctions for Respondents' failures to produce documents in response to the Issuer B ABDs are revocation of REB's registration and a bar against Bassie being associated with any registered public accounting firm. We agree that those sanctions are appropriate. We also conclude that it is appropriate to impose a civil money penalty against Bassie.

A. Revocation and Bar

Respondents argue that the sanctions imposed by the Hearing Officer, revocation and bar, are too severe, "most importantly" because there is no evidence that Issuer A's investors or any other investors have been harmed by the failure to produce the documents.^{14/} This argument misapprehends the threat to the system of Board oversight posed by noncooperation with an investigation.

The Board's power to investigate possible violations and to impose appropriate sanctions^{15/} is fundamental to its ability to "protect the interests of investors and further

^{13/} See Section 105(b)(3) of the Act and PCAOB Rule 5300(b). Rule 5300(b) specifies, by incorporating certain provisions of Rule 5300(a), that those lesser sanctions may include civil money penalties.

^{14/} Respondents' Opening Brief at 8; Respondents' Reply Brief at 6-7.

^{15/} See Sections 101(c)(4), 105(b)(1), and 105(c)(4) of the Act.

the public interest in the preparation of informative, accurate, and independent audit reports."^{16/} Conducting investigations in an appropriate and timely manner depends upon registered firms' and associated persons' compliance with demands for documents and testimony made pursuant to the Board's authority under the Act. Noncooperation frustrates the oversight system by impeding the Board's ability to determine whether violations have occurred for which sanctions should be imposed, including sanctions that would protect investors from further violations, and thus deprives investors of an important protection that the Act was intended to provide. The question whether any specific harm to a particular investor can be tied directly to Respondents having thwarted such an investigation is not relevant to consideration of the sanction for their having done so.^{17/}

Respondents contend that the sanctions analysis should take account of their new offer to make the documents available for review and copying by the Division. Respondents made the offer in their May 29, 2009 opening brief before the Board,^{18/} and do not appear from the record to have made it at any earlier point – not in response to the Division's repeated communications between December 2006 and June 2007, not in response to the Division's September 2007 letter warning Respondents that the Division intended to recommend disciplinary proceedings, not in response to the institution of disciplinary proceedings, and not in response to the Division's motion for summary disposition before the Hearing Officer. It was only after the Hearing Officer granted summary disposition that Respondents made this offer, on the basis of which they now argue that "only the delay in the production of the documents should be considered in assessing any sanctions."^{19/} We do not agree with Respondents' characterization of their failure as a "delay," nor do we view their offer to make

^{16/} Section 101(a) of the Act.

^{17/} Cf. In the Matter of the Application of Gately & Associates, LLC and James P. Gately, CPA for Review of Disciplinary Action by PCAOB, SEC Release No. 34-62656 (August 5, 2010) at 22-23 (absence of fraud or deceit does not diminish seriousness of failure to cooperate in PCAOB inspection designed, among other things, to uncover such misconduct).

^{18/} See Respondents' Opening Brief at 6-7.

^{19/} Respondents' Reply Brief at 4.

documents available now as a factor to be given any weight in the sanction determination.^{20/}

Respondents also argue that the sanctions imposed by the Hearing Officer are "harsh and excessive" in light of the fact that Respondents relied on advice of counsel in not producing the documents. For the reasons described above, the record does not support the conclusion that Respondents received and relied on the purported advice of counsel, and Respondents did not make a submission sufficient to establish, on that point, that there is a genuine issue of fact that would require a hearing to resolve. Accordingly, Respondents' purported reliance on advice of counsel is not a factor in the sanctions analysis.

We find that Respondents' conduct warrants revocation of REB's registration and a bar on Bassie's association with any registered public accounting firm. In a Board investigation, Respondents received document production demands in response to which they produced none of the demanded documents. They continued not to produce the demanded documents despite the Division's repeated warnings, over several months, that such noncooperation could result in disciplinary sanctions. In response to the Division's communications and warnings, Respondents for a while told the Division that they intended to cooperate and just needed more time, but Respondents later simply stopped responding concerning the demand.

This type of noncooperation undermines the Board's ability to protect investors and advance the public interest by identifying and addressing misconduct in connection with the audits of public companies' financial statements. In the absence of any mitigating circumstances, such noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors. If REB were to remain a registered firm and Bassie an associated person, they would have opportunities to similarly undermine those processes, and the related investor protection, in the future.

^{20/} Cf. Gately, SEC Release No. 34-62656 at 23 (applying, in the context of PCAOB inspection demands, principle that "disciplinary proceedings should not be required in order to compel compliance"); CMG Institutional Trading, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *20 (Jan. 30, 2009) ("we have emphasized repeatedly that NASD should not have to initiate disciplinary action to elicit a response to its information requests made pursuant to Rule 8210").

B. Civil Money Penalty

Although not included in the Hearing Officer's initial decision, we also find that Respondents' conduct warrants the imposition of a civil money penalty. Section 105(c)(4) of the Act authorizes the Board to impose such "disciplinary or remedial sanctions as it determines appropriate" for violations of certain laws, rules, and standards, and specifies that those sanctions may include civil money penalties up to specified maximum amounts. Although that provision is separate from section 105(b)(3)'s provision authorizing sanctions for noncooperation with an investigation, section 105(b)(3) authorizes the Board to impose "such other lesser sanctions" (in addition to bars, revocations, and suspensions) as the Board specifies by rule, and the Board's rules implementing that authority incorporate, as such lesser sanctions, the civil money penalty provisions found in section 105(c)(4).^{21/}

In considering whether a civil money penalty is an appropriate disciplinary or remedial sanction, we are guided by the statutorily prescribed objectives of any exercise of our sanctioning authority: the protection of investors and the public interest. See section 101(a) of the Act (Board established "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports"); section 101(c)(5) (Board to perform duties or functions as the Board determines necessary "to carry out this Act, in order to protect investors, or to further the public interest"). We are also cognizant that the Securities and Exchange Commission ("Commission"), in reviewing any contested sanctions that we impose, is called upon to do so with "due regard for the public interest and the protection of investors."^{22/}

In considering the exercise of our authority to impose civil money penalties, we have taken into account the factors enumerated in, and the Commission's application of, a somewhat comparable statutory authorization in the Securities Exchange Act of 1934 ("Exchange Act"). Like the authorization to the Board in the Act, section 21B of the Exchange Act authorizes the Commission to impose civil money penalties in administrative proceedings, up to specified maximum amounts, if the Commission finds that "such penalty is in the public interest."^{23/} Unlike the Act, however, Exchange Act

^{21/} See PCAOB Rule 5300(b)(1) (incorporating sanctions described in Rule 5300(a)(4)).

^{22/} Section 107(c)(3) of the Act.

^{23/} Section 21B(a) of the Exchange Act.

section 21B provides guidance regarding relevant factors "[i]n considering under this section whether a penalty is in the public interest."^{24/} The factors specified in section 21B(c) include (1) whether the conduct for which a penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm to other persons resulting directly or indirectly from the conduct; (3) the extent to which any person was unjustly enriched; (4) whether the person against whom a penalty is assessed has previously been found by the Commission, another appropriate regulatory agency, or self-regulatory organization ("SRO") to have violated federal securities laws, state securities laws, or SRO rules, or has been enjoined from such violations or convicted of certain offenses; (5) the need to deter such person and other persons from such conduct; and (6) such other matters as justice may require.

Section 21B does not require that all of these factors be present as a condition to imposing a penalty, but sets them out as factors to be considered. See In the Matter of Next Financial Group, Inc. 93 SEC Docket 1369, 2008 WL 2444775 at *49 (June 18, 2008) (Initial Decision) ("Not all factors may be relevant in a given case, and the factors need not all carry equal weight"). The Commission has imposed civil money penalties under section 21B on numerous occasions, emphasizing various of these factors, including in cases in which the Commission imposed a bar in addition to the civil money penalty. See, e.g., In the Matter of VFinance Investments Inc. and Richard Campanella, SEC Release No. 34-62448, 2010 WL 2674858 at * 18 (July 2, 2010) (barring individual from association with any broker or dealer in principal or supervisory capacity and imposing \$30,000 civil money penalty described as "warranted to create a monetary incentive for Respondents and other industry participants to fulfill their recordkeeping obligations and cooperate with regulatory inquiries – particularly when, as in this case, such person is aware that compliance may reveal regulatory violations potentially resulting in disgorgement or monetary penalties"); In the Matter of Gregory O. Trautman, SEC Release No. 34-61167, 2009 WL 4828994 at *22-23 (December 15, 2009) (barring individual from association with any broker or dealer and imposing a \$120,000 civil money penalty as "necessary to deter others" from such conduct, and in light of fact that conduct involved deception causing harm to others and resulting in enrichment of individual's firm); In the Matter of Guy P. Riordan, SEC Release No. 34-61153, 2009 WL 4731397 at *21-22 (December 11, 2009) (barring individual from association with any broker or dealer and imposing separate \$100,000 civil money penalties for each of five violations in light of fact that conduct involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement and resulted in substantial pecuniary gain); In the Matter of Joseph John VanCook, SEC

^{24/} Section 21B(c) of the Exchange Act.

Release No. 34-61039, 2009 WL 4005083 at *18 (November 20, 2009) (barring individual from association with any broker or dealer and imposing \$100,000 civil money penalty described as "an amount necessary to deter VanCook from future misconduct" and that "will also have a remedial effect of deterring others from engaging in the same misconduct").^{25/}

The courts have recognized that Commission sanctions involving bars and section 21B civil money penalties are appropriate, and should be upheld absent a "gross abuse of discretion," given that "Congress has charged the Commission with protecting the investing public," and the question of appropriate remedies is "peculiarly a matter for administrative competence." Rizek v. SEC, 215 F.3d 157, 160 (1st Cir. 2000) (upholding bar on individual's association with any broker, dealer, member of a national securities exchange, or member of a registered securities association and imposition of \$100,000 civil money penalty) (quoting A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir. 1977), and Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973)).

The Board, too, is charged to exercise its sanctioning authority "as the Board considers appropriate"^{26/} (subject to Commission review) to protect the investing public. Looking to the Exchange Act section 21B factors and precedent for guidance on protecting investors and advancing the public interest through civil money penalties,^{27/} we conclude that a civil money penalty is plainly appropriate in this case.

^{25/} Trautman, Riordan, and VanCook all involved financial harm to investors that the Commission orders addressed through substantial disgorgement remedies (more than \$600,000 in Trautman, more than \$900,000 in Riordan, and more than \$500,000 in VanCook), underscoring that the separate civil money penalty is imposed for a purpose distinct from making a financially harmed victim whole.

^{26/} Section 105(b)(3)(A)(iii) of the Act; see also Section 105(c)(4) of the Act ("Board may impose such disciplinary or remedial sanctions as it determines appropriate").

^{27/} Relevant, and similar, guidance is also provided by the courts even outside of the section 21B context. See McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005) (factors relevant in deciding whether a sanction is appropriately remedial include "the seriousness of the offense, the corresponding harm to the trading public, the potential gain to the [offender] for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the [offender] and others").

In response to the Issuer B ABDs, Respondents disregarded their obligation to cooperate with the Board's investigation. On the record, as described above, it is clear that this disregard was deliberate or reckless. Respondents produced none of the demanded documents, continued not to produce them despite the Division's repeated warnings, over several months, that such noncooperation could result in disciplinary sanctions, and, after first telling the Division that they intended to cooperate and just needed more time, simply stopped responding concerning the demand.

We also conclude that Respondents' conduct caused at least indirect harm to others. Investors and markets are put at risk, and perhaps harmed in ways that never become known, when a regulatory investigation is improperly thwarted by a regulated person's refusal to provide information. Such noncooperation undermines the Board's ability to protect investors and advance the public interest by identifying and addressing misconduct in connection with the audits of public companies' financial statements. The undermining of this protection is a harm to investors and markets that factors into a sanctions analysis. Cf. Gately, SEC Release No. 34-62656 at 19 (recognizing as obvious the risk to investors and markets posed by a failure to produce information in a Board inspection).

We have also considered together the section 21B factors concerning whether any person was unjustly enriched and whether there is a need to deter such person and other persons from similar noncooperation. The obligation of registered firms and associated persons to cooperate with the Board is a fundamental aspect of PCAOB registration status. Yet, under the processes set out in the Act and the Board's rules, it necessarily takes some time before Board disciplinary sanctions in response to noncooperation are imposed and take effect. During that time, nothing prevents the firm or person from continuing to reap financial benefits from performing audit services for issuers, all the while ignoring the corresponding cooperation obligation that is essential to the Board's ability to protect investors in those issuers.

In short, in the absence of a civil money penalty, noncooperation with the Board might seem to certain kinds of individuals – who fear that cooperation will provide information that would lead to sanctions for violations of laws, rules, or standards – to be the course most likely to prolong the period of their registration and allow them to maximize their income from issuer audit work before being sanctioned. A civil money penalty for noncooperation is appropriate both as a deterrent to that kind of reasoning and conduct, see VFinance Investments, 2010 WL 2674858 at * 18 (civil money penalty warranted to create incentive for respondents and other industry participants to cooperate with regulatory inquiries, particularly when aware that compliance may reveal regulatory violations potentially resulting in disgorgement or monetary penalties), and,

where applicable, to take account of the fact that financial gains from continuing to perform issuer audit work while not fulfilling the responsibilities that accompany PCAOB registration status might fairly be viewed as similar to unjust enrichment.^{28/}

In our view, the factors described above weigh strongly in favor of imposing a civil money penalty in addition to the other sanctions in this case.^{29/} We also consider, however, certain process points. The Division, in its motion for summary disposition, requested that the Hearing Officer impose civil money penalties in specified amounts.

^{28/} We find nothing in the record of this case concerning whether Respondents received income from issuer audit work during the period of their noncooperation, and our sanction decision is not based on any understandings or assumptions on that point. We note, however, that in public filings with the Commission, issuers have disclosed paying audit fees to REB totaling \$154,000 for audit services performed during the period of Respondents' noncooperation. See Form 10-K/A filed by FTS Group, Inc. on May 15, 2008 (including REB audit report dated April 11, 2008 on financial statements for period ended December 31, 2007 and disclosing audit fees of \$45,000 to REB); Form 10-KSB filed by Larrea Biosciences Corporation on August 6, 2007 (including REB audit report dated July 26, 2007 on financial statements for period ended April 30, 2007 and disclosing audit fees of \$64,000 to REB); Form 10-K/A filed by FTS Group, Inc. on April 16, 2007 (including REB audit report dated April 11, 2007 on financial statements for period ended December 31, 2006 and disclosing audit fees of \$45,000 to REB).

^{29/} We have also considered the section 21B factor concerning whether a person has previously been found by another appropriate regulatory agency or a self-regulatory organization to have violated relevant federal or state laws. In the context of a registered public accounting firm, we view findings of a state board of accountancy as a potentially relevant factor. Cf. section 2(a)(1) of the Act (defining "appropriate state regulatory authority" to include "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"). The record indicates that the Texas State Board of Public Accountancy reprimanded Bassie in 2001 for failing to respond to communications from the Texas State Board in violation of state law and that agency's rules, and required Bassie to pay \$250 in administrative penalties, pay \$500 in administrative costs, and complete six hours of continuing professional education in the area of professional ethics. On the limited information about that matter in the record, however, we do not treat this factor as significant to our consideration of whether to impose a penalty.

Respondents' opposition to that motion focused on liability issues and did not address the penalty issue. As the Hearing Officer then issued his initial decision without imposing a civil money penalty,^{30/} and as the Division has not renewed its request for a civil money penalty before us, Respondents did not have any subsequent occasion to argue specifically against a penalty. Somewhat related to that point, a respondent in the Exchange Act section 21B context may present, and the Commission, in determining whether a penalty is in the public interest, may in its discretion consider, evidence of the respondent's ability to pay.^{31/} Respondents here have not had a specific opportunity to present evidence on their ability to pay a penalty.

We do not view either point as an obstacle to imposition of a penalty at this stage in the process. With regard to ability to pay, even if we were guided by the Exchange Act section 21B(d) approach, that approach commits to the agency's discretion the question of whether ability to pay is relevant to penalty considerations in any particular case.^{32/} For various reasons, ability to pay might be irrelevant. See, e.g., Trautman, 2009 WL 4828994 at *23 (even accepting respondents' financial statements at face value, "egregiousness of Trautman's conduct outweighs any discretionary waiver, and penalty, among other sanctions, was "necessary to deter others"); VanCook, 2009 WL 4005083 at *19 ("conduct was sufficiently egregious to outweigh any consideration of [respondent's] inability to pay" and penalty, among other sanctions, was "necessary . . . to deter him and others" from such conduct). Because of the seriousness with which we view noncooperation, the egregiousness of Respondents' noncooperation, and the need to protect investors and advance the public interest by deterring such noncooperation, evidence concerning Respondents' ability to pay a penalty would be irrelevant to our determination of whether to impose a penalty.

Given the irrelevance of evidence bearing on ability to pay, and the nature of the arguments that Respondents have already made, we see no need to provide Respondents with a separate opportunity to argue specifically against the imposition of

^{30/} The initial decision did not address the Division's request for civil money penalties.

^{31/} See section 21B(d) of the Exchange Act.

^{32/} See section 21B(d) of the Exchange Act; cf. Rule 630(a) of the Commission's Rules of Practice ("Commission may, in its discretion . . . consider evidence concerning ability to pay in determining whether . . . a penalty is in the public interest").

a civil money penalty. Respondents have had an opportunity to argue against the factual and legal conclusions (relating to their noncooperation) that provide the basis for the Board's authority to impose a civil money penalty. For the reasons described earlier, we have rejected their arguments, and those issues need not be reargued in the specific context of our consideration of sanctions beyond those imposed in the initial decision. The other factors described above, which we have identified as weighing strongly in favor of a civil money penalty, relate to broader considerations concerning the exercise of our sanctioning authority in the public interest. It is not inappropriate for us to make decisions based on such considerations without first giving all parties an opportunity to brief us on their views.^{33/}

Accordingly, we have determined to impose a civil money penalty. We turn now to consideration of the amount of the penalty. The Act specifies maximum penalty amounts, and those specified amounts are from time to time subject to penalty inflation adjustments published in the Code of Federal Regulations. For conduct occurring after February 14, 2005 but before March 4, 2009 (the period encompassing Respondents' noncooperation before these proceedings were instituted), the Board is authorized to impose a civil money penalty of up to \$800,000 for a natural person and up to \$15.825 million for other persons in cases involving intentional or knowing conduct, including reckless conduct, or repeated instances of negligent conduct.^{34/}

In this case we have determined to impose a civil money penalty of \$75,000. While this is well below the maximum penalty that we could impose, it nonetheless reflects the seriousness of Respondents' noncooperation, including the harm to investors from the possibility that such noncooperation may have prevented the Board from uncovering evidence that would have revealed failures or violations warranting an even steeper penalty. We also view it as sufficient to deter similar noncooperation by

^{33/} As set out in PCAOB Rule 5460(c), the Board's review of an initial decision is de novo, and the Board may, among other things, modify that decision in whole or in part. The Board's ability to modify an initial decision is not conditioned on giving the parties a specific opportunity to brief each contemplated modification.

^{34/} See Sections 105(c)(4)(D) and 105(c)(5) of the Act; 17 C.F.R. § 201.1003 Table III; PCAOB Rules 5300(b)(1) and 5300(a)(4). For sanctionable conduct in that same period that does not involve intentional or knowing (including reckless) conduct or repeated instances of negligent conduct, the Board is authorized to impose a civil money penalty of up to \$110,000 for a natural person and \$2.1 million for other persons.

others. Because the record indicates that REB is a sole proprietorship owned and controlled by Bassie, we impose a penalty solely on Bassie.

V.

For the reasons described above, we conclude that, in order to protect the interests of investors and to further the public interest, REB's PCAOB registration should be permanently revoked, Bassie should be permanently barred from associating with any registered public accounting firm,^{35/} and a civil money penalty of \$75,000 should be imposed against Bassie.^{36/}

An appropriate order will issue.^{37/}

By the Board.

^{35/} Respondents' briefs reflect a concern that sanctions imposed by the Hearing Officer, and potentially imposed by the Board, include "denial of the property right of Respondent's CPA license." Respondents' Reply Brief at 6. We have no authority to reach, and our sanctions do not reach, any state or professional licenses held by Respondents. We note, however, that as required by Section 105(d) of the Act, a copy of this decision and the related order will be transmitted to the appropriate state regulator.

^{36/} All funds collected by the Board as a result of the assessment of civil money penalties shall be used in accordance with Section 109(c)(2) of the Act.

^{37/} We have considered all of the parties' contentions regarding the issue of noncooperation in connection with the Issuer B ABDs. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion. The Hearing Officer also granted summary disposition in favor of the Division with respect to other grounds for imposing sanctions against Respondents, and the parties have addressed those findings in their briefs. As to those matters, we have concluded that there are genuine issues of material fact that preclude resolution of the allegations on summary disposition. In light of the sanctions we are imposing, however, we are not at this time remanding those other aspects of the case or ordering further proceedings on any other aspects of the case.



PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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In the Matter of R.E. Bassie & Co.)	PCAOB File No. 105-2009-001
and R. Everett Bassie, CPA)	
)	ORDER IMPOSING SANCTIONS
Respondents.)	October 6, 2010
)	
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_____)	

On the basis of the Board's opinion issued this day, it is

ORDERED that R. Everett Bassie is permanently barred from associating with any registered public accounting firm; and it is further

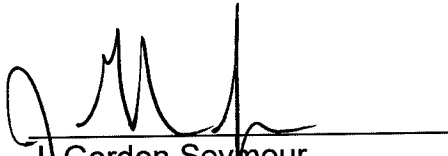
ORDERED that R.E. Bassie & Co.'s registration with the Board is permanently revoked; and it is further

ORDERED that R. Everett Bassie shall pay a civil money penalty in the amount of \$75,000 by (a) United States postal money order, certified check, bank cashier's check, or bank money order, (b) made payable to the Public Company Accounting Oversight Board, (c) delivered to the Controller, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006 within 30 days after the effective date, described below, and (d) submitted under a cover letter which identifies R. Everett Bassie as a respondent in these proceedings, sets forth the title and PCAOB File Number of these proceedings, and states that payment is made pursuant to this Order, a copy of which cover letter and money order or check shall be sent to Office of the Secretary, Attention: J. Gordon Seymour, General Counsel and Secretary, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006.

Effective Date: If a respondent does not file an application for review by the Securities and Exchange Commission ("Commission") and the Commission does not order review of sanctions ordered against a respondent on its own motion, the effective date of the sanctions shall be the later of the expiration of the time period for filing an

application for Commission review or the expiration of the time period for the Commission to order review. If a respondent files an application for review by the Commission or the Commission orders review of sanctions ordered against a respondent, the effective date of the sanctions ordered against that respondent shall be the date the Commission lifts the stay imposed by Section 105(e) of the Sarbanes-Oxley Act of 2002.

By the Board.



J. Gordon Seymour
Secretary

October 6, 2010