

**PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD**

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	)	PCAOB File No. 105-2012-007
In the Matter of <i>Kenneth J. McBride</i>	)	
	)	<b>Notice of Finality of Initial Decision</b>
Respondent.	)	
	)	May 7, 2013
	)	

On March 15, 2013, the Chief Hearing Officer of the Public Company Accounting Oversight Board issued the attached Initial Decision pursuant to PCAOB Rule 5204(b) ordering, as sanctions, that the PCAOB registration of Kenneth J. McBride ("the Firm") be permanently revoked and that the Firm pay a civil money penalty in the amount of \$5,000.

There having been no petition for Board review of the Initial Decision filed by any party pursuant to PCAOB Rule 5460(a) and no action by the Board to call the matter for review pursuant to PCAOB Rule 5460(b), the Initial Decision has today become final pursuant to PCAOB Rule 5204(d).

The Firm shall pay the civil money penalty by (a) wire transfer pursuant to instructions provided by Board staff; or (b) United States postal money order, certified check, bank cashier's check or bank money order; (c) made payable to the Public Company Accounting Oversight Board; (d) delivered to the Controller, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington D.C. 20006; and (e) submitted under a cover letter which identifies Kenneth J. McBride 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 Notice, a copy of which cover letter and money order or check shall be sent to Office of the Secretary, Attention: Phoebe W. Brown, Secretary, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006.

**Effective Date of Sanctions:** If the Firm 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 the Firm 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 the Firm files an application for review by the Commission or the Commission orders review of sanctions ordered against the Firm, the effective date of the sanctions ordered against the Firm shall be the date the Commission lifts the stay imposed by Section 105(e) of the Sarbanes-Oxley Act of 2002.



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Phoebe W. Brown  
Secretary

May 7, 2013

In the Matter of Kenneth J. McBride,  
  
Respondent.

PCAOB No. 105-2012-007

Hearing Officer – DMF

**INITIAL DECISION (DEFAULT)**

March 15, 2013

*Summary*

*Respondent was held in default, pursuant to PCAOB Rule 5409(a), for failing to file an Answer in response to the Order Instituting Disciplinary Proceedings (“OIP”). The allegations in the OIP, which are deemed true and are supported by evidence in the record, establish that Respondent failed to file annual reports and to pay annual fees for the years 2010, 2011, and 2012, as required by Sections 102(d) and 102(f) of the Sarbanes-Oxley Act of 2002, as amended, (“the Act”) and PCAOB Rules 2200 and 2202. For these violations, pursuant to Sections 105(c)(4) and 105(c)(5) of the Act and PCAOB Rule 5300(a), Respondent’s registration with the PCAOB is revoked and Respondent is ordered to pay a civil money penalty in the amount of \$5,000.*

*Appearances*

Noah A. Berlin, Esq., Washington, DC, for the Division of Enforcement and Investigations.

No appearance by or on behalf of Respondent Kenneth J. McBride.

**DECISION**

**1. Introduction**

On December 11, 2012, the Public Company Accounting Oversight Board (“PCAOB” or the “Board”) issued an Order Instituting Disciplinary Proceedings (“OIP”) alleging that

Respondent Kenneth J. McBride (“McBride”) violated Section 102(d) of the Sarbanes-Oxley Act of 2002, as amended, (the “Act”) and PCAOB Rule 2200 by failing to file annual reports for 2010, 2011, and 2012, and violated Section 102(f) of the Act and Rule 2202 by failing to pay annual fees for 2010, 2011, and 2012.

The OIP directed McBride to file an Answer to the allegations contained in the OIP within twenty (20) days after service of the OIP on McBride. On December 20, 2012, the Secretary filed a Notice of Service indicating that McBride was served with a copy of the OIP on December 12, 2012. Accordingly, McBride was required to file his Answer to the OIP by January 2, 2013.

McBride failed to file an Answer to the OIP by the January 2, 2013, deadline. On January 8, 2013, I issued an order directing McBride to show cause why he should not be held in default, pursuant to Rule 5409(a)(2), for failing to file an Answer, and requiring McBride to file his response to the order by January 22, 2013. The order to show cause warned McBride that if he failed to file a response to the order within the time allowed, he would be held in default, and that if he was held in default, a default decision might be issued finding that McBride committed the violations alleged in the OIP and imposing sanctions.

McBride did not file any response to the order to show cause by January 22, 2013. Accordingly, on January 24, 2013, I issued an order holding McBride in default, pursuant to Rule 5409(a)(2), and directing the Division of Enforcement and Investigations (“Division”) to file a motion for issuance of a default decision, with appropriate supporting materials, by February 25, 2013. The Division filed its motion for entry of a default decision, with supporting materials, on February 25, 2013. McBride did not file any response to the motion. For the following reasons, the Division’s motion is granted.

## **2. Violation**

The relevant facts are established by the allegations in the OIP, which are deemed true, pursuant to Rule 5409(a), and the materials filed by the Division in support of its motion, which substantiate and expand upon the OIP's allegations.<sup>1</sup> McBride operates a sole proprietorship located in Cold Spring Harbor, New York, and is licensed to engage in the practice of public accounting under the laws of New York. McBride registered with the Board on February 23, 2010, pursuant to Section 102 of the Act and Board rules. A search of public filings indicates that McBride issued one broker-dealer report dated February 25, 2009 for an audit period ending December 31, 2008.

Pursuant to Section 102(d) of the Act and Rules 2200 and 2201, each registered public accounting firm is required to submit an annual report to the PCAOB on Form 2 by June 30 of each year. In addition, pursuant to Section 102(f) of the Act and Rule 2202, each registered public accounting firm must pay an annual fee to the Board by July 31 of each year. McBride failed to file an annual report or to pay an annual fee in 2010, 2011, and 2012.

These facts are sufficient to establish that McBride violated Sections 102(d) and 102(f) of the Act and Rules 2200 and 2202, as alleged in the OIP.

## **3. Sanctions**

The remaining issue is what sanctions should be imposed for those violations. The imposition of disciplinary sanctions is governed by Sections 105(c)(4) and 105(c)(5) of the Act. To justify a suspension or revocation of McBride's registration, McBride's violations must have involved "intentional or knowing conduct, including reckless conduct," or "repeated instances of

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<sup>1</sup> See James M. Russen, Jr., Exch. Act Rel. No. 32895, 51 S.E.C. 675, 678 n.12 (1993) ("The Association did not base its conclusion simply on the complaint's allegations; rather, it reviewed the record evidence presented by its staff and determined that the evidence supported a finding of violation. This approach affords this Commission a basis for discharging its review function under Section 19 of the Securities Exchange Act.").

negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.” On the other hand, a civil money penalty may be imposed without such a finding, so long as the penalty does not exceed the amount set forth in Section 105(c)(4)(D)(i) of the Act, as adjusted. The Division requests that McBride’s registration be suspended for a period of one year and that he be ordered to pay a civil money penalty of \$5,000.

The materials submitted by the Division in support of its motion for a default decision establish that, prior to the institution of these proceedings, the Division made numerous attempts to notify McBride of his failure to timely file annual reports or pay annual fees. From July 19, 2010, through September 15, 2011, PCAOB staff sent both emails to the email address used in McBride’s application for registration and correspondence by Federal Express to the address used in McBride’s registration application (“Registered Address”) in an effort to alert McBride to his failure to file his 2010 and 2011 annual reports and to pay his 2010 and 2011 annual fees. At least one of the emails and all of the correspondence was returned as undeliverable.

The Division subsequently sent McBride a charging letter dated July 12, 2012, concerning McBride’s failure to timely file his 2011 annual report and pay his 2011 annual fee. The charging letter was sent to an address that the Division determined was McBride’s current mailing address and it was delivered successfully. The charging letter described the basis for disciplinary proceedings against McBride as a result of his delinquencies, and offered McBride three options: become compliant by filing an annual report and paying the annual fee for 2011; submit a Form 1-WD, pursuant to Rule 2107, to withdraw from Board registration; or submit a statement of position as to why the firm should not be charged in a disciplinary proceeding. The charging letter also indicated that the Division would not recommend that the Board institute disciplinary proceedings if either of the first two options was performed by August 2, 2012.



Division staff received a telephone call from McBride on the morning of July 19, 2012, in which he indicated that he had received the charging letter and intended to file a Form 1-WD to withdraw from registration, the second option described in the July 12, 2012, charging letter, in order to avoid disciplinary action by the Board. Division staff directed McBride to the PCAOB's website for filing instructions, and gave McBride an e-mail address to contact in case he had any questions about the Form 1-WD submission process.

After more than a month passed without McBride undertaking any of the three options described in the July 12, 2012, charging letter, Division staff sent McBride a follow-up letter, dated August 27, 2012, which was delivered. The letter noted that McBride had failed to submit a Form 1-WD by August 2, 2012, and asked McBride to do so immediately. The letter further warned that McBride's failure to submit a Form 1-WD, or take any of the other actions described in the charging letter, might result in the Division recommending that the Board institute a disciplinary proceeding against him.

The Board instituted these proceedings on December 11, 2012, and the OIP was served on McBride on December 12, 2012. On or about December 17, 2012, McBride contacted Division staff to begin settlement negotiations. On January 9, 2013, after I issued the order requiring McBride to show cause why he should not be held in default, he contacted Division counsel again, indicating that he would endeavor to make his delinquent annual report filings, pay his delinquent annual fees, and file a Form 1-WD. As of the date of the Division's motion, however, Respondent had not taken any of those actions.

These facts are sufficient to establish that McBride's conduct meets the requirements of Section 105(c)(5) of the Act. When he voluntarily registered with the Board, McBride accepted the responsibility of every registered public accounting firm to file annual reports and pay annual

fees; his failure to either file an annual report or pay an annual fee for three consecutive years reflects, at a minimum, repeated instances of negligent conduct each constituting a violation of the Act and the Board's rules.

After registering, McBride apparently changed his email and post office addresses without advising the Board. As a result, PCAOB staff's initial efforts to contact him about his delinquencies were unsuccessful. Ultimately, however, McBride was notified and given options that would have allowed him to avoid disciplinary action, yet after representing that he would file a Form 1-WD to withdraw from registration, he failed to do so. After this proceeding was filed, McBride represented to the Division that he would file his delinquent reports, pay his delinquent annual fees, and file a Form 1-WD, but failed to do so. These facts are sufficient to establish that, after receiving actual notice of his delinquencies, McBride's failure to file his past-due annual reports and to pay his past-due annual fees constituted intentional or knowing conduct within the meaning of Section 105(c)(5).<sup>2</sup>

In light of these facts, I conclude that the one-year suspension recommended by the Division would be insufficient to address McBride's violations. The violations continued for several years, even after McBride was given options for curing them, which indicates that McBride is unwilling or unable to conform his conduct to PCAOB requirements. Moreover, when McBride advised the staff on several occasions that he planned to take action to cure his violations, he consistently indicated that he intended to file a Form 1-WD to withdraw from registration, which indicates a lack of interest in continuing to be a registered public accounting

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<sup>2</sup> I have considered in that regard McBride's statements to the Division indicating that he had been undergoing treatment for prostate cancer. According to the Division, however, McBride never asserted that his medical condition prevented him from filing his annual reports or paying his annual fees, and at the time of his representation to the Division on January 9, 2013, that he would endeavor to file his overdue annual reports and to pay his overdue annual fees, he advised the Division that his condition was cured or in remission. In the absence of some evidence that his medical condition interfered with his ability to file his annual reports and to pay his annual fees, or to cure his delinquencies in that regard, I find it irrelevant to the sanctions issue.



firm. Finally, his failure to participate in this proceeding also indicates that McBride lacks the intent or ability to conform to the Board's requirements. Accordingly, I conclude that McBride's registration should be revoked.

In determining whether a civil money penalty is an appropriate sanction and, if so, the amount of the penalty, the Board has considered the factors set forth in Section 21B(c) of the Securities Exchange Act of 1934 ("Exchange Act") as providing helpful and relevant guidance.

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.

Larry O'Donnell, CPA, P.C., PCAOB File No. 105-2010-002 (Oct. 19, 2010), at 9-10 (footnotes omitted). The Securities and Exchange Commission has confirmed that "[a]n analysis based on Section 21B is ... sufficiently flexible to be used in this context." R.E. Bassie & Co., Accounting and Auditing Enforcement Rel. No. 3354, 2012 SEC LEXIS 89 at \*47 (Jan. 10, 2012).

In this case, McBride's conduct initially involved repeated instances of negligent disregard of his obligations as a registered public accounting firm, and ultimately an intentional disregard of his obligation to cure his deficiencies, even when offered alternatives that would have allowed him to avoid disciplinary action. Further, by failing to pay his annual fees, McBride has, in effect, unjustly enriched himself. Finally, there is a need to deter not only

McBride, but also other registered public accounting firms, from such conduct. On the other hand, there is no evidence of harm to other persons or of any prior misconduct on the part of McBride.

Taking all the relevant circumstances into consideration, I conclude that the \$5,000 civil money penalty sought by the Division is appropriate to accomplish the Board's remedial objectives in this proceeding.

#### **4. Order**

For the foregoing reasons, **IT IS ORDERED**, pursuant to Section 105(c)(4) and (c)(5) of the Act and Rule 5300(a), that for violating Section 102(d) of the Act and PCAOB Rule 2200 by failing to file annual reports for 2010, 2011 and 2012, and for violating Section 102(f) of the Act and Rule 2202 by failing to pay an annual fee for 2010, 2011 and 2012, the registration of Respondent Kenneth J. McBride is permanently revoked and Respondent Kenneth J. McBride shall pay a civil money penalty in the amount of \$5,000.

This Initial Decision shall become final in accordance with Rule 5204(d)(1) upon issuance of a notice of finality by the Secretary. Any party may obtain Board review of this Initial Decision in accordance with Rule 5460(a), or the Board may, on its own initiative, order review, in which case this Initial Decision will not become final.

  
David M. Fitzgerald  
Hearing Officer