

File No. PCAOB 2019-01  
Consists of 34 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

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Form 19b-4

Proposed Rules

By

Public Company Accounting Oversight Board

SEC  
Mail Processing  
Section

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Washington DC  
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In accordance with Rule 19b-4 under the  
Securities Exchange Act of 1934

1. Text of the Proposed Rules

(a) Pursuant to the provisions of Section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), 15 U.S.C. 7217(b), the Public Company Accounting Oversight Board (“Board” or “PCAOB”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) proposed amendments to the Board’s bylaws and rules that provide that the PCAOB’s appointment and removal of any hearing officer are subject to Commission approval and make related clarifying and conforming changes to the Board’s rules. Specifically, the Board is amending Article VI of its bylaws and PCAOB Rules 1001(h)(i), 5200, and 5402. The text of these amendments is attached as Exhibit A.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Board

The Board approved the proposed amendments to the Board’s bylaws and rules, and authorized them for filing with the SEC, at its closed meeting on December 20, 2018. No other action by the Board is necessary for the filing of the amendments.

The Board has filed these amendments for immediate effectiveness. The implementation date of these proposed changes to the Board’s bylaws and rules is the date of filing.<sup>1</sup>

3. Board’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rules Change

(a) Purpose

The Board’s duties under the Act include acting on registration applications of public

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<sup>1</sup> Securities Exchange Act of 1934, Section 19(b)(3)(A), 15 U.S.C. 78s(b)(3)(A); 17 CFR 240.19b-4(f)(3).

accounting firms that prepare audit reports for issuers, brokers, or dealers,<sup>2</sup> and conducting disciplinary proceedings concerning, and imposing appropriate sanctions where justified upon, registered public accounting firms and their associated persons.<sup>3</sup> In carrying out these duties, the Board may direct that a PCAOB hearing officer preside over a disciplinary or other proceeding.<sup>4</sup> The Board's authority to do so derives from Section 101(f)(4) of the Act, permitting the Board, subject to Commission oversight under Section 107 of the Act, "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." Section 101(g)(2) of the Act further authorizes that "[t]he rules of the Board shall, subject to the approval of the Commission . . . permit, as the Board determines necessary and appropriate, delegation by the Board of any of its functions to an . . . employee of the Board, . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter." In 2004, the Commission approved the Board's proposed rules relating to investigations and adjudications, authorizing creation of the PCAOB's hearing officer position.<sup>5</sup>

On June 21, 2018, the U.S. Supreme Court held in *Lucia v. SEC* that SEC Administrative Law Judges (ALJs) are inferior officers under the Appointments Clause of the U.S. Constitution

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<sup>2</sup> The PCAOB has oversight authority with respect to audits of brokers and dealers that are registered with the SEC. *See* Sections 110(3) and (4) of the Act, 15 U.S.C. 7220(3) and (4).

<sup>3</sup> *See, e.g.*, Sections 101(c)(1) & (4), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1) & (4), 7212(c), 7215(a) & (c)(1)-(3).

<sup>4</sup> *See, e.g.*, Sections 101(f)(4) and 101(g)(2) of the Act, 15 U.S.C. 7211(f)(4) & (g)(2); PCAOB Rules 5200 (Commencement of Disciplinary Proceedings), 5500 (Commencement of Hearing on Disapproval of a Registration Application).

<sup>5</sup> *See* Order Approving Proposed Rules Relating to Investigations and Adjudications, SEC Rel. No. 34-49704, 2004 WL 1439833 (May 14, 2004).

and that accordingly SEC ALJs are required to be appointed by “the President, a court of law, or a head of department,” such as the Commission.<sup>6</sup> Since the *Lucia* decision, the Commission has taken various actions, including issuance of an order reiterating its November 30, 2017 approval of the prior appointments of its ALJs by its staff as the Commission’s own under the Constitution.<sup>7</sup> In light of the *Lucia* litigation, other government agencies have taken similar measures as to their ALJs or like officials, also out of an abundance of caution and for avoidance of doubt.<sup>8</sup>

The *Lucia* case did not involve a challenge to PCAOB hearing officers, only to SEC ALJs. Nor has any court, the Commission, or the Board adjudicated whether a PCAOB hearing officer is, like an SEC ALJ, an inferior officer under the Appointments Clause.<sup>9</sup> Indeed, there

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<sup>6</sup> 138 S. Ct. 2044, 2050-51 (2018).

<sup>7</sup> See *In re Pending Administrative Proceedings*, SEC Rel. No. 34-83907, 2018 WL 4003609, \*1 (Aug. 22, 2018).

<sup>8</sup> See, e.g., USITC, The Appointment of the Commission’s Administrative Law Judges for Section 337 Investigations, 83 Fed. Reg. 45,678-01 (Sept. 10, 2018); FMSHRC, Ratification Notice (Apr. 3, 2018), available at [www.fmshrc.gov/about/news/commission-ratification-notice](http://www.fmshrc.gov/about/news/commission-ratification-notice); FDIC, Resolution of Board of Directors (July 19, 2018), available at <https://www.fdic.gov/news/board/2018-07-19-085152.pdf>; CFTC, Ratification and Reconsideration Order, *In re Pending Administrative Proceedings*, 2018 WL 1966116 (Apr. 6, 2018); Letter from Sec’y R. Alexander Acosta, Dep’t of Labor, to Hon. Paul R. Almanza, Admin. Law Judge, Dep’t of Labor (Dec. 21, 2017), available at [https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently\\_Requested\\_Records/ALJ\\_Appointments/Secretarys\\_Ratification\\_of\\_ALJ\\_Appointments\\_12\\_21\\_2017.pdf](https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf); FTC, *P130500 Federal Trade Commission Minute: Ratification of Appointment of Administrative Law Judge and Chief Administrative Law Judge* (Sept. 11, 2015), attached as Ex. A to FTC, Order Denying Respondent LabMD, Inc.’s Motion to Dismiss, *In re LabMD Inc.*, No. 9357 (Sept. 14, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150914labmdmotion.pdf>.

<sup>9</sup> An attempt was made to challenge the constitutionality of a PCAOB hearing officer’s appointment in *Kabani v. SEC*, but the court held that the argument had not been timely raised and was forfeited. 733 F. App’x 918, 2018 WL 3828524, \*1 (9<sup>th</sup> Cir. Aug. 13, 2018).

are a number of differences between the position of an SEC ALJ and the position of a PCAOB hearing officer.<sup>10</sup>

Nevertheless, out of an abundance of caution and to eliminate any uncertainty about the status of PCAOB hearing officers that might distract from the PCAOB's mission, including its important registration and disciplinary functions, the Board is adopting certain amendments to its bylaws and rules. These amendments modify the PCAOB's processes to appoint and remove its hearing officers to provide that such appointments and removals shall be subject to the approval of the Commission, a head of department under the Appointments Clause.

The amendments to Article VI of the Board's bylaws and PCAOB Rule 1001(h)(i), the language of which rule is changed to cross-reference the bylaw amendment, specify that the PCAOB's appointment and removal of any PCAOB hearing officer are subject to Commission approval. These changes are consistent with the Commission's broad authority to oversee the Board under Section 107 of the Act, *see* Sections 101(c) & (f) and 107 of the Act, 15 U.S.C. 7211(c) & (f), 7217, and the Commission's authority to "appoint . . . officers, attorneys, economists, examiners, and other employees" under Section 4(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78d(b).

As contemplated by these amendments, when the PCAOB's Governing Board, as defined by the bylaws,<sup>11</sup> has reached a decision on the appointment or removal of any PCAOB hearing

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<sup>10</sup> For example, an SEC ALJ may administer oaths and affirmations; issue, revoke, quash, or modify subpoenas; issue protective orders; and punish contemptuous conduct; a PCAOB hearing officer does not have that authority. *Compare* 17 CFR 200.14(a)(1) & (2), 200.111(b), 180(a), 232(e), 322 *with* PCAOB Rules 5103, 5105, 5200(b)(1), 5424.

<sup>11</sup> *See* Articles IV and VI of the PCAOB's bylaws (stating that "[t]he Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act" and that "[t]he Chairman of the Governing Board . . . shall also be the President and Chief Executive Officer of the Corporation"). In *Free*

officer, that decision shall be submitted to the Commission for consideration. The proposed appointment or removal of a hearing officer by the PCAOB cannot be effectuated until Commission approval has been given. The Commission’s approval of a PCAOB hearing officer’s appointment will result in the hearing officer being appointed in the manner of an inferior officer for purposes of the Appointments Clause.<sup>12</sup>

The Board is also adopting certain clarifying and conforming amendments to its adjudications rules in light of the rule changes discussed above. Specifically, the Board is adding a new subsection to Rule 5200 to summarize the framework within which the hearing officer functions under the Act and the Board’s rules. That new subsection explains that all proceedings shall be presided over by the Board, which is the entity empowered to act on registration applications and to conduct disciplinary proceedings.<sup>13</sup> Alternatively, the Board may order that the proceedings be conducted in the first instance by a hearing officer to whom the Board has, under certain conditions, delegated adjudicatory responsibilities.<sup>14</sup> The new subsection makes even more explicit the manner in which current PCAOB rules, such as Rules

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*Enterprise Fund v. PCAOB*, 561 U.S. 477, 510 (2010), the Supreme Court held that PCAOB Governing Board members are inferior officers under the Appointments Clause.

<sup>12</sup> See *Free Enterprise Fund*, 561 U.S. at 512 n.13 (noting examples of precedents in which “[w]e have previously found that the department head’s approval [of the appointment of personnel] satisfies the Appointments Clause”).

<sup>13</sup> See, e.g., Sections 101(c)(1) & (4) of the Act, 15 U.S.C. 7211(c)(1) & (4) (“the Board shall . . . register public accounting firms . . . [and] conduct . . . disciplinary proceedings . . .”) (emphasis added).

<sup>14</sup> See Section 101(g)(2) of the Act, 15 U.S.C. 7211(g)(2) (permitting, under specified conditions, “delegation by the Board of any of its functions to an . . . employee of the Board . . . , including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter”).

5200(b)(10), 5201(d)(2), 5204(b), and 5445, situate the hearing officer within PCAOB adjudication processes.<sup>15</sup>

Additionally, the amendments make clarifying and conforming edits to the heading of current PCAOB Rule 5200(b) and to the heading and text of PCAOB Rule 5402(b). Specifically, the words “appointment” and “appoint” in these current rules are replaced with “assignment” and “assign,” and current Rule 5200(b) is renumbered Rule 5200(c) and cross-referenced to new Rule 5200(b). These changes avoid any confusion between the actions of the Board and the Commission in appointing, and approving the appointment of, a hearing officer, and the PCAOB Secretary’s ministerial act of assigning a specific hearing officer to a specific proceeding pursuant to a Board order.

The above-described, targeted amendments seek to dispel any legal uncertainty arising from *Lucia* about the PCAOB hearing officer, who, as noted, may be tasked with presiding over a disciplinary or other proceeding. This will facilitate and make more efficient the Board’s performance of its duties under the Act to take “[a]ction on [a]pplications” for the “regist[r]ation [of] public accounting firms that prepare audit reports for issuers, brokers, and dealers”; to “conduct . . . disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms”; and to “enforce compliance with th[e] 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.”<sup>16</sup> These functions are part of the Board’s responsibility “to oversee

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<sup>15</sup> The provision is also analogous to SEC Rule of Practice 110, 17 CFR 201.110.

<sup>16</sup> See, e.g., Sections 101(c)(1), (4) & (6), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1), (4) & (6), 7212(c), 7215(a) & (c)(1)-(3).

the audit of 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.”<sup>17</sup>

Moreover, additional benefits will flow from the amendments because the Appointments Clause serves an important public purpose. The Supreme Court has described the Clause’s requirements as “among the significant structural safeguards of the constitutional scheme,” “designed to preserve political accountability relative to important government assignments.”<sup>18</sup> The Board has chosen to remedy the uncertainty caused by *Lucia* by conforming the appointment and removal of its hearing officers to those requirements. Thus, the Appointments Clause’s benefits and protections are explicitly extended to respondents in PCAOB proceedings, and to the public more broadly.

(b) Statutory Basis

The statutory basis for the proposed amendments is Title I of the Act. Specifically, Section 101(f)(2) of the Act empowers the Board, subject to Commission oversight under Section 107 of the Act, “to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act.” Section 101(f)(4), as discussed, empowers the Board, subject to Commission oversight under Section 107 of the Act, to appoint personnel. Section 101(g)(1) directs the Board, “subject to the approval of the Commission . . . [to] provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under th[e] Act.” And Section 101(g)(2), as discussed, permits the Board, “subject to the approval of the Commission,” to delegate its hearing functions within the

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<sup>17</sup> See Section 101(a) of the Act, 15 U.S.C. 7211(a).

<sup>18</sup> *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).



PCAOB. Furthermore, the amendments directly relate to statutory duties of the Board and purposes for its establishment that are discussed above.

4. Board's Statement on Burden on Competition

Not applicable. The proposed amendments are concerned solely with the administration of the PCAOB, as discussed below.

5. Board's Statement on Comments on the Proposed Rules Change Received from Members, Participants or Others

Written comments were neither solicited nor received. The proposed amendments are concerned solely with the administration of the PCAOB, as discussed below.

6. Extension of Time Period for Commission Action

Not applicable. The proposed amendments are concerned solely with the administration of the PCAOB, as discussed below.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The proposed amendments to the Board's bylaws and rules are concerned solely with the administration of the PCAOB. In particular, they relate to the PCAOB's employment relationship with its hearing officers, the PCAOB's interaction with the Commission in the Commission's performance of oversight of the PCAOB, and the clarification of the delegations of authority by the Board to PCAOB hearing officers. In that the amendments are concerned solely with the administration of the PCAOB, they are effective upon filing pursuant to the Exchange Act, Section 19(b)(3)(A), 15 U.S.C. 78s(b)(3)(A), and paragraph (f)(3) of Rule 19b-4 thereunder, 17 CFR 240.19b-4(f)(3).

8. Proposed Rules Based on Rules of Another Board or of the Commission

The proposed rule change to add a new subsection (b) to Rule 5200 is based in part on Commission Rule of Practice 110, in conformity with the Board's current rules.

9. Exhibits

Exhibit A – Text of the proposed amendments.


Exhibit 1 – Form of Notice of Proposed Changes for Publication in the Federal Register.

Exhibit 3 – PCAOB Release No. 2019-001 (Adopting Release)

10. Signatures

Pursuant to the requirements of the Act and the Exchange Act, as amended, the Board has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Public Company Accounting Oversight Board

By:   
\_\_\_\_\_  
Phoebe W. Brown  
Secretary

January 29, 2019

Exhibit A – Text of the Proposed Amendments

Below is the text of the proposed amendments to the Board’s bylaws and rules. Proposed new language is underlined; proposed deletions are in brackets. Text that remains unchanged is either specified or indicated by “\* \* \* \*” in the text below.

**BYLAWS**

\* \* \* \*

**ARTICLE VI**

**OFFICERS**

6.1 through 6.2 No Change.

**6.3. Powers of the Chief Executive Officer.**

(a) through (c) No Change.

(d) Furthermore, notwithstanding any other provision of these bylaws, the appointment or removal of any hearing officer shall be made by the Governing Board and shall be subject to the approval of the Securities and Exchange Commission.

\* \* \* \*

**RULES**

**SECTION 1. GENERAL PROVISIONS**

\* \* \* \*

**Rule 1001. Definitions of Terms Employed in Rules.**

(a)(i) through (f)(iii) No Change.

**(h)(i) Hearing Officer**

The term “hearing officer” means a person, other than a Board member or staff of the interested division, [duly authorized by the Board] appointed in accordance with Article 6.3 of the Board’s bylaws to preside at [a hearing] hearings.

(i)(i) through (t)(iii) No Change.

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## SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

\* \* \* \*

### Part 2 — Disciplinary Proceedings

\* \* \* \*

#### **Rule 5200. Commencement of Disciplinary Proceedings**

(a) No Change.

#### **(b) Presiding Official**

All proceedings shall be presided over by the Board or, if the Board orders, by a hearing officer.

#### **(b)(c) [Appointment] Assignment of a Hearing Officer**

Subject to Rule 5200(b), [As] as soon as practicable after the Board has issued an order instituting proceedings, or after a registration applicant has requested a hearing pursuant to Rule 5500(b), the Secretary shall assign a hearing officer to preside over the proceeding and shall serve the parties with notice of the hearing officer's assignment. Subject to Rules 5402 and 5403, the hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. The powers of the hearing officer include, but are not limited to, the following—

(1) through (12) No Change.

#### **(c)(d) Separation of Functions**

The staff of the Division of Enforcement and Investigations may not participate or advise in the decision, or in Board review of the decision, in any proceeding in which the Division of

Enforcement and Investigations is the interested division, except as a witness or counsel in the proceeding. Any other employee or agent of the Board engaged in the performance of investigative or prosecutorial functions for the Board in a proceeding may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. A hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

**[(d)](e) Consolidation of Proceedings**

By order of the Board or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Board or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this Rule, no distinction is made between joinder and consolidation of proceedings.

\* \* \* \*

**Rule 5402. Hearing Officer Disqualification and Withdrawal**

(a) No Change.

**(b) [Appointment] Assignment of a Replacement Hearing Officer**

Upon withdrawal of a hearing officer, or in the event that a hearing officer is incapacitated or is otherwise unable to continue to serve after being [appointed] assigned, the Secretary will [appoint] assign a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is [appointed] assigned after a

hearing has commenced, the replacement hearing officer may recall any witness or may certify familiarity with any part or all of the record.

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EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. PCAOB-2019-01)

[Date]

Public Company Accounting Oversight Board; Notice of Filing of and Immediate Effectiveness of Proposed Bylaw and Rule Amendments to Provide that the Board's Appointment and Removal of Hearing Officers Are Subject to Commission Approval

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), 15 U.S.C. 7217(b), notice is hereby given that on January 29, 2019, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or the "Commission") the proposed amendments described in items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed amendments from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Amendments

On December 20, 2018, the Board adopted amendments to its bylaws and rules (collectively, the "proposed amendments") to provide that the PCAOB's appointment and removal of PCAOB hearing officers are subject to Commission approval and to make related clarifying and conforming changes to the PCAOB's rules. Specifically, the Board is amending Article VI of its bylaws and PCAOB Rules 1001(h)(i), 5200, and 5402. The proposed amendments are concerned solely with the administration of the PCAOB in that they relate to the employment relationship between the Board and its hearing officers, its interaction with the Commission in the Commission's performance of oversight of the PCAOB, and the clarification of the delegations of authority by the Board to PCAOB hearing officers.

The text of the proposed amendments appears in the Board's SEC Form 19b-4 filing and is available on the Board's website at <https://pcaobus.org/Rulemaking/Pages/Docket045> and at the Commission's Public Reference Room.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Amendments

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed amendments and stated that the amendments are concerned solely with the administration of the PCAOB. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Amendments

1. Purpose

The Board's duties under the Act include acting on registration applications of public accounting firms that prepare audit reports for issuers, brokers, or dealers,<sup>1</sup> and conducting disciplinary proceedings concerning, and imposing appropriate sanctions where justified upon, registered public accounting firms and their associated persons.<sup>2</sup> In carrying out these duties, the Board may direct that a PCAOB hearing officer preside

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<sup>1</sup> The PCAOB has oversight authority with respect to audits of brokers and dealers that are registered with the SEC. *See* Sections 110(3) and (4) of the Act, 15 U.S.C. 7220(3) and (4).

<sup>2</sup> *See, e.g.,* Sections 101(c)(1) & (4), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1) & (4), 7212(c), 7215(a) & (c)(1)-(3).



over a disciplinary or other proceeding.<sup>3</sup> The Board’s authority to do so derives from Section 101(f)(4) of the Act, permitting the Board, subject to Commission oversight under Section 107 of the Act, “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.” Section 101(g)(2) of the Act further authorizes that “[t]he rules of the Board shall, subject to the approval of the Commission . . . permit, as the Board determines necessary and appropriate, delegation by the Board of any of its functions to an . . . employee of the Board, . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter.” In 2004, the Commission approved the Board’s proposed rules relating to investigations and adjudications, authorizing creation of the PCAOB’s hearing officer position.<sup>4</sup>

On June 21, 2018, the U.S. Supreme Court held in *Lucia v. SEC* that SEC Administrative Law Judges (ALJs) are inferior officers under the Appointments Clause of the U.S. Constitution and that accordingly SEC ALJs are required to be appointed by “the President, a court of law, or a head of department,” such as the Commission.<sup>5</sup> Since the *Lucia* decision, the Commission has taken various actions, including issuance of an order reiterating its November 30, 2017 approval of the prior appointments of its ALJs by

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<sup>3</sup> See, e.g., Sections 101(f)(4) and 101(g)(2) of the Act, 15 U.S.C. 7211(f)(4) & (g)(2); PCAOB Rules 5200 (Commencement of Disciplinary Proceedings), 5500 (Commencement of Hearing on Disapproval of a Registration Application).

<sup>4</sup> See *Order Approving Proposed Rules Relating to Investigations and Adjudications*, SEC Rel. No. 34-49704, 2004 WL 1439833 (May 14, 2004).

<sup>5</sup> 138 S. Ct. 2044, 2050-51 (2018).

its staff as the Commission's own under the Constitution.<sup>6</sup> In light of the *Lucia* litigation, other federal government agencies have taken similar measures as to their ALJs or like officials, also out of an abundance of caution and for avoidance of doubt.<sup>7</sup>

The *Lucia* case did not involve a challenge to PCAOB hearing officers, only to SEC ALJs. Nor has any court, the Commission, or the Board adjudicated whether a PCAOB hearing officer is, like an SEC ALJ, an inferior officer under the Appointments Clause.<sup>8</sup> Indeed, there are a number of differences between the position of an SEC ALJ and the position of a PCAOB hearing officer.<sup>9</sup>

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<sup>7</sup> See, e.g., USITC, *The Appointment of the Commission's Administrative Law Judges for Section 337 Investigations*, 83 Fed. Reg. 45,678-01 (Sept. 10, 2018); FMSHRC, *Ratification Notice* (Apr. 3, 2018), available at [www.fmshrc.gov/about/news/commission-ratification-notice](http://www.fmshrc.gov/about/news/commission-ratification-notice); FDIC, *Resolution of Board of Directors* (July 19, 2018), available at <https://www.fdic.gov/news/board/2018-07-19-085152.pdf>; CFTC, *Ratification and Reconsideration Order, In re Pending Administrative Proceedings*, 2018 WL 1966116 (Apr. 6, 2018); Letter from Sec'y R. Alexander Acosta, Dep't of Labor, to Hon. Paul R. Almanza, Admin. Law Judge, Dep't of Labor (Dec. 21, 2017), available at [https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently\\_Requested\\_Records/ALJ\\_Appointments/Secretarys\\_Ratification\\_of\\_ALJ\\_Appointments\\_12\\_21\\_2017.pdf](https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf); FTC, *P130500 Federal Trade Commission Minute: Ratification of Appointment of Administrative Law Judge and Chief Administrative Law Judge* (Sept. 11, 2015), attached as Ex. A to FTC, *Order Denying Respondent LabMD, Inc.'s Motion to Dismiss, In re LabMD Inc.*, No. 9357 (Sept. 14, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150914labmdmotion.pdf>.

<sup>8</sup> An attempt was made to challenge the constitutionality of a PCAOB hearing officer's appointment in *Kabani v. SEC*, but the court held that the argument had not been timely raised and was forfeited. 733 F. App'x 918, 2018 WL 3828524, \*1 (9<sup>th</sup> Cir. Aug. 13, 2018).

<sup>9</sup> For example, an SEC ALJ may administer oaths and affirmations; issue, revoke, quash, or modify subpoenas; issue protective orders; and punish contemptuous conduct; a PCAOB hearing officer does not have that authority. Compare 17 CFR 200.14(a)(1) & (2), 200.111(b), 180(a), 232(e), 322 with PCAOB Rules 5103, 5105, 5200(b)(1), 5424.

Nevertheless, out of an abundance of caution and to eliminate any uncertainty about the status of PCAOB hearing officers that might distract from the PCAOB's mission, including its important registration and disciplinary functions, the Board is adopting certain amendments to its bylaws and rules. These amendments modify the PCAOB's processes to appoint and remove its hearing officers to provide that such appointments and removals shall be subject to the approval of the Commission, a head of department under the Appointments Clause.

The amendments to Article VI of the Board's bylaws and PCAOB Rule 1001(h)(i), the language of which rule is changed to cross-reference the bylaw amendment, specify that the PCAOB's appointment and removal of any PCAOB hearing officer are subject to Commission approval. These changes are consistent with the Commission's broad authority to oversee the Board under Section 107 of the Act, *see* Sections 101(c) & (f) and 107 of the Act, 15 U.S.C. 7211(c) & (f), 7217, and the Commission's authority to "appoint . . . officers, attorneys, economists, examiners, and other employees" under Section 4(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78d(b).

As contemplated by these amendments, when the PCAOB's Governing Board, as defined by the bylaws,<sup>10</sup> has reached a decision on the appointment or removal of any PCAOB hearing officer, that decision shall be submitted to the Commission for

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<sup>10</sup> *See* Articles IV and VI of the PCAOB's bylaws (stating that "[t]he Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act" and that "[t]he Chairman of the Governing Board . . . shall also be the President and Chief Executive Officer of the Corporation"). In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 510 (2010), the Supreme Court held that PCAOB Governing Board members are inferior officers under the Appointments Clause.

consideration. The proposed appointment or removal of a hearing officer by the PCAOB cannot be effectuated until Commission approval has been given. The Commission's approval of a PCAOB hearing officer's appointment will result in the hearing officer being appointed in the manner of an inferior officer for purposes of the Appointments Clause.<sup>11</sup>

The Board is also adopting certain clarifying and conforming amendments to its adjudications rules in light of the rule changes discussed above. Specifically, the Board is adding a new subsection to Rule 5200 to summarize the framework within which the hearing officer functions under the Act and the Board's rules. That new subsection explains that all proceedings shall be presided over by the Board, which is the entity empowered to act on registration applications and to conduct disciplinary proceedings.<sup>12</sup> Alternatively, the Board may order that the proceedings be conducted in the first instance by a hearing officer to whom the Board has, under certain conditions, delegated adjudicatory responsibilities.<sup>13</sup> The new subsection makes even more explicit the manner in which current PCAOB rules, such as Rules 5200(b)(10), 5201(d)(2), 5204(b), and 5445, situate the hearing officer within PCAOB adjudication processes.<sup>14</sup>

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<sup>11</sup> See *Free Enterprise Fund*, 561 U.S. at 512 n.13 (noting examples of precedents in which “[w]e have previously found that the department head’s approval [of the appointment of personnel] satisfies the Appointments Clause”).

<sup>12</sup> See, e.g., Sections 101(c)(1) & (4) of the Act, 15 U.S.C. 7211(c)(1) & (4) (“the Board shall . . . register public accounting firms . . . [and] conduct . . . disciplinary proceedings . . .”) (emphasis added).

<sup>13</sup> See Section 101(g)(2) of the Act, 15 U.S.C. 7211(g)(2) (permitting, under specified conditions, “delegation by the Board of any of its functions to an . . . employee of the Board . . . , including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter”).

<sup>14</sup> The provision is also analogous to SEC Rule of Practice 110, 17 CFR 201.110.

Additionally, the amendments make clarifying and conforming edits to the heading of current PCAOB Rule 5200(b) and to the heading and text of PCAOB Rule 5402(b). Specifically, the words “appointment” and “appoint” in these current rules are replaced with “assignment” and “assign,” and current Rule 5200(b) is renumbered Rule 5200(c) and cross-referenced to new Rule 5200(b). These changes avoid any confusion between the actions of the Board and the Commission in appointing, and approving the appointment of, a hearing officer, and the PCAOB Secretary’s ministerial act of assigning a specific hearing officer to a specific proceeding pursuant to a Board order.

The above-described, targeted amendments seek to dispel any legal uncertainty arising from *Lucia* about the PCAOB hearing officer, who, as noted, may be tasked with presiding over a disciplinary or other proceeding. This will facilitate and make more efficient the Board’s performance of its duties under the Act to take “[a]ction on [a]pplications” for the “regist[r]ation [of] public accounting firms that prepare audit reports for issuers, brokers, and dealers”; to “conduct . . . disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms”; and to “enforce compliance with th[e] 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.”<sup>15</sup> These functions are part of the Board’s responsibility “to oversee the audit of companies that are subject to the securities laws, and related matters, in order to

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<sup>15</sup> See, e.g., Sections 101(c)(1), (4) & (6), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1), (4) & (6), 7212(c), 7215(a) & (c)(1)-(3).

protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.”<sup>16</sup>

Moreover, additional benefits will flow from the amendments because the Appointments Clause serves an important public purpose. The Supreme Court has described the Clause’s requirements as “among the significant structural safeguards of the constitutional scheme,” “designed to preserve political accountability relative to important government assignments.”<sup>17</sup> The Board has chosen to remedy the uncertainty caused by *Lucia* by conforming the appointment and removal of its hearing officers to those requirements. Thus, the Appointments Clause’s benefits and protections are explicitly extended to respondents in PCAOB proceedings, and to the public more broadly.

## 2. Statutory Basis

The statutory basis for the proposed amendments is Title I of the Act. Specifically, Section 101(f)(2) of the Act empowers the Board, subject to Commission oversight under Section 107 of the Act, “to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act.” Section 101(f)(4), as discussed, empowers the Board, subject to Commission oversight under Section 107 of the Act, to appoint personnel. Section 101(g)(1) directs the Board, “subject to the approval of the Commission . . . [to] provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under th[e] Act.” And Section 101(g)(2), as discussed, permits the Board, “subject to the approval of the Commission,” to delegate its hearing functions within the PCAOB. Furthermore, the

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<sup>16</sup> See Section 101(a) of the Act, 15 U.S.C. 7211(a).

<sup>17</sup> *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

amendments directly relate to statutory duties of the Board and purposes for its establishment that are discussed above.

B. Board's Statement on Burden on Competition

Not applicable. The proposed amendments are concerned solely with the administration of the PCAOB, as discussed in Item I above.

C. Board's Statement on Comments on the Proposed Amendments Received from Members, Participants or Others

Written comments were neither solicited nor received. The proposed amendments are concerned solely with the administration of the PCAOB, as discussed in Item I above.

III. Date of Effectiveness of the Proposed Amendments and Timing for Commission

The foregoing proposed amendments have become effective pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934<sup>18</sup> and paragraph (f)(3) of Rule 19b-4 thereunder.<sup>19</sup> At any time within 60 days of the filing of the proposed amendments, the Commission summarily may temporarily suspend such amendments 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 Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed amendments are consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f)(3).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/pcaob.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include PCAOB-2019-01 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to PCAOB-2019-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/pcaob.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed amendments that are filed with the Commission, and all written communications relating to the proposed amendments between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without charge; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to PCAOB-2019-01 and



should be submitted on or before [insert 21 days from publication in the Federal Register].

By the Commission.

Brent J. Fields  
Secretary



Public Company Accounting Oversight Board

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BYLAW AND RULE AMENDMENTS TO  
 PROVIDE THAT THE PCAOB'S  
 APPOINTMENT AND REMOVAL OF ITS  
 HEARING OFFICERS ARE SUBJECT TO  
 COMMISSION APPROVAL

PCAOB Release No. 2019-001  
 January 29, 2019

PCAOB Rulemaking  
 Docket Matter No. 045

**Summary:** The Public Company Accounting Oversight Board (“Board” or “PCAOB”) is adopting amendments to its bylaws and rules to provide that the PCAOB’s appointment and removal of its hearing officers are subject to Securities and Exchange Commission (“SEC” or “Commission”) approval, and to make related clarifying and conforming changes.

**Board Contacts:** Luis de la Torre, Associate General Counsel (202-591-4316, delatorrel@pcaobus.org), or Jerome P. Sisul, Assistant General Counsel (202-591-4466, sisulj@pcaobus.org)

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## I. Summary

The Board’s duties under the Sarbanes-Oxley Act (“Act”) include (a) acting on registration applications of public accounting firms that prepare audit reports for issuers, brokers, or dealers<sup>1</sup> and (b) conducting disciplinary proceedings concerning, and imposing appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms.<sup>2</sup> In carrying out these duties, the Board may direct that a PCAOB hearing officer preside over a disciplinary or other proceeding.<sup>3</sup> The Board’s authority to do so derives from Section 101(f)(4) of the Act, permitting the

<sup>1</sup> The PCAOB has oversight authority with respect to audits of brokers and dealers that are registered with the SEC. See Sections 110(3) and (4) of the Act, 15 U.S.C. 7220(3) and (4).

<sup>2</sup> See, e.g., Sections 101(c)(1) & (4), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1) & (4), 7212(c), 7215(a) & (c)(1)-(3).

<sup>3</sup> See, e.g., Sections 101(f)(4) and 101(g)(2) of the Act, 15 U.S.C. 7211(f)(4) & (g)(2); PCAOB Rules 5200 (Commencement of Disciplinary Proceedings), 5500 (Commencement of Hearing on Disapproval of a Registration Application).

Board, subject to Commission oversight under Section 107 of the Act, “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.” Section 101(g)(2) of the Act further authorizes that “[t]he rules of the Board shall, subject to the approval of the Commission . . . permit, as the Board determines necessary and appropriate, delegation by the Board of any of its functions to an . . . employee of the Board, . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter.” In 2004, the Commission approved the Board’s proposed rules relating to investigations and adjudications, authorizing creation of the PCAOB’s hearing officer position.<sup>4</sup>

On June 21, 2018, the U.S. Supreme Court held in *Lucia v. SEC* that SEC Administrative Law Judges (“ALJs”) are inferior officers under the Appointments Clause of the U.S. Constitution and that, accordingly, SEC ALJs are required to be appointed by “the President, a court of law, or a head of department,” such as the Commission.<sup>5</sup> Since the *Lucia* decision, the Commission has taken various actions, including issuance of an order reiterating its November 30, 2017 approval of the prior appointments of its ALJs by its staff as the Commission’s own under the Constitution.<sup>6</sup> In light of the *Lucia* litigation, other federal government agencies have taken similar measures as to their ALJs or like officials, also out of an abundance of caution and for avoidance of doubt.<sup>7</sup>

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<sup>4</sup> See *Order Approving Proposed Rules Relating to Investigations and Adjudications*, SEC Rel. No. 34-49704, 2004 WL 1439833 (May 14, 2004).

<sup>5</sup> 138 S. Ct. 2044, 2050-51 (2018).

<sup>6</sup> See *In re Pending Administrative Proceedings*, SEC Rel. No. 34-83907, 2018 WL 4003609, \*1 (Aug. 22, 2018).

<sup>7</sup> See, e.g., USITC, *The Appointment of the Commission’s Administrative Law Judges for Section 337 Investigations*, 83 Fed. Reg. 45,678-01 (Sept. 10, 2018); FMSHRC, *Ratification Notice* (Apr. 3, 2018), available at [www.fmshr.gov/about/news/commission-ratification-notice](http://www.fmshr.gov/about/news/commission-ratification-notice); FDIC, *Resolution of Board of Directors* (July 19, 2018), available at <https://www.fdic.gov/news/board/2018-07-19-085152.pdf>; CFTC, *Ratification and Reconsideration Order, In re Pending Administrative Proceedings*, 2018 WL 1966116 (Apr. 6, 2018); Letter from Sec’y R. Alexander Acosta, Dep’t of Labor, to Hon. Paul R. Almanza, Admin. Law Judge, Dep’t of Labor (Dec. 21, 2017), available at [https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently\\_Requested\\_Records/ALJ\\_Appointments/Secretarys\\_Ratification\\_of\\_ALJ\\_Appointments\\_12\\_21\\_2017.pdf](https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf); FTC, *P130500 Federal Trade Commission Minute: Ratification of Appointment of Administrative Law Judge and Chief Administrative Law Judge* (Sept. 11, 2015), attached as Ex. A to FTC, *Order Denying Respondent LabMD*,

The *Lucia* case did not involve a challenge to PCAOB hearing officers, only to SEC ALJs. Nor has any court, the Commission, or the Board adjudicated whether a PCAOB hearing officer is, like an SEC ALJ, an inferior officer under the Appointments Clause.<sup>8</sup> Indeed, there are a number of differences between the position of an SEC ALJ and the position of a PCAOB hearing officer.<sup>9</sup>

Nevertheless, out of an abundance of caution, and to eliminate any uncertainty about the status of PCAOB hearing officers that might distract from the PCAOB's mission, including its important registration and disciplinary functions, the Board is adopting certain amendments to its bylaws and rules. These amendments modify the PCAOB's processes to appoint and remove its hearing officers to provide that such appointments and removals shall be subject to the approval of the Commission, a head of department under the Appointments Clause.

## II. Description of the Amendments

The Board is adopting amendments to its bylaws and rules to provide that the PCAOB's appointment and removal of any PCAOB hearing officer are subject to Commission approval and to make related clarifying and conforming changes to the PCAOB's existing rules. Specifically, the Board is amending Article VI of its bylaws and PCAOB Rules 1001(h)(i), 5200, and 5402, as discussed below.

The amendments to Article VI of the bylaws and Rule 1001(h)(i), the language of which rule is changed to cross-reference the bylaw amendment, specify that the PCAOB's appointment and removal of any PCAOB hearing officer are subject to Commission approval. These changes are consistent with the Commission's broad authority to oversee the PCAOB under Section 107 of the Act<sup>10</sup> and the Commission's

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Inc.'s Motion to Dismiss, *In re LabMD Inc.*, No. 9357 (Sept. 14, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150914labmdmotion.pdf>.

<sup>8</sup> An attempt was made to challenge the constitutionality of a PCAOB hearing officer's appointment in *Kabani v. SEC*, but the court held that the argument had not been timely raised and was forfeited. 733 F. App'x 918, 2018 WL 3828524, \*1 (9<sup>th</sup> Cir. Aug. 13, 2018).

<sup>9</sup> For example, an SEC ALJ may administer oaths and affirmations; issue, revoke, quash, or modify subpoenas; issue protective orders; and punish contemptuous conduct; a PCAOB hearing officer does not have that authority. Compare 17 CFR 200.14(a)(1) & (2), 200.111(b), 180(a), 232(e), 322 with PCAOB Rules 5103, 5105, 5200(b)(1), 5424.

<sup>10</sup> See Sections 101(c) & (f) and 107 of the Act, 15 U.S.C. 7211(c) & (f), 7217.

authority to “appoint . . . officers, attorneys, economists, examiners, and other employees” under Section 4(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78d(b).

As contemplated by these amendments, when the PCAOB’s Governing Board, as defined by the bylaws,<sup>11</sup> has reached a decision on the appointment or removal of any PCAOB hearing officer, that decision shall be submitted to the Commission for consideration. The proposed appointment or removal of a hearing officer by the PCAOB cannot be effectuated until Commission approval has been given. The Commission’s approval of a PCAOB hearing officer’s appointment will result in the hearing officer being appointed in the manner of an inferior officer for purposes of the Appointments Clause.<sup>12</sup>

The Board is also adopting certain clarifying and conforming amendments to its adjudications rules in light of the rule changes discussed above. Specifically, the Board is adding a new subsection to Rule 5200 to summarize the framework within which the hearing officer functions under the Act and the Board’s rules. That new subsection explains that all proceedings shall be presided over by the Board, which is the entity empowered to act on registration applications and to conduct disciplinary proceedings.<sup>13</sup> Alternatively, the Board may order that the proceeding be conducted in the first instance by a hearing officer to whom the Board has, under certain conditions, delegated adjudicatory responsibilities.<sup>14</sup> The new subsection makes even more explicit the

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<sup>11</sup> See Articles IV and VI of the PCAOB’s bylaws (stating that “[t]he Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act” and that “[t]he Chairman of the Governing Board . . . shall also be the President and Chief Executive Officer of the Corporation”). In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 510 (2010), the Supreme Court held that PCAOB Governing Board members are inferior officers under the Appointments Clause.

<sup>12</sup> See *Free Enterprise Fund*, 561 U.S. at 512 n.13 (noting examples of precedents in which “[w]e have previously found that the department head’s approval [of the appointment of personnel] satisfies the Appointments Clause”).

<sup>13</sup> See, e.g., Sections 101(c)(1) & (4) of the Act, 15 U.S.C. 7211(c)(1) & (4) (“the Board shall . . . register public accounting firms . . . [and] conduct . . . disciplinary proceedings . . .”) (emphasis added).

<sup>14</sup> See Section 101(g)(2) of the Act, 15 U.S.C. 7211(g)(2) (permitting, under specified conditions, “delegation by the Board of any of its functions to an . . . employee of the Board, . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter”).

manner in which current PCAOB rules, such as Rules 5200(b)(10), 5201(d)(2), 5204(b), and 5445, situate the hearing officer within PCAOB adjudication processes.<sup>15</sup>

Additionally, the amendments make clarifying and conforming edits to the heading of current PCAOB Rule 5200(b) and to the heading and text of PCAOB Rule 5402(b). Specifically, the words “appointment” and “appoint” in these current rules are replaced with “assignment” and “assign,” and current Rule 5200(b) is renumbered Rule 5200(c) and cross-referenced to new Rule 5200(b). These changes avoid any confusion between the actions of the Board and the Commission in appointing, and approving the appointment of, a hearing officer, and the PCAOB Secretary’s ministerial act of assigning a specific hearing officer to a specific proceeding pursuant to a Board order.

The above-described, targeted amendments seek to dispel any legal uncertainty arising from *Lucia* about the PCAOB hearing officer, who, as noted, may be tasked with presiding over a disciplinary or other proceeding. This will facilitate and make more efficient the Board’s performance of its duties under the Act to take “[a]ction on [a]pplications” for the “regist[r]ation [of] public accounting firms that prepare audit reports for issuers, brokers, and dealers”; to “conduct . . . disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms”; and to “enforce compliance with th[e] 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.”<sup>16</sup> These functions are part of the Board’s responsibility “to oversee the audit of 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.”<sup>17</sup>

Moreover, additional benefits will flow from the amendments because the Appointments Clause serves an important public purpose. The Supreme Court has described the Clause’s requirements as “among the significant structural safeguards of the constitutional scheme,” “designed to preserve political accountability relative to important government assignments.”<sup>18</sup> The Board has chosen to remedy any

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<sup>15</sup> The provision is also analogous to SEC Rule of Practice 110, 17 CFR 201.110.

<sup>16</sup> See, e.g., Sections 101(c)(1), (4) & (6), 102(c), 105(a) & (c)(1)-(3) of the Act, 15 U.S.C. 7211(c)(1), (4) & (6), 7212(c), 7215(a) & (c)(1)-(3).

<sup>17</sup> See Section 101(a) of the Act, 15 U.S.C. 7211(a).

<sup>18</sup> *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

uncertainty caused by *Lucia* by conforming the appointment and removal of its hearing officers to those requirements. Thus, the Appointments Clause's benefits and protections are explicitly extended to respondents in PCAOB proceedings, and to the public more broadly.

### III. Administrative Considerations

The amendments that the Board is adopting today are concerned solely with the administration of the PCAOB.<sup>19</sup> In particular, they relate to the PCAOB's employment relationship with its hearing officers, the PCAOB's interaction with the Commission in the Commission's performance of oversight of the PCAOB, and the clarification of the delegations of authority by the Board to PCAOB hearing officers. Therefore, the Board believes that public notice and comment in advance of adopting these bylaw and rule amendments is not required.

### IV. Text of the Amendments

For the reasons discussed above, the Board is amending Article VI of the bylaws and Rules 1001(h)(i), 5200, and 5402 as follows:

#### BYLAWS

\* \* \* \*

#### ARTICLE VI OFFICERS

\* \* \* \*

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<sup>19</sup> The statutory basis for the proposed amendments is Title I of the Act. Specifically, Section 101(f)(2) of the Act empowers the Board, subject to Commission oversight under Section 107 of the Act, "to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act." Section 101(f)(4), as discussed, empowers the Board, subject to Commission oversight under Section 107 of the Act, to appoint personnel. Section 101(g)(1) directs the Board, "subject to the approval of the Commission . . . [to] provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under th[e] Act." And Section 101(g)(2) permits the Board, "subject to the approval of the Commission," to delegate its hearing functions within the PCAOB. Furthermore, the amendments directly relate to statutory duties of the Board and purposes for its establishment that are discussed above.

6.3. Powers of the Chief Executive Officer.

\* \* \* \*

- (d) Furthermore, notwithstanding any other provision of these bylaws, the appointment or removal of any hearing officer shall be made by the Governing Board and shall be subject to the approval of the Securities and Exchange Commission.

\* \* \* \*

**RULES**

**SECTION 1. GENERAL PROVISIONS**

\* \* \* \*

**Rule 1001. Definitions of Terms Employed in Rules.**

\* \* \* \*

**(h)(i) Hearing Officer**

The term “hearing officer” means a person, other than a Board member or staff of the interested division, appointed in accordance with Article 6.3 of the Board’s bylaws to preside at hearings.

\* \* \* \*

**SECTION 5. INVESTIGATIONS AND ADJUDICATIONS**

\* \* \* \*

**Part 2 — Disciplinary Proceedings**

\* \* \* \*

**Rule 5200. Commencement of Disciplinary Proceedings**

\* \* \* \*



**(b) Presiding Official**

All proceedings shall be presided over by the Board or, if the Board orders, by a hearing officer.

**(c) Assignment of a Hearing Officer**

Subject to Rule 5200(b), as soon as practicable after the Board has issued an order instituting proceedings, or after a registration applicant has requested a hearing pursuant to Rule 5500(b), the Secretary shall assign a hearing officer to preside over the proceeding and shall serve the parties with notice of the hearing officer's assignment. Subject to Rules 5402 and 5403, the hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. The powers of the hearing officer include, but are not limited to, the following—

\* \* \* \*

**(d) Separation of Functions**

The staff of the Division of Enforcement and Investigations may not participate or advise in the decision, or in Board review of the decision, in any proceeding in which the Division of Enforcement and Investigations is the interested division, except as a witness or counsel in the proceeding. Any other employee or agent of the Board engaged in the performance of investigative or prosecutorial functions for the Board in a proceeding may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. A hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

**(e) Consolidation of Proceedings**

By order of the Board or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Board or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this Rule, no distinction is made between joinder and consolidation of proceedings.

\* \* \* \*

**Rule 5402. Hearing Officer Disqualification and Withdrawal**

\* \* \* \*

**(b) Assignment of a Replacement Hearing Officer**

Upon withdrawal of a hearing officer, or in the event that a hearing officer is incapacitated or is otherwise unable to continue to serve after being assigned, the Secretary will assign a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is assigned after a hearing has commenced, the replacement hearing officer may recall any witness or may certify familiarity with any part or all of the record.

\* \* \* \*

On the 29<sup>th</sup> day of January, in the year 2019, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ Phoebe W. Brown

Phoebe W. Brown  
Secretary

January 29, 2019