SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67900 / September 20, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3407 / September 20, 2012

Admin. Proc. File No. 3-14323

In the Matter of

MICHAEL C. PATTISON, CPA
c/o Patrick J. Richard
James H. Vorhis
Nossaman LLP
50 California Street, 34th Floor
San Francisco, CA 94111

OPINION OF THE COMMISSION

RULE 102(e) PROCEEDING

Grounds for Remedial Action

Civil Injunction

Certified public accountant was permanently enjoined from violating internal accounting controls and books and records provisions of the federal securities laws. *Held*, it is in the public interest to permanently disqualify respondent from appearing or practicing before the Commission as an accountant.

APPEARANCES:

Patrick J. Richard and *James H. Vorhis*, of Nossaman LLP, for Michael C. Pattison, CPA.

Marc J. Fagel, *Susan F. LaMarca*, and *Robert L. Tashjian*, for the Division of Enforcement.

Appeal filed: October 21, 2011
Last brief received: January 26, 2012

I.

Michael C. Pattison, a certified public accountant ("CPA") and former Controller of Embarcadero Technologies, Inc. ("Embarcadero") from January 2000 through July 2005, appeals from an initial decision of an administrative law judge.[1] The law judge decided this matter based on cross-motions for summary disposition, granting the Division's motion and denying Pattison's motion. The law judge found that Pattison was enjoined from violating internal accounting controls and books and records provisions of the federal securities laws and permanently denied him the privilege of appearing or practicing before the Commission pursuant to Rule 102(e)(3) of the Commission's Rules of Practice.[2] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

A. District Court Injunctive Proceeding

On September 24, 2010, following a civil trial in the United States District Court for the Northern District of California, a jury found that Pattison violated Section 13(b)(5) of the Securities Exchange Act of 1934[3] and Exchange Act Rule 13b2-1[4] in connection with Pattison's involvement in backdating stock options.[5] On June 9, 2011, the District Court issued a corrected order finding that the jury's verdict was "supported by substantial evidence in the record," and

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[1] *Michael C. Pattison, CPA*, Initial Decision Rel. No. 434 (Sep. 29, 2011), 102 SEC Docket 46456.

[2] 17 C.F.R. § 201.102(e)(3).

[3] Exchange Act Section 13(b)(5) provides that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2)." 15 U.S.C. § 78m(b)(5). Section 13(b)(2)(A) and (B), respectively, require that every issuer subject to the statute make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets, and devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions and assets are handled as prescribed in the statute. 15 U.S.C. §§ 78m(b)(2)(A) and (B).

[4] Exchange Act Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account" subject to Section 13(b)(2)(A). 17 C.F.R. § 240.13b2-1. *See also supra* note 3.

[5] The jury did not find Pattison liable on claims that he had violated or aided and abetted violations of antifraud provisions or aided and abetted violations of reporting provisions of the federal securities laws.

denying Pattison's motions for judgment as a matter of law and a new trial.[6] On that same date, the District Court entered a separate corrected final judgment against Pattison, permanently enjoining him from violating Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1.[7] The District Court ordered Pattison to disgorge $74,446 and pay a civil money penalty of $50,000. Pattison has appealed the District Court's final judgment to the United States Court of Appeals for the Ninth Circuit.[8] That appeal is pending. The District Court's findings are summarized below.

1. Embarcadero and its Employee Stock Option Policy

Embarcadero is a software company headquartered in San Francisco, California. In April 2000, Embarcadero held an initial public offering and remained a publicly-traded company through June 2007. From late 2000 until the third quarter of 2004, Embarcadero's chief executive officer ("CEO"), Stephen Wong, granted stock options to employees pursuant to authorization from the company's Compensation Committee.

A stock option "is the right to purchase a share of stock from a company at a fixed price, referred to as the 'strike price,' on or after a specified vesting date."[9] A recipient who exercises the option by purchasing stock from the company at the strike price is then free to sell the same stock at its current market price.[10] Companies generally grant stock options with a strike price

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[6] *SEC v. Michael C. Pattison*, Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, No. C-08-4238 EMC (N.D. Cal. June 9, 2011) (amending order issued on Feb. 22, 2011).

[7] *SEC v. Michael C. Pattison*, Corrected Order and Judgment Granting Motion for Entry of Final Judgment, No. C-08-4238 EMC (N.D. Cal. June 9, 2011) (amending order issued on Feb. 23, 2011).

[8] *SEC v. Raj P. Sabhlok and Michael C. Pattison*, No. C-08-4238 EMC (N.D. Cal. July 28, 2011). Sabhlok, the other party in the complaint, was Embarcadero's Chief Financial Officer during the period at issue and consented to an injunction from violating or aiding and abetting the violation of various reporting, recordkeeping, internal controls, and antifraud provisions of the federal securities laws, a $200,000 civil money penalty, and a $300,000 forfeiture under Section 304(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7243(a). *SEC v. Raj P. Sabhlok and Michael C. Pattison*, No. C-08-4238 CRB (N.D. Cal. Apr. 21, 2010).

[9] *United States v. Reyes*, 577 F.3d 1069, 1073 (9th Cir. 2009).

[10] *SEC v. Jasper*, 678 F.3d 1116, 1119 (9th Cir. 2012) (citation omitted).

equal to the market price on the date the stock option is granted.[11] "Backdating" stock options refers to "the practice of recording an option's grant date and strike price retrospectively."[12] Where the backdating results in a strike price that is lower than the fair market value of the stock on the date of the actual grant, the option is referred to as "in the money" because it has immediate positive value on that date.[13]

Pattison, who had been a practicing accountant since 1987, was the only licensed CPA in Embarcadero's Finance Department and served as the company's Controller from January 2000 through July 2005. As Controller, Pattison oversaw Embarcadero's day-to-day accounting functions and was responsible for communicating with auditors and preparing financial statements that were filed with the Commission.[14] During that time, he was also responsible for "recording all equity account activity," including activity related to the issuance of stock options to employees.

Embarcadero's stock option plan, which was approved by the Board of Directors and stockholders in February 2000, governed the manner in which the company issued and accounted for stock options. In that plan, Embarcadero adopted an accounting convention promulgated in 1972 referred to as the Accounting Principles Board Opinion No. 25 ("APB 25"). Under APB 25, a company granting an in-the-money stock option is required "to record an expense for the 'profit,' treated as compensation to the option recipient over the [option's] vesting period."[15] In other words, the benefit to the option recipient is recorded on the company's corporate books and

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[11] *Reyes*, 577 F.3d at 1073.

[12] *Id*.; *see also New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1093 (9th Cir. 2011) ("Backdating of options occurs when a company's officers or directors responsible for administering the [company's] stock option plan monitor the price of the company stock and then award a stock option grant as of a certain date in the past when the share price was lowest, thus locking in the largest possible gain for the option recipient.").

[13] *See SEC v. Berry*, 580 F. Supp. 2d 911, 913 n.2 (N.D. Cal. 2008). If a stock option is issued at a strike price equal to the fair market value of the stock on the date of the actual grant, then the option is "at the money," whether or not backdating has occurred. *See SEC v. Reyes*, 491 F. Supp. 2d 906, 908 (N.D. Cal. 2007).

[14] Because the company's stock was registered with the Commission pursuant to Exchange Act Section 12(g) and traded on Nasdaq, Exchange Act Section 13 required Embarcadero to file with the Commission annual reports (Form 10-K) that included audited financial statements and quarterly reports (Form 10-Q). 15 U.S.C. § 78m.

[15] *New Mexico State Inv. Council*, 641 F.3d at 1093, 1096.

in the company's financial statements as a non-cash compensation expense.[16] Otherwise, "the company's reported net income is overstated for each of the years the options vest, potentially deceiving the market and investors."[17] Pattison knew that under APB 25 "in-the-money" options had to be reported as a compensation expense.

Although Embarcadero adopted a method of accounting for in-the-money stock options, Pattison knew that the company nevertheless understood that it had not and would not grant that type of stock option. For example, Embarcadero's legal counsel told Pattison that the company would not backdate stock options. Pattison drafted and distributed a July 1, 2002 internal controls memorandum explaining that "since the IPO[,] no option has ever been issued at below fair market value. Therefore, there have been no additional deferred comp charges. The Company does not intend to issue below fair market value options in the future." Pattison authored another internal controls memorandum, dated March 14, 2003, in which he stated that there would be no stock option grants below fair market value. Pattison also knew that, consistent with the memoranda and the advice provided by Embarcadero's legal counsel, Embarcadero publicly stated that it had not granted in-the-money stock options. For example, Embarcadero stated in Forms 10-K covering fiscal years 2003 and 2002 that it adopted APB 25, and that "[s]ince the date of the initial public offering, all stock options grants made during the year were at fair market value, which is defined as the closing share price on the day prior to the option grant date."

2. Pattison Did Not Properly Record Backdated Stock Option Grants

From late 2000 through 2004, Wong nonetheless granted in-the-money stock options, and Pattison did not properly record these transactions. Near the end of each quarter, Pattison compiled and sent to Wong a proposed list of employees who were to receive in-the-money stock options. These stock options were backdated, *i.e.*, the date of the strike price on the stock option was earlier than the date that Wong approved the grant.[18] After receiving approval from Wong, Pattison sent the information to E*Trade, which maintained Embarcadero's stock options data, where he entered the backdated information instead of the date on which Wong approved the grant. E*Trade then entered the backdated information provided by Pattison into a database used to track Embarcadero's stock option grants. At Pattison's direction, an administrative assistant prepared stock option agreements for Embarcadero's employees. The assistant relied on the backdated information in the E*Trade database to prepare the agreement.

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[16] *Reyes*, 577 F.3d at 1073.

[17] *New Mexico State Inv. Council*, 641 F.3d at 1093; *see also Jasper*, 678 F.3d at 1120.

[18] *See supra* notes 12 & 13 and accompanying text.

Embarcadero's auditors reviewed the company's stock option activity each quarter. In connection with that review, Pattison provided the auditors with quarterly summaries of stock option activity. Although it was important to the auditors to know whether stock options were backdated in connection with their review of the company's financial statements and disclosures, neither the quarterly summaries that Pattison prepared for them nor Pattison himself informed the auditors that stock options were backdated.

At Wong's instruction, Pattison also "parked" stock options, *i.e.*, reserved stock options for later use by purportedly having assigned them to an employee. For example, in April 2002, Pattison represented through the E*Trade template and in a quarterly summary provided to the auditors that a purported employee named Kent Scantland received 75,000 stock options. Pattison knew, however, that Scantland was no longer an employee and that the stock options were not intended for him. When Pattison asked Wong what to do about "the 75K place marker to Kent Scantland" and informed him that the auditors "tend[ed] to spend a fair deal of time on the options," Wong replied, "If you can wipe it, then we should do so since it is out of the money." After the auditors tested the Scantland grant as part of their review, they recorded in their workpapers Pattison's explanation that the Scantland grant had been an error and recorded in the wrong place under the wrong name. Pattison did not tell the auditors that Wong instructed him to "sock away" stock options or to "wipe" the Scantland grant.

Pattison parked stock options on a second occasion. In May 2004, Embarcadero's Vice President of Human Resources asked to speak with Pattison about an allegation that he "put some options in an employee's account for another employee." Pattison admitted that he did so, to which the vice president responded that, "It is just wrong on so many levels."

In 2006, Embarcadero's Audit Committee retained a law firm to conduct an internal investigation after receiving a report from the company's auditors about past stock option grants. Embarcadero's Board of Directors formed a "Special Committee" to analyze the company's past stock options practices, "including all option grants from the Company's initial public offering in April 2000 to August 2006 . . . ." The Special Committee concluded that "about half" of the "1,086 individual stock option grants on 119 different dates, representing more than 6.5 million shares of common stock" "were misdated and mispriced from the time of the initial public offering until March 2005." On December 18, 2006, Embarcadero issued a press release announcing the Audit Committee's conclusion that all of the company's previously issued financial statements should not be relied upon. Embarcadero thereafter filed a restatement of certain portions of its financial statements variously covering fiscal years 2006 through 2002. The restatement explained that as a result of the revised accounting for the options in question, Embarcadero's stock-based compensation expense figures from the time of the initial public offering in April 2000 through December 31, 2005 had been understated by a total of $14.6 million.

3. District Court Judgment

The District Court found that

> [t]he weight of the evidence established that [Pattison] systematically backdated stock option grants on a regular basis, misrepresented the dates of actual approval by CEO Wong, failed to affirmatively disclose the practice to the Board and . . . auditors, and failed to insure that an accounting expense was taken for the . . . 'in-the-money' grants he facilitated. The weight of the evidence also shows that he thereby circumvented internal controls against backdated options.

The District Court concluded that the "jury found that [Pattison] acted knowingly when he falsified records and/or circumvented internal controls to make it appear that no stock option grants were backdated and below fair market value." The District Court enjoined Pattison from violating Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1, and ordered him to disgorge $74,446 and pay a civil money penalty of $50,000.

B. Administrative Proceedings

On April 5, 2011, based on the injunction, we issued an Order Instituting Proceedings pursuant to Rule of Practice 102(e)(3)(i) and temporarily suspended Pattison from appearing or practicing before the Commission.[19] Pattison filed a timely petition to lift the temporary suspension, which the Division of Enforcement opposed.[20] We denied Pattison's petition and directed that a hearing be held before a law judge.[21] After a prehearing conference, Pattison and the Division each moved for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice.[22] On September 29, 2011, an administrative law judge found there was no genuine issue with regard to any material fact and granted the Division's motion pursuant to Rule 250. The law judge found that the District Court "permanently enjoined Pattison from violating federal securities laws, by reason of his misconduct, in an action brought by the Commission." In determining the appropriate sanction, the law judge found it "in the public interest to permanently disqualify Pattison from appearing or practicing before the Commission." This appeal followed.

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[19] 17 C.F.R. § 201.102(e)(3)(i).

[20] *See* 17 C.F.R. § 201.102(e)(3)(ii).

[21] *See* 17 C.F.R. § 201.102(e)(3)(iii).

[22] 17 C.F.R. § 201.250.

III.

Rule of Practice 102(e) has been the primary tool available to the Commission to preserve the integrity of its processes and ensure the competence of the professionals who appear and practice before it.[23] The Commission adopted the rule as a "means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence."[24] The rule generally enables the Commission to initiate administrative disciplinary proceedings against professionals who do not possess the requisite qualifications to represent others, lack character or integrity, engage in unethical or improper professional conduct, have violated or have been enjoined from violating or aiding and abetting the violation of the federal securities laws, have had their license to practice revoked or suspended, or have been convicted of a felony or misdemeanor involving moral turpitude.[25] The sanctions available in such proceedings include a censure, temporary suspension, and permanent disqualification from practice before the Commission.[26]

In a proceeding under Rule 102(e)(3), the Division has the burden to show that the petitioner has been permanently enjoined by a court of competent jurisdiction, by reason of his misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of the federal securities laws, or has been found by a court of competent jurisdiction in an action brought by the Commission, or by the Commission in an administrative proceeding, to

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[23] *Chris G. Gunderson, Esq.*, Exchange Act Rel. No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24046 (citing *Marrie v. SEC*, 374 F.3d 1196, 1200 (D.C. Cir. 2004) (stating that Rule of Practice 102(e) "is directed at protecting the integrity of the Commission's processes, as well as the confidence of the investing public in the integrity of the financial reporting process"); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (stating that Rule of Practice 2(e), the predecessor to Rule of Practice 102(e), "represents an attempt by the Commission to protect the integrity of its own processes," and upholding the validity of Rule of Practice 2(e) as "reasonably related" to the purposes of the federal securities laws).

[24] *Gunderson*, 97 SEC Docket at 24046 (citing *Touche Ross*, 609 F.2d at 582).

[25] *See* 17 C.F.R. §§ 201.102(e)(1)-(3).

[26] *See* 17 C.F.R. §§ 201.102(e)(1), 201.102(e)(3)(iv). According to Rule of Practice 102(f), "practicing before the Commission" includes, but is not be limited to, "[t]ransacting any business with the Commission," and "[t]he preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert." 17 C.F.R. § 201.102(f).

have violated or aided and abetted the violation of the federal securities laws.[27] Once that burden has been met, the burden shifts to the petitioner to show cause why he should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission.[28] A petitioner in a Rule 102(e)(3) proceeding may not collaterally attack any finding made against him or fact admitted by him the in the underlying proceeding.[29]

Here, the Division satisfied its burden by showing that the District Court, a court of competent jurisdiction, in an action brought by the Commission, found Pattison in violation of internal accounting controls and books and records provisions of the federal securities laws and, based on its findings, permanently enjoined him from violating those provisions. The sole issues therefore are whether Pattison has shown cause why he should not be sanctioned, and if he has not, to determine the appropriate remedial sanction.

Pattison, however, challenges the Division's right to bring this proceeding under Rule 102(e)(3). He argues that "the Commission should be required to base any administrative discipline, including a permanent suspension, under a subsection of Rule 102(e)(1)" because "any other ruling leaves open the chance of administrative sanctions with no standard." Pattison points to Rule 102(e)(1)(ii), which permits the Commission to discipline an accountant for "improper professional conduct," and to Rule 102(e)(1)(iv), which defines that term, with respect to persons licensed to practice as accountants, to mean:

> (A) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or
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> (B) either of the following two types of negligent conduct:
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> (1) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.

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[27] 17 C.F.R. § 201.102(e)(3)(iv); *see also Gunderson*, 97 SEC Docket at 24047.

[28] *Id*.

[29] 17 C.F.R. § 201.102(e)(3)(iv); *see also Gunderson*, 97 SEC Docket at 24048 ("Gunderson may not contest, in this administrative proceeding, the findings made against him by the district court in the federal injunctive action.").

> (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.[30]

From this, he concludes that "the conduct for which an accountant is disciplined must be done with a certain level of mens rea."

Pattison argues that proceeding under Rule 102(e)(3), as the Division did here, would allow the Division to "seek discipline after *any* permanent injunction, regardless of the level of scienter involved in the underlying claim, or the type of claim" (emphasis in original). He characterizes as "immaterial" the citations by the Division and law judge to analogous settlements under Rule 102(e)(3) because those matters were "not prosecuted through the administrative tribunal." Pattison states that he was entitled to summary disposition because the Division failed to "provide notice of its basis for discipline" or "adequately allege liability" under Rule 102(e)(1).

Pattison's argument fails to recognize the distinct bases for disciplinary action provided under subsections (3) and (1) of Rule 102(e). The Commission may, pursuant to Rule 102(e)(3)(i)(A), suspend or bar a respondent based on an injunction. This does not create a "chance of administrative sanctions with no standard." To the contrary, the Rule has a structured, precise standard: Once the respondent has requested a hearing, the Division must establish that the respondent has been "permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the federal securities laws or of the rules and regulations thereunder" as the basis for the proceeding. Rule 102(e)(3) thus reflects our determination that a finding by a court of competent jurisdiction that a respondent has violated securities laws, or that an injunction against future violations is warranted, is a sufficient standard of unfitness for practice before the Commission that we "will afford a hearing only to consider mitigating or other factors why neither censure nor temporary or permanent disqualification should be imposed."[31] "The overall purpose of the . . . amendment [that added paragraph (3) to Rule 102(e)] is to prevent situations in which the investing public places its trust in, or reliance upon, attorneys, accountants, engineers, and other professionals or experts who have

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[30] 17 C.F.R. § 201.102(e)(1)(iv).

[31] *See Final Amendment to Rule 2(e) of the Rules of Practice*, Exchange Act Rel. No. 9164 (May 10, 1971), 1971 WL 126066, at *1 (adding to Rule 2(e) new language enabling the Commission to "restrict practice before the Commission by persons found to have violated or to have participated in violations of the securities laws and by persons who have been permanently enjoined from violating the securities laws, whether or not a finding of past violation has been made"). Furthermore, "no distinction will be made between injunctions and findings which have been contested and those which have been entered upon consent." *Id*.

demonstrated an unwillingness or inability to comply with the requirements of the Federal securities laws . . . ."[32]

Rule 102(e)(3) then permits the respondent to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. Under this provision, the Commission acts "with due regard to the public interest."[33] The standards by which we are guided in assessing the public interest are those set forth in *Steadman v. SEC*[34] in determining the appropriate remedial sanction under Rule 102(e)(3).[35] As noted, we also consider any mitigative factors established by the respondent.

Rule 102(e)(3)(i)(A) is analogous to our statutory authority under Exchange Act Section 15(b)(6)(A)(iii) to discipline a regulated person who is enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C).[36] Matters brought pursuant to this provision require only that the Division establish that the respondent is a person associated or seeking to become associated, or, at the time of the alleged misconduct, was associated or was seeking to become associated with a broker or dealer, or is a person participating, or at the time of the alleged misconduct, was participating in a penny stock offering, and that the person "is

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[32] *Id*. Pattison incorrectly states that Rule 102(e)(3) permits the Division to "seek discipline after *any* permanent injunction, regardless of the level of scienter involved in the underlying claim, or the type of claim." Subpart 3 is limited to injunctions based on violations of the federal securities laws. Thus, the standard for the presumption of unfitness to practice before the Commission is directly related to the individual's failure to comply with statutes administered by the Commission.

[33] 17 C.F.R. § 102(e)(3)(i); *see also Gunderson*, 97 SEC Docket at 24044 (under Rule 102(e)(3), permanently disqualifying attorney, in Commission adjudicatory appeal from a law judge's initial decision, from appearing or practicing before the Commission based on injunction against violating registration and antifraud provisions of the federal securities laws); *Herbert M. Campbell*, Initial Decision Rel. No. 266 (Oct. 27, 2004), 83 SEC Docket 3997 (under Rule 102(e)(3), permanently disqualifying attorney, in Commission adjudicatory proceeding before a law judge, from appearing or practicing before the Commission based on injunction against violating reporting and antifraud provisions of the federal securities laws).

[34] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[35] *Gunderson*, 97 SEC Docket at 24048.

[36] 15 U.S.C. § 78*o*(b)(6)(A)(iii). Exchange Act Section 15(b)(4)(C) authorizes the Commission to sanction a broker or dealer or an associated person of a broker or dealer who is permanently or temporarily enjoined from acting as a certain kind of securities professional, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security. 15 U.S.C. § 78*o*(b)(4)(C).

enjoined from any action, conduct, or practice" specified in Exchange Act Section 15(b)(4)(C).[37] Once this has been established, the respondent charged under Exchange Act Section 15(b)(6)(A)(iii) is not permitted to collaterally attack the underlying injunction or findings of the court.[38] Courts have repeatedly upheld this principle.[39] A respondent who wishes to challenge

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[37] *See*, *e.g.*, *Vladimir Boris Bugarski*, Exchange Act Rel. No. 66842 (Apr. 20, 2012), 103SEC Docket 53374, 53378 ("It is undisputed that the district court enjoined Respondents from conduct in connection with the purchase or sale of securities and that, at the time of the alleged misconduct, Respondents were participating in an offering of penny stock. Accordingly, we find that the threshold statutory requirements [under Exchange Act Section 15(b)(6)(A)(iii)] for the imposition of sanctions have been satisfied."); *Phillip J. Milligan*, Exchange Act Rel. No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796 (finding that "the statutory requirements for the imposition of sanctions have been satisfied" under Exchange Act Section 15(b)(6)(A)(iii) where the record established that the respondent had been enjoined from engaging in fraudulent conduct in connection with the purchase or sale of securities and that, at the time the enjoined conduct occurred, the respondent was associated with a broker-dealer); *Thomas J. Donovan*, 58 S.E.C. 1032, 1042-43 (2005) (finding that respondent was formerly associated with a broker-dealer and enjoined from further violations of the antifraud provisions of the federal securities laws, and that Exchange Act Section 15(b)(6)(A)(iii) authorized the Commission to sanction respondent); *Michael T. Studer*, 57 S.E.C. 890, 893 (2004) (finding that the respondent was associated with a broker or dealer and enjoined from engaging in any conduct or practice in connection with either (a) the activity of a broker or dealer or (b) the purchase or sale of a security, and that Exchange Act Section 15(b)(6)(A)(iii) authorized the Commission to sanction the respondent), *aff'd*, 148 F. App'x 58 (2d Cir. 2005) (unpublished).

[38] *See Milligan*, 98 SEC Docket at 26796-97 (finding in a proceeding brought under Exchange Act Section 15(b)(6)(A)(iii), where the respondent was a person enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C), that "[w]e have repeatedly held that a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding and we consider those findings in determining the appropriate sanction.") (citing *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 ("It is well established that [respondents are] collaterally estopped from challenging in [follow-on] administrative proceeding the decisions of the district court in the injunctive proceeding.")).

[39] *Studer v. SEC*, 148 F. App'x 58, 59 (2d Cir. 2005) (unpublished) (finding that respondent, in an appeal of a follow-on administrative proceeding "is prohibited from relitigating the factual and legal conclusions of the district court regarding his violations of federal securities laws"); *see also Gann v. SEC*, 361 F. App'x 556, 558 (5th Cir. 2010) (unpublished) (finding, in an appeal of a follow-on administrative proceeding, that "[b]ecause the factual issues in this case were fully litigated and resolved in the district court, we treat the district court's findings of fact as conclusive and binding on the parties"); *Brownson v. SEC*, 66 F. App'x 687, 688

(continued...)

the underlying injunction or court's findings may only do so by filing an appeal in the appropriate United States Court of Appeals.[40]

By contrast, Rule 102(e)(1), codified by the Sarbanes-Oxley Act of 2002,[41] authorizes the Commission to discipline professionals for "improper professional conduct," defined for accountants as conduct that the Commission finds "results in a violation of applicable professional standards," and meets certain mens rea requirements. Thus, a proceeding under Rule 102(e)(1)(ii) does not necessarily involve conduct that is illegal, nor does it involve a situation where another adjudicatory tribunal has already made findings of misconduct and imposed a sanction. Unlike proceedings brought under Rule 102(e)(3), the Commission itself must make the determination as to whether the respondent's conduct fits within certain standards carefully defined under Rule 102(e)(1), including, with respect to accountants, whether professional standards have been violated with a defined mens rea. If such conduct falls within the proscriptions of Rule 102(e)(1), the Commission must then determine whether a sanction is appropriate. Similarly, proceedings brought, for example, under Exchange Act Section 15(b)(4)(A) or (D) require the Commission to make its own findings of misconduct before it can determine the appropriate sanction, if any.[42] That is because, as with Rule 102(e)(1), the Commission does not have in the record findings made by another adjudicatory tribunal to serve as a basis for a sanction determination. In proceedings brought under Rule 102(e)(3) based on an underlying injunction, however, the Commission may rely on the findings of a court that an injunction against future violative conduct is warranted.[43]

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[39] (...continued)
(unpublished) (9th Cir. 2003) (finding, in an appeal of a follow-on administrative proceeding, that respondent's "plea agreement and criminal conviction are substantial evidence supporting the SEC's conclusion that it is in the public interest to permanently bar [respondent] from association with a broker or dealer. *See Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1308 (unpublished) (9th Cir. 1981) (stating that collateral estoppel may be used where party seeks to apply finding from criminal case to subsequent civil proceeding).").

[40] *Franklin*, 91 SEC Docket at 2713-14 (finding, in a proceeding instituted under Exchange Act Section 15(b)(6)(A), that "[t]he appropriate forum for Franklin's challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals . . . ."), *petition denied*, 285 F. App'x 761 (D.C. Cir. 2008) (per curiam).

[41] Pub. L. No. 107-204, § 602, 116 Stat. 745 (2002).

[42] 15 U.S.C. §§ 78*o*(b)(4)(A), (D).

[43] 17 C.F.R. § 201.102(e)(3)(i)(A). Alternatively, the Commission may rely on findings by a court in an action brought by the Commission, or by the Commission in an
(continued...)

Accordingly, we reject Pattison's contention that this matter should have been brought under Rule 102(e)(1) and find that the Division appropriately brought this proceeding under Rule 102(e)(3).

B. Public Interest Factors

In assessing the need for sanctions in the public interest, we consider, among other things: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[44] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[45] We also consider the extent to which the sanction will have a deterrent effect.[46]

We find that Pattison's conduct was egregious and recurrent. For every quarterly period over four years, Pattison facilitated improper backdating by falsifying Embarcadero's books and records and circumventing Embarcadero's system of internal accounting controls. Corporate books and records are "'the bedrock elements of our system of corporate disclosure and accountability,'" and thus "accurate recordkeeping is an essential ingredient in promoting management responsibility."[47] Likewise,

> [i]nternal controls safeguard assets and assure the reliability of financial records, one of their main jobs being to prevent and detect errors and irregularities that arise in the accounting systems of the company. Internal accounting controls are

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[43] (...continued)
administrative proceeding, that a respondent has violated or aided and abetted the violation of the federal securities laws. 17 C.F.R. § 201.102(e)(3)(i)(B).

[44] *Steadman,* 603 F.2d at 1140.

[45] *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam).

[46] *Franklin*, 91 SEC Docket at 2708, 2719 & n.28 (citing *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 n.12 (1995); *Lester Kuznets*, 48 S.E.C. 551, 555 (1986); *McCarthy v. SEC*, 406 F.3d 179, 188, 190 (2d Cir. 2005)).

[47] *SEC v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 746 (N.D. Ga. 1983) (citation omitted).

> basic indicators of the reliability of the financial statements and the accounting system and records from which financial statements are prepared.[48]

Pattison's actions betrayed these principles and, as the District Court found, had profound effects. Embarcadero understated corporate expenses by more than $14 million. The company possessed books and records and filed public reports with the Commission that failed to accurately and fairly reflect its transactions and disposition of its assets. It suffered the receipt of decreased payments when employees exercised backdated stock options. The Company's share value was potentially diluted as a result of enhanced incentives to exercise stock options. In 2007, Embarcadero restated portions of its financial statements going back as far as fiscal year 2002, and faced negative tax consequences associated with the restatement. In addition to being enjoined, Pattison was ordered to disgorge $74,446—representing the portion of his profit attributable to exercising his own backdated stock options—and pay a second-tier civil money penalty of $50,000, which the District Court judge determined was reflective of the jury's view that Pattison "knowingly engaged in conduct violative of regulatory and statutory laws."[49] We therefore reject Pattison's characterization of his misconduct as a "mere technical violation" arising "from a single decision made to delegate option-granting authority to the CEO in the fourth quarter of 2000."

We find that Pattison acted with a high degree of scienter. Pattison had been a practicing accountant for roughly fifteen years and was the only licensed CPA in Embarcadero's Finance Department. Despite knowing that APB 25 required the company to record in-the-money stock option grants as outgoing compensation and that the company did not intend to grant in-the-money stock options, in part based on internal controls memoranda that Pattison authored, Pattison nonetheless facilitated the improper granting of in-the-money stock options. He did so by entering backdated information into Embarcadero's E*Trade database, directing his administrative assistant to prepare stock option agreements for Embarcadero's employees based on the backdated information, providing to the company's auditors, without further elaboration, quarterly summaries that he knew contained backdated information, and parking backdated stock

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[48] *Id*. at 750 (citation omitted); *see also Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Exchange Act Rel. No. 47986 (June 18, 2003), 80 SEC Docket 1196, 1217 ("The establishment and maintenance of internal control over financial reporting has always been an important responsibility of management. An effective system of internal control over financial reporting is necessary to produce reliable financial statements and other financial information used by investors.").

[49] *See supra* note 7, Corrected Order and Judgment Granting Motion for Entry of Final Judgment, at 6.

options in various inactive employee accounts for later use.[50] The District Court determined that "[a] reasonable inference is that Defendant consciously intended to hide the actual grant approval dates from the auditors and keep backdated options from being publicly reported. Certainly, the jury could have so found."[51] We conclude that Pattison's repeated efforts to conceal improper backdating further demonstrate that he acted with a high degree of scienter.[52]

Pattison asserts that the Initial Decision and the District Court improperly determined that he acted with scienter and argues that the jury found him liable for a violation that did not require a showing of scienter. He contends that "[t]he 'knowing' standard of Section 13(b)(5) is not the same as 'scienter.' A 'knowing' violation of Section 13(b)(5) means that Pattison was found to have acted intentionally, but not that he acted with the 'intent to deceive, manipulate, or defraud' as is required for scienter-based claims. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1975)." The District Court, in fact, found that Pattison acted with an intent to deceive.[53] It did

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[50] As the District Court found, "every stock option grant during the period in question has a grant date selected with hindsight, yet [Pattison] *never* expressly disclosed the date of actual approval by CEO Wong on any document. Nor did [Pattison] ever explicitly communicate to [the] auditors Embarcadero's practice of selecting grant dates with hindsight." *See supra* note 6, Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, at 14-15 (emphasis in original).

[51] *See supra* note 6, Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial, at 15.

[52] *See Milligan*, 98 SEC Docket at 26798-99 & n.20 (finding that respondent acted with a high degree of scienter based on his attempts to conceal misconduct) (citing *Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10892).

[53] "Mr. Pattison fails to explain how a knowing falsification is really anything different from an intent to deceive. In other words, if a person intentionally makes a false statement (found here), that is tantamount to an intent to deceive. . . . As noted in the legislative history for § 13, '[t]he knowledge required is that the person be aware that he is or may be making a false statement or causing corporate records to be falsified through a conscious undertaking or due to his conscious disregard for the truth.' S. Rep. 95-114, at 4107." *SEC v. Michael C. Pattison*, Order Denying Defendant's Motion for Judgment of Law and Motion for a New Trial; and Granting in Part and Denying in Part Defendant's Motion to Amend Judgment, No. C-08-4238 EMC (N.D. Cal. June 9, 2011), at 14. Pattison also claims that, because the District Court used a general verdict form, "one cannot even determine whether Mr. Pattison was found liable for a 'knowing falsification of records' or, instead, an internal controls violation." The jury, however, found that Pattison violated Exchange Act Section 13(b)(5) pursuant to a jury

(continued...)

so, not as a misstatement of the jury's finding of a violation, but in connection with the Court's assessment of the necessity of imposing an injunction as a remedy for that violation. Pattison is estopped from attacking here the factual findings or legal conclusions of the underlying injunctive proceeding.[54] In any event, we are unpersuaded by his argument.

We do not construe the term "scienter" so narrowly. While it is true that the United States Supreme Court in *Ernst & Ernst* defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud," it did so in the context of a securities fraud case. There, the Court predicated the actor's state of mind on elements, *i.e.*, deceit, manipulation, and fraud, that explicitly were the basis for the violation at issue. The Supreme Court, however, also discussed scienter more generally as "knowing or intentional misconduct," given that the issue in that case was "whether scienter is a necessary element" of a private cause of action under Exchange Act Section 10(b) and Rule 10b-5 thereunder, or "whether negligent conduct alone is sufficient."[55] Courts have consistently relied on the broader definition of scienter in the context of violations of the federal securities laws.[56] We, too, have viewed scienter through a wider lens.[57]

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[53] (...continued)
instruction specifically providing that a knowing falsification was required, and that knowingly, as used in Exchange Act Section 13(b)(5) "means intentionally; recklessness is not sufficient." *Id.* at 14.

[54] *Supra* note 29, *see also supra* note 38.

[55] *Ernst & Ernst*, 425 U.S. at 197.

[56] *See*, *e.g.*, *Dura Pharm., Inc.*, 544 U.S. 336, 341 (2005) ("scienter, *i.e.*, a wrongful state of mind, see *Ernst & Ernst*, [425 U.S. 185] at 197"); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1051 (9th Cir. 2011) ("The requisite state of mind for a securities fraud case is scienter, which is knowing or intentional conduct, or reckless conduct 'to the extent that it reflects some degree of intentional or conscious misconduct, or what we have called deliberate recklessness.'") (citation omitted), *cert. denied*, 132 S. Ct. 2713 (2012); *Graham v. SEC*, 222 F.3d 994, 1000 (2d Cir. 2000) (scienter in aiding and abetting cases is established by showing defendant rendered assistance to violator of federal securities laws "knowingly or recklessly"); *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980) (finding that scienter is "[a] knowledge of what one is doing and the consequences of those actions"); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 167 (2d Cir. 1980) (finding that "scienter is 'knowing or intentional misconduct'").

[57] *See Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1103 (finding that "[t]he scienter requirement [in an aiding and abetting violation] may be satisfied by showing that [respondent] knew of, or recklessly disregarded, the wrongdoing and her role in furthering it"); *cf. Michael J. Marrie, CPA*, Exchange Act Rel. No. 48246
(continued...)

Here, the District Court found that Pattison acted with scienter based on his conduct. Specifically, the District Court found:

> While the instant case is a civil action and not a criminal action, the § 13 jury instruction that the parties agreed upon stated that *knowing* falsification was required – in other words, the SEC (although it did not have to) agreed to the criminal liability scienter requirement. Accordingly, there was scienter in this case (in the sense of a knowing falsification); at least, the jury so found.[58]

The District Court found that Pattison provided sincere assurances against future violations but that he also had not recognized the wrongful nature of his conduct. For example, the Court found that Pattison voluntarily disclosed his misconduct to attorneys representing Embarcadero's Special Committee and voluntarily met with the Commission during its investigation. But the Court also found that Pattison either placed blame for stock options backdating on others or denied any wrongdoing. Indeed, Pattison continues to dispute that his conduct was egregious and argues that "books and records claims do not fall under the antifraud provisions of the securities laws, and should not be addressed with the 'severest of sanctions.'" We are concerned that, despite his assurances against future violations, Pattison's failure to appreciate the gravity of his misconduct raises troubling questions about his fitness to appear and practice before the Commission.

Pattison asserts that the likelihood is low that his occupation will present opportunities for future violations. He states that he has "worked for the last seven years without any blemish on his record. He has not moved professionally towards the public sector, and even submitted a Declaration in the District Court action expressly stating he had no intention to work for a public company again." He also asserts that his "employment history since leaving Embarcadero bears

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[57] (...continued)
(July 29, 2003), 80 SEC Docket 2694, 2704-05 & n.14 ("The question is not whether an accountant recklessly intended to aid in the fraud committed by the audit client, but rather whether the accountant recklessly violated applicable professional standards [in connection with a proceeding brought under Rule 102(e)(1)]."), *reversed on other grounds*, 374 F.3d at 1205 (rejecting respondents' contention that, because the Commission borrowed the definition of recklessness used in substantive antifraud provisions for purposes of a proceeding under Rule 102(e)(1), the Commission also was required to adopt other elements of a securities fraud violation, such as the requirements of an intent to defraud and materiality).

[58] To the extent that Pattison contends that scienter must be an element of the underlying violations in order for us to evaluate the degree of scienter under the *Steadman* factors, he is incorrect. *See Steadman*, 603 F.2d at 1140 ("We heartily endorse the Commission's view that while scienter is not required to make out violations of several of the statutory sections involved here, the respondent's state of mind is highly relevant in determining the remedy to impose.").

that out. Pattison has changed jobs—he no longer works for a public company and instead performs trust and estate work [as an accountant] for a company owned by a private individual."

Pattison, however, remains licensed as a CPA. Moreover, the Court found that Pattison stated in his deposition that his work for the company is "[m]uch the same as what I would do at a public accounting firm."[59] Should the company go public or be acquired by a public company, the accuracy of its historical books and records could be critical, and Pattison could potentially find himself in a position to handle the company's future accounting duties. Moreover, Pattison's statement that he "is not likely to appear before the Commission again, but . . . has demonstrated over these last seven years that he possesses the skills and moral character to do so in the future," suggests the possibility of his eventually appearing and practicing before the Commission. We conclude that a reasonable likelihood exists that Pattison's occupation will present opportunities for future violations.[60]

Pattison asserts that the law judge improperly granted summary disposition because he presented mitigating facts that required an evidentiary hearing. Rule of Practice 250(b) provides that a hearing officer may grant a motion for summary disposition without an in-person hearing if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law."[61] Once the Division showed that it had satisfied the criteria for summary disposition, Pattison had the opportunity to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing.

Pattison's submissions below "relate[d] to the appropriateness of the sanction," which we have considered fully above, but did not raise "the existence of a genuine issue of material

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[59] *See supra* note 53, Order Denying Defendant's Motion for Judgment of Law and Motion for a New Trial; and Granting in Part and Denying in Part Defendant's Motion to Amend Judgment, at 12.

[60] Pattison cites to *SEC v. Monarch Fund*, 608 F.2d 938, 943 (2d. Cir. 1979), and *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D. D.C. 1978) for the proposition that "the more time that has passed since a violation, the lesser the need for an injunctive sanction." Pattison's citations are inapposite. In these cases, the courts considered the propriety of imposing an injunction. As we have discussed, the propriety of Pattison's injunction is not at issue. Moreover, these cases suggest that courts consider the amount of time that has elapsed since the last violation as one among many factors in evaluating whether there exists a reasonable likelihood of future violations.

[61] 17 C.F.R. § 201.250(b).

fact."[62] An in-person hearing therefore was not required. Pattison states that it is mitigating that he has worked for the last seven years without a blemish on his record, has not moved professionally towards the public sector, and voluntarily told the Special Committee that he backdated stock option grants. We already have accepted these facts as true and taken them into consideration above.

Pattison also states that he "was still working at Embarcadero for almost a year after the alleged violations occurred and thus his compliance with these statutes began while he was still working at Embarcadero." Yet Pattison also highlights the fact that, by the end of 2004, the company, not Pattison, decided to enforce the prohibition against granting in-the-money stock options and that none was granted thereafter as a result. Pattison asserts that he was "absolved by a jury of all fraud and [aiding and abetting] false reporting charges," and the violation occurred nearly seven years ago. While we accept these statements as true, we do not agree that the need for a permanent suspension is diminished given the other facts of this case. Pattison also argues that we should consider as mitigating that the District Court prevented him from presenting "his key accounting expert"[63] and improperly admitted as evidence Embarcadero's Form 10-K for the 2006 fiscal year, which restated numerous portions of financial statements for previous years, and that the Division failed to designate expert witnesses at the trial. Pattison is prohibited from attempting to relitigate the District Court's findings.[64]

Pattison argues that a permanent suspension is "far in excess of other accountants who have had securities fraud judgments entered against them for backdating stock options." The

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[62] *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14264 & n.62 (citing *Seghers*, 548 F.3d at 134), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[63] Pattison attached to his reply brief the accounting expert's "anticipated testimony" that he asserts he "was required to provide to the District Court," and which was intended to support his argument that his conduct was not egregious. Commission Rule of Practice 452, 17 C.F.R. § 201.452, permits the admission of additional evidence where the evidence is material and where there exist reasonable grounds for failing to produce the evidence earlier. Pattison has not met the rule's requirements. He filed no motion to adduce this additional evidence. Nor did he provide an explanation for his failure to adduce the document earlier (*i.e.*, before the law judge or in earlier filings on appeal) or respond when the Division challenged his submission. Pattison also does not explain how this attachment is material. We nevertheless admit it as a matter of discretion.

[64] *See supra* note 54.

cases to which Pattison cites, however, were settled matters.[65] We have repeatedly observed that comparisons to sanctions in settled cases are inappropriate because respondents who offer to settle may properly receive lesser sanctions than they otherwise might have. That is because, "in settlement cases we take into account pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings."[66]

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[65] In all of the cited cases, respondents settled both the underlying injunctive matter and the follow-on Rule 102(e) proceeding. *See Antonio Canova*, Exchange Act Rel. No. 59758 (Apr. 13, 2009), 95 SEC Docket 16041; *Anthony Bonica*, Exchange Act Rel. No. 62242 (June 8, 2010), 98 SEC Docket 28963; *Clinton Ronald Greenman*, Exchange Act Rel. No. 61147 (Dec. 10, 2009), 97 SEC Docket 23380; *John Wilroy*, Exchange Act Rel. No. 61148 (Dec. 10, 2009), 97 SEC Docket 23384; *Gregory Pasko*, Exchange Act Rel. No. 61149 (Dec. 10, 2009), 97 SEC Docket 23388; *Lisa Roberts*, Exchange Act Rel. No. 60345 (July 20, 2009), 96 SEC Docket 18982; *Kevin Brooks*, Exchange Act Rel. No. 59785 (Apr. 17, 2009), 95 SEC Docket 16159; *Dennis Kavelman and Arcangelo Loberto*, Exchange Act Rel. No. 59648 (Mar. 30, 2009), 95 SEC Docket 15530.

Pattison also refers to the result in *Robert W. Armstrong, III*, 58 S.E.C. 542 (2005), a litigated case, where an accountant was found to have violated the antifraud provisions and was not permanently suspended under Rule 102(e). *Armstrong* is not applicable here. That matter was brought under Rule 102(e)(1), which, as we have explained, involves procedures and standards different from those in a Rule 102(e)(3) proceeding. Moreover, "in light of the unique circumstances [in that case], we . . . determined, as an exercise of our equitable discretion, not to impose any suspension" pursuant to Rule 102(e)(1) without providing any analysis or identifying the unique circumstances leading to this result. Accordingly, *Armstrong* provides no precedential guidance with respect to the imposition of sanctions pursuant to Rule 102(e)(3).

[66] *Nassar and Co., Inc.*, 47 S.E.C. 20, 26 & n.37 (1978) (citing cases), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979); *see also Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10892-93 (rejecting respondent's argument in an administrative proceeding based on an underlying injunction that he should not receive a harsher sanction than that imposed on other individuals who committed violations similar to the one for which he was enjoined but where the other individuals settled their administrative proceedings); *Leslie A. Arouh*, 57 S.E.C. 1099, 1123 (2004) (rejecting respondent's argument that sanction was unjust where more culpable respondent received lesser sanction); *cf. Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5089, 5118 (where NASD had previously offered to settle charges for lesser sanctions than ultimately imposed after litigation, Commission rejected argument that NASD's alleged willingness to accept a lesser sanction in settlement shows that NASD did not consider that more stringent sanctions were necessary, noting "it is well established that those who offer to settle may properly receive lesser sanctions than they otherwise might have based on 'pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings.'").

The appropriate sanction in any case, moreover, depends on the particular facts and circumstances presented.[67] Litigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters.[68] Here, the record shows that, although Pattison was not found liable on the fraud charge in the injunctive action, the Court made extensive findings in justification of the injunction against him concerning the egregiousness of the conduct and his level of scienter. As discussed above, these violations go to the heart of an accountant's obligations in any practice before the Commission and justify the bar against such practice.[69]

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[67] *See Robert L. Burns*, Advisers Act Rel. No. 3260 (Aug. 5, 2011), 101 SEC Docket 44807, 44824 n.52 ("[I]t is well established that the appropriateness of a sanction 'depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings.'") (citing *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5134, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (citing *Butz v. Glover Livestock Comm'n Co*., 411 U.S. 182, 187 (1973)); *cf. World Trade Fin. Corp.*, Exchange Act Rel. No. 66114 (Jan. 6, 2012), 102 SEC Docket 49942, 49966 & n.82 (noting, in review of FINRA matter, that the "appropriate sanction, however, depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings.") (citing *Butz*, 411 U.S. at 187); *see also McCarthy*, 406 F.3d at 188 (stating that an appeals court's review of Commission sanctions "receives only limited benefit from comparison to sanctions imposed in other cases due to the highly fact-dependent nature of the propriety of sanctions"); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) (rejecting respondent's argument that the imposition of lesser sanctions in other cases involving purportedly more serious violations is inconsistent and stating that "we cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding") (citing *Tager v. SEC*, 344 F.2d 5, 8-9 (2d Cir. 1965) ("Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission.")).

[68] *See Nassar and Co., Inc.,* 47 S.E.C. at 26. In the settled matters cited by Pattison, for example, we do not have a record that would permit a comparison with all the *Steadman* factors influencing a sanction decision, such as the likelihood that a respondent's occupation will present opportunities for future violations.

[69] Pattison argues that a bar is unprecedented and that no accountant has "ever been permanently barred from practicing in front of the Commission for a books and records violation." For the reasons discussed in the text, we believe the bar against practice before the Commission is justified here because of the connection between the nature of the violation and the duties involved in any practice by an accountant before the Commission.

As we have stated, "[t]he Commission disciplines professionals pursuant to Rule 102(e) in order to 'protect the integrity of its processes.'"[70] The Commission adopted the rule as a "means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence."[71] We believe that permanently disqualifying Pattison from appearing or practicing before the Commission is remedial because it will prevent Pattison and deter others from disregarding their professional responsibilities and protect the investing public by encouraging reliable corporate disclosure and accountability through accurate recordkeeping and diligent compliance with internal accounting controls.

An appropriate order will issue.[72]

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, PAREDES and GALLAGHER); Commissioner AGUILAR not participating.

Elizabeth M. Murphy
Secretary

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[70] *Robert W. Armstrong, III*, 58 S.E.C. 542, 571-72 & n.62 (2005) (citing *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (stating that Rule of Practice 2(e), the predecessor to Rule of Practice 102(e), "represents an attempt by the Commission to protect the integrity of its own processes" and upholding the validity of Rule of Practice 2(e) as "reasonably related" to the purposes of the federal securities laws).

[71] *Gunderson*, 97 SEC Docket at 24046 (citing *Touche Ross*, 609 F.2d at 582).

[72] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67900 / September 20, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3407 / September 20, 2012

Admin. Proc. File No. 3-14323

In the Matter of

MICHAEL C. PATTISON, CPA
c/o Patrick J. Richard
James H. Vorhis
Nossaman LLP
50 California Street, 34th Floor
San Francisco, CA 94111

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's Opinion issued this day, it is

ORDERED that Michael C. Pattison, CPA be, and he hereby is, permanently disqualified from appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary