File No. PCAOB-2003-06
Consists of 606 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

Form 19b-4

Proposed Rules

By

Public Company Accounting Oversight Board

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"), the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") is filing with the Securities and Exchange Commission ("SEC" or "Commission") proposed rules consisting of 41 temporary rules and nine temporary definitions. The proposed temporary rules are attached as Exhibit A.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Board

(a) The temporary rules are a subset of a set of rules that the Board approved, and authorized for filing with the SEC, at its Open Meeting on September 29, 2003. No other action by the Board is necessary for the filing of these proposed temporary rules.

(b) Questions regarding this rule filing may be directed to Gordon Seymour, Acting General Counsel (202-207-9034; seymourg@pcaobus.org); or Michael Stevenson, Associate General Counsel (202-207-9054; stevensonm@pcaobus.org).

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

(a) Purpose

Section 102 of the Act prohibits accounting firms that are not registered with the Board from preparing or issuing, or playing a substantial role in the preparation or furnishing of, an audit report with respect to any issuer. Under Board rules previously approved by the Commission, the Board will not disapprove an application for registration without first giving the applicant an opportunity for a hearing. The purpose of the proposed temporary rules is to supply fair procedures and rules to govern the

conduct of any such hearing. The proposed temporary rules consist of 41 rules and nine definitions. The proposed rules and definitions are included among those described in detail in the discussion in Exhibit 3.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

4. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed temporary rules supply procedures for the conduct of fair hearings. Moreover, the proposed temporary rules would apply only in the context of a hearing that an applicant for registration elects, at its option, to have.

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

The Board released the proposed rules for public comment on July 28, 2003. See Exhibit 2(a)(1). The Board received 17 written comment letters relating to its proposal. See Exhibits 2(a)(2) and 2(a)(3).

The Board has carefully considered all comments it has received. In response to the written comments received, the Board has clarified and modified certain aspects of the proposed rules. The Board's response to the comments it received and the changes made to the rules in response to these comments are included in Exhibit 3.

6. Extension of Time Period for Commission Action

The Board does not consent to an extension of the time period specified in Section 19(b)(2) of the Securities Exchange Act of 1934.

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

Section 102 of the Act, and the Board's rules, prohibit accounting firms that are not registered with the Board from preparing or issuing, or playing a substantial role in the preparation or furnishing of, an audit report with respect to any issuer. Under the Act and the Board's rules, that prohibition will take effect on October 22, 2003. Under Board rules previously approved by the Commission, the Board may not disapprove an application for registration without first giving the applicant an opportunity for a hearing. As the October 22 effective date of the prohibition draws nearer, and the Board considers a substantial volume of registration applications, the Board has a significant need to have hearing procedures and rules in effect in the event that the Board must provide any such hearing. Moreover, the proposed rules provide reasonable procedures, and many of them are in fact modeled on the Commission's own procedural rules.

Rules that the Board has adopted to govern a broader scope of matters – including investigations and all disciplinary proceedings – would supply the necessary procedures and rules, but, in the normal course of events, the earliest that those rules would be approved by the Commission would be well after the October 22 effective date of the prohibition. To ensure that any applicant who is entitled to a hearing may receive that hearing as soon as reasonably possible, the Board requests that the Commission grant accelerated effectiveness to just those rules that may be necessary to conduct a fair hearing on possible disapproval of a registration application. The Board requests such accelerated approval only to make the rules effective for the purpose of any

necessary registration hearings on a temporary basis, with the rules to be superseded by any rules eventually approved by the Commission after notice and comment..

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

The proposed rules are not based on the rules of another board or of the Commission. As discussed in Exhibit 3 to this filing, certain elements of the proposed rules are drawn from parts of the Commission's Rules of Practice, relevant provisions of the United States Code, and other sources.

9. Exhibits

Exhibit A –	Text of Proposed Rules
Exhibit 1 –	Form of Notice of Proposed Rules for Publication in the Federal Register
Exhibit 2(a)(1) –	PCAOB Release No. 2003-012 (July 28, 2003)
Exhibit 2(a)(2) –	Alphabetical List of Comments
Exhibit 2(a)(3) –	Written comments on the rules proposed in PCAOB Release No. 2003-012
Exhibit 3 –	PCAOB Release No. 2003-015 (September 29, 2003)

10. Signatures

Pursuant to the requirements of the Act and the Securities Exchange Act of 1934, 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: _____
William J. McDonough
Chairman

EXHIBIT A

PROPOSED TEMPORARY RULES

RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires –

(a)(ix)T Accounting Board Demand

The term "accounting board demand" means a command to produce documents and/or to appear at a certain time and place to give testimony.

(a)(x)T Accounting Board Request

The term "accounting board request" means a request to produce documents and/or to appear at a certain time and place to give testimony.

(c)(ii)T Counsel

The term "counsel" means an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

(h)(i)T 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 to preside at a hearing.

(i)(iv)T Interested Division

The term "interested division" means a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding.

(o)(ii)T Order Instituting Proceedings

The term "order instituting proceedings" means an order issued by the Board commencing a disciplinary proceeding.

(p)(iii)T Party

The term "party" means the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

(p)(iv)T Person

The term "person" means any natural person or any business, legal or governmental entity or association.

(s)(iii)T Secretary

The term "Secretary" means the Secretary of the Board.

Rule 1002T. Time Computation

In computing any period of time prescribed in or allowed by these Rules or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed by rule or order for service by mail. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a federal legal holiday.

Note: The Secretary will maintain a list of federal legal holidays.

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

Rule 5000. [Reserved]

Part 1 – [Reserved]

Part 2 – Disciplinary Proceedings

Rule 5200T. Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) Appointment of a Hearing Officer

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) obtaining a court reporter to administer oaths and affirmations;

(2) issuing accounting board demands pursuant to Rule 5424;

(3) receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(4) regulating the course of a proceeding and the conduct of the parties and their counsel;

(5) holding prehearing and other conferences and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(6) recusing himself or herself upon motion made by a party or upon his or her own motion;

(7) ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(8) subject to any limitations set forth elsewhere in these Rules, considering and ruling upon all procedural and other motions;

(9) preparing an initial decision as provided in Rule 5204;

(10) upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board;

(11) informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods; and

(12) scheduling hearing dates, except that a hearing officer may not, absent the approval of the Board, change a hearing date set by Board order.

(c) 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) 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 5201T. Notification of Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) [Reserved]

(c) Notice of a Hearing on a Registration Application

In the case of a proceeding pursuant to Rule 5500, the notice of a hearing shall state proposed grounds for disapproving the registration application.

(d) [Reserved]

Rule 5202T. Record of Disciplinary Proceedings

(a) Contents of the Record

(1) Record of a Disciplinary Proceeding

A hearing record shall consist of –

(i) the order instituting proceedings, each notice of hearing and any amendments;

(ii) each application, supplemental application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(iii) each stipulation, transcript of testimony and document or other information admitted into evidence;

(iv) each written communication accepted by the hearing officer pursuant to Rule 5420;

(v) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal pursuant to Rule 5402, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(vi) all motions, briefs and other papers filed on interlocutory appeal;

(vi) any proposed findings and conclusions;

(viii) each written order or notice issued by the hearing officer or the Board; and

(ix) any other document or item accepted into the record by the Board or the hearing officer.

(2) Record on Disapproval of Application for Registration

The record on a disapproval of an application with respect to which the applicant has elected to waive its opportunity for a hearing pursuant to Rule 5500 shall consist of –

(i) the application for registration, and any supplemented application;

(ii) any additional information provided by the applicant;

(iii) any other information obtained by the Board in connection with the application;

(iv) the notice of a hearing and any written order issued by the Board; and

(v) any other document or item accepted into the record by the Board.

(b) Documents Not Admitted

Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any documents offered in evidence but excluded until all opportunities for Commission and judicial review have been exhausted or waived.

(c) Substitution of Copies

A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this Rule.

(d) Preparation of Record and Certification of Record Index

Promptly after the close of a hearing, the hearing officer shall transmit to the Secretary an index of any motions, exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any party may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. The initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(e) Final Transmittal of Record Items to the Secretary

After the close of a hearing, the hearing officer shall transmit to the Secretary originals of exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer, and any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

Rule 5203T. Public and Private Hearings

No hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.

Rule 5204T. Determinations in Disciplinary Proceedings

(a) [Reserved]

(b) Initial Decision of a Hearing Officer

Unless the Board directs otherwise, a hearing officer shall prepare an initial decision in any proceeding in which the Board directs a hearing officer to preside at a hearing. An initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and such other information as the Board may require.

Note: Unless the Board has directed otherwise, the Board expects hearing officers in proceedings pursuant to Rule 5500 to prepare initial decisions within 45 days after the deadline for filing post-hearing briefs or other submissions.

(c) Filing, Service and Publication

The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties. In a public proceeding, the Secretary shall as soon as practicable thereafter publish the initial decision, unless the Board otherwise directs.

(d) When Final

(1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary.

(2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.

(3) The Secretary shall not issue a notice of finality as to any party

(i) who has filed a timely petition for review; or

(ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205T. Settlement of Disciplinary Proceedings Without a Determination After Hearing

(a) Availability

Any firm or person who is notified that a proceeding may or will be instituted against him or her, or any firm or person that is a party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) Procedure

An offer of settlement shall state that it is made pursuant to this Rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(2) and (3) of this Rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the Director of Enforcement and Investigations.

(c) Consideration of Offers of Settlement

(1) The Director of Enforcement and Investigations shall present an offer of settlement to the Board with his or her recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Board unless the person making the offer so requests.

(2) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer –

(i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of post-hearing briefs or other submissions, proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(3) By submitting an offer of settlement the person further waives –

(i) such provisions of the Rules of Board Procedure or other requirements of law as may be construed to prevent any member of the Board's staff from participating in the preparation of, or advising the Board as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any right to claim bias or prejudgment by the Board based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(4) If the Board rejects the offer of settlement, the person making the offer shall be notified of the Board's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. Rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(3) of this Rule with respect to any discussions concerning the rejected offer of settlement.

(5) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Board.

Note: In a hearing on disapproval of registration, an offer of settlement will be considered and handled by the Director of Registration and Inspections in accordance with Rule 5206 as if the Director of Registration and Inspections were the Director of Enforcement and Investigations.

5206. [Reserved]

Part 3 – [Reserved]

Part 4 – Rules of Board Procedure

GENERAL

Rule 5400T. Hearings

Hearings for the purpose of taking evidence shall be held only upon order of the Board. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

Rule 5401T. Appearance and Practice Before the Board

A person shall not be represented before the Board or a hearing officer except as stated in paragraphs (a) or (b) of this Rule or as otherwise permitted by the Board or a hearing officer.

(a) Representing Oneself

In any proceeding, an individual may appear on his or her own behalf.

(b) Representing Others

In any proceeding, a person may be represented by counsel; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(c) Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal

(1) Representing Oneself

When an individual first makes any filing or otherwise appears on his or her own behalf before the Board or a hearing officer, he or she shall file with the Secretary both an electronic and a mailing address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours, and the individual shall promptly advise the Secretary of changes to that information during the course of the proceeding.

(2) Representing Others

When a person first makes any filing or otherwise appears in a representative capacity before the Board or a hearing officer, that person shall file with the Secretary, and keep current, a written notice stating the name of the proceeding; the representative's name, mailing address, electronic address and telephone number; and the name and electronic and mailing addresses of the person or persons represented; and, if the person is an attorney, a declaration that the attorney is admitted to practice before the Supreme Court of the United States or the highest court of any state, as defined in Section 3(a)(16) of the Exchange Act.

(3) Power of Attorney

Any individual appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the Board showing his or her authority to act in such capacity.

(4) Withdrawal

Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Board or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal. Leave to withdraw shall not be withheld absent good cause.

Rule 5402T. Hearing Officer Disqualification and Withdrawal

(a) Motion for Withdrawal

A party who has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned, may make a motion to the hearing officer that the hearing officer withdraw, which shall be filed with the Secretary. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding. A motion for withdrawal shall be filed within 15 days after the later of –

(1) when the party learned of the facts believed to constitute the basis for the disqualification; or

(2) when the party was notified of the assignment of the hearing officer.

(b) Appointment 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, the Secretary will appoint a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is appointed 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.

Rule 5403T. Ex Parte Communications

Except to the extent permitted for the disposition of ex parte matters as authorized by law or the Board's Rules –

(a) the person presiding over an evidentiary hearing may not consult a person or party on a fact in issue, unless on notice and with opportunity for all parties to participate; and

(b) neither a party, nor any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing, may –

(1) communicate with the person presiding over an evidentiary hearing on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) communicate with the Board or any member of the Board on a fact in issue, unless on notice and opportunity for all parties to participate or under circumstances in which a party excluded from the communication has waived the rights described in Rule 5205(c)(3) with respect to the matters that are the subject of the communication.

Rule 5404T. Service of Papers by Parties

In every proceeding, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in a manner calculated to bring the paper to the attention of the party to be served.

Rule 5405T. Filing of Papers With the Board: Procedure

(a) When to File

All papers required to be served by a party upon any person shall be filed with the Board at the time of service or promptly thereafter. Papers required to

be filed with the Board must be received within the time limit, if any, for such filing.

(b) Where to File

Unless otherwise permitted by the Secretary, filing of papers with the Board shall be made by electronically filing them with the Secretary.

Note: When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Secretary, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date received electronically by the Secretary. Upon request, the Secretary may permit regulators granted permission to participate on a limited basis (to request a stay), amici curiae, nonparties and others to file in paper form. Where practicable, the Secretary will scan such a filing into the docket file.

Rule 5406T. Filing of Papers: Form

(a) Specifications

Papers filed in connection with any proceeding shall –

(1) be formatted in a Portable Document Format on pages measuring 8½ x 11 inches, except that, upon consent of the Secretary for good cause, a document may be filed in paper form;

Note: To the extent that the reduction of larger documents would render them illegible, the Secretary may consent to the filing of such documents on larger paper, in electronic or paper form.

(2) include at the head of the paper, or on a title page, the name of the Board, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(3) be paginated with margins at least 1 inch wide; and

(4) be double-spaced in a 12-point font, with single-spaced footnotes and single-spaced indented quotations.

(b) Form of Briefs

All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

Rule 5407T. Filing of Papers: Signature Requirement and Effect

Following the issuance of an order instituting proceedings, every filing of a party who represents himself or herself shall sign his or her individual name and state the date and his or her address and telephone number on every filing. A party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number.

Note: If practicable, a party's or an attorney's signature should be scanned into an electronic document. In any event, however, the use of an attorney's electronic mail address, or password for the Board's electronic filing system, shall constitute the signature of that attorney.

Rule 5408T. Motions

(a) Generally

Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. Unless otherwise ordered by the Board or the hearing officer, if a motion is properly made to the Board concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Board. No oral argument shall be heard on any motion unless the Board or the hearing officer otherwise directs.

(b) Opposing and Reply Briefs

Except as provided in Rule 5427, and unless otherwise ordered by the Board or a hearing officer, a brief in opposition to a motion shall be filed within five days after service of the motion. Reply briefs are only permitted with leave of the hearing officer.

(c) Length Limitation

Except as provided in Rule 5427, a brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The hearing officer may grant

requests for leave to file briefs in excess of 10 pages, upon a showing of good cause.

Rule 5409T. Default and Motions to Set Aside Default

(a) Default

A party to a proceeding may be deemed to be in default and the Board or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings or notice of a hearing, the allegations of which may be deemed to be true, if that party fails –

(1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer when required to do so by a Board order, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Board or the hearing officer.

(b) Motion to Set Aside Default

A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Board at any time, may for good cause shown set aside a default.

Rule 5410T. Additional Time For Service by Mail

If service is made by mail, three days shall be added to the prescribed period for response.

Rule 5411T. Modifications of Time, Postponements and Adjournments

Except as otherwise provided by law, the Board, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision, may, for good cause shown, extend or shorten any time limits prescribed by these Rules for the filing of any papers and may, consistent with paragraph (b) of this Rule, postpone or adjourn any hearing.

Rules 5412. – 5419. [Reserved]

PREHEARING RULES

Rule 5420T. Stay Requests

(a) Leave to Participate to Request a Stay

The Board or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, an appropriate state regulatory authority, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a Commission investigation or proceeding, a criminal investigation or prosecution, or a state regulatory proceeding, arising out of the same or similar facts that are at issue in the pending Board or disciplinary proceeding. Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. A stay granted pursuant to this Rule may be granted for such a period and upon such conditions as the Board or the hearing officer deems appropriate.

(b) Stay to Protect Ongoing Commission Investigation

Upon a showing that a stay requested pursuant to this Rule is necessary to protect an ongoing Commission investigation, the motion for the stay shall be granted.

(c) Other Stays

Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for the stay shall be favored.

Rule 5421T. Answer to Allegations

(a) When Required

In its order instituting proceedings, the Board may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer.

(b) When to File

Unless additional time is granted by the hearing officer or the Board, a party filing an answer as provided in paragraph (a) of this Rule shall do so within

20 days after service upon the party of an order instituting proceedings pursuant to Rule 5500. If the order instituting proceedings is amended, the Board or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) Contents of Answer and Effect of Failure to Deny

Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

Rule 5422T. Availability of Documents For Inspection and Copying

(a) Documents to be Available for Inspection and Copying

(1) [Reserved]

(2) [Reserved]

(3) Proceedings Commenced Pursuant to Rule 5500

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5500, the Division of Registration and Inspections shall make available for inspection and copying by the applicant documents obtained by that division in connection with the registration application prior to the notice of hearing, except that the Division need not produce any documents described in subparagraph (b) that it does not intend to introduce as evidence.

(b) Documents That May Be Withheld

(1) The interested division may decline to make available for inspection and copying –

(i) any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration;

(ii) any other document that is privileged, including any other document protected by the attorney work product doctrine;

(iii) any document that would disclose the identity of a confidential source; and

(iv) any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(2) Nothing in this paragraph (b), or in paragraph (a)(2) above, authorizes the interested division in connection with a disciplinary proceeding or hearing on disapproval of registration to withhold documents that contain material exculpatory evidence.

(c) Procedures Concerning Withheld Documents

(1) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the respondent with a log of documents withheld pursuant to paragraph (b)(1)(ii) of this Rule. The log shall provide the same information that a person would be required to supply to the Board under Rule 5106 in connection with a privilege assertion. On a motion by any respondent, a hearing officer may, in his or her discretion, require the interested division to submit any document listed on the log for inspection by the hearing officer in camera. A hearing officer may order that any such document be made available to a respondent for inspection and copying only if the hearing officer determines that the document is not a document described in paragraph (b)(1)(ii).

(2) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the hearing officer and each respondent with a list of documents withheld pursuant to paragraph (b)(1)(iii) or (b)(1)(iv) of this Rule and a brief description of the reason for withholding each document. The list provided to the respondent may be redacted as necessary to protect interests related to the interested division's reason for withholding the document. The hearing officer may require the interested division to submit any such document for inspection by the hearing officer in camera. The hearing officer may order that any such document be made available to the respondent for inspection and copying only if the hearing officer determines that –

(i) with respect to any document withheld pursuant to paragraph (b)(1)(iii) –

(A) producing the document would not have the effect of identifying a confidential source; or

(B) the document contains material, exculpatory evidence, provided, however, that to the extent such evidence can be disclosed without disclosing the identity of a confidential source, such identity shall not be disclosed.

(ii) with respect to any document withheld pursuant to paragraph (b)(1)(iv) –

(A) the document is relevant to the subject matter of the proceeding and no good cause exists for withholding it; or

(B) the document contains material, exculpatory evidence.

(d) Timing of Inspection and Copying

Unless otherwise ordered by the Board or the hearing officer, the interested division shall make documents available for inspection and copying to any respondent who is not in default under Rule 5409 no later than 14 days after the institution of proceedings pursuant to Rule 5500.

(e) Place of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to a party for inspection and copying at the Board office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A party shall not be given custody of the documents or leave to remove the documents from the Board's offices pursuant to the requirements of this Rule other than by written agreement of the interested division. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) Copying Costs and Procedures

A party may obtain a photocopy of any documents made available for inspection. The party shall be responsible for the cost of photocopying. The respondent shall be given access to the documents at the Board's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) Failure to Make Documents Available – Harmless Error

In the event that a document required to be made available to a party pursuant to this Rule is not made available by the interested division, no

rehearing or redecision of a proceeding already heard or decided shall be required, unless the party shall establish that the failure to make the document available was not harmless error.

> Note: The interested division's obligation under this Rule relates to documents obtained by that division. Documents located only in the files of other divisions or offices are beyond the scope of the Rule, except that documents located in the files of other divisions and that the interested division intends to introduce as evidence shall, for purposes of this Rule, be treated as if they have been obtained by the interested division and must therefore be made available under this Rule.

Rule 5423T. Production of Witness Statements

(a) Availability

Upon motion by any respondent in a disciplinary proceeding, the hearing officer may order that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce - Harmless Error

In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

(c) Definition of Statement

For purposes of this Rule, the term "statement" shall have the meaning set forth in 18 U.S.C. § 3500(e).

Rule 5424T. Accounting Board Demands and Commission Subpoenas

(a) Accounting Board Demands and Requests

In connection with any hearing ordered by the Board, a party may request the issuance of an accounting board demand of a registered public accounting firm or an associated person of such a firm, or an accounting board request of any other person. Such a demand or request may call for the attendance and testimony of a witness at the designated time and place of the hearing or for the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, an application for issuance of such a demand or request shall be made in writing and served on each party. A party whose application for such a demand or request has been denied or modified may not submit any other application seeking substantially the same testimony or other evidence specified in the denied application or excluded from an otherwise granted application.

(1) Unavailability of Hearing Officer

In the event that the hearing officer assigned to a proceeding is unavailable, any member of the Board, or other person designated by the Board for this purpose, may grant an application for the issuance of an accounting board demand or request. A party seeking such issuance may submit the application to the Secretary, who shall direct it to a person authorized to grant the request, deny the request, or grant the request with modifications.

(2) Signing May be Delegated

A hearing officer may authorize issuance of an accounting board demand, or an accounting board request, and may delegate the manual signing of the demand or request to any other person.

(3) Standards for Issuance

Where it appears that an application for an accounting board demand or request is reasonable in scope and is reasonably calculated to encompass, or lead to the discovery of, admissible evidence, the application shall be granted. If it appears that the accounting board demand or request sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, designed to seek irrelevant information, or sought for the purpose of harassment or delay, the application shall be denied. The hearing officer or other person ruling on the application may, in his or her discretion, as a condition precedent to the issuance of the demand or request, require the party seeking the demand or request to show the general relevance and reasonable scope of the testimony or other evidence sought. After consideration of all the circumstances, the hearing officer or other person ruling on the application may grant the application upon such

conditions or with such modifications as fairness requires. In making the determination, the hearing officer or other person ruling on the application may inquire of the parties whether they will stipulate to the facts sought to be proved.

Note: Whenever possible, the parties should explore the extent to which stipulations of fact may obviate the need for issuance of accounting board demands and requests to non-parties, and the hearing officer or other person ruling on an application for issuance of an accounting board demand or request should encourage the parties to reach such stipulations when possible.

(4) Witness Fees

A witness, other than a party, who is summoned to a Board proceeding pursuant to an accounting board demand, or an accounting board request, or who is deposed pursuant to Rule 5425, shall be paid his or her reasonable expenses by the party at whose instance the witness appears.

Rule 5425T. Depositions to Preserve Testimony for Hearing

(a) Procedure

Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

Note: Depositions under the Rules of Board Procedure are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not permitted for purposes of discovery.

(b) Required Finding When Ordering a Deposition

In the discretion of the Board or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, or otherwise unavailable, and that the taking of a deposition will serve the interests of justice.

(c) Procedure at Depositions

A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(d) Objections to Questions or Evidence

Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted in the transcript, but no person other than the hearing officer shall have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence during the deposition shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) Filing of Depositions

The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

Rule 5426T. Prior Sworn Statements of Witnesses in Lieu of Live Testimony

At a hearing, any person wishing to introduce a prior, sworn statement of a nonparty witness otherwise admissible in the proceeding, in lieu of live testimony may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement in lieu of live testimony may be granted if –

(a) the witness is dead;

(b) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(c) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(d) the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand; or,

(e) in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rules 5427. – 5439. [Reserved]

CONDUCT OF HEARINGS

Rule 5440T. Record of Hearings

(a) Recordation

All hearings shall be recorded and a written transcript thereof shall be prepared.

(b) Availability of a Transcript

Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings shall be available for purchase only by parties, provided, however, that any person compelled to testify at a hearing may purchase a copy of that person's own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or other submissions, or within such earlier time as directed by the Board or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Rule 5441T. Evidence: Admissibility

The Board or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Rule 5442T. Evidence: Objections and Offers of Proof

(a) Objections

Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Board, however, unless raised –

(1) pursuant to interlocutory review in accordance with Rule 5461;

(2) in a proposed finding or conclusion filed pursuant to Rule 5445; or

(3) in a petition for Board review of an initial decision filed in accordance with Rule 5460.

(b) Offers of Proof

Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 5202(b).

Rule 5443T. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 5444T. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding, a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, shall be determined by the Board or the hearing officer in each proceeding.

Rule 5445T. Post-hearing Briefs and Other Submissions

(a) At the end of the hearing in any proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500 in which an initial decision is to be issued, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which post-hearing briefs or other submissions are to be filed. Unless the hearing officer, for good cause shown, permits a different

period and sets forth in the order the reasons why the different period is necessary –

(i) the party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing; and

(ii) the total period within which all such filings and any opposition and reply submissions are to be filed shall be no longer than 90 days after the end of the hearing.

Rules 5446. – 5459. [Reserved]

APPEALS TO THE BOARD

Rule 5460T. Board Review of Determinations of Hearing Officers

(a) Petition for Review of Initial Decision by Hearing Officers

Any party to a hearing may obtain Board review of an initial decision by filing a petition for review that –

(1) sets forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception; and

(2) is filed, in a proceeding instituted pursuant to Rule 5500, within 30 days after service of the initial decision on the petitioner or within 10 days after the filing of a petition for review by another party, whichever is later.

(b) Review on Board's Initiative

The Board may, on its own initiative, order review of any initial decision, or a portion of any initial decision, at any time before the initial decision becomes final pursuant to Rule 5204(d).

(c) De Novo Review

Based on a petition for review, or on its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper based on the record.

(d) Limitations on Matters Reviewed

Review by the Board of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing

schedule order issued pursuant to Rule 5462(a). On notice to all parties, however, the Board may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) Summary Affirmance

The Board may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Board.

Rule 5461T. Interlocutory Review

(a) Availability

The Board will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Board may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this Rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Board may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) Certification Process

A ruling submitted to the Board for interlocutory review shall be certified in writing by the hearing officer as appropriate for interlocutory review and shall specify the basis for certification. The hearing officer shall certify a ruling only if –

(1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that –

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(c) Proceedings Not Stayed

The filing of an application for interlocutory review or the grant of interlocutory review shall not stay proceedings before the hearing officer unless

he or she, or the Board, shall so order. The Board will not consider the motion for a stay unless the motion has first been made to the hearing officer.

Rule 5462T. Briefs Filed with the Board

(a) Briefing Schedule Order

Upon a timely and valid petition for review, or upon its own timely motion to review an initial decision, other than review ordered pursuant to Rule 5469, the Board shall issue a briefing schedule order directing the parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs may be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board. The briefing schedule order shall be issued –

(1) at the time the Board orders review on its own initiative pursuant to Rule 5460(b), or orders interlocutory review on its own motion pursuant to Rule 5460; or

(2) within 21 days, or such longer time as provided by the Board, after –

(i) the last day permitted for filing a petition for review pursuant to Rule 5204(d);

(ii) certification of a ruling for interlocutory review pursuant to Rule 5461(c).

(b) Contents of Briefs

Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) Length Limitation

Opening and opposition briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Board.

Rule 5463T. Oral Argument Before the Board

(a) Availability

The Board, on its own motion or the motion of a party, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Board will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Board determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) Procedure

Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Board shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Board, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) Time Allowed

Unless the Board orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Board may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

> Note: The term "side" is used in this Rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. If multiple parties have a common interest, they may constitute only a single side.

(d) Participation of Board Members

A member of the Board who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

Rule 5464T. Additional Evidence

Upon its own motion or the motion of a party, the Board may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Board. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Any other party may file a response to the motion within 5 days after the motion is filed, or such longer time as the Board may allow. The Board may accept or hear additional evidence, or it may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

Rule 5465T. Record Before the Board

The Board shall determine each matter on the basis of the record.

(a) Contents of the Record

In proceedings for final decision before the Board, the record shall consist of –

(1) all items part of the hearing record below in accordance with Rule 5202(a);

(2) any petitions for review, cross-petitions or oppositions; and

(3) all briefs, motions, submissions and other papers filed on appeal or review.

(b) Transmittal of Record to Board

Within 14 days after the last date set for filing briefs or such later date as the Board directs, the Secretary shall transmit the record to the Board.

(c) Review of Documents Not Admitted

Any document offered in evidence but excluded by the hearing officer or the Board and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Board on appeal

but shall be transmitted to the Board by the Secretary if so requested by the Board. In the event that the Board does not request the document, the Secretary shall retain the document not admitted into the record until the later of –

(1) the date upon which the Board's order becomes final, or

(2) the conclusion of any Commission and judicial review of that order.

Rule 5466T. Reconsideration

(a) Scope of Rule

A party may file a motion for reconsideration of a final order issued by the Board.

(b) Procedure

A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Board may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Board, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Board.

Rule 5467. – 5499. [Reserved]

Part 5 – Hearings on Disapproval of Registration Applications

Rule 5500T. Commencement of Hearing on Disapproval of a Registration Application

The Board may commence a proceeding to determine whether to approve or disapprove a public accounting firm's application for registration when, based on review of an application for registration as a registered public accounting firm –

(a) the Board determines, pursuant to Rule 2106(b)(2)(ii), to provide the applicant with written notice of a hearing to determine whether to approve or disapprove the application; and

(b) within such period, as the Board permits, after the date of service of a notice of a hearing whether to approve or disapprove an application for registration pursuant to Rule 2106(b)(2)(ii), the public accounting firm served with such notice files with the Secretary a written request for a hearing date and a notice of appearance pursuant to Rule 5401(c), and includes with the request –

(1) a statement that the public accounting firm has elected not to treat the notice as a written notice of disapproval for purposes of Section 102(c) of the Act; and

(2) a statement describing with specificity why the public accounting firm believes that the Board should not issue a written notice of disapproval.

Rule 5501T. Procedures for a Hearing on Disapproval of a Registration Application

Proceedings instituted pursuant to Rule 5500 shall be subject to procedures as described in Parts 2 and 4 of Section 5 of the Board's Rules.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. PCAOB-2003-06)

[Date]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Temporary Hearing Rules

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on September 30, 2003, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

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

On September 29, 2003, the Board adopted rules on investigations and adjudications (the “Enforcement Rules”). The current proposal is limited to a subset of the Enforcement Rules. The subset consists of certain rules that would govern hearings that the Board may hold concerning possible disapproval of applications for registration. As to the subset (the “Temporary Hearing Rules”), the Board requests that the Commission grant accelerated effectiveness, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (“Exchange Act”). The Board seeks accelerated effectiveness of the Temporary Hearing

Rules to facilitate any registration disapproval hearings that may be necessary before the Enforcement Rules are approved. The Board requests that effectiveness only on a temporary basis. The Temporary Hearing Rules would be superseded by any Enforcement Rules approved by the Commission, upon final Commission approval of those rules. The Temporary Hearing Rules include 41 rules and nine definitions, all of which are designated as temporary by appending a "T" to the rule number. The text of the Temporary Hearing Rules is as follows:

RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires –

(a)(ix)T Accounting Board Demand

The term "accounting board demand" means a command to produce documents and/or to appear at a certain time and place to give testimony.

(a)(x)T Accounting Board Request

The term "accounting board request" means a request to produce documents and/or to appear at a certain time and place to give testimony.

(c)(ii)T Counsel

The term "counsel" means an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

(h)(i)T 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 to preside at a hearing.

(i)(iv)T Interested Division

The term "interested division" means a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding.

(o)(ii)T Order Instituting Proceedings

The term "order instituting proceedings" means an order issued by the Board commencing a disciplinary proceeding.

(p)(iii)T Party

The term "party" means the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

(p)(iv)T Person

The term "person" means any natural person or any business, legal or governmental entity or association.

(s)(iii)T Secretary

The term "Secretary" means the Secretary of the Board.

Rule 1002T. Time Computation

In computing any period of time prescribed in or allowed by these Rules or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed by rule or order for service by mail. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a federal legal holiday.

Note: The Secretary will maintain a list of federal legal holidays.

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

Rule 5000. [Reserved]

Part 1 – [Reserved]

Part 2 – Disciplinary Proceedings

Rule 5200T. Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) Appointment of a Hearing Officer

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) obtaining a court reporter to administer oaths and affirmations;

(2) issuing accounting board demands pursuant to Rule 5424;

(3) receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(4) regulating the course of a proceeding and the conduct of the parties and their counsel;

(5) holding prehearing and other conferences and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(6) recusing himself or herself upon motion made by a party or upon his or her own motion;

(7) ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(8) subject to any limitations set forth elsewhere in these Rules, considering and ruling upon all procedural and other motions;

(9) preparing an initial decision as provided in Rule 5204;

(10) upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board;

(11) informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods; and

(12) scheduling hearing dates, except that a hearing officer may not, absent the approval of the Board, change a hearing date set by Board order.

(c) 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) 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 5201T. Notification of Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) [Reserved]

(c) Notice of a Hearing on a Registration Application

In the case of a proceeding pursuant to Rule 5500, the notice of a hearing shall state proposed grounds for disapproving the registration application.

(d) [Reserved]

Rule 5202T. Record of Disciplinary Proceedings

(a) Contents of the Record

(1) Record of a Disciplinary Proceeding

A hearing record shall consist of –

(i) the order instituting proceedings, each notice of hearing and any amendments;

(ii) each application, supplemental application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(iii) each stipulation, transcript of testimony and document or other information admitted into evidence;

(iv) each written communication accepted by the hearing officer pursuant to Rule 5420;

(v) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal pursuant to Rule 5402, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(vi) all motions, briefs and other papers filed on interlocutory appeal;

(vi) any proposed findings and conclusions;

(viii) each written order or notice issued by the hearing officer or the Board; and

(ix) any other document or item accepted into the record by the Board or the hearing officer.

(2) Record on Disapproval of Application for Registration

The record on a disapproval of an application with respect to which the applicant has elected to waive its opportunity for a hearing pursuant to Rule 5500 shall consist of –

(i) the application for registration, and any supplemented application;

(ii) any additional information provided by the applicant;

(iii) any other information obtained by the Board in connection with the application;

(iv) the notice of a hearing and any written order issued by the Board; and

(v) any other document or item accepted into the record by the Board.

(b) Documents Not Admitted

Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any documents offered in evidence but excluded until all opportunities for Commission and judicial review have been exhausted or waived.

(c) Substitution of Copies

A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this Rule.

(d) Preparation of Record and Certification of Record Index

Promptly after the close of a hearing, the hearing officer shall transmit to the Secretary an index of any motions, exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any party may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. The initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(e) Final Transmittal of Record Items to the Secretary

After the close of a hearing, the hearing officer shall transmit to the Secretary originals of exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer, and any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial

decision by the Secretary, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

Rule 5203T. Public and Private Hearings

No hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.

Rule 5204T. Determinations in Disciplinary Proceedings

(a) [Reserved]

(b) Initial Decision of a Hearing Officer

Unless the Board directs otherwise, a hearing officer shall prepare an initial decision in any proceeding in which the Board directs a hearing officer to preside at a hearing. An initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and such other information as the Board may require.

Note: Unless the Board has directed otherwise, the Board expects hearing officers in proceedings pursuant to Rule 5500 to prepare initial decisions within 45 days after the deadline for filing post-hearing briefs or other submissions.

(c) Filing, Service and Publication

The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties. In a public proceeding, the Secretary shall as soon as practicable thereafter publish the initial decision, unless the Board otherwise directs.

(d) When Final

(1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary.

(2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.

(3) The Secretary shall not issue a notice of finality as to any party

(i) who has filed a timely petition for review; or

(ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205T. Settlement of Disciplinary Proceedings Without a Determination After Hearing

(a) Availability

Any firm or person who is notified that a proceeding may or will be instituted against him or her, or any firm or person that is a party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) Procedure

An offer of settlement shall state that it is made pursuant to this Rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(2) and (3) of this Rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the Director of Enforcement and Investigations.

(c) Consideration of Offers of Settlement

(1) The Director of Enforcement and Investigations shall present an offer of settlement to the Board with his or her recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Board unless the person making the offer so requests.

(2) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer –

(i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of post-hearing briefs or other submissions, proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(3) By submitting an offer of settlement the person further waives –

(i) such provisions of the Rules of Board Procedure or other requirements of law as may be construed to prevent any member of the Board's staff from participating in the preparation of, or advising the Board as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any right to claim bias or prejudgment by the Board based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(4) If the Board rejects the offer of settlement, the person making the offer shall be notified of the Board's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. Rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(3) of this Rule with respect to any discussions concerning the rejected offer of settlement.

(5) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Board.

Note: In a hearing on disapproval of registration, an offer of settlement will be considered and handled by the Director of Registration and Inspections in accordance with Rule 5206 as if the Director of Registration and Inspections were the Director of Enforcement and Investigations.

Rule 5206. [Reserved]

Part 3 – [Reserved]

Part 4 – Rules of Board Procedure

GENERAL

Rule 5400T. Hearings

Hearings for the purpose of taking evidence shall be held only upon order of the Board. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

Rule 5401T. Appearance and Practice Before the Board

A person shall not be represented before the Board or a hearing officer except as stated in paragraphs (a) or (b) of this Rule or as otherwise permitted by the Board or a hearing officer.

(a) Representing Oneself

In any proceeding, an individual may appear on his or her own behalf.

(b) Representing Others

In any proceeding, a person may be represented by counsel; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(c) Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal

(1) Representing Oneself

When an individual first makes any filing or otherwise appears on his or her own behalf before the Board or a hearing officer, he or she shall file with the Secretary both an electronic and a mailing address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours, and the individual shall promptly advise the Secretary of changes to that information during the course of the proceeding.

(2) Representing Others

When a person first makes any filing or otherwise appears in a representative capacity before the Board or a hearing officer, that person shall file with the Secretary, and keep current, a written notice stating the name of the proceeding; the representative's name, mailing address, electronic address and telephone number; and the name and electronic and mailing addresses of the person or persons represented; and, if the person is an attorney, a declaration that the attorney is admitted to practice before the Supreme Court of the United States or the highest court of any state, as defined in Section 3(a)(16) of the Exchange Act.

(3) Power of Attorney

Any individual appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the Board showing his or her authority to act in such capacity.

(4) Withdrawal

Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Board or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal. Leave to withdraw shall not be withheld absent good cause.

Rule 5402T. Hearing Officer Disqualification and Withdrawal

(a) Motion for Withdrawal

A party who has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned, may make a motion to the hearing officer that the hearing officer withdraw, which shall be filed with the Secretary. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding. A motion for withdrawal shall be filed within 15 days after the later of –

(1) when the party learned of the facts believed to constitute the basis for the disqualification; or

(2) when the party was notified of the assignment of the hearing officer.

(b) Appointment 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, the Secretary will appoint a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is appointed 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.

Rule 5403T. Ex Parte Communications

Except to the extent permitted for the disposition of ex parte matters as authorized by law or the Board's Rules –

(a) the person presiding over an evidentiary hearing may not consult a person or party on a fact in issue, unless on notice and with opportunity for all parties to participate; and

(b) neither a party, nor any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing, may –

(1) communicate with the person presiding over an evidentiary hearing on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) communicate with the Board or any member of the Board on a fact in issue, unless on notice and opportunity for all parties to participate or under circumstances in which a party excluded from the communication has waived the rights described in Rule 5205(c)(3) with respect to the matters that are the subject of the communication.

Rule 5404T. Service of Papers by Parties

In every proceeding, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in a manner calculated to bring the paper to the attention of the party to be served.

Rule 5405T. Filing of Papers With the Board: Procedure

(a) When to File

All papers required to be served by a party upon any person shall be filed with the Board at the time of service or promptly thereafter. Papers required to be filed with the Board must be received within the time limit, if any, for such filing.

(b) Where to File

Unless otherwise permitted by the Secretary, filing of papers with the Board shall be made by electronically filing them with the Secretary.

Note: When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Secretary, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date received electronically by the Secretary. Upon request, the Secretary may permit regulators granted permission to participate on a limited basis (to request a stay), amici curiae, nonparties and others to file in paper form. Where practicable, the Secretary will scan such a filing into the docket file.

Rule 5406T. Filing of Papers: Form

(a) Specifications

Papers filed in connection with any proceeding shall –

(1) be formatted in a Portable Document Format on pages measuring 8½ x 11 inches, except that, upon consent of the Secretary for good cause, a document may be filed in paper form;

Note: To the extent that the reduction of larger documents would render them illegible, the Secretary may consent to the filing of such documents on larger paper, in electronic or paper form.

(2) include at the head of the paper, or on a title page, the name of the Board, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(3) be paginated with margins at least 1 inch wide; and

(4) be double-spaced in a 12-point font, with single-spaced footnotes and single-spaced indented quotations.

(b) Form of Briefs

All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

Rule 5407T. Filing of Papers: Signature Requirement and Effect

Following the issuance of an order instituting proceedings, every filing of a party who represents himself or herself shall sign his or her individual name and state the date and his or her address and telephone number on every filing. A party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number.

> Note: If practicable, a party's or an attorney's signature should be scanned into an electronic document. In any event, however, the use of an attorney's electronic mail address, or password for the Board's electronic filing system, shall constitute the signature of that attorney.

Rule 5408T. Motions

(a) Generally

Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. Unless otherwise ordered by the Board or the hearing officer, if a motion is properly made to the Board concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Board. No oral argument shall be heard on any motion unless the Board or the hearing officer otherwise directs.

(b) Opposing and Reply Briefs

Except as provided in Rule 5427, and unless otherwise ordered by the Board or a hearing officer, a brief in opposition to a motion shall be filed within five days after service of the motion. Reply briefs are only permitted with leave of the hearing officer.

(c) Length Limitation

Except as provided in Rule 5427, a brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of

contents, table of authorities, and/or addendum. The hearing officer may grant requests for leave to file briefs in excess of 10 pages, upon a showing of good cause.

Rule 5409T. Default and Motions to Set Aside Default

(a) Default

A party to a proceeding may be deemed to be in default and the Board or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings or notice of a hearing, the allegations of which may be deemed to be true, if that party fails –

(1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer when required to do so by a Board order, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Board or the hearing officer.

(b) Motion to Set Aside Default

A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Board at any time, may for good cause shown set aside a default.

Rule 5410T. Additional Time For Service by Mail

If service is made by mail, three days shall be added to the prescribed period for response.

Rule 5411T. Modifications of Time, Postponements and Adjournments

Except as otherwise provided by law, the Board, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision, may, for good cause shown, extend or shorten any time limits prescribed by these Rules for the filing of any papers and may, consistent with paragraph (b) of this Rule, postpone or adjourn any hearing.

Rules 5412. – 5419. [Reserved]

PREHEARING RULES

Rule 5420T. Stay Requests

(a) Leave to Participate to Request a Stay

The Board or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, an appropriate state regulatory authority, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a Commission investigation or proceeding, a criminal investigation or prosecution, or a state regulatory proceeding, arising out of the same or similar facts that are at issue in the pending Board or disciplinary proceeding. Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. A stay granted pursuant to this Rule may be granted for such a period and upon such conditions as the Board or the hearing officer deems appropriate.

(b) Stay to Protect Ongoing Commission Investigation

Upon a showing that a stay requested pursuant to this Rule is necessary to protect an ongoing Commission investigation, the motion for the stay shall be granted.

(c) Other Stays

Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for the stay shall be favored.

Rule 5421T. Answer to Allegations

(a) When Required

In its order instituting proceedings, the Board may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer.

(b) When to File

Unless additional time is granted by the hearing officer or the Board, a party filing an answer as provided in paragraph (a) of this Rule shall do so within 20 days after service upon the party of an order instituting proceedings pursuant to Rule 5500. If the order instituting proceedings is amended, the Board or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) Contents of Answer and Effect of Failure to Deny

Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

Rule 5422T. Availability of Documents For Inspection and Copying

(a) Documents to be Available for Inspection and Copying

(1) [Reserved]

(2) [Reserved]

(3) Proceedings Commenced Pursuant to Rule 5500

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5500, the Division of Registration and Inspections shall make available for inspection and copying by the applicant documents obtained by that division in connection with the registration application prior to the notice of hearing, except that the Division need not produce any documents described in subparagraph (b) that it does not intend to introduce as evidence.

(b) Documents That May Be Withheld

(1) The interested division may decline to make available for inspection and copying –

(i) any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board

members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration;

(ii) any other document that is privileged, including any other document protected by the attorney work product doctrine;

(iii) any document that would disclose the identity of a confidential source; and

(iv) any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(2) Nothing in this paragraph (b), or in paragraph (a)(2) above, authorizes the interested division in connection with a disciplinary proceeding or hearing on disapproval of registration to withhold documents that contain material exculpatory evidence.

(c) Procedures Concerning Withheld Documents

(1) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the respondent with a log of documents withheld pursuant to paragraph (b)(1)(ii) of this Rule. The log shall provide the same information that a person would be required to supply to the Board under Rule 5106 in connection with a privilege assertion. On a motion by any respondent, a hearing officer may, in his or her discretion, require the interested division to submit any document listed on the log for inspection by the hearing officer in camera. A hearing officer may order that any such document be made available to a respondent for inspection and copying only if the hearing officer determines that the document is not a document described in paragraph (b)(1)(ii).

(2) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the hearing officer and each respondent with a list of documents withheld pursuant to paragraph (b)(1)(iii) or (b)(1)(iv) of this Rule and a brief description of the reason for withholding each document. The list provided to the respondent may be redacted as necessary to protect interests related to the interested division's reason for withholding the document. The hearing officer may require the interested division to submit any such document for inspection by the hearing officer in camera. The hearing officer may order that any such document be made available to the respondent for inspection and copying only if the hearing officer determines that –

(i) with respect to any document withheld pursuant to paragraph (b)(1)(iii) –

(A) producing the document would not have the effect of identifying a confidential source; or

(B) the document contains material, exculpatory evidence, provided, however, that to the extent such evidence can be disclosed without disclosing the identity of a confidential source, such identity shall not be disclosed.

(ii) with respect to any document withheld pursuant to paragraph (b)(1)(iv) –

(A) the document is relevant to the subject matter of the proceeding and no good cause exists for withholding it; or

(B) the document contains material, exculpatory evidence.

(d) Timing of Inspection and Copying

Unless otherwise ordered by the Board or the hearing officer, the interested division shall make documents available for inspection and copying to any respondent who is not in default under Rule 5409 no later than 14 days after the institution of proceedings pursuant to Rule 5500.

(e) Place of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to a party for inspection and copying at the Board office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A party shall not be given custody of the documents or leave to remove the documents from the Board's offices pursuant to the requirements of this Rule other than by written agreement of the interested division. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) Copying Costs and Procedures

A party may obtain a photocopy of any documents made available for inspection. The party shall be responsible for the cost of photocopying. The respondent shall be given access to the documents at the Board's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) Failure to Make Documents Available – Harmless Error

In the event that a document required to be made available to a party pursuant to this Rule is not made available by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the party shall establish that the failure to make the document available was not harmless error.

> Note: The interested division's obligation under this Rule relates to documents obtained by that division. Documents located only in the files of other divisions or offices are beyond the scope of the Rule, except that documents located in the files of other divisions and that the interested division intends to introduce as evidence shall, for purposes of this Rule, be treated as if they have been obtained by the interested division and must therefore be made available under this Rule.

Rule 5423T. Production of Witness Statements

(a) Availability

Upon motion by any respondent in a disciplinary proceeding, the hearing officer may order that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce - Harmless Error

In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

(c) Definition of Statement

For purposes of this Rule, the term "statement" shall have the meaning set forth in 18 U.S.C. § 3500(e).

Rule 5424T. Accounting Board Demands and Commission Subpoenas

(a) Accounting Board Demands and Requests

In connection with any hearing ordered by the Board, a party may request the issuance of an accounting board demand of a registered public accounting firm or an associated person of such a firm, or an accounting board request of any other person. Such a demand or request may call for the attendance and testimony of a witness at the designated time and place of the hearing or for the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, an application for issuance of such a demand or request shall be made in writing and served on each party. A party whose application for such a demand or request has been denied or modified may not submit any other application seeking substantially the same testimony or other evidence specified in the denied application or excluded from an otherwise granted application.

(1) Unavailability of Hearing Officer

In the event that the hearing officer assigned to a proceeding is unavailable, any member of the Board, or other person designated by the Board for this purpose, may grant an application for the issuance of an accounting board demand or request. A party seeking such issuance may submit the application to the Secretary, who shall direct it to a person authorized to grant the request, deny the request, or grant the request with modifications.

(2) Signing May be Delegated

A hearing officer may authorize issuance of an accounting board demand, or an accounting board request, and may delegate the manual signing of the demand or request to any other person.

(3) Standards for Issuance

Where it appears that an application for an accounting board demand or request is reasonable in scope and is reasonably calculated to encompass, or lead to the discovery of, admissible evidence, the application shall be granted. If it appears that the accounting board demand or request sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, designed to seek irrelevant information, or sought for the purpose of harassment or delay, the application shall be denied. The hearing officer or other person ruling on the application may, in his or her discretion, as a condition precedent to the issuance of the demand or request, require the party seeking the demand or request to show the general relevance and reasonable scope of the testimony or other evidence sought. After consideration of all the circumstances, the hearing officer or other person ruling on the application may grant the application upon such conditions or with such modifications as fairness requires. In making the determination, the hearing officer or other person ruling on the application may inquire of the parties whether they will stipulate to the facts sought to be proved.

> Note: Whenever possible, the parties should explore the extent to which stipulations of fact may obviate the need for issuance of accounting board demands and requests to non-parties, and the hearing officer or other person ruling on an application for issuance of an accounting board demand or request should encourage the parties to reach such stipulations when possible.

(4) Witness Fees

A witness, other than a party, who is summoned to a Board proceeding pursuant to an accounting board demand, or an accounting board request, or who is deposed pursuant to Rule 5425, shall be paid his or her reasonable expenses by the party at whose instance the witness appears.

Rule 5425T. Depositions to Preserve Testimony for Hearing

(a) Procedure

Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

Note: Depositions under the Rules of Board Procedure are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not permitted for purposes of discovery.

(b) Required Finding When Ordering a Deposition

In the discretion of the Board or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, or otherwise unavailable, and that the taking of a deposition will serve the interests of justice.

(c) Procedure at Depositions

A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(d) Objections to Questions or Evidence

Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted in the transcript, but no person other than the hearing officer shall have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence during the deposition shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) Filing of Depositions

The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

Rule 5426T. Prior Sworn Statements of Witnesses in Lieu of Live Testimony

At a hearing, any person wishing to introduce a prior, sworn statement of a nonparty witness otherwise admissible in the proceeding, in lieu of live testimony may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of

the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement in lieu of live testimony may be granted if –

(a) the witness is dead;

(b) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(c) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(d) the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand; or,

(e) in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rules 5427. – 5439. [Reserved]

CONDUCT OF HEARINGS

Rule 5440T. Record of Hearings

(a) Recordation

All hearings shall be recorded and a written transcript thereof shall be prepared.

(b) Availability of a Transcript

Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings shall be available for purchase only by parties, provided, however, that any person compelled to testify at a hearing may purchase a copy of that person's own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or other submissions, or within such earlier time as directed by the Board or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Rule 5441T. Evidence: Admissibility

The Board or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Rule 5442T. Evidence: Objections and Offers of Proof

(a) Objections

Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Board, however, unless raised –

(1) pursuant to interlocutory review in accordance with Rule 5461;

(2) in a proposed finding or conclusion filed pursuant to Rule 5445; or

(3) in a petition for Board review of an initial decision filed in accordance with Rule 5460.

(b) Offers of Proof

Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 5202(b).

Rule 5443T. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 5444T. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding, a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, shall be determined by the Board or the hearing officer in each proceeding.

Rule 5445T. Post-hearing Briefs and Other Submissions

(a) At the end of the hearing in any proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500 in which an initial decision is to be issued, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which post-hearing briefs or other submissions are to be filed. Unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary –

(i) the party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing; and

(ii) the total period within which all such filings and any opposition and reply submissions are to be filed shall be no longer than 90 days after the end of the hearing.

Rules 5446. – 5459. [Reserved]

APPEALS TO THE BOARD

Rule 5460T. Board Review of Determinations of Hearing Officers

(a) Petition for Review of Initial Decision by Hearing Officers

Any party to a hearing may obtain Board review of an initial decision by filing a petition for review that –

(1) sets forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception; and

(2) is filed, in a proceeding instituted pursuant to Rule 5500, within 30 days after service of the initial decision on the petitioner or within 10 days after the filing of a petition for review by another party, whichever is later.

(b) Review on Board's Initiative

The Board may, on its own initiative, order review of any initial decision, or a portion of any initial decision, at any time before the initial decision becomes final pursuant to Rule 5204(d).

(c) De Novo Review

Based on a petition for review, or on its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper based on the record.

(d) Limitations on Matters Reviewed

Review by the Board of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 5462(a). On notice to all parties, however, the Board may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) Summary Affirmance

The Board may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Board.

Rule 5461T. Interlocutory Review

(a) Availability

The Board will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Board may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this Rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Board may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) Certification Process

A ruling submitted to the Board for interlocutory review shall be certified in writing by the hearing officer as appropriate for interlocutory review and shall specify the basis for certification. The hearing officer shall certify a ruling only if –

(1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that –

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(c) Proceedings Not Stayed

The filing of an application for interlocutory review or the grant of interlocutory review shall not stay proceedings before the hearing officer unless he or she, or the Board, shall so order. The Board will not consider the motion for a stay unless the motion has first been made to the hearing officer.

Rule 5462T. Briefs Filed with the Board

(a) Briefing Schedule Order

Upon a timely and valid petition for review, or upon its own timely motion to review an initial decision, other than review ordered pursuant to Rule 5469, the Board shall issue a briefing schedule order directing the parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs may be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board. The briefing schedule order shall be issued –

(1) at the time the Board orders review on its own initiative pursuant to Rule 5460(b), or orders interlocutory review on its own motion pursuant to Rule 5460; or

(2) within 21 days, or such longer time as provided by the Board, after –

(i) the last day permitted for filing a petition for review pursuant to Rule 5204(d);

(ii) certification of a ruling for interlocutory review pursuant to Rule 5461(c).

(b) Contents of Briefs

Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) Length Limitation

Opening and opposition briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Board.

Rule 5463T. Oral Argument Before the Board

(a) Availability

The Board, on its own motion or the motion of a party, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Board will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Board determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) Procedure

Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Board shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Board, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) Time Allowed

Unless the Board orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Board may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

Note: The term "side" is used in this Rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. If multiple parties have a common interest, they may constitute only a single side.

(d) Participation of Board Members

A member of the Board who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

Rule 5464T. Additional Evidence

Upon its own motion or the motion of a party, the Board may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Board. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Any other party may file a response to the motion within 5 days after the motion is filed, or such longer time as the Board may allow. The Board may accept or hear additional evidence, or it may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

Rule 5465T. Record Before the Board

The Board shall determine each matter on the basis of the record.

(a) Contents of the Record

In proceedings for final decision before the Board, the record shall consist of –

(1) all items part of the hearing record below in accordance with Rule 5202(a);

(2) any petitions for review, cross-petitions or oppositions; and

(3) all briefs, motions, submissions and other papers filed on appeal or review.

(b) Transmittal of Record to Board

Within 14 days after the last date set for filing briefs or such later date as the Board directs, the Secretary shall transmit the record to the Board.

(c) Review of Documents Not Admitted

Any document offered in evidence but excluded by the hearing officer or the Board and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Board on appeal but shall be transmitted to the Board by the Secretary if so requested by the Board. In the event that the Board does not request the document, the Secretary shall retain the document not admitted into the record until the later of –

(1) the date upon which the Board's order becomes final, or

(2) the conclusion of any Commission and judicial review of that order.

Rule 5466T. Reconsideration

(a) Scope of Rule

A party may file a motion for reconsideration of a final order issued by the Board.

(b) Procedure

A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Board may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided,

the grounds relied upon, and the relief sought. Except with permission of the Board, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Board.

Rule 5467. – 5499. [Reserved]

Part 5 – Hearings on Disapproval of Registration Applications

Rule 5500T. Commencement of Hearing on Disapproval of a Registration Application

The Board may commence a proceeding to determine whether to approve or disapprove a public accounting firm's application for registration when, based on review of an application for registration as a registered public accounting firm –

(a) the Board determines, pursuant to Rule 2106(b)(2)(ii), to provide the applicant with written notice of a hearing to determine whether to approve or disapprove the application; and

(b) within such period, as the Board permits, after the date of service of a notice of a hearing whether to approve or disapprove an application for registration pursuant to Rule 2106(b)(2)(ii), the public accounting firm served with such notice files with the Secretary a written request for a hearing date and a notice of appearance pursuant to Rule 5401(c), and includes with the request –

(1) a statement that the public accounting firm has elected not to treat the notice as a written notice of disapproval for purposes of Section 102(c) of the Act; and

(2) a statement describing with specificity why the public accounting firm believes that the Board should not issue a written notice of disapproval.

Rule 5501T. Procedures for a Hearing on Disapproval of a Registration Application

Proceedings instituted pursuant to Rule 5500 shall be subject to procedures as described in Parts 2 and 4 of Section 5 of the Board's Rules.

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

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any

comments it received on the proposed rules. 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 as they relate to the proposed Temporary Hearing Rules.

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

(a) Purpose

Section 102 of the Act prohibits accounting firms that are not registered with the Board from preparing or issuing, or playing a substantial role in the preparation or furnishing of, an audit report with respect to any issuer. Under Board rules previously approved by the Commission, the Board will not disapprove an application for registration without first giving the applicant an opportunity for a hearing. The purpose of the proposed temporary rules is to supply fair procedures and rules to govern the conduct of any such hearing. The proposed temporary rules consist of 41 rules and nine definitions. Each of the rules and definitions is discussed below.

Rule 1001 – Definitions

Rule 1001(a)(ix)T defines "accounting board demand" as a command to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term only to identify demands made upon registered public accounting firms and associated persons of such firms. Under the Act, the Board has authority to require those firms and persons to provide any testimony or documents sought by the Board in furtherance of its

responsibilities under the Act, and including in particular any testimony or documents that the Board considers relevant to an investigation.

Rule 1001(a)(x)T defines "accounting board request" as a request to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term to distinguish the Board's efforts to obtain documents and testimony from persons other than registered public accounting firms and their associated persons.

Rule 1001(c)(ii)T defines "counsel" as an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

Rule 1001(h)(i)T defines "hearing officer" to mean any person, other than a Board member or staff of the interested division, duly authorized by theBoard to preside at a hearing.

Rule 1001(i)(iv)T defines "interested division" as a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding. As a general matter, the interested division in a disciplinary proceeding will be the Division of Enforcement and Investigations, and the interested division in a hearing on disapproval of a registration application will be the Division of Registration and Inspections. The definition is adapted from Rule 101(a)(6) of the Commission's Rules of Practice.

Rule 1001(o)(ii)T defines "order instituting proceedings" as an order issued by the Board commencing a disciplinary proceeding.

Rule 1001(p)(iii)T defines "party" as the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

Rule 1001(p)(iv)T defines "person" as any natural person or any business, legal or governmental entity or association.

Rule 1001(s)(iii)T defines "Secretary" as the Secretary of the Board.

Rule 1002T – Time Computation

Rule 1002T describes the method by which the Board shall compute time for purposes of complying with deadlines in the Board's rules.

Rule 5200T – Commencement of Disciplinary Proceedings

Rule 5200T(b) provides for an appointment of a hearing officer by the Board as soon as practicable after issuance of the order instituting proceedings or after a registration applicant has requested a hearing pursuant to Rule 5500T(b). The rule is adapted from NASD Rule 9213(a). Under Rule 5200T(b), the Board shall notify the parties of the hearing officer's assignment. The hearing officer shall have authority to do all things necessary and appropriate to discharge his or her duties, including, but not limited to, the matters specified in Rule 5200T(b). The rule expressly subjects the hearing officer's authority to the limitations described in Rule 5402T (concerning hearing officer disqualification) and Rule 5403T (concerning *ex parte* communications).

Rule 5200T(c) provides that the Board will observe certain separation of functions principles. The rule provides that neither the staff of the Division of

Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel. In addition, the rule provides that 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.

With respect to proceedings that involve a common question of law or fact, Rule 5200T(d) provides that the Board or a hearing officer may, by order, consolidate the proceedings for hearing of any or all matters at issue in the proceedings. The rule is adapted from Rule 201 of the Commission's Rules of Practice. The rule provides that consolidation shall not prejudice any rights that any party may have under the Board's Rules and shall not affect the right of any party to raise issues that could have been raised in the absence of consolidation.

Rule 5201T – Notification of Commencement of Disciplinary Proceedings

Rule 5201T(c) provides that, in the case of a hearing on a registration application commenced under Rule 5500T, the notice of hearing shall state proposed grounds for disapproving the registration application.

Rule 5202T – Record of Disciplinary Proceedings

Rule 5202T(a) describes the material that shall make up the contents of the record in a disciplinary proceeding (Rule 5202T(a)(1)) and the contents of the record on disapproval of an application for registration (Rule 5202T(a)(2)). Under Rule 5202T(b), any document offered as evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be

considered part of the record but shall be maintained by the Secretary until all opportunities for Commission and judicial review have been exhausted or waived. Paragraphs (c)-(e) of Rule 5202T address the substitution of true copies for documents in the record, the preparation of the record and the certification of the record index, and the final transmittal of record items to the Secretary. The rule is adapted from Rules 350 and 351 of the Commission's Rules of Practice.

Rule 5203T – Public and Private Hearings

Under Rule 5203T, a hearing on disapproval of a registration application shall be nonpublic unless the Board orders otherwise. The rule essentially creates a presumption that a hearing on disapproval of a registration application will be non-public. A disapproval hearing will, by its nature, involve a firm that is not yet a registered firm and may well involve a record that includes confidential information submitted as part of the registration application. The rule reserves to the Board the flexibility to make the hearing public if warranted by unusual circumstances. In any event, if the Board decides, after a hearing, to disapprove the application, that decision, along with the reasons for the decision, will be made public according to the provisions of Section 105(d) of the Act.

Rule 5204T – Determinations in Disciplinary Proceedings

Rule 5204T(b) provides that, unless the Board orders otherwise, the hearing officer shall prepare an initial decision following a hearing. The rule provides that the initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and such other

information as the Board may require. The rule is adapted from Rule 360 of the Commission's Rules of Practice.

The note to Rule 5204T(b) sets out the Board's general expectations about the time frame within which a hearing officer should complete an initial decision in various types of cases. These time frames are nothing more than the Board's general expectations and do not create any right in any person to have an initial decision prepared within any particular period of time.

Rule 5204T(c) governs the hearing officer's filing of the initial decision with the Secretary and the Secretary's service of the initial decision on the parties.

Rule 5204T(d) provides the circumstances in which an initial decision of a hearing officer becomes the final decision of the Board as to a party. The rule is adapted from Rule 360(d) of the Commission's Rules of Practice. Rule 5204T(d)(1) provides that the initial decision becomes the Board's final decision as to a party upon issuance by the Secretary of a notice of finality. Rule 5204T(d)(2) provides that the Secretary shall issue the notice of finality no later than twenty days after the lapsing of the time period for filing a petition for Board review (as described in Rule 5460T), unless one of the two conditions described in Rule 5204T(d)(3) has occurred. Rule 5204T(d)(3) provides that the Secretary shall not issue a notice of finality as to any party who has filed a timely petition for Board review or with respect to whom the Board, on its own motion, has ordered review of the initial decision pursuant to Rule 5460T(b).

Rule 5205T – Settlement of Disciplinary Proceedings Without a Determination After Hearing

Rule 5205T governs certain matters related to possible settlement of disciplinary proceedings. The rule is adapted from Rule 240 of the Commission's Rules of Practice.

Rule 5205T provides that any person who is or is to be a party to a disciplinary proceeding may at any time propose in writing an offer of settlement. The rule imposes requirements for the content of the offer, and requires that it be signed by the person making the offer, not by counsel.

Rule 5205T(c)(1) requires that the Division Director the offer to the Board along with a recommendation concerning the offer, except that, if the recommendation is unfavorable, the Director shall not present the offer to the Board unless the person making the offer so requests.

Rule 5205T(c)(2)-(3) set out various matters that the person making the offer must waive before the Board will consider the offer, including waiver of rights to hearings, rights to proposed findings of fact and conclusions of law, rights to proceedings before and an initial decision by a hearing officer, rights to post-hearing procedures, rights to judicial review, rights to have Board and Board staff observe separation of functions principles, and rights to claim bias or prejudgment by the Board based on consideration of or discussions concerning the settlement offer.

Rule 5205T(c)(4) provides that if the Board rejects the offer, the offer will be deemed withdrawn and will not constitute a part of the record. Rule 5205T(c)(4) further provides that rejection of the offer will not affect the continued

validity of waivers of rights to claim bias or prejudgment on the basis of discussions concerning the settlement offer.

Rule 5205T(c)(5) provides that Board acceptance of an offer will occur only upon the issuance of findings and an order by the Board.

A note to Rule 5205T points out that in hearings on disapproval of registration, settlement offers will be handled by the Director of Registration and Inspections.

Rule 5400T – Hearings

Rule 5400T provides for hearings to be held only upon order of the Board and to be conducted in a fair, impartial, expeditious and orderly manner. The rule is adapted from Rule 200 of the Commission's Rules of Practice.

Rule 5401T – Appearance and Practice Before the Board

Rule 5401T provides that a person may appear on his own behalf before the Board or may be represented by counsel. Rule 5401T further provides that a member of a partnership may represent the partnership and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. Rule 5401T(c) imposes certain procedural requirements related to representation and withdrawal.

Rule 5402T – Hearing Officer Disqualification and Withdrawal

Rule 5402T allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402T also provides for appointment of a replacement hearing officer in the event of withdrawal or

disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233.

Rule 5403T – *Ex Parte* Communications

Rule 5403T prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The rule also prohibits a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules. Rule 5403T(b) extends that restriction on *ex parte* communications not only to a party (including the interested division) but also to any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing,

Rule 5404T – Service of Papers by Parties

Rule 5404T requires service of papers on each party in a manner calculated to bring the paper to the attention of the party served.

Rule 5405T – Filing of Papers With the Board: Procedure

Rule 5405T governs procedures for filing papers with the Board.

Rule 5406T – Filing of Papers: Form

Rule 5406T governs the form of papers to be filed with the Board.

Rule 5407T – Filing of Papers: Signature Requirement and Effect

Rule 5407T requires every paper filed to be signed either by the party, if the party represents himself or herself, or by counsel if the party is represented by counsel. Because the Board expects most papers to be filed electronically, a

note to the rule states that the signature should be scanned into an electronic document where practicable, but that otherwise certain indicia of electronic signature will suffice.

Rule 5408T – Motions

Rule 5408T describes procedures and length limitations related to motions and supporting briefs.

Rule 5409T – Default and Motions to Set Aside Default

Rule 5409T describes the circumstances that shall constitute a default and the procedure for seeking to set aside a default. The rule is adapted from Rule 155 of the Commission's Rules of Practice.

Rule 5410T – Extra Time for Service by Mail

Rule 5410T allows an additional three days, with respect to any computation of time, for service made by mail.

Rule 5411T – Modifications of Time, Postponements and Adjournments

Rule 5411T provides that the Board maintains discretion, except as otherwise provided by law, to adjust the time limits prescribed by the rules or to postpone or adjourn any hearing.

Rule 5420T – Leave to Participate to Request a Stay

Rule 5420T provides a procedure by which certain entities may seek a stay of a hearing. The entities that may seek such a stay would have been the Commission, the United States Department of Justice or any United States Attorney's Office, any criminal prosecutorial authority of a state or political

subdivision of a state, and an appropriate state regulatory authority may seek a stay.

Under Rule 5420T, an authorized representative of any such entity may seek leave to participate on a limited basis to request a stay. Rule 5420tTprovides that a stay shall be granted upon a showing that a stay is necessary to protect an ongoing Commission investigation, and that a stay shall otherwise be favored upon a showing that it is in the public interest or for the protection of investors.

Rule 5421T – Answer to Allegations

Rule 5421T governs the filing of answers to orders instituting proceedings. A party may file an answer in any matter, but is not required to file an answer unless ordered to do so in the order instituting proceedings.

Rule 5422T – Availability of Documents for Inspection and Copying

Rule 5422T governs the obligations of Board staff to make documents available to a party for inspection and copying. Paragraphs (a) through (c) of Rule 5422T are the core provisions for determining what documents the staff must make available. Paragraph (a) describes generally the documents that the staff must make available to a respondent. Paragraph (b) limits paragraph (a) by describing categories of documents that the staff may withhold, subject to an overriding obligation not to withhold material exculpatory evidence. Paragraph (c) prescribes procedures the staff must follow when withholding certain categories of documents, and procedures for a hearing officer to determine whether withholding is appropriate.

Rule 5422T(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500T. Rule 5422T(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the Division in connection with the registration application prior to the notice of hearing.

Rule 5422T(a) includes specific exceptions for, and must be read in conjunction with, Rule 5422T(b), which describes four categories of documents that the Division may withhold from a respondent even if Rule 5422T(a) would otherwise require the Division to make the document available. Moreover, withholding documents may trigger the procedural requirements of Rule 5422T(c). We therefore individually address each of the four categories of documents that may be withheld under Rule 5422T(b), and any Rule 5422T(c) procedures related to withholding those documents.

Under Rule 5422T(b)(1)(i), the Division need not make available any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration. Withholding such documents does not trigger any procedural requirements under Rule 5422T(c).

Under Rule 5422T(b)(1)(ii), the Division need not make available any other document that, while not encompassed within the first category, is nevertheless protected by a privilege or by the attorney work product doctrine.

This category would include, for example, documents that were privileged in the hands of the person who supplied them to the Board, but who supplied them pursuant to an understanding that doing so would not otherwise waive the privilege. As to this category of withheld documents, Rule 5422T(c)(1) requires the Division to supply to the hearing officer and each respondent a log providing all of the same information that Rule 5106 requires a person to submit when asserting a privilege against production to the Board.[1/]

Under Rule 5422T(b)(1)(iii), the Division need not make available any document that would disclose the identity of a confidential source. The rule provides, however, that the staff may not withhold a document on this basis if doing so results in withholding material exculpatory evidence. Rule 5422T(c)(2) requires the Division to provide the hearing officer with a list of any documents withheld to protect the identity of a confidential informant. The rule requires the Division to provide the same list to each respondent, although the staff may redact as much information as necessary from that list (including, in appropriate circumstances, all information) to protect the interests related to the Division's reason for withholding the document. The hearing officer, in his or her discretion, may review any such document in camera to assess the grounds for withholding it and to assess whether it includes material exculpatory evidence.

[1/] Rule 5106, adopted by the Board on September 29, 2003, is currently pending before the Commission for approval and will not take effect unless the Commission approves it. If Rule 5422T(c)(1) takes effect on a temporary basis before Rule 5106 takes effect, the portions of Rule 5106 that are incorporated by reference in Rule 5422T(c)(1) shall be given effect as part of Rule 5422T(c)(1) as fully as if they were expressly restated therein.

Under Rule 5422T(b)(1)(iv), the Division need not make available any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown. For example, the staff might have documents supplied by a foreign regulator under a confidentiality agreement. If the staff does not intend to use them, the "good cause" exception allows the staff to withhold them to honor the confidentiality agreement. Again, however, the good cause exception does not allow the staff to withhold a document that contains material exculpatory evidence. Rule 5422T(c)'s procedures, described above with respect to confidential informant documents, apply in the same fashion to documents withheld as irrelevant or otherwise for good cause.

In addition to the procedural protections described above, Rule 5422T(b)(2) provides an over-arching restriction on what the Division may withhold. It provides that nothing in paragraph (b) authorizes the interested division to withhold non-privileged documents that contain material exculpatory evidence.

Rule 5422T(d) governs the time period in which the staff must make the documents available. Under the rule, the staff must make the documents available within 14 days of the institution of proceedings under Rule 5500.

Rule 5422T(e) provides that the staff shall make the documents available at the Board's office where the documents are normally maintained, or at such other place as the parties agree upon in writing. Rule 5422T(d) further provides

that, except as subject to any specific contrary agreement with the staff, a party shall not have custody of the documents and shall not remove the documents from the Board's offices, though the party may make and retain copies of the documents. Rule 5422T(f) provides that a party wishing to make copies of the documents must bear the cost of copying.

Rule 5422T(g) addresses any failure by the interested division to make available any document that these rules required it to make available. The rule provides that, in that event, no person shall be entitled to a rehearing or redecision in a matter already heard or decided unless that person first establishes that the failure to make the document available did not constitute harmless error.

A note following Rule 5422T points out that the obligations of the interested division under this rule extend only to documents obtained by that division, and that this Rule does not require the interested division to make available documents located only in the files of other divisions or offices. The proviso, however, is not intended to relieve the interested division of the obligation to make available any such document that the division knows of and intends to introduce as evidence. Any such document should be treated, for purposes of Rule 5422T, just as if it were physically located in the division's files.

Rule 5423T – Production of Witness Statements

Rule 5423T(a) provides that a respondent may move that the interested division produce any statement of a person, called or to be called as a witness by the division, that pertains or is expected to pertain to his or her direct testimony

and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. The hearing officer shall have authority to grant such a motion and require production of any such statement. Rule 5423T(b) provides, however, that the interested division's failure to produce any such statement shall not be grounds for rehearing or redecision of a matter already heard or decided unless the respondent first establishes that the failure to produce the statement was not harmless error. The rule is based on Rule 231 of the Commission's Rules of Practice.

Rule 5424T – Accounting Board Demands

Rule 5424T provides for mechanisms by which any party may seek to secure testimony or evidence relevant to a proceeding. Rule 5424T(a) describes procedures by which any party may seek to have an accounting board demand served on any registered public accounting firm or associated person of such a firm, or seek to have an accounting board request served on any other person. Under the rule, the party must make a request to the hearing officer for issuance of the accounting board demand or accounting board request. In the event of the hearing officer's unavailability, the party may present its request, through the Secretary, to any member of the Board, or any other person designated by the Board to issue such demands and requests.

The application for an accounting board demand or accounting board request may be denied, or may be granted with modifications, if it is unreasonable, oppressive, excessive in scope, or unduly burdensome. The rule provides that a person whose application for an accounting board demand or

accounting board request has been denied or modified may not make the same application to another person and may not apply to the Board for a Commission subpoena covering the same testimony, documents, or information as the denied application covered or as was excluded by modification in granting an application. Rule 5424T(a) also provides that a party who applies for an accounting board demand or accounting board request to summon a witness shall pay the witness's reasonable expenses.

Rule 5425T – Depositions to Preserve Testimony for Hearing

Rule 5425T provides procedures by which a party may seek a deposition for the purpose of preserving for a hearing the testimony of a person who may be unavailable to appear at the hearing. Rule 5425T does not provide for depositions taken for the purpose of discovery. The rule is adapted from Rule 233 of the Commission's Rules of Practice.

Under Rule 5425T(a), a party seeking to take a deposition to preserve testimony must make a written motion setting out the reasons why the deposition is necessary and specifically including the reasons that the party believes the witness will be unable to testify at the hearing. The motion must also identify the witness, the matters on which the party intends to question the witness, and the proposed time and place of the deposition. Under Rule 5425T(b), the hearing officer may grant the motion if the hearing officer finds that the witness will likely give testimony material to the proceeding, that it is likely the witness will be unable to appear at the hearing because of age, sickness, infirmity, imprisonment or other disability, or will otherwise be unavailable, and that the taking of the

deposition will serve the interests of justice. Rules 5425T(c)-(e) describe certain procedures governing any such deposition allowed by the hearing officer.

Rule 5426T – Prior Sworn Statements of Witnesses in Lieu of Live Testimony

Rule 5426T provides procedures by which a party may introduce into evidence a witness's prior sworn statement in lieu of live testimony by the witness. Rule 5426T is not a limitation on any party's ability to introduce a prior sworn statement with respect to a witness who appears in person and testifies (for purposes of impeachment, for example). But Rule 5426T does limit the circumstances in which a party may introduce a prior sworn statement in lieu of live testimony by the witness.

Rule 5426T identifies five circumstances in which the hearing officer may grant a motion to introduce a prior sworn statement in lieu of live testimony: (1) if the witness is dead, (2) if the witness is outside of the United States, unless it appears that the witness's absence from the country was procured by the party offering the prior sworn statement, (3) if the witness is unable to attend because of age, sickness, infirmity, imprisonment or other disability, (4) if the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand, or (5) if, in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In granting a motion to introduce a prior sworn statement, a hearing officer has the discretion, under Rule 5426T, to require that all relevant portions of the statement be included or to exclude portions of the statement not relevant to the proceeding.

Rule 5440T – Record of Hearings

Rule 5440T describes procedures related to the creation, correction, and availability of hearing transcripts.

Rule 5441T – Evidence: Admissibility

Rule 5441T provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. The standard in Rule 5441T is based on the Administrative Procedures Act.[2/] In addition, the same standard is used in the SEC's Rules of Practice.[3/] By using this phrase in Rule 5441T, the Board intends for evidentiary issues in PCAOB hearings to be addressed in a generally similar manner to SEC administrative hearings, and the administrative hearings of most other administrative agencies. Rule 5441T is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility.[4/] In particular, the three bases in the rule -- irrelevance, immateriality, and undue repetition -- are not the only permissible bases on which a hearing officer may exclude evidence under administrative practice. Nor does the standard in Rule 5441T preclude a hearing officer from

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[2/] 5 U.S.C. 556(c)(3) and (d).

[3/] See SEC Rule of Practice 320, 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.")

[4/] See, e.g., Commission Opinion: Wheat, First Securities, Inc.; Rel. No. 34-48378, (August 20, 2003) (holding that hearsay is admissible in an SEC administrative hearing, but noting that the "record shows the probative and reliable nature of this evidence").

referring to principles from the Federal Rules of Evidence or other authoritative sources in exercising his or her discretion to resolve evidentiary issues.[5/]

Rule 5442T – Evidence: Objections and Offers of Proof

Rule 5442T(a) provides that any objections must be made on the record and must be in short form, stating the grounds relied upon. Under Rule 5442T(a) any exception to a hearing officer's ruling on an objection need not be noted at the time of the ruling but will be deemed waived on appeal to the Board unless the exception was raised (1) on interlocutory review under Rule 5461T, (2) in a proposed finding or conclusion filed under Rule 5445T, or (3) in a petition for Board review of an initial decision filed under Rule 5460T. Rule 5442T(b) provides that when evidence is excluded from the record, the party offering the evidence may make an offer of proof which shall be included in the record. The excluded material itself would be retained under Rule 5202T(b).

Rule 5443T – Evidence: Presentation Under Oath or Affirmation

Rule 5443T provides that witnesses at a hearing shall testify under oath or affirmation.

Rule 5444T – Evidence: Rebuttal and Cross-Examination

Rule 5444T provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall determine the scope and form of evidence, rebuttal

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[5/] See id. (explaining that same result would have been reached had the administrative law judge applied the Federal Rules of Evidence).

evidence, and cross-examination in any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

Rule 5445T – Post-hearing Briefs and Other Submissions

Rule 5445T provides procedures relating to the submission of post-hearing briefs and other submissions.

Rule 5460T – Board Review of Determinations of Hearing Officers

Rule 5460T concerns Board review of initial decisions. Under Rule 5460T, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 30 days of an initial decision in proceedings on disapproval of a registration application. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

Also under Rule 5460T(a), if one party submits a timely petition for review, any other party then has an additional ten days to submit its own petition for review, even if its petition raises different issues than those raised by the first party to submit a petition. The purpose of this rule is to avoid the unnecessary expenditure of Board resources in cases where no party would appeal if it knew that the other party would not appeal, but in which one or more parties nevertheless appeal because of a concern that failing to appeal will deprive it of the opportunity to raise its issues in any appeal lodged by another party. Under Rule 5460T(a), no party need guess about the other party's intentions, and no

party sacrifices anything by waiting to see whether another party files a timely petition for review.

Rule 5460T(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204T(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460T(c)-(e) set out procedural matters related to Board review.

Rule 5461T – Interlocutory Review

Rule 5461T concerns Board interlocutory review of hearing officer rulings. Under Rule 5461T(a), the Board will not grant interlocutory review absent extraordinary circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461T(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461T(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise

ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. § 1292(b).

Rule 5462T – Briefs Filed with the Board

Rule 5462T describes procedural requirements related to briefs and the filing of briefs. The rule is adapted from Rule 450 of the Commission's Rules of Practice.

Rule 5463T – Oral Argument Before the Board

Rule 5463T concerns oral argument before the Board. Under Rule 5463T(a), the Board may order oral argument, with or without the motion of a party, on any matter. The rule provides that, in general, motions for oral argument will be granted unless exceptional circumstances make oral argument impractical or inadvisable. Rules 5463T(b)-(c) provide for procedures relating to oral argument. Rule 5463T(d) provides that a member of the Board who is not present for oral argument may nevertheless participate in the Board's decision as long as the Board member reviews a transcript of the argument before participating in the decision.

Rule 5464T – Additional Evidence

Rule 5464T provides that the Board may, upon its own motion or the motion of a party, allow the submission of additional evidence in connection with the Board's review of an initial decision. The rule is adapted from Rule 452 of the Commission's Rules of Practice.

Rule 5465T – Record Before the Board

Rule 5465T provides that the Board shall determine each matter on the basis of the record and provides certain requirements concerning the record. The rule is adapted from Rule 460 of the Commission's Rules of Practice.

Rule 5466T – Reconsideration

Rule 5466T provides procedures by which a party may seek reconsideration of a Board decision. The rule is adapted from Rule 470 of the Commission's Rules of Practice.

Rule 5469T – Board Consideration of Actions Made Pursuant to Delegated Authority

Rule 5469T provides procedures relating to Board consideration of petitions for review of actions made pursuant to authority delegated by the Board. Rule 5469T(a) provides that the Board may act summarily on the basis of the petition, or on the basis of the petition and any staff response, or may require additional statements in support of or opposition to the petition. Rule 5469T(b) provides that the effect of any staff action would not be stayed pending any petition for review of that action.

Rule 5500T – Commencement of Hearing on Disapproval of a Registration Application

Rule 5500T describes the procedure relating to the commencement of a Board adjudication proceeding to consider an application for registration. Under the Board's registration rules, if the Board is unable to make the determination necessary to approve a registration application, the Board will provide the

applicant with notice of a hearing. Rule 5500T provides the procedures through which such a proceeding would be commenced.

Specifically, Rule 5500T provides that a proceeding would commence after the Board provides a notice of hearing under Rule 2106(b)(2)(ii) and the applicant timely files a request for a hearing date and notice of appearance, rather than opting to treat the Board's notice of hearing as a denial of the application. Under Rule 5500T(b), a request for hearing must include a statement that the applicant has elected not to treat the notice of hearing as a disapproval of its application and a statement describing with specificity why the applicant believes that the Board should not disapprove the application.

Rule 5501T – Procedures for a Hearing on Disapproval of a Registration Application

Rule 5501T provides that proceedings commenced pursuant to Rule 5500T are subject to the procedures set out in Parts 2 and 4 of Section 5 of the Board's rules.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed temporary rules supply procedures for the conduct of fair hearings. Moreover, the proposed temporary rules would apply

only in the context of a hearing that an applicant for registration elects, at its option, to have.

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

The Board published the Enforcement Rules, including the rules that constitute the Temporary Hearing Rules, for public comment in PCAOB Release No. 2003-012 (July 28, 2003). A copy of PCAOB Release No. 2003-012 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at www.pcaobus.org. The Board received 17 written comments. The Board has clarified and modified certain aspects of the rules that constitute the Temporary Hearing Rules in response to comments it received, as discussed below.

The Board proposed to define the term "hearing officer" to include a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing. Several commenters expressed the view that neither Board members nor staff of the interested division should ever serve as hearing officers. We never intended to permit staff of the interested division to serve as hearing officers, and we have revised the rule to exclude that possibility. Nor did we intend to provide for a Board member to serve as a hearing officer except in an extraordinary situation, and we are now persuaded that the rule should exclude that possibility as well. In general, we intend to rely on a corps of qualified persons whose service to the Board is strictly limited to the role of hearing officer.

We may rely on consultants for this purpose, or we may employ a staff of hearing officers, or we may rely on a combination of the two.

Rule 5200T(c) provides that the Board will observe certain separation of functions principles. The proposed rule provided that any Board employee or agent engaged in investigative or prosecutorial functions for the Board in a proceeding could not, in that same proceeding or a factually related proceeding, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. One commenter suggested that this rule should clearly exclude all enforcement personnel from participating in the adjudication of a disciplinary proceeding, whether or not they had an investigative or prosecutorial role in the matter. We are persuaded that this represents a good policy choice and we have revised the rule accordingly. The final rule provides that neither the staff of the Division of Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel.

Rule 5401T provides that a person may appear on his own behalf before the Board or may be represented by counsel and imposes certain procedural requirements related to representation and withdrawal. The proposed rule provided that an individual's withdrawal from representation of a party would be permitted only with the approval of the Board or the hearing officer. One commenter suggested that it would be helpful if the rules would enumerate grounds that would be adequate for withdrawal. Other commenters suggested

that the rules should provide that permission to withdraw would not be unreasonably withheld. One commenter suggested that a party's request to replace counsel (as distinct from counsel's request to withdraw) should not require approval.

We are sensitive to the importance of counsel being free to withdraw in appropriate circumstances, and the importance of a party being free to change counsel in appropriate circumstances. We are also mindful of the ways in which an ostensible desire to withdraw or to change counsel can be used to delay or disrupt proceedings. To provide some assurance of the limited scope within which we intend for the Board or hearing officer to withhold permission to withdraw, we have adopted the suggestion of those commenters who urged that the rule provide that permission to withdraw would not be unreasonably withheld.

Rule 5402T allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402T also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233. Commenters suggested that the rule should provide for a right of immediate interlocutory appeal to the Board from a hearing officer's denial of a recusal motion. One commenter stated that this was of particular importance given the possibility that Board staff, including enforcement staff, might be assigned to serve as hearing officers.

As discussed earlier, we have revised the definition of "hearing officer" to provide that neither a Board member nor any staff of the interested division will serve as a hearing officer. We decline to create a special right of interlocutory Board review in every case of a denied recusal motion. The interlocutory appeal process, governed by Rule 5461T, allows a party to request that the hearing officer certify his or her recusal ruling for interlocutory review. The rule requires that the hearing officer should certify the ruling if immediate review of the order may materially advance the completion of the proceeding. Given that a reversible denial of a recusal motion could substantially delay completion of the proceeding by eventually requiring a complete re-hearing before a different hearing officer, we expect hearing officers to give careful attention to whether that standard for certification has been met with respect to any ruling denying a recusal motion.

One commenter suggested that the rule should provide that, if a hearing officer is replaced, the parties should have a right to move that certain testimony be reheard so that the new hearing officer may judge credibility. We believe that the rules as proposed and adopted are flexible enough to accommodate such a motion and to leave the decision within the discretion of the new hearing officer.

Rule 5403T prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The proposed rule also prohibited a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's

rules. Commenters suggested that the restriction should extend beyond the interested division to any Board staff that has had substantial involvement in a matter. We have revised Rule 5403T(b) to impose the restriction not only on a party (including the interested division) but also on any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing,

Rule 5422T(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500T. Rule 5422T(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the Division in connection with the registration application prior to the notice of hearing, and specifies the categories of documents that the Division may withhold from production. In response to comments, we have revised the proposed rule to provide more clearly that nonprivileged documents that include material, exculpatory evidence may not be withheld even if they otherwise fall into one of the categories of documents that may be withheld. In response to other comments, we have revised the rule to require the Division to supply a log of certain privileged documents and lists of other withheld documents.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 35 days of the date of publication of this notice in the *Federal Register* or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the Temporary Hearing Rules, including whether the proposed rules are consistent with the Act and the securities laws or are necessary or appropriate in the public interest or for the protection of investors. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rules that are filed with the Commission, and all written communications relating to the proposed rules 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 inspection and copying in the Commission's Public Reference Room. All submissions should refer to File No. PCAOB-2003-06 and should be submitted within [insert date 30 days from the date of publication in the Federal Register].

By the Commission.

Secretary

PCAOB
Public Company Accounting Oversight Board

1666 K Street, N.W.
Washington, DC 20006
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PROPOSED RULES ON INVESTIGATIONS AND ADJUDICATIONS	PCAOB Release No. 2003-012 July 28, 2003 PCAOB Rulemaking Docket Matter No. 005

Summary: The Public Company Accounting Oversight Board ("Board" or "PCAOB") has proposed rules on investigations and hearings in disciplinary proceedings, pursuant to Section 105 of the Sarbanes-Oxley Act of 2002 ("Act"), and hearings on registration applications pursuant to Section 102 of the Act. The proposal consists of 64 rules (PCAOB Rules 5000 through 5501), plus certain definitions that would appear in Rule 1001. The Board invites public comment on the proposed rules and will consider all comments received, modify its proposal as it deems appropriate, and submit final rules to the Securities and Exchange Commission ("Commission") for approval pursuant to Section 107 of the Act. The Board's rules will not take effect unless and until approved by the Commission.

Public Comment: Interested persons may submit written comments to the Board. Such comments should be sent to Office of the Secretary, PCAOB, 1666 K Street, N.W., Washington, D.C. 20006-2803. Comments may also be submitted by e-mail to comments@pcaobus.org or through the Board's Web site at www.pcaobus.org. All comments should refer to PCAOB Rulemaking Docket Matter No. 005 and should be received by the Board no later than 5:00 PM (EDT) on August 18, 2003.

Board
Contacts: Samantha Ross, Chief of Staff (202/207-9093; rosss@pcaobus.org); Michael Stevenson, Associate General Counsel (202/207-9054; stevensonm@pcaobus.org).

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The Board has proposed, and is seeking comment on, rules relating to investigations and adjudications. Section 105 of the Act grants the Board broad investigative and disciplinary authority over registered public accounting firms and persons associated with such firms. To implement this authority, Section 105(a) directs the Board to establish, by rule, fair procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms.

Under the proposed rules, the Board and its staff may conduct investigations concerning any acts or practices, or omissions to act, by registered public accounting firms and persons associated with such firms, or both, that may violate any provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. The Act provides the Board authority to require registered public accounting firms and their associated persons to cooperate with Board investigations. The Act also permits the Board to seek information from other persons, including clients of registered firms.

When violations are detected, the Board will provide an opportunity for a hearing, and in appropriate cases, impose sanctions designed to prevent a repetition and to enhance the quality and reliability of future audits. These sanctions may include temporarily or permanently prohibiting a firm or associated person from participating in audits of public companies or from being associated with a registered public accounting firm. Sanctions may also require special remedial measures, such as training, new quality control procedures, and the appointment of an independent monitor.

The Board may also hold hearings on registration applications, pursuant to Section 102 of the Act. Under the Board's registration rules, if the Board is unable to determine that a public accounting firm has met the standard for approval of an application, the Board may provide the firm with a notice of a hearing, which the firm may elect to treat as a written notice of disapproval for purposes of making an appeal to

the Commission under Section 107. If such a firm chooses to request a hearing, the Board would, in appropriate circumstances, afford the firm a hearing pursuant to the proposed rules.

The proposed rules on investigations and adjudications consist of 64 rules (PCAOB Rules 5000 through 5469 and 5500 through 5501), plus certain definitions that would appear in Rule 1001. Appendices 1 and 2 to this release contain, respectively, the text of these proposed rules and a section-by-section analysis of the rules. Section A of this release provides an overview of the operation of the proposed rules. Section B of this release requests comments and describes how they may be submitted to the Board.

A. Operation of the Proposed Rules on Investigations and Adjudications

1. Rules on Inquiries and Investigations

Section 105(b)(1) of the Act provides the Board the authority to conduct investigations relating to the conduct and practices of registered public accounting firms and their associated persons. The Board's rules implement that authority by providing for two types of Board investigative matters – informal inquiries and formal investigations. Proposed Rules 5100 through 5112 would provide for the Board and its staff to undertake such matters.

a. Informal Inquiries

Under proposed Rule 5100, the staff of the Board would be authorized to undertake informal inquiries, without a formal vote of the Board. Informal inquiries may be based on matters uncovered during inspections, matters brought informally to the attention of the Board's staff by other regulators, informants, members of the public or news reports, among other things. In an informal inquiry, the staff may request information from, or interview, any person, including registered public accounting firms and their clients, and associated persons and employees of such entities.[1/] Decisions to open or close such inquiries, or to recommend that the Board authorize a formal investigation into the same matter, will be made by the Board's Division of Enforcement and Investigations.

[1/] See Rule 5100(b).

b. Formal Investigations

Section 105(b)(2) of the Act authorizes the Board, in conducting investigations relating to the conduct of registered public accounting firms and persons associated with such a firm, to –

- Require the testimony of the firm, or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

- Require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof that the Board considers relevant or material to the investigation, and to inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied; and

- Request testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to a Board investigation, with appropriate notice.

When it appears that a violation of any provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports or the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, may have occurred, the Board may, by a vote of the Board, issue an order of formal investigation.[2/] Such an order will empower members of the Board's staff to issue written demands or requests for testimony or production of documents (an "accounting board demand" or an "accounting board request") to any person pursuant to Section 105(b)(2), to the extent the information sought is relevant to the matters described in the Board's order of formal investigation.[3/] While the proposed rules would not delegate the power to open and close formal investigations to the staff, they would provide for the

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[2/] See Rule 5101(a).

[3/] See Rule 5101(a)(2).

Board's issuance of orders authorizing the staff to issue accounting board demands and requests once an investigation has been opened.[4/]

Proposed Rules 5102 through 5105 would implement the Board's authority under Section 105(b)(2) of the Act to seek testimony and documents. Specifically, Rule 5102 provides for the taking of testimony pursuant to an accounting board demand. Among other things, Rule 5102 provides for appropriate notice of an accounting board demand and for testimony to be taken on the record and under oath or affirmation. Board investigations will not be public. Accordingly, proposed Rule 5102 also identifies those persons who may be present in Board examinations, and it excludes all persons other than the person being examined and his or her counsel, the Board and its staff, a court reporter, and in appropriate circumstances, such other persons as the Board or its staff permit.[5/] Rule 5103 provides for accounting board demands to require the production of audit workpapers and other documents by registered public accounting firms and persons associated with such firms, and Rule 5104 provides for a Board examination of the books and records of any registered public accounting firm or associated person to verify the accuracy of any documents or information produced pursuant to Rule 5102 or Rule 5103. Failure to comply with an accounting board demand, or any other refusal to cooperate with a Board investigation, may result in the commencement of a disciplinary proceeding on noncooperation with an investigation, after which a registered public accounting firm or person associated with such a firm may be subject to sanction.[6/]

As a corollary, proposed Rule 5105 would provide for accounting board requests for testimony or production of documents from persons not associated with a registered public accounting firm. A person's failure to comply with an accounting board request

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[4/] See Rule 5101(b).

[5/] See Rule 5102(c)(4). In no event, however, shall a person other than the deponent who has been, or is reasonably likely to be, examined in the investigation be permitted to be present. This provision is consistent with attorney ethics rules. See, e.g., Code of Prof. Responsibility (New York) DR 5-102 (Lawyers as Witnesses).

[6/] See Rule 5110. In order to encourage efficient and thorough investigations, proposed Rule 5110 provides for certain special and expedited procedures to determine whether a sanction for noncooperation with an investigation is appropriate.

may result in the Board seeking a Commission subpoena for the requested testimony, documents or other information, pursuant to proposed Rule 5111. [7/]

Proposed Rule 5106 would set forth a framework for the assertion of a claim of privilege as an objection to an accounting board demand. This rule would require the recipient of an accounting board demand to identify the nature of the privilege and to provide a privilege log, as is typically required in federal courts and other tribunals.[8/] Consistent with Section 105(b)(5) of the Act, proposed Rule 5108 provides for confidential treatment of investigatory records. Under Section 105(b)(5) of the Act, confidential documents described in Rule 5108 "shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the federal government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with" a disciplinary proceeding under Section 105(c) of the Act.

Proposed Rule 5109 provides for certain rights of witnesses in inquiries and investigations, including a right to review an order of formal investigation, a right to be represented by counsel, a right to inspect and copy the official transcript of one's own testimony, and a right to submit to the Board a written statement setting forth one's interests and positions in regard to the subject matter of the investigation.

Finally, proposed Rule 5112 would provide for coordination between the Board and the Commission and for referring investigations to the Commission, and as directed by the Commission, to the Attorney General of the United States or one or more states, or any other appropriate state regulatory authority.

[7/] Neither a failure to comply with a request, nor a request itself, is, however, a prerequisite to the Board seeking a Commission subpoena. The Board may seek a Commission subpoena at any time, with or without notice to the person to whom the Board seeks to direct the subpoena.

[8/] See, e.g., Local Civil Rule 26.2 of the Southern District of New York. Rule 5107 also sets forth uniform definitions for use in accounting board demands and requests.

2. Rules on Disciplinary Proceedings

Most of the Board's disciplinary proceedings will likely involve apparent violations of the securities laws, or of the Board's rules and professional standards, that are discovered as a result of Board inspections or investigations. The Board's disciplinary process, however, will also address two other situations – the failure of registered public accounting firms and their associated persons to cooperate with Board investigations and the failure of registered public accounting firms or their supervisory personnel reasonably to supervise associated persons who have committed violations.

Proposed rules 5200 through 5207 would govern the Board's disciplinary proceedings. Specifically, proposed Rule 5200 would codify in the Board's rules the three types of disciplinary proceedings the Board will conduct, as described above. Proposed Rule 5201 would provide for the Board to issue an order instituting proceedings, providing notice to registered firms or associated persons subject to such proceedings of the nature of the allegations against them. In most cases, as soon as practicable after the Board has issued an order instituting proceedings, the Secretary of the Board will assign a hearing officer to preside over the proceeding.[9/] Consistent with Section 105(c) of the Act, proposed Rule 5202 provides for a record of every hearing to be kept, and proposed Rule 5203 provides for hearings to be nonpublic, unless otherwise ordered by the Board. In disciplinary proceedings, consistent with Section 105(c)(2) of the Act, the Board will order a hearing to be public only upon a showing of good cause and the consent of the parties to the hearing. Proposed Rule 5204 provides for determinations in Board disciplinary proceedings to be made on the basis of an initial decision prepared by a hearing officer, which may be appealed to the Board within a specified time period.[10/]

[9/] See Rule 5200(b).

[10/] Proposed Rule 5450 provides for initial decisions in proceedings based on violations of the securities laws or the Board's rules, on failure to supervise, or on whether an application for registration should be approved, to be appealable by the respondent or the Board's staff within 30 days after service of the initial decision. Initial decisions in proceedings based on noncooperation with an investigation would be appealable within 10 days after service of the initial decision.

Proposed Rule 5205 provides for settlement of disciplinary proceedings, based on offers of settlement that may be submitted by respondents in such proceedings. This Rule would establish a procedure for considering such offers that would be consistent with the Commission's practice.[11/]

Absent settlement, any final disciplinary action taken by the Board will be subject to Commission review under Section 107(c) of the Act. Under Section 105(e) of the Act, application to the Commission for review (or the institution by the Commission of review) will stay imposition of any Board sanction. To provide for an orderly resolution of such Commission review, Rule 5207 would, consistent with Section 105(e) of the Act, provide for an automatic stay of any final disciplinary action until the later of (a) Commission action to dissolve the stay, or (b) the expiration of the period during which, on its own motion, or upon application pursuant to Section 19(d)(2) of the Exchange Act, the Commission may institute review of the action.

3. Rules on Sanctions

Under Section 105(c)(4) of the Act, the Board may impose disciplinary or remedial sanctions if the Board finds that a registered public accounting firm, or a person associated with such a firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Section 105(c)(4) sets forth certain sanctions, including suspension or revocation of a firm's registration, a suspension or bar of an associated person, certain civil money penalties, censure, and required professional education or training. In addition, Section 105(c)(4) permits the Board to impose "any other appropriate sanction provided for in the rules of the Board." Proposed Rule 5300 would codify those sanctions specifically described in Section 105(c)(4) and would add four additional sanctions related to appointment of an independent monitor to observe and report on compliance, appointment of counsel or another consultant to design policies to effectuate compliance, requiring adoption or implementation of certain policies or other undertakings, and requiring a firm to obtain an independent review and report on one or more audit engagements. Rule 5300 would also include sanctions based on disciplinary proceedings relating to noncooperation with an investigation, pursuant to Section 105(b) of the Act, including

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[11/] See Commission Rule of Practice 240.

suspension or revocation of a firm's registration, a suspension or bar of an associated person, certain civil money penalties, a censure, appointment of a special master or independent monitor to monitor and report on compliance accounting board demands, and authorization for a hearing officer to retain jurisdiction to monitor compliance with accounting board demands and to rule on future disputes.

Proposed Rule 5301 would address the effect of sanctions on persons and on registered firms, consistent with Section 105(c)(7)(A) of the Act. Specifically, Rule 5301(a) would provide that "[n]o person that is suspended or barred from being associated with a registered public accounting firm, or has failed to comply with any sanction pursuant to Rule 5300, may willfully become or remain associated with any registered public accounting firm, without the consent of the Board, pursuant to Rule 5302, or the Commission." Thus, a person who is suspended or barred from being associated with a registered public accounting firm would not be permitted, in connection with the preparation or issuance of any audit report, (i) to share in the profits of, or receive compensation in any other form from, any registered public accounting firm, or (ii) to participate as agent on behalf of such a firm in any activity of that firm.[12/] A Note to the Rule explains that this prohibition includes receiving any salary, and any bonus, profit or other remuneration that results directly or indirectly from any audit fees that might have been earned during the period of the suspension or bar.

As a corollary to proposed Rule 5301(a), proposed Rule 5301(b) would provide that "[n]o registered public accounting firm that knows, or, in the exercise of reasonable care should have known, of the suspension or bar of a person may permit such person to become or remain associated with it, without the consent of the Board, pursuant to Rule 5302, or the Commission." In order to provide assurance that a firm that employs or continues to employ a barred person has not permitted the person to perform the activities of an associated person, the Board will consider, in connection with reporting requirements that it expects to develop in the future, whether to require such firms to provide regular reports on the activities and role within the firm of the barred person.

[12/] See Rule 1001(p)(i).

4. Rules of Board Procedure for the Conduct of Hearings

Proposed Rules 5400 through 5469 would govern hearings in Board disciplinary proceedings, as well as hearings on whether an application for registration should be approved or disapproved. These proposed rules include general rules, prehearing rules, rules on the conduct of hearings, and rules on appeals to the Board.

The general rules in the Board's proposed Rules of Board Procedure would, among other things, provide for parties or their counsel to file notices of appearance[13/] and prohibit parties and their counsel from engaging in ex parte communications with hearing officers. The general rules would also provide for the form, method and timing of filing papers, including motions, in Board proceedings.[14/] The Board intends to establish an electronic docketing system that will facilitate management of and access to dockets and filings. Because the Board expects that most of its hearings will be nonpublic,[15/] in most cases the Board will restrict access to dockets and filings to parties and their counsel, who will receive user ID's and passwords.

The prehearing rules in the Board's proposed Rules of Board Procedure would, among other things –

- provide for registered firms and associated persons subject to orders instituting proceedings to file answers (voluntarily or as required by the Board);[16/]

- provide for the Board's staff to make available to such firms and persons certain documents, including witness statements, consistent with the spirit of the Jencks Act (18 U.S.C. § 3500);[17/]

[13/] See Rule 5401.

[14/] See Rules 5404 – 5408 and 5410 and 5411.

[15/] Section 105(c)(2) of the Act provides that hearings under Section 105 "shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing."

[16/] See Rule 5421.

- provide for assembling hearing witnesses and testimony through the use of accounting board demands and Commission subpoenas to appear at a hearing, prehearing depositions to preserve testimony for presentation at a hearing, and prior sworn statements of unavailable witnesses;[18/]

- provide for any party to make a motion for summary disposition of a proceeding without an evidentiary hearing;[19/] and

- provide for the Commission and certain other governmental authorities to seek leave to participate in a Board proceeding in order to seek a stay of a Board hearing during a Commission investigation or proceeding, or a federal or state criminal investigation or proceeding, arising out of the same facts that are at issue in the Board proceeding.[20/]

The Board intends that presiding hearing officers will have the discretion to conduct hearings as appropriate in each proceeding. Nevertheless, proposed Rules 5440 through 5445 would provide certain broad principles and requirements to govern hearings. Specifically, proposed Rule 5440 would provide for a record of the hearing to be kept. Under proposed Rule 5444, the scope and form of evidence, including rebuttal evidence, if any, and cross-examination, if any, would be determined by the Board or the hearing officer in each proceeding, although proposed Rules 5441 through 5443 would establish a general framework on the admissibility of evidence, objections and offers of proof, and the presentation of testimony under oath or affirmation. Finally, proposed Rule 5445 would provide parties the opportunity to submit post-hearing briefs and other appropriate submissions, although the Rule would permit a hearing officer in a proceeding on noncooperation with an investigation, in his or her discretion, to render an initial decision without allowing for post-hearing submissions or after having allowed for such submissions on an expedited schedule.

[17/] See Rules 5422 and 5423.

[18/] See Rules 5425 – 5427.

[19/] See Rule 5428.

[20/] See Rule 5420.

Proposed Rule 5460 through 5466 would provide for procedures in appeals of initial and other hearing officer decisions to the Board. Specifically, proposed Rule 5460 would govern the filing of petitions for review of initial decisions and Board review of such decisions on its own initiative. Proposed Rule 5461 would permit interlocutory review of hearing officer decisions other than initial decisions in limited circumstances.[21/] Proposed Rule 5462 would provide for a briefing schedule order that, in most cases, would require opening briefs to be filed within 40 days of the date of the order, opposition briefs to be filed within 30 days thereafter, and reply briefs to be filed within 14 days after opposition briefs. The proposed Rule would also govern the contents and length of briefs. Under proposed Rule 5463, the Board would be able, on its own motion or the motion of a party, to order oral argument with respect to any matter. The Board expects that such motions will be granted unless exceptional circumstances make oral argument impractical or inadvisable. Proposed Rules 5464 and 5465 would govern the record before the Board, which in exceptional cases could include additional evidence not submitted in the hearing, if the proponent of the evidence were able to show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce it previously. Finally, proposed Rule 5466 would provide for motions to reconsider a final order issued by the Board, in certain limited situations.

Under Section 107(c) of the Act, any final sanction of the Board will be subject to Commission review, and under Section 25 of the Exchange Act of 1934, Commission decisions on Board sanctions will be appealable to the U.S. Courts of Appeals. In the event of such appeals, proposed Rule 5467 would require a registered firm that has filed a petition for Commission or court review, or that is associated with a person who has filed such a petition, to file a notice and copy of the petition with the Secretary of the Board.

5. Hearings on Disapprovals of Registration Applications

In addition to proceedings pursuant to proposed Rule 5200(a), the Board will provide an opportunity for a hearing before disapproving the registration application of a public accounting firm. Under Rule 2106(b), the Board will provide an applicant for

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[21/] In addition, proposed Rule 5468 and 5469 would govern appeals to the Board of actions made pursuant to delegated authority.

whom it is unable to determine that the standard for approval has been met a notice of hearing, which the applicant may elect to treat as a written notice of disapproval in order to be able to make an immediate appeal to the Commission. Consistent with the Board's Rule 2106(b), under proposed Rule 5500, the Board would commence a proceeding to determine whether to approve or disapprove a registration application when the applicant has elected not to treat the notice as a written notice of disapproval and instead has requested a hearing.

In the event that an applicant requests such a hearing, proposed Rule 5501 would provide that the proceeding would be governed by the procedures described in Parts II and IV of Section 5 of the Board's Rules, which includes the Rules of Board Procedure for hearings described above.

6. Special Issues Relating to Non-U.S. Firms

The rules proposed today apply to investigations and disciplinary proceedings concerning registered public accounting firms. Non-U.S. public accounting firms are not required to be registered until April 19, 2004. As the Board has previously announced, the nature and scope of the Board's oversight over non-U.S. accounting firms that audit the financial statements of U.S. public companies will be the subject of dialogue between the Board and its foreign counterparts. The Board is committed to finding ways of accomplishing the goals of the Act without subjecting non-U.S. firms to unnecessary burdens or conflicting requirements. The Board's proposed rules are not intended in any way to signal that the Board has already determined how its oversight should operate as to those firms, or to preclude any adjustments to the rules that may be appropriate in light of those discussions.

B. Opportunity for Public Comment

Interested persons are encouraged to submit their views to the Board. Written comments should be sent to Office of the Secretary, PCAOB, 1666 K Street, N.W., Washington, D.C. 20006-2803. Comments may also be submitted by e-mail to comments@pcaobus.org or through the Board's Web site at www.pcaobus.org. All comments should refer to PCAOB Rulemaking Docket Matter No. 005 in the subject or reference line and should be received by the Board no later than 5:00 PM (EST) on August 18, 2003.

* * *

On the 28th day of July, in the year 2003, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ J. Gordon Seymour
Acting Secretary

July 28, 2003

APPENDICES –

1. Proposed Rules Relating to Investigations and Adjudications

2. Section-by-Section Analysis of Proposed Rules Relating to Investigations and Adjudications

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Appendix 1 – Proposed Rules Relating to Investigations and Adjudications

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RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

Rule 1000. [Reserved]

Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires –

(a)(ix) Accounting Board Demand

The term "accounting board demand" means a command to produce documents and/or to appear at a certain time and place to give testimony.

(a)(x) Accounting Board Request

The term "accounting board request" means a request to produce documents and/or to appear at a certain time and place to give testimony.

(b)(ii) Bar

The term "bar" means a permanent disciplinary sanction prohibiting a person from being associated with a registered public accounting firm.

(c)(ii) Counsel

The term "counsel" means an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state.

(d)(i) Disciplinary Proceeding

The term "disciplinary proceeding" means a proceeding initiated by an order instituting proceedings, held for the purpose of determining whether or not a registered public accounting firm, or any person associated with a registered public accounting firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards; or has failed to cooperate with the Board in connection with an investigation; and whether to impose a sanction pursuant to Rule 5300.

(d)(ii) Document

The term "document" is synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to audit work papers.

(h)(i) Hearing Officer

The term "hearing officer" means a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing.

(i)(iv) Interested Division

The term "interested division" means a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding.

(o)(ii) Order Instituting Proceedings

The term "order instituting proceedings" means an order issued by the Board commencing a disciplinary proceeding.

(p)(iii) Party

The term "party" means the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

(p)(iv) Person

The term "person" means any natural person or any business, legal or governmental entity or association.

(r)(iii) Revocation

The term "revocation" means a permanent disciplinary sanction terminating a firm's registration.

(s)(iii) Secretary

The term "Secretary" means the Secretary of the Board.

(s)(iv) Suspension

The term "suspension" means a temporary disciplinary sanction, which lapses by its own terms, prohibiting –

(1) a registered public accounting firm from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer; or

(2) a person from being associated with a registered public accounting firm.

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

Rule 5000. General

A registered public accounting firm, and any person associated with such a firm, shall comply with all Board orders to which the firm or person is subject.

Part 1 – Inquiries and Investigations

Rule 5100. Informal Inquiries

(a) Commencement of an Informal Inquiry

The Director of Enforcement and Investigations may undertake an informal inquiry where it appears that, or to determine whether, an act or practice, or omission to act, by a registered public accounting firm, any associated person of that firm, or both, may violate –

(1) any provision of the Act;

(2) the Rules of the Board;

(3) the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act; or

(4) professional standards.

(b) Informal Inquiry Activities

In an informal inquiry, the Director of Enforcement and Investigations may request documents, information or testimony from, or an interview with, any person.

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Rule 5101. Commencement and Closure of Investigations

(a) Commencement of Investigations

(1) Order of Formal Investigation

Upon the recommendation of the Director of Enforcement and Investigations or the Director of Inspections, or upon the Board's own initiative, or otherwise, the Board may issue an order of formal investigation when it appears that an act or practice, or omission to act, by a registered public accounting firm or any person associated with a registered public accounting firm may violate any provision of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards.

(2) Designation of Staff

In an order of formal investigation, the Board may designate members, or groups of members, of the Board's staff to issue accounting board demands to, and otherwise require or request cooperation of, any person pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent the information sought is relevant to the matters described in the Board's order of investigation.

(b) Closure of Investigations

Upon the recommendation of the Director of Enforcement and Investigations, or on its own initiative, the Board may issue an order terminating or suspending, for a specified period of time, a formal investigation.

Rule 5102. Testimony of Registered Public Accounting Firms and Associated Persons in Investigations

(a) General

The Board, and the staff of the Board designated in an order of formal investigation, may require the testimony of any registered public accounting firm or any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation.

(b) Accounting Board Demand for Testimony

The Board, and the staff of the Board designated in an order of formal investigation, shall require testimony by serving an accounting board demand that –

(1) gives reasonable notice of the time and place for the taking of testimony;

(2) states the method or methods by which the testimony shall be recorded, which may be by sound or sound-and-visual, but shall include by stenographic means; and

(3) if the person to be examined is a registered public accounting firm, a description with reasonable particularity of the matters on which examination is requested.

(c) Conduct of Examination

(1) Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

(2) General

Examinations shall be conducted before a reporter designated by the Board's staff.

(3) Persons Permitted to be Present

Persons permitted to be present at an examination pursuant to this Rule are limited to –

(i) the person being examined and his or her counsel, subject to Rule 5109(b);

(ii) any Board member or member of the staff of the Board;

(iii) the reporter; and

(iv) such other persons as the Board, or the staff of the Board designated in the order of formal investigation, determine are appropriate to permit to be present; provided, however, that in no event shall a person other than the witness who has been or is reasonably likely to be examined in the investigation be present.

(4) Examinations of Registered Public Accounting Firms

A registered public accounting firm subject to an accounting board demand shall designate one or more persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the registered public accounting firm.

(e) Transcript

A witness shall have 10 days after being notified by the reporter that the transcript, or, where applicable, video or other recording, is available in which to review the transcript or other recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the witness for making them. The reporter shall make a certificate in writing to accompany the transcript, which shall indicate –

(1) that the witness was duly sworn by the officer and that the transcript is a true record of the testimony given by the witness; and

(2) whether the witness requested to review the transcript and, if so, that the reporter has appended any changes made by the witness during the period allowed.

Rule 5103. Production of Audit Workpapers and Other Documents in Investigations

(a) General

Upon demand, the Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board demand for the production of audit work papers or any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board or its staff considers relevant or material to the investigation.

(b) Time and Manner of Production

An accounting board demand shall set forth a reasonable time and place for production. Unless an accounting board demand expressly requests or permits the production of copies, original documents shall be produced. Unless an accounting board demand expressly requests or permits printed copies of electronic documents, documents that exist in electronic form shall be produced in that form.

Rule 5104. Examination of Books and Records in Aid of Investigations

Upon demand and without regard to the Board's Rules under Section 104 of the Act, the Board, and the staff of the Board designated in an order of formal investigation, may examine the books and records of any registered public accounting firm or associated person to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation.

Rule 5105. Requests for Testimony or Production of Documents from Persons Not Associated With Registered Public Accounting Firms

(a) Testimony

The Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board request for the testimony of any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation.

(1) Requests for Testimony

An accounting board request for testimony pursuant to subparagraph (a) of this Rule shall –

(i) give appropriate notice, subject to the needs of the investigation of the time and place for the taking of testimony;

(ii) state the method or methods by which the testimony shall be recorded, which may be by sound or sound-and-visual, but shall include by stenographic means; and

(iii) if the person to be examined is an issuer, an association, a governmental agency, or other organized entity, provide a description with reasonable particularity of the matters on which examination is requested.

(2) Conduct of Examination and Transcript

An examination requested pursuant to this Rule shall be conducted consistent with Rules 5102(c) through 5102(d) and a transcript shall be prepared consistent with Rule 5102(e). If the person to be examined is an issuer, or a partnership or association or governmental agency, the person to be examined shall designate one or more persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(b) Documents

The Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board request to any person, including any issuer, for the production of any document that is relevant or material to an investigation, with appropriate notice, subject to the needs of the investigation. A request issued pursuant to this Rule shall set forth a reasonable time and place for production, subject to the needs of the investigation.

Note: Failure to comply with an accounting board request pursuant to Rule 5105 may result in a Board request for the issuance of a Commission subpoena, pursuant to Rule 5111.

Rule 5106. Assertion of Claim of Privilege

(a) Required Information Supporting Assertion

When a claim of privilege is asserted in objecting to any accounting board demand for information, including but not limited to testimony, and an answer is not provided on the basis of such assertion,

(1) the person asserting the privilege, or his or her attorney, shall identify the nature of the privilege (including attorney work product) that is being claimed and indicate the relevant jurisdiction's privilege rule being invoked; and

(2) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information –

(i) for documents: (A) the type of document, (e.g., letter or memorandum); (B) the general subject matter of the document; (C) the date of the document; and (D) such other information as is sufficient to identify the document for a Commission subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other; and

(ii) for oral communications: (A) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (B) the date and place of communication; and (C) the general subject matter of the communication.

(b) Claims During Testimony

Where a claim of privilege is asserted during testimony, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) shall be furnished –

(1) at the deposition, to the extent it is readily available from the witness or otherwise; or

(2) to the extent the information is not readily available at the deposition, in writing within five business days after the deposition session at which the privilege is asserted, unless otherwise agreed by the staff of the Board.

(c) Claims Other than During Testimony

Where a claim of privilege is asserted in response to an accounting board demand for information other than during testimony, the information set forth in paragraph (a) shall be furnished in writing at the time of the response to such accounting board demand, unless otherwise agreed by the Board or its staff.

Rule 5107. Uniform Definitions in Demands and Requests for Information

(a) General

The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all accounting board demands. This Rule shall not preclude (1) the definition of other terms specific to the particular inquiry or investigation, (2) the use of abbreviations, or (3) a more narrow definition of a term defined in paragraph (c).

(b) Scope

This Rule is not intended to broaden or narrow the scope of the Board's authority to request information permitted by the Act.

(c) Definitions

The following definitions apply to all accounting board demands –

(1) Communication

The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) Document

The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to audit work papers.

(3) Identify (with respect to person)

When referring to a person, to "identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent requests for the identification of that person.

(4) Identify (with respect to documents)

When referring to documents, to "identify" means to give, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document; and (iv) author(s), addressee(s) and recipients(s).

(5) Person

The term "person" is defined as any natural person or any business, legal or governmental entity or association.

(6) Concerning

The term "concerning" means relating to, referring to, describing, evidencing or constituting.

(d) Rules of Construction

The following rules of construction apply to all discovery requests –

(1) All/Each

The terms "all" and "each" shall be construed as all and each.

(2) And/Or

The connectives "and" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the request for information all responses that might otherwise be construed outside of its scope.

(3) Number

The use of the singular form of any word includes the plural and vice versa.

Rule 5108. Confidentiality of Investigatory Records

Unless otherwise ordered by the Board or the Commission, informal inquiries and formal investigations, and any documents, testimony or other information prepared or received by or specifically for the Board or the staff of the Board in connection with such inquiries and investigations, shall be confidential in the hands of the Board, unless and until presented in connection with a public proceeding or released in accordance with Section 105(c) of the Act, and the Board's Rules thereunder; provided, however, that the Board may make such information available –

(a) to the Commission; and

(b) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors, to the following –

(1) the Attorney General of the United States;

(2) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

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

(4) any appropriate State regulatory authority.

Note: Under Section 105(b)(5) of the Act, the documents described in Rule 5108 "shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the federal government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c)" of Section 105 of the Act.

Note: The Director of Enforcement and Investigations may engage in and may authorize members of the Board's staff to engage in discussions with persons identified in Rule 5108, or their staff, concerning information obtained in an informal inquiry or a formal investigation.

Rule 5109. Rights of Witnesses in Inquiries and Investigations

(a) Review of Order of Formal Investigation

Any person who is compelled to testify or produce documents pursuant to a subpoena issued pursuant to Rule 5111, or who testifies or produces documents pursuant to an accounting board demand or request, shall, upon request, be shown the Board's order of formal investigation. In the discretion of the Director of Enforcement and Investigations, a copy of the order of formal investigation may also be furnished to such a person for his or her retention.

(b) Right to Counsel

Any person compelled to testify pursuant to a subpoena issued pursuant to Rule 5111, or who appears pursuant to an accounting board demand or request, may be accompanied, represented and advised by counsel, subject to Rule 5102(c)(3), provided, however, that the counsel provide the Board's staff with a notice of appearance that states, or state on the record at the commencement of testimony, that the counsel represents the witness.

(c) Inspection and Copying

Upon written request to the Director of Enforcement and Investigations and proper identification, a witness may inspect the official transcript of the witness's own testimony. Upon written request and payment of the appropriate fees to cover the cost of production or reproduction, a person who has submitted documentary evidence or testimony in an informal inquiry or formal investigation may procure a copy of such evidence or the transcript of such testimony, except that prior to such evidence or testimony being presented in connection with a proceeding or released in accordance with Section 105(c) of the Act, and the Board's Rules thereunder, the Director of Enforcement and Investigations may for good cause deny such request.

(d) Statements of Position

Registered public accounting firms, and persons associated with firms, who become involved in an informal inquiry or a formal investigation may, on their own initiatives, submit a written statement to the Board setting forth their interests and positions in regard to the subject matter of the investigation. Upon request, the Board's staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to those persons and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Board for the commencement of a disciplinary proceeding. In the event a recommendation for the commencement of a disciplinary proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Board in conjunction with the staff recommendation.

Rule 5110. Non-cooperation with an Investigation

(a) Grounds for Instituting Proceedings

If it appears to the Board, on the recommendation of the Director of Enforcement and Investigations or otherwise, that a registered public accounting firm, or a person associated with a such a firm, may have failed to comply with an accounting board demand, may have given testimony that is false or misleading or that omits material information, or may otherwise have failed to cooperate in connection with an investigation, the Board may institute a disciplinary proceeding pursuant to Rule 5200(a)(3) for noncooperation with an investigation.

(b) Special and Expedited Procedures

Disciplinary proceedings instituted pursuant to Rule 5200(a)(3) for noncooperation with an investigation shall be subject to special and expedited procedures as described in Rules 5201(b)(3), 5204(c)(2), 5300(b), 5302(d), 5422(a)(2), 5445(b), 5460(a)(2)(iii), and 5461(a).

Rule 5111. Requests for Issuance of Commission Subpoenas in Aid of an Investigation

(a) General

The Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and the production of, any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation.

(b) Application for a Subpoena

An application for a subpoena submitted to the Commission shall include –

(1) a completed form of subpoena; and

(2) such other information as the Commission may require.

Rule 5112. Coordination and Referral of Investigations

(a) Commission Notification of Order of Formal Investigation

As soon as practicable after entry of an order of formal investigation pursuant to Rule 5101 that involves a potential violation of the securities laws, the Secretary of the Board shall send a copy of the order to the Commission, or any staff of the Commission designated to receive orders of formal investigation by the Board, and Board staff shall thereafter coordinate their work with the work of the Commission's Division of Enforcement, as necessary to protect any ongoing Commission investigation.

(b) Board Referrals of Investigations

The Board may refer any investigation to the Commission and, in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), to such regulator.

(c) Commission-directed Referrals of Investigations

At the direction of the Commission, the Board may refer any investigation to –

(1) the Attorney General of the United States;

(2) the attorney general of one or more States; and

(3) an appropriate State regulatory authority.

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Part 2 – Disciplinary Proceedings

Rule 5200. Commencement of Disciplinary Proceedings

(a) Grounds for Commencement of Disciplinary Proceedings

The Board may commence a disciplinary proceeding when –

(1) it appears to the Board, as the result of an investigation or otherwise, that a hearing is warranted to determine whether a registered public accounting firm, or an associated person of such a firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards;

(2) it appears to the Board, as the result of an investigation or otherwise, that a hearing is warranted to determine whether a registered public accounting firm, or the supervisory personnel of such a firm, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards, and such associated person commits a violation of the Act, or any of such rules, laws, or standards;

(3) it appears to the Board that a hearing is warranted pursuant to Rule 5110.

(b) Appointment of a Hearing Officer

As soon as practicable after the Board has issued an order instituting proceedings, 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) obtaining a court reporter to administer oaths and affirmations;

(2) issuing accounting board demands pursuant to Rule 5424;

(3) receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(4) regulating the course of a proceeding and the conduct of the parties and their counsel;

(5) holding prehearing and other conferences and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(6) recusing himself or herself upon motion made by a party or upon his or her own motion;

(7) ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(8) subject to any limitations set forth elsewhere in these Rules, considering and ruling upon all procedural and other motions;

(9) preparing an initial decision as provided in Rule 5204;

(10) upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board; and

(11) informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

(c) Separation of Functions

Any employee or agent 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) 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 of Procedure 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 5201. Notification of Commencement of Disciplinary Proceedings

(a) Notice

Whenever an order instituting proceedings is issued by the Board, the Secretary shall give each firm or person charged appropriate notice of the order within a time reasonable in light of the circumstances.

Note: Paragraph (a) requires that appropriate notice of an order instituting proceedings be given. Where emergency or expedited action is sought, notice of a hearing may be given prior to formal service of the order instituting proceedings by any means calculated to give actual notice that a hearing will be held.

(b) Content of Order Instituting Proceedings

An order instituting proceedings issued pursuant to subparagraph (a) shall specify in reasonable detail, with respect to each firm or person charged –

(1) in the case of a proceeding instituted pursuant to Rule 5200(a)(1) –

(i) the conduct alleged to have violated the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports or the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act and professional standards; and

(ii) the rule, statute or standard violated;

(2) in the case of a proceeding instituted pursuant to Rule 5200(a)(2) –

(i) the failure to supervise alleged to have violated the Rules of the Board or to have failed to prevent violations of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports or the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act and applicable professional standards; and

(ii) the violative conduct of the supervised associated person and the rule, statute or standard violated; or

(3) in the case of a proceeding instituted pursuant to Rule 5200(a)(3) –

(i) the conduct alleged to constitute the failure to cooperate with an investigation; and

(ii) a hearing date.

(c) Notice of a Hearing on a Registration Application

In the case of a proceeding pursuant to Rule 5500, the notice of a hearing shall state proposed grounds for disapproving the registration application.

(d) Amendment to Order Instituting Proceedings

(1) By the Board

Upon motion by the interested division, the Board may, at any time, amend an order instituting proceedings, or a notice of a hearing, to include new matters of fact or law.

(2) By the Hearing Officer

Upon motion by the interested division, the hearing officer may, at any time prior to the filing of an initial decision or, if no proposed initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

Note: Where amendments to an order instituting proceedings are intended to correct an error, to conform the order to the evidence or to take into account subsequent developments which should be considered in disposing of the proceeding, and the amendments are within the scope of the original order, either a hearing officer or the Board has authority to amend the order. Since, however, the Board has not delegated its authority to authorize orders instituting proceedings, hearing officers do not have authority to initiate new charges or to expand the scope of matters set down for hearing beyond the framework of the original order instituting proceedings.

Rule 5202. Record of Disciplinary Proceedings

(a) Contents of the Record

(1) A hearing record shall consist of –

(i) the order instituting proceedings, each notice of hearing and any amendments;

(ii) each application, supplemental application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(iii) each stipulation, transcript of testimony and document or other information admitted into evidence;

(iv) each written communication accepted by the hearing officer pursuant to Rule 5420;

(v) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal pursuant to Rule 5402, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(vi) all motions, briefs and other papers filed on interlocutory appeal;

(vi) any proposed findings and conclusions;

(viii) each written order or notice issued by the hearing officer or the Board; and

(ix) any other document or item accepted into the record by the Board or the hearing officer.

(2) Record on Disapproval of Application for Registration

The record on a disapproval of an application with respect to which the applicant has elected to waive its opportunity for a hearing pursuant to Rule 5500 shall consist of –

(i) the application for registration, and any supplemented application;

(ii) any additional information provided by the applicant;

(iii) any other information obtained by the Board in connection with the application;

(iv) the notice of a hearing and any written order issued by the Board; and

(v) any other document or item accepted into the record by the Board.

(b) Documents Not Admitted

Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any documents offered in evidence but excluded until all opportunities for Commission and judicial review have been exhausted or waived.

(c) Substitution of Copies

A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this Rule.

(d) Preparation of Record and Certification of Record Index

Promptly after the close of a hearing, the hearing officer shall transmit to the Secretary an index of any motions, exhibits or any other documents submitted to, or

accepted into evidence by, the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any party may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. The initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(e) Final Transmittal of Record Items to the Secretary

After the close of a hearing, the hearing officer shall transmit to the Secretary originals of exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer, and any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

Rule 5203. Public and Private Hearings

No hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.

Rule 5204. Determinations in Disciplinary Proceedings

(a) Initial Decision of a Hearing Officer

Unless the Board directs otherwise, a hearing officer shall prepare an initial decision in any proceeding in which the Board directs a hearing officer to preside at a hearing. An initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law or discretion presented on the record and such other information as the Board may require.

Note: Unless the Board has directed otherwise, the Board expects hearing officers in proceedings instituted pursuant to Rule 5200(a)(1) or Rule 5200(a)(2) to prepare initial decisions within 60 days after the deadline for filing post-hearing briefs or other submissions; the Board expects hearing officers in proceedings instituted pursuant to Rule 5200(a)(3) to prepare initial decisions within 30 days after deadline for filing post-hearing briefs; and the Board expects hearing officers in proceedings pursuant to Rule 5500 to prepare initial decisions within 45 days after the deadline for filing post-hearing briefs or other submissions.

(b) Filing, Service and Publication

The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties. In a public proceeding, the Secretary shall as soon as practicable thereafter publish the initial decision, unless the Board otherwise directs.

(c) When Final

(1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary.

(2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.

(3) The Secretary shall not issue a notice of finality as to any party

(i) who has filed a timely petition for review; or

(ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205. Settlement of Disciplinary Proceedings Without a Determination After Hearing

(a) Availability

Any firm or person who is notified that a proceeding may or will be instituted against him or her, or any firm or person that is a party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) Procedure

An offer of settlement shall state that it is made pursuant to this Rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(2) and (3) of this Rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the Director of Enforcement and Investigations.

(c) Consideration of Offers of Settlement

(1) The Director of Enforcement and Investigations shall present an offer of settlement to the Board with his or her recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Board unless the person making the offer so requests.

(2) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer –

(i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of post-hearing briefs or other submissions, proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(3) By submitting an offer of settlement the person further waives –

(i) such provisions of the Rules of Board Procedure or other requirements of law as may be construed to prevent any member of the Board's staff from participating in the preparation of, or advising the Board as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any right to claim bias or prejudgment by the Board based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(4) If the Board rejects the offer of settlement, the person making the offer shall be notified of the Board's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. Rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(3) of this Rule with respect to any discussions concerning the rejected offer of settlement.

(5) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Board.

Note: In a hearing on disapproval of registration, an offer of settlement will be considered and handled by the Director of Registration and Inspections in accordance with Rule 5206 as if the Director of Registration and Inspections were the Director of Enforcement and Investigations.

Rule 5206. Automatic Stay of Final Disciplinary Actions

No final disciplinary sanction of the Board shall be effective until the later of –

(a) Commission action to dissolve the stay provided by Section 105(e) of the Act; or

(b) the expiration of the period during which, on its own motion, or upon application pursuant to Section 19(d)(2) of the Exchange Act, the Commission may institute review of the sanction.

Part 3 – Disciplinary Sanctions

Rule 5300. Sanctions

(a) Sanctions in Proceedings Instituted Pursuant to Rule 5200(a)(1) or Rule 5200(a)(2)

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to the applicable limitations under Section 105(c)(5) of the Act, including –

(1) temporary suspension or permanent revocation of registration;

(2) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(3) temporary or permanent limitation on the activities, functions or operations of such firm or person (other than in connection with required additional professional education or training);

Note: Limitations on the activities, functions or operations of a firm may include prohibiting a firm from accepting new audit clients for a period of time, requiring a firm to assign a reviewer or supervisor to an associated person, requiring a firm to terminate one or more audit engagements, and requiring a firm to make functional changes in supervisory personnel organization and/or in engagement team organization.

(4) a civil money penalty for each such violation, in an amount equal to –

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

(ii) in any case to which Section 105(c)(5) of the Act applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(5) censure;

(6) require additional professional education or training;

(7) require a registered public accounting firm to engage an independent monitor, subject to the approval of the Board, to observe and report on the firm's compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards;

(8) require a registered public accounting firm to engage counsel or another consultant to design policies to effectuate compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards;

(9) require a registered public accounting firm, or a person associated with such a firm, to adopt or implement policies, or to undertake other actions, to improve audit quality or to effectuate compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit

reports and the obligations and liabilities of accountants with respect thereto, or professional standards; and

(10) require a registered public accounting firm to obtain an independent review and report on one or more engagements.

(b) Sanctions in Proceedings Instituted Pursuant to Rule 5200(a)(3)

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm, or a person associated with such a firm, has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, including –

(1) the sanctions described in subparagraphs (1) – (5) of paragraph (a) of this Rule;

(2) requiring a registered public accounting firm to engage a special master or independent monitor, appointed by the hearing officer, to monitor and report on the firms' compliance with an accounting board demand or with future accounting board demands; or

(3) authorizing the hearing officer to retain jurisdiction to monitor compliance with an accounting board demand or with future account board demands and to rule on future disputes, if any, related to such demands.

Note: Rule 5300 does not preclude the imposition of any sanction, on consent, in the context of a settlement, notwithstanding that the sanction is not listed in the Rule.

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Rule 5301. Effect of Sanctions

(a) Effect on Persons

No person that is suspended or barred from being associated with a registered public accounting firm, or has failed to comply with any sanction pursuant to Rule 5300, may willfully become or remain associated with any registered public accounting firm, without the consent of the Board, pursuant to Rule 5302, or the Commission.

Note: A person who is suspended or barred from being associated with a registered public accounting firm may not, in connection with the preparation or issuance of any audit report, (i) share in the profits of, or receive compensation in any other form from, any registered public accounting firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm. See Rule 1001(p)(i). This prohibition includes receiving any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that might have been earned during the period of the suspension or bar.

(b) Effect on Registered Public Accounting Firms

No registered public accounting firm that knows, or, in the exercise of reasonable care should have known, of the suspension or bar of a person may permit such person to become or remain associated with it, without the consent of the Board, pursuant to Rule 5302, or the Commission.

Note: Rule 5301(b) prohibits a registered public accounting firm from permitting a person subject to a suspension or bar, in connection with the preparation or issuance of any audit report, to (i) share in the profits of, or receive compensation in any other form from, such firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm. See Rule 1001(p)(i). This prohibition includes paying or crediting any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that the person might have earned during the period of the suspension or bar.

Rule 5302. Applications for Relief From, or Modification of, Revocations and Bars

(a) Application for Registration After a Revocation of Registration

Unless the Board orders otherwise, any public accounting firm whose registration has been revoked pursuant to a Board determination that permitted the firm an opportunity to reapply for registration after a specified time period has lapsed may file an application for registration pursuant to Rule 2101 after the specified time period has lapsed. The revocation of the firm's registration shall continue, however, unless and until an application for registration is approved pursuant to Rule 2106(b)(1).

(b) Petition to Terminate a Bar

(1) Scope

Any person subject to a bar imposed by an order that contains a proviso that a petition to terminate the bar may be made to the Board after a specific period of time may file a petition for Board consent to associate, or to change the terms and conditions of association, with a registered public accounting firm.

(2) Form of Petition

A petition to terminate a bar shall be supported by an affidavit that addresses the factors set forth in subparagraph (b)(4) of this Rule and shall include as exhibits:

(i) a copy of the Board order imposing the bar;

(ii) a copy of any Commission or court order concerning the bar;

(iii) a written statement by the proposed registered public accounting firm with which the petitioner wishes to associate that describes –

(A) the terms and conditions of employment and supervision to be exercised over such petitioner and, where applicable, by such petitioner;

(B) the qualifications, experience, and disciplinary records of the proposed supervisor(s) of the petitioner;

(C) the compliance and disciplinary history, during the two years preceding the filing of the petition, of the registered public accounting firm with which the petitioner wishes to be associated; and

(D) the names of any other associated persons in the same registered public accounting firm who have previously been barred by the Board or the Commission, and whether they are to be supervised by the petitioner.

(3) Required Showing

The petitioner shall make a showing satisfactory for the Board to be able to determine that the proposed association would be consistent with the public interest.

(4) Factors to be Addressed

The affidavit required by paragraph (b)(1) of this Rule shall address each of the following:

(i) the time period since the imposition of the bar;

(ii) any restitution or similar action taken by the petitioner to recompense any person injured by the misconduct that resulted in the bar;

(iii) the petitioner's compliance with the order imposing the bar;

(iv) the petitioner's employment during the period subsequent to the imposition of the bar;

(v) the capacity or position in which the applicant proposes to be associated;

(vi) the manner and extent of supervision to be exercised over such petitioner and, where applicable, by such petitioner;

(vii) any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her reassociation; and

(viii) any other information material to the petition.

(5) Notification to Petitioner and Written Statement

In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this rule, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall have 30 days to submit a written statement in response.

(c) Application for Termination of Other Revocations and Bars

Unless the Board orders otherwise, any firm or person that is subject to a revocation or bar pursuant to a Board determination that does not provide for an opportunity to reapply for registration, or to terminate a bar, may request leave to file an application for registration, or a petition to terminate a bar, at any time. The sanction shall continue, however, unless and until the Board has permitted and granted such an application or petition for good cause shown.

(d) Application for Termination of Sanctions for Noncooperation

Unless the Board orders otherwise, any firm or person that has remedied the noncooperation that formed the basis for a disciplinary sanction may file an application for termination of any such sanction that is ongoing. The sanction shall continue, however, unless and until it has been terminated by the Board.

(e) Applications for Termination of Other Sanctions

Unless the Board orders otherwise, any firm or person subject to a sanction pursuant to subparagraphs (3), (6), (7), (8), (9) or (10) of Rule 5300(a) may file an

application for termination of any continuing sanction at any time, and the applicant may, in the Board's discretion, be afforded a hearing. The sanction shall continue, however, unless and until it has been terminated by the Board for good cause shown.

Rule 5303. Use of Money Penalties

All civil money penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, administered by the Board or by an entity or agent identified by the Board.

Rule 5304. Summary Suspension for Failure to Pay Money Penalties

(a) Registered Public Accounting Firms

After exhaustion of all reviews and appeals, and the termination of any stay, authorized by law or the Rules of the Board, and after seven days' notice in writing, the Board may summarily suspend the registration of a registered public accounting firm that has failed to pay a money penalty imposed pursuant to Rule 5300(a)(4). Such a suspension of registration shall lapse upon payment, within 90 days, of the fine or other monetary sanction, plus interest. If payment is not made within 90 days, a suspension of registration shall be lifted only upon –

(1) payment of the fine or other monetary sanction, plus interest; and

(2) the filing of an application for registration pursuant to Rule 2101, and Board approval of that application pursuant to the Board's Rules relating to registration.

(b) Associated Persons

After exhaustion of all reviews and appeals, and the termination of any stay, authorized by law or the Rules of the Board, and after seven days' notice in writing, the Board may summarily suspend any person who has failed to pay a money penalty imposed pursuant to Rule 5300(a)(4). If such a money penalty is not paid within 90 days of such notice, the Board may summarily bar such person.

Part 4 – Rules of Board Procedure

GENERAL

Rule 5400. Hearings

Hearings for the purpose of taking evidence shall be held only upon order of the Board. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

Rule 5401. Appearance and Practice Before the Board

A person shall not be represented before the Board or a hearing officer except as stated in paragraphs (a) or (b) of this Rule or as otherwise permitted by the Board or a hearing officer.

(a) Representing Oneself

In any proceeding, an individual may appear on his or her own behalf.

(b) Representing Others

In any proceeding, a person may be represented by counsel; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(c) Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal

(1) Representing Oneself

When an individual first makes any filing or otherwise appears on his or her own behalf before the Board or a hearing officer, he or she shall file with the Secretary, and keep current, both an electronic and a mailing address at which any notice or other written communication required to be served upon him or her or furnished to him or her

may be sent and a telephone number where he or she may be reached during business hours.

(2) Representing Others

When a person first makes any filing or otherwise appears in a representative capacity before the Board or a hearing officer, that person shall file with the Secretary, and keep current, a written notice stating the name of the proceeding; the representative's name, mailing address, electronic address and telephone number; and the name and electronic and mailing addresses of the person or persons represented; and, if the person is an attorney, a declaration that the attorney is admitted to practice before the Supreme Court of the United States or the highest court of any state, as defined in Section 3(a)(16) of the Exchange Act.

(3) Power of Attorney

Any individual appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the Board showing his or her authority to act in such capacity.

(4) Withdrawal

Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Board or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal.

Rule 5402. Hearing Officer Disqualification and Withdrawal

(a) Motion for Withdrawal

A party who has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned, may make a motion to the hearing officer that the hearing officer withdraw, which shall be filed with the Secretary. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding. A motion for withdrawal shall be filed within 15 days after the later of –

(1) when the party learned of the facts believed to constitute the basis for the disqualification; or

(2) when the party was notified of the assignment of the hearing officer.

(b) Appointment 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, the Secretary will appoint a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is appointed 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.

Rule 5403. Ex Parte Communications

Except to the extent permitted for the disposition of ex parte matters as authorized by law or the Board's Rules –

(a) the person presiding over an evidentiary hearing may not consult a person or party on a fact in issue, unless on notice and with opportunity for all parties to participate; and

(b) a party may not –

(1) communicate with the person presiding over an evidentiary hearing on a fact in issue, unless on notice and opportunity for all parties to participate;

(2) communicate with the Board or any member of the Board on a fact in issue, unless on notice and opportunity for all parties to participate or under circumstances in which a party excluded from the communication has waived the rights described in Rule 5205(c)(3) with respect to the matters that are the subject of the communication.

Rule 5404. Service of Papers by Parties

In every proceeding, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in a manner calculated to bring the paper to the attention of the party to be served.

Rule 5405. Filing of Papers With the Board: Procedure

(a) When to File

All papers required to be served by a party upon any person shall be filed with the Board at the time of service or promptly thereafter. Papers required to be filed with the Board must be received within the time limit, if any, for such filing.

(b) Where to File

Unless otherwise permitted by the Secretary, filing of papers with the Board shall be made by electronically filing them with the Secretary.

Note: When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Secretary, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date received electronically by the Secretary. Upon request, the Secretary may permit regulators granted permission to participate on a limited basis (to request a stay), amici curiae, nonparties and others to file in

paper form. Where practicable, the Secretary will scan such a filing into the docket file.

Rule 5406. Filing of Papers: Form

(a) Specifications

Papers filed in connection with any proceeding shall –

(1) be formatted in a Portable Document Format on pages measuring 8½ x 11 inches, except that, upon consent of the Secretary for good cause, a document may be filed in paper form;

Note: To the extent that the reduction of larger documents would render them illegible, the Secretary may consent to the filing of such documents on larger paper, in electronic or paper form.

(2) include at the head of the paper, or on a title page, the name of the Board, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(3) be paginated with margins at least 1 inch wide; and

(4) be double-spaced in a 12-point font, with single-spaced footnotes and single-spaced indented quotations.

(b) Form of Briefs

All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

Rule 5407. Filing of Papers: Signature Requirement and Effect

Following the issuance of an order instituting proceedings, every filing of a party who represents himself or herself shall sign his or her individual name and state the

date and his or her address and telephone number on every filing. A party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number.

> Note: If practicable, a party's or an attorney's signature should be scanned into an electronic document. In any event, however, the use of an attorney's electronic mail address, or password for the Board's electronic filing system, shall constitute the signature of that attorney.

Rule 5408. Motions

(a) Generally

Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. Unless otherwise ordered by the Board or the hearing officer, if a motion is properly made to the Board concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Board. No oral argument shall be heard on any motion unless the Board or the hearing officer otherwise directs.

(b) Opposing and Reply Briefs

Except as provided in Rule 5427, and unless otherwise ordered by the Board or a hearing officer, a brief in opposition to a motion shall be filed within five days after service of the motion. Reply briefs are only permitted with leave of the hearing officer.

(c) Length Limitation

Except as provided in Rule 5427, a brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The hearing officer may grant requests for leave to file briefs in excess of 10 pages, upon a showing of good cause.

Rule 5409. Default and Motions to Set Aside Default

(a) Default

A party to a proceeding may be deemed to be in default and the Board or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings or notice of a hearing, the allegations of which may be deemed to be true, if that party fails –

(1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer when required to do so by a Board order, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Board or the hearing officer.

(b) Motion to Set Aside Default

A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Board at any time, may for good cause shown set aside a default.

Rule 5410. Time Computation

(a) Computation

In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this Rule. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a federal legal holiday.

Note: The Secretary will maintain a list of federal legal holidays.

(b) Additional Time For Service by Mail

If service is made by mail, three days shall be added to the prescribed period for response.

Rule 5411. Modifications of Time, Postponements and Adjournments

Except as otherwise provided by law, the Board, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision, may, for good cause shown, extend or shorten any time limits prescribed by these Rules for the filing of any papers and may, consistent with paragraph (b) of this Rule, postpone or adjourn any hearing.

Rules 5412. – 5419. [Reserved]

PREHEARING RULES

Rule 5420. Leave to Participate to Request a Stay

The Board or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a Commission investigation or proceeding, or a criminal investigation or prosecution, arising out of the same or similar facts that are at issue in the pending Board or disciplinary proceeding. Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. A stay granted pursuant to this Rule may be granted for such a period and upon such conditions as the Board or the hearing officer deems appropriate.

(1) Stay to Protect Ongoing Commission Investigation

Upon a showing that a stay requested pursuant to this Rule is necessary to protect an ongoing Commission investigation, the motion for the stay shall be granted.

(2) Other Stays

Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for the stay shall be favored.

PCAOB
Public Company Accounting Oversight Board

Rule 5421. Answer to Allegations

(a) When Required

In its order instituting proceedings, the Board may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer.

(b) When to File

Except where a different period is provided by rule or by order, a party filing an answer as provided in paragraph (a) of this Rule shall do so within 20 days after service upon the party of an order instituting proceedings pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, and within 5 days after service upon the party of an order instituting proceedings pursuant to Rule 5200(a)(3). If the order instituting proceedings is amended, the Board or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) Contents of Answer and Effect of Failure to Deny

Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

Rule 5422. Availability of Documents For Inspection and Copying

(a) Documents to be Available for Inspection and Copying

(1) Proceedings Commenced Pursuant to Rule 5200(a)(1) and 5200(a)(2)

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5200(a)(1) or Rule 5200(a)(2), the Division of Enforcement and Investigations shall make available for inspection and copying by any party to the proceeding –

(i) each request, subpoena, or accounting board demand for documents, testimony, or information issued in the investigation or in the informal inquiry, if any, that preceded the investigation or disciplinary proceeding;

(ii) responses to any such requests, subpoenas, and accounting board demands, including any documents produced in response;

(iii) testimony transcripts and exhibits, and any other verbatim records of witness statements;

(iv) all other documents prepared or obtained by the Division of Enforcement and Investigations in connection with the investigation prior to the institution of proceedings, except that the Division need not produce any of the following documents that it does not intend to introduce as evidence –

(A) any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation or disciplinary proceeding;

(B) any document that is privileged, including any document protected by the attorney work product doctrine;

(C) any document that would disclose the identity of a confidential source; and

(D) any other document that the hearing officer or the Board grants the Division leave to withhold as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(2) Proceedings Commenced Pursuant to Rule 5200(a)(3)

Unless otherwise provided by this Rule, or by order of the Board, the Division of Enforcement and Investigations shall make available for inspection and copying by any party to the proceeding all documents upon which the Division intends to rely in seeking a finding of noncooperation but shall not be required to make available any other documents.

(3) Proceedings Commenced Pursuant to Rule 5500

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5500, the Division of Registration and Inspections shall make available for inspection and copying by the applicant documents obtained by that division in connection with the registration application prior to the notice of hearing, except that the Division need not produce any of the following documents that it does not intend to introduce as evidence –

(i) any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the hearing on disapproval of registration;

(ii) any document that is privileged, including any document protected by the attorney work product doctrine;

(iii) any document that would disclose the identity of a confidential source; and

(iv) any other document that the hearing officer or the Board grants the Division leave to withhold as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(b) Withheld Document List

The hearing officer may require the interested division to submit for review a list of documents withheld pursuant to paragraphs (a)(1)(iv)(B)-(C) or (a)(3)(ii)-(iii) of this Rule, or to submit any such document for inspection by the hearing officer in camera. A hearing officer may order that any document withheld pursuant to those paragraphs be made available for inspection and copying only if the hearing officer determines that the document is not a document described in those paragraphs.

(c) Timing of Inspection and Copying

Unless otherwise ordered by the Board or the hearing officer, the interested division shall commence making documents available to a respondent for inspection and copying to any respondent who is not in default under Rule 5409 no later than 14 days after the institution of proceedings pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, and no later than 7 days after proceedings have been instituted pursuant to Rule 5200(a)(3).

(d) Place of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to a party for inspection and copying at the Board office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A party shall not be given custody of the documents or leave to remove the documents from the Board's offices pursuant to the requirements of this Rule other than by written agreement of the interested division. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(e) Copying Costs and Procedures

A party may obtain a photocopy of any documents made available for inspection. The party shall be responsible for the cost of photocopying. The respondent shall be given access to the documents at the Board's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(f) Failure to Make Documents Available – Harmless Error

In the event that a document required to be made available to a party pursuant to this Rule is not made available by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the party shall establish that the failure to make the document available was not harmless error.

Note: The interested division's obligation under this Rule relates to documents obtained by that division. Documents located only in the files of other divisions or offices are beyond the scope of the Rule, except that documents located in the files of other divisions and that the interested division intends to introduce as evidence shall, for purposes of this Rule, be treated as if they have been obtained by the interested division and must therefore be made available under this Rule.

Rule 5423. Production of Witness Statements

(a) Availability

Upon motion by any respondent in a disciplinary proceeding, the hearing officer may order that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce - Harmless Error

In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

(c) Definition of Statement

For purposes of this Rule, the term "statement" shall have the meaning set forth in 18 U.S.C. § 3500(e).

Rule 5424. Accounting Board Demands and Commission Subpoenas

(a) Accounting Board Demands and Requests

In connection with any hearing ordered by the Board, a party may request the issuance of an accounting board demand of a registered public accounting firm or an associated person of such a firm, or an accounting board request of any other person. Such a demand or request may call for the attendance and testimony of a witness at the designated time and place of the hearing or for the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, an application for issuance of such a demand or request shall be made in writing and served on each party. A person whose application for such a demand or request has been denied or modified may not submit a substantially similar application to any other person and may not request that the Board seek a Commission subpoena pursuant to paragraph (b) of this Rule, seeking substantially the same testimony or other evidence specified in the denied application or excluded from an otherwise granted application.

(1) Unavailability of Hearing Officer

In the event that the hearing officer assigned to a proceeding is unavailable, any member of the Board, or other person designated by the Board for this purpose, may grant an application for the issuance of an accounting board demand or request. A party seeking such issuance may submit the application to the Secretary, who shall direct it to a person authorized to grant the request, deny the request, or grant the request with modifications.

(2) Signing May be Delegated

A hearing officer may authorize issuance of an accounting board demand, or an accounting board request, and may delegate the manual signing of the demand or request to any other person.

(3) Standards for Issuance

Where it appears that an application for an accounting board demand or request is reasonable in scope and is reasonably calculated to encompass, or lead to the discovery of, admissible evidence, the application shall be granted. If it appears that the accounting board demand or request sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, designed to seek irrelevant information, or sought for the purpose of harassment or delay, the application shall be denied. The hearing officer or other person ruling on the application may, in his or her discretion, as a condition precedent to the issuance of the demand or request, require the applicant seeking the demand or request to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer or other person ruling on the application may grant the application upon such conditions or with such modifications as fairness requires. In making the determination, the person issuing the demand or request may inquire of the parties whether they will stipulate to the facts sought to be proved.

Note: Whenever possible, the parties should explore the extent to which stipulations of fact may obviate the need for issuance of accounting board demands and requests to non-parties, and the person ruling on an application for issuance of an accounting board demand or request should encourage the parties to reach such stipulations when possible.

(4) Witness Fees

A witness, other than a party, who is summoned to a Board proceeding pursuant to an accounting board demand, or an accounting board request, or who is deposed pursuant to Rule 5425, shall be paid his or her reasonable expenses by the party at whose instance the witness appears.

(b) Commission Subpoenas

In connection with any hearing ordered by the Board, and upon the application of any party or on its own initiative, the Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena to any person, including any client of a registered public accounting firm, requiring the person to provide any

testimony or produce any documents that the Board considers relevant or material to a Board proceeding.

Rule 5425. Depositions to Preserve Testimony for Hearing

(a) Procedure

Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

Note: Depositions under the Rules of Board Procedure are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not permitted for purposes of discovery.

(b) Required Finding When Ordering a Deposition

In the discretion of the Board or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, or otherwise unavailable, and that the taking of a deposition will serve the interests of justice.

(c) Procedure at Depositions

A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(d) Objections to Questions or Evidence

Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) Filing of Depositions

The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

Rule 5426. Prior Sworn Statements of Witnesses in Lieu of Live Testimony

At a hearing, any person wishing to introduce a prior, sworn statement of a nonparty witness otherwise admissible in the proceeding, in lieu of live testimony may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement in lieu of live testimony may be granted if –

(a) the witness is dead;

(b) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(c) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(d) the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand; or,

(e) in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rule 5427. Motion for Summary Disposition

(a) For Interested Division

After a party has filed an answer and documents have been made available to that respondent for inspection and copying pursuant to Rule 5422, or after service of a motion for summary disposition by the respondent, the interested division may make a motion for summary disposition of the proceedings with respect to that respondent.

(b) For Respondent

A respondent party may at any time make a motion for summary disposition of the proceeding with respect to that respondent.

(c) Pre-motion Conference Required

A party seeking summary disposition shall request and attend a pre-motion conference with the hearing officer before filing its motion for summary disposition.

(1) Due-date for Filing

At the pre-motion conference, the hearing officer will schedule a due-date for the submission of the motion for summary disposition and may, but is not required to, schedule a due-date for the submission of a response to the motion for summary judgment.

(2) Review and Decide Procedure

If the hearing officer has not scheduled a due-date for a response to the motion for summary judgment, upon review of the motion the hearing officer may decide to deny the motion or to require a response to the motion. A hearing officer shall not grant a motion for summary disposition until after the due-date for filing a response to the motion has passed.

(d) Decision on Motion

The hearing officer shall promptly grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law. A summary disposition, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to a sanction. A hearing officer's decision to deny a motion for summary disposition is not subject to interlocutory appeal.

(e) Lengths of Briefs

Neither a brief in support of a motion for summary disposition, nor a brief in response to such a motion, shall exceed 25 pages in length, without leave of the hearing officer. Reply briefs are discouraged and are not permitted without leave of the hearing officer.

Rules 5428. – 5439. [Reserved]

CONDUCT OF HEARINGS

Rule 5440. Record of Hearings

(a) Recordation

All hearings shall be recorded and a written transcript thereof shall be prepared.

(b) Availability of a Transcript

Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings shall be available for purchase only by parties, provided, however, that any person compelled to testify at a hearing may purchase a copy of his or her own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or other submissions, or within such earlier time as directed by the Board or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Rule 5441. Evidence: Admissibility

The Board or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Rule 5442. Evidence: Objections and Offers of Proof

(a) Objections

Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Board, however, unless raised –

(1) pursuant to interlocutory review in accordance with Rule 5461;

(2) in a proposed finding or conclusion filed pursuant to Rule 5445; or

(3) in a petition for Board review of an initial decision filed in accordance with Rule 5460.

(b) Offers of Proof

Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 5202(b).

Rule 5443. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 5444. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding, a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, shall be determined by the Board or the hearing officer in each proceeding.

Rule 5445. Post-hearing Briefs and Other Submissions

(a) At the end of the hearing in any proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500 in which an initial decision is to be issued, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which post-hearing briefs or other submissions are to be filed. Unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary –

(i) the party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing; and

(ii) the total period within which all such filings and any opposition and reply submissions are to be filed shall be no longer than 90 days after the end of the hearing.

(b) In any proceeding instituted pursuant to Rule 5200(a)(3), the hearing officer may, in his or her discretion, render an initial decision without allowing for post-hearing briefs or other submissions, or may allow for such briefs or other submissions according to an expedited schedule.

Rules 5446. – 5459. [Reserved]

APPEALS TO THE BOARD

Rule 5460. Board Review of Determinations of Hearing Officers

(a) Petition for Review of Initial Decision by Hearing Officers

Any party to a hearing may obtain Board review of an initial decision by filing a petition for review that –

(1) sets forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception; and

(2) is filed –

(i) in a proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, within 30 days after service of the initial decision on the petitioner or within 10 days after the filing of a petition for review by another party, whichever is later; or

(ii) in a proceeding instituted pursuant to Rule 5200(a)(3), within 10 days after service of the initial decision on the petitioner.

(b) Review on Board's Initiative

The Board may, on its own initiative, order review of any initial decision, or a portion of any initial decision, at any time before the initial decision becomes final pursuant to Rule 5204(c).

(c) De Novo Review

Based on a petition for review, or on its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper based on the record.

(d) Limitations on Matters Reviewed

Review by the Board of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 5462(a). On notice to all parties, however, the Board may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) Summary Affirmance

The Board may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Board.

Rule 5461. Interlocutory Review

(a) Availability

The Board will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Board may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this Rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Board may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) Certification Process

A ruling submitted to the Board for interlocutory review shall be certified in writing by the hearing officer as appropriate for interlocutory review and shall specify the basis for certification. The hearing officer shall certify a ruling only if –

(1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that –

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(c) Proceedings Not Stayed

The filing of an application for interlocutory review or the grant of interlocutory review shall not stay proceedings before the hearing officer unless he or she, or the Board, shall so order. The Board will not consider the motion for a stay unless the motion has first been made to the hearing officer.

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Rule 5462. Briefs Filed with the Board

(a) Briefing Schedule Order

Upon a timely and valid petition for review, or upon its own timely motion to review an initial decision, other than review ordered pursuant to Rule 5469, the Board shall issue a briefing schedule order directing the parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs may be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board. The briefing schedule order shall be issued –

(1) at the time the Board orders review on its own initiative pursuant to Rule 5460(b), or orders interlocutory review on its own motion pursuant to Rule 5460; or

(2) within 21 days, or such longer time as provided by the Board, after –

(i) the last day permitted for filing a petition for review pursuant to Rule 5204(c);

(ii) certification of a ruling for interlocutory review pursuant to Rule 5461(c).

(b) Contents of Briefs

Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) Length Limitation

Opening and opposition briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Board.

Rule 5463. Oral Argument Before the Board

(a) Availability

The Board, on its own motion or the motion of a party, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Board will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Board determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) Procedure

Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Board shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Board, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) Time Allowed

Unless the Board orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Board may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided

equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

Note: The term "side" is used in this Rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. If multiple parties have a common interest, they may constitute only a single side.

(d) Participation of Board Members

A member of the Board who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

Rule 5464. Additional Evidence

Upon its own motion or the motion of a party, the Board may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Board. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Any other party may file a response to the motion within 5 days after the motion is filed, or such longer time as the Board may allow. The Board may accept or hear additional evidence, or it may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

Rule 5465. Record Before the Board

The Board shall determine each matter on the basis of the record.

(a) Contents of the Record

In proceedings for final decision before the Board, the record shall consist of –

(1) all items part of the hearing record below in accordance with Rule 5202(a);

(2) any petitions for review, cross-petitions or oppositions; and

(3) all briefs, motions, submissions and other papers filed on appeal or review.

(b) Transmittal of Record to Board

Within 14 days after the last date set for filing briefs or such later date as the Board directs, the Secretary shall transmit the record to the Board.

(c) Review of Documents Not Admitted

Any document offered in evidence but excluded by the hearing officer or the Board and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Board on appeal but shall be transmitted to the Board by the Secretary if so requested by the Board. In the event that the Board does not request the document, the Secretary shall retain the document not admitted into the record until the later of –

(1) the date upon which the Board's order becomes final, or

(2) the conclusion of any Commission and judicial review of that order.

Rule 5466. Reconsideration

(a) Scope of Rule

A party may file a motion for reconsideration of a final order issued by the Board.

(b) Procedure

A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Board may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Board, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Board.

Rule 5467. Receipt of Petitions for Commission or Judicial Review

A registered public accounting firm –

(a) that has filed a petition for Commission review of a final disciplinary sanction of the Board pursuant to Section 19(d)(2) of the Exchange Act, or a petition for court review of a Commission order with respect to such a sanction pursuant to Section 25(a)(1) of the Exchange Act, or

(b) that is associated with a person who has filed such a petition,

shall file a notice and copy of the petition with the Secretary within 10 days after the petition is made.

Note: Appeals of final disciplinary sanctions by the Board are instituted by the filing of a petition for review in accordance with the Commission's Rules of Practice. Unless directed otherwise by statute, appeals of Commission orders and decisions on a sanction imposed by the Board to a court of appeals are instituted by the filing of a petition for review in accordance with the Federal Rules of Appellate Procedure. See Fed. R. App. P. 15(a).

Rule 5468. Appeal of Actions Made Pursuant to Delegated Authority

(a) Notice of Intention to Petition for Review

A petition for Board review of an action made pursuant to delegated authority shall be made by filing a written notice of intention to petition for review within five days after actual notice to the petitioner of the action or service of notice of the action, whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to Rule 5401(d).

(b) Petition for Review

Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (a) of this Rule, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form. The Board will review all actions made pursuant to delegated authority with respect to which timely notices of intention to petition for review, and timely petitions for review, have been filed.

Rule 5469. Board Consideration of Actions Made Pursuant to Delegated Authority

(a) Scope of Review

Upon a petition for review, or upon its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to delegated authority.

(b) Order for Review

In an order granting a petition for review or directing review on the Board's own initiative, the Board will set forth the time within which a statement in support of or in opposition to the action made pursuant to delegated authority may be made and shall

state whether a stay shall be granted, if none is in effect, or shall be continued, if in effect pursuant to paragraph (c) of this Rule.

(c) Automatic Stay of Delegated Action

An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Board. Upon filing with the Board of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Board that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Board orders otherwise.

Rules 5470. – 5499. [Reserved]

Part 5 – Hearings on Disapproval of Registration Applications

Rule 5500. Commencement of Hearing on Disapproval of a Registration Application

The Board may commence a proceeding to determine whether to approve or disapprove a public accounting firm's application for registration when, based on review of an application for registration as a registered public accounting firm –

(a) the Board determines, pursuant to Rule 2106(b)(2)(ii), to provide the applicant with written notice of a hearing to determine whether to approve or disapprove the application; and

(b) within such period, as the Board permits, after the date of service of a notice of a hearing whether to approve or disapprove an application for registration pursuant to Rule 2106(b)(2)(ii), the public accounting firm served with such notice files with the Secretary a written request for a hearing date and a notice of appearance pursuant to Rule 5201(b), and includes with the request –

(1) a statement that the public accounting firm has elected not to treat the notice as a written notice of disapproval for purposes of Section 102(c) of the Act; and

(2) a statement describing with specificity why the public accounting firm believes that the Board should not issue a written notice of disapproval.

Rule 5501. Procedures for a Hearing on Disapproval of a Registration Application

Proceedings instituted pursuant to Rule 5500 shall be subject to procedures as described in Parts 2 and 4 of Section 5 of the Board's Rules.

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Appendix 2 – Section-by-Section Analysis of Proposed Rules Relating to Investigations and Adjudications

The Board's proposed rules relating to investigations and adjudications consist of 67 rules, plus definitions that would appear in Rule 1001. Each of the rules and definitions is discussed below.

Rule 1001 – Definitions of Terms Employed in Rules

Rule 1001 contains definitions of terms used in the Board's rules. The proposed rules relating to investigations and adjudications employ certain terms that would be added to the terms defined in Rule 1001.

Accounting Board Demand

Rule 1001(a)(ix) defines "accounting board demand" as a command to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term only to identify demands made upon registered public accounting firms and associated persons of such firms. Under the Act, the Board has authority to require those firms and persons to provide any testimony or documents sought by the Board in furtherance of its responsibilities under the Act, and including in particular any testimony or documents that the Board considers relevant to an investigation.

Accounting Board Request

Rule 1001(a)(x) defines "accounting board request" as a request to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term to distinguish the Board's efforts to obtain documents and testimony from

persons other than registered public accounting firms and their associated persons. Under the Act, the Board lacks compulsory authority as to such persons.

Bar

Rule 1001(b)(ii) defines "bar" as a permanent disciplinary sanction prohibiting a person from being associated with a registered public accounting firm. As a concept, the rules distinguish between a "bar" and a "suspension." Both sanctions, when applied to an associated person, prohibit the person from being an associated person of a registered public accounting firm. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the person may resume being an associated person without any other action by the person or the Board. In contrast, a bar is a permanent sanction that does not expire unless the person petitions the Board for termination of the bar, pursuant to the provisions of the rules, and the Board grants the petition. In some cases, the Board may impose a bar that expressly provides that a person may petition for termination of the bar after a fixed period. In other cases, the Board may impose a bar with no such provision.

Counsel

Rule 1001(c)(ii) defines "counsel" as an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state.

Disciplinary Proceeding

Rule 1001(d)(i) defines "disciplinary proceeding" as a proceeding initiated by an order instituting proceedings, held for the purpose of determining whether or not a registered public accounting firm, or any person associated with a registered public accounting firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards; or has failed to cooperate with the Board in connection with an investigation; and whether to impose a sanction pursuant to Rule 5300.

Document

Rule 1001(d)(ii) defines "document" as synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to audit work papers.

Hearing Officer

Rule 1001(h)(i) defines "hearing officer" as a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing. The definition is adapted from Rule 101(a)(5) of the Commission's Rules of Practice.

Interested Division

Rule 1001(i)(iv) defines "interested division" as a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding. As a general matter, the interested division in a disciplinary proceeding will be the Division of Enforcement and Investigations, and the interested division in a hearing on disapproval of a registration application will be the Division of Registration and Inspections. The definition is adapted from Rule 101(a)(6) of the Commission's Rules of Practice.

Order Instituting Proceedings

Rule 1001(o)(ii) defines "order instituting proceedings" as an order issued by the Board commencing a disciplinary proceeding.

Party

Rule 1001(p)(iii) defines "party" as the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

Person

Rule 1001(p)(iv) defines "person" as any natural person or any business, legal or governmental entity or association.

Revocation

Rule 1001(r)(iii) defines "revocation" as a permanent disciplinary sanction terminating a firm's registration. As a concept, the rules distinguish between a "revocation" and a "suspension." Both sanctions, when applied to a firm, prohibit the firm from preparing or issuing, or participating in the preparation or issuance of, audit reports. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the firm may resume such work without any other action by the firm or the Board. In contrast, revocation is a permanent sanction that does not expire unless the firm petitions the Board for termination of the revocation, pursuant to the provisions of the rules, and the Board grants the petition. In some cases, the Board may impose a revocation that expressly provides that a firm may

petition for termination of the revocation after a fixed period. In other cases, the Board may impose a revocation with no such provision.

Secretary

Rule 1001(s)(iii) defines "Secretary" as the Secretary of the Board.

Suspension

Rule 1001(s)(iv) defines "suspension" as a temporary disciplinary sanction, which lapses by its own terms, prohibiting (1) a registered public accounting firm from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer; or (2) a person from being associated with a registered public accounting firm. A suspension is distinct from a bar (as to an associated person) and a revocation (as to a firm) in that a suspension is a sanction that expires by its own terms at a fixed time, with no further action required of the associated person, the firm, or the Board.

Rule 5000 – General

Proposed Rule 5000 requires that registered public accounting firms and any associated persons of such firms comply with all Board orders to which they are subject. The Act authorizes the Board to take certain action with respect to, or require certain things of, registered public accounting firms and their associated persons. For example,

the Act authorizes the Board to require such firms and persons to produce documents or to provide testimony, and the Act authorizes the Board to impose significant disciplinary sanctions on such firms and persons for various violations and for noncooperation with Board investigations. In exercising its authority, the Board will frequently act through the vehicle of a Board order. A requirement of compliance with such orders is implicit in the authority to take the action, and Rule 5000 makes that requirement explicit.

Part 1 – Inquiries and Investigations

Part 1 of the Board's Rules on Investigations and Adjudications consists of Rules 5100 through 5112. These rules address procedural matters concerning the conduct of informal inquiries by Board staff and formal Board investigations.

Rule 5100 – Informal Inquiries

The Board contemplates that the staff of the Division of Enforcement and Investigations will sometimes conduct informal inquiries to determine whether to recommend that the Board open a formal investigation on a matter. Rule 5100 describes generally the circumstances in which the staff may conduct an informal inquiry (Rule 5100(a)) and the scope of the activity in which the staff may engage in an informal inquiry (Rule 5100(b)).

Under Rule 5100(a), the staff may undertake an informal inquiry where it appears to the staff that an act or practice, or an omission to act, by a registered public accounting firm or an associated person may violate the Act, the Board's rules, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Under Rule 5100(b), the staff may pursue an informal inquiry by requesting documents, information, or testimony from any person. The staff may not, in an informal inquiry, issue accounting board demands.

Rule 5101 – Commencement and Closure of Investigations

Rule 5101 describes generally the processes by which the Board will commence and close formal investigations. The Board may commence a formal investigation when it appears that an act or practice, or omission to act, by a registered public accounting firm or any person associated with such a firm may violate any provision of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Rule 5101(a)(1) provides that the way the Board will commence an

investigation is by issuing an order of formal investigation. Rule 5101(a)(2) provides that the Board may, in the formal order, designate Board staff members, or groups of staff members (such as a particular division or office) authorized to issue accounting board demands and otherwise require or request the cooperation of any person in connection with the investigation.

Rule 5101(b) provides that the Board may issue an order suspending a formal investigation for a specified period of time or terminating a formal investigation.

Rule 5102 – Testimony of Registered Public Accounting Firms and Associated Persons in Investigations

Section 105(b)(2)(A) of the Act authorizes the Board to promulgate rules requiring the testimony of any registered public accounting firm or any associated person of such a firm with respect to any matter that the Board considers relevant or material to an investigation. Rule 5102(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require such testimony. Paragraphs (b) through (e) of Rule 5102 describe procedures related to obtaining and recording that testimony.

Rule 5102(b) provides that the Board or staff shall require testimony by serving an accounting board demand. Under the rule, the demand must give reasonable notice of the time and place for taking testimony, must describe the methods by which the

testimony will be recorded, and, if the demand is directed to a firm rather than to a natural person, must supply a description with reasonable particularity of the matters on which examination is requested. The rule does not impose any requirement of a minimum period of notice for testimony, but does require reasonable notice. As a general matter, the Board anticipates that the staff will provide at least five business days notice when demanding testimony. But what constitutes reasonable notice will vary depending upon the circumstances, and may sometimes be less than five business days.

Rule 5102(c) describes procedures related to the actual conduct of the examination. Rule 5102(c)(1) provides that each witness shall be required to declare that the witness will testify truthfully, by oath or affirmation. The oath or affirmation provision of the rule is adapted from Federal Rule of Evidence 603. The authority to administer and obtain such an oath or affirmation is implicit in the Board's authority to require testimony.

Rule 5102(c)(2) provides that examinations shall be conducted before a reporter designated by the Board's staff to record the examination. Rule 5102(c)(3) imposes restrictions on who may be present during the examination. Persons who may be present are limited to the witness, the witness's counsel (subject to Rule 5109(b),

discussed below), any member of the Board or the Board's staff, the reporter, and any other person whom the Board or the staff designated in the order of formal investigation determine to be appropriate permit to be present. All of these provisions, however, are qualified by the restriction that in no event shall any person (other than the witness) who has been or is reasonably likely to be examined in the investigation be present. This last restriction is not limited to registered public accounting firms and associated persons of such firms but also includes any other person from whom the Board or the staff could seek to require testimony pursuant to a Commission subpoena (as described in Rule 5111).

Rule 5102(c)(4) is modeled on Rule 30(b)(6) of the Federal Rules of Civil Procedure. Rule 5102(c)(4) provides that a registered public accounting firm that is required to provide testimony shall designate one or more persons to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. Those persons are then required to testify as to matters known or reasonably available to the firm.

Rule 5102(e) allows a witness 10 days, after being notified that the transcript or other recording of the examination is available for review, to describe any changes in form or substance that the witness would make and to supply the reasons for such

changes. Under the rule, the transcript shall be accompanied by the reporter's certification that the witness was duly sworn and that the transcript is a true record of the testimony, and shall indicate whether the witness requested to review the transcript. The reporter shall also append to the transcript any changes to the testimony made by the witness during the review period described above.

Rule 5103 – Production of Audit Workpapers and Other Documents in Investigations

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules requiring the production of audit workpapers and any other document or information in the possession of any registered public accounting firm or any associated person of such a firm, wherever domiciled, with respect to any matter that the Board considers relevant or material to an investigation. Rule 5103(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require production of such documents and information.

Rule 5103(b) provides that an accounting board demand for such documents or information shall set forth a reasonable time and place for such production. Rule 5103(b) does not impose any minimum notice requirement before production shall be due. As a general matter, the Board anticipates that the staff will provide at least five business days notice before production is due. But what constitutes a reasonable time

for production will vary and may, in some circumstances, be less than five days. Rule 5103(b) also provides that unless otherwise requested or permitted in the accounting board demand, the documents produced shall be the originals, and any document that exists in electronic form shall be produced in electronic form.

Rule 5104 – Examination of Books and Records in Aid of Investigations

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules allowing the Board to inspect the books and records of a registered public accounting firm or any associated person of such a firm, wherever domiciled, to verify the accuracy of any documents and information supplied by the firm or person in an investigation. Rule 5104 implements that authority by providing that the Board and the staff designated in an order of formal investigation may examine such books and records to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation. Any such examination would be separate and apart from any Board inspection pursuant to Section 104 of the Act and the Board's rules thereunder and would not be subject to the provisions of Section 104 or the Board's rules thereunder. Rule 5104 requires that the firm or person allow such examination upon demand, and does not provide for any minimum notice period.

Rule 5105 – Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms

Section 105(b)(2)(C) of the Act authorizes the Board to promulgate rules to request that any person, including any client of a registered public accounting firm, provide any testimony and documents that the Board considers relevant or material to an investigation. The Act requires the Board and the staff to provide appropriate notice of such requests, subject to the needs of the investigation. Rule 5105 implements that authority by providing that the Board and the staff may make such requests to any person. In this context, the proposed rules use the term "accounting board request" to distinguish it from an "accounting board demand," which may be made only to registered public accounting firms and associated persons of such firms.

Rule 5105 provides that the Board or staff shall give appropriate notice when requesting testimony (Rule 5105(a)(1)) and specify a reasonable time and place when requesting document production (Rule 5105(b)). What notice is appropriate for testimony, and what is a reasonable time and place for production, may vary with the circumstances and the needs of the investigation. Rule 5105(a)(1) also provides that an accounting board request for testimony shall state the method by which the testimony shall be recorded. The rule further provides that if the person to be examined is an organized entity, rather than a natural person, the accounting board request shall

provide a description with reasonable particularity of the matters on which examination is requested.

Rule 5105(a)(2) incorporates, in the context of testimony pursuant to an accounting board request, the procedural and transcript provisions of testimony pursuant to an accounting board demand, as discussed above with respect to Rules 5102(c)-(e).

Although the Board can only request, and not require, testimony or production of documents from persons other than registered public accounting firms and associated persons of such firms, the Board does have the option of seeking a Commission subpoena to require testimony or document production from any person, as discussed below with respect to Rule 5111. The note to Rule 5105 serves as a reminder that this option is available to the Board. The note, however, does not in any way limit the Board's authority to seek a Commission subpoena at any time, even if the Board has not first sought the testimony or documents through an accounting board request. Neither the note, nor anything in the Board's rules, creates any right in any person to receive an accounting board request or any other form of notice from the Board before the Board seeks a Commission subpoena to be served on that person.

Rule 5106 – Assertion of Claim of Privilege

Rule 5106 imposes requirements on any person who declines to provide testimony, documents, or information required by an accounting board demand on the ground of an assertion of privilege. The rule specifies the types of information that a person must supply related to the privilege assertion. The rule is adapted from Rule 6.2 of the local rules of the District Court for the Southern District of New York. Failure to supply the required information is a violation of the rule, and may subject a person to a disciplinary proceeding for violation of a Board rule or for noncooperation with an investigation. Rule 5106 does not convey any right to withhold documents, information, or testimony on the basis of any particular privilege.

Rule 5107 – Uniform Definitions in Demands and Requests for Information

Rule 5107 supplies certain definitions and rules of construction that shall be deemed to be incorporated by reference into all accounting board demands and accounting board requests for information. These definitions and rules of construction are modeled on those in use by the federal districts courts in the Southern District of New York. Rule 5107 does not preclude the Board or the staff, in any particular accounting board demand or accounting board request, from defining other terms, or

from using abbreviations, or supplementing or using only part of a definition of a term defined in Rule 5107.

Rule 5108 – Confidentiality of Investigatory Records

Rule 5108 provides that unless otherwise ordered by the Board or the Commission, all documents, testimony, or other information prepared or received by or specifically for the Board or the staff in connection with an informal inquiry or a formal investigation shall be confidential in the hands of the Board, unless and until presented in connection with a public proceeding or released in accordance with Section 105(c) of the Act and the Board's rules thereunder. Consistent with Section 105(b)(5) of the Act, however, Rule 5108 provides that the Board may supply any such information to the Commission and, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors, to certain other government entities, specifically: the Attorney General of the United States, an appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act) other than the Commission if the information pertains to an audit report for an institution subject to the jurisdiction of such regulator, state attorneys general in connection with any criminal investigation, and appropriate state regulatory authorities.

The first note to Rule 5108 points out that Section 105(b)(5) of the Act provides that the documents, testimony, and information described above shall be confidential and privileged as an evidentiary matter in any proceeding in federal or state court or administrative agency and, in the hands of any agency or establishment of the federal government, shall be exempt from disclosure under the Freedom of Information Act.

The second note to Rule 5108 points out that the Director of Enforcement and Investigations may engage in, and may authorize staff to engage in, discussions with persons identified in Rule 5108 concerning documents, testimony, and information described in the rule.

Rule 5109 – Rights of Witnesses in Inquiries and Investigations

Rule 5109 sets out certain rights accorded to persons from whom the Board seeks documents, testimony, or information in an investigation. Under Rule 5109(a), any person compelled to testify or produce documents pursuant to a Commission subpoena issued pursuant to Rule 5111, and any person who testifies or produces documents pursuant to an accounting board demand, shall, upon request, be allowed to review the Board's order of formal investigation. No such person is entitled to obtain their own copy of the order of formal investigation, but the Director of Enforcement and Investigations may, in his or her discretion, allow a person to obtain a copy of the order.

This rule is adapted from Rule 7(a) of the Commission's Rules Relating to Investigations.

Rule 5109(b) allows any person who appears to testify in a formal investigation to be accompanied, represented, and advised by counsel. Rule 5109(b) grants this right on the condition that counsel affirmatively represents to the staff, either through a notice of appearance or a statement on the record at the beginning of the testimony, that he or she represents the witness. This rule is adapted from Rule 7(b) of the Commission's Rules Relating to Investigations. The right granted by Rule 5109(b) is also limited by Rule 5102(c)(3), which does not allow for the presence of any person, even counsel, who has been or is reasonably likely to be examined in the investigation.

Rule 5109(c) provides that a witness may inspect the transcript of his or her own testimony. A person who has testified or provided documents may also request a copy of his or her transcript or of the documents he or she produced. If the request is granted, the transcript or documents may be obtained upon the payment of fees to cover the cost of reproduction. Any such request, however, may be denied by the Director of Enforcement and Investigations for good cause shown if the documents or testimony have not been presented in connection with a proceeding or released in

accordance with Section 105(c) of the Act and the Board's rules thereunder. This rule is adapted in part from Rule 6 of the Commission's Rules Relating to Investigations.

Rule 5109(d) provides that registered public accounting firms and persons associated with such firms may, on their own initiative at any time, submit a written statement to the Board setting forth their interests and positions in regard to the subject matter of any investigation in which they have become involved. The staff, either upon request or on its own initiative, may – but is not required to – advise any such person of the general nature of an investigation, including the indicated violations as they pertain to that person, and may prescribe a fixed period of time that will be allowed for the person to submit a statement of position and interests before the staff makes any recommendation to the Board. Rule 5109(d) provides that any such statement that is submitted will be forwarded to the Board in conjunction with any staff recommendation pertaining to the person submitting the statement. This rule is adapted from Rule 7(a) of the Commission's Rules Relating to Investigations.

Rule 5110 – Non-cooperation with an Investigation

Section 105(b)(3) of the Act authorizes the Board to impose sanctions, including revocation of registration and bar on association, against any registered public accounting firm or associated person who refuses to testify, produce documents, or

otherwise cooperate with the Board in connection with an investigation. Rule 5110 describes how the Board will implement that authority.

Under Rule 5110(a), the Board may institute a disciplinary proceeding for non-cooperation with an investigation if it appears to the Board that a registered public accounting firm or an associated person may have failed to comply with an accounting board demand, may have given testimony that is false or misleading or that omits material information, or may otherwise have failed to cooperate in connection with an investigation. The Board shall institute such proceedings pursuant to Rule 5200(a)(3).

A disciplinary proceeding for non-cooperation shall proceed generally according to the hearing procedures set out in the Board's rules. Because of the nature of the conduct being sanctioned, however, a disciplinary proceeding for non-cooperation will generally be a streamlined proceeding focused on a narrow issue. For that reason, various of the procedural rules governing disciplinary proceedings include certain provisions that will apply only to disciplinary proceedings for non-cooperation. Among other things, those provisions include that an order instituting non-cooperation proceedings shall specify a hearing date (Rule 5201(b)(3)), and that documents made available to the respondent shall be limited to those documents on which the staff intends to rely to establish the fact of non-cooperation (Rule 5422(a)(2)).

Rule 5111 – Requests for Issuance of Commission Subpoenas in Aid of an Investigation

Section 105(b)(2)(D) of the Act authorizes the Board to promulgate rules according to which the Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena on any person to require testimony and the production of documents that the Board considers relevant or material to an investigation. Rule 5111 implements that authority by providing that the Board shall seek issuance of such subpoenas in a manner established by the Commission, and in seeking such subpoenas shall supply the Commission with a completed form of subpoena and such other information as the Commission may require.

Rule 5112 – Coordination and Referral of Investigations

Rule 5112(a) provides that the Board will notify the Commission of any pending investigation that involves a potential violation of the securities laws. The rule provides that the Board will do so as soon as practicable after entry of an order of formal investigation by sending a copy of the order to the Commission or appropriate Commission staff. Rule 5112(a) provides that the staff will then coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.

Rule 5112(b) provides that the Board may refer any investigation to the Commission and, in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), to that regulator.

Rule 5112(c) provides that, at the direction of the Commission, the Board may refer any investigation to the Attorney General of the United States, the attorney general of one or more states, and an appropriate state regulatory authority.

Part 2 – Disciplinary Proceedings

Part 2 of the Board's Rules on Investigations and Adjudications consists of Rules 5200 through 5206. These rules address the commencement of disciplinary proceedings and the elements of those proceedings.

Rule 5200 – Commencement of Disciplinary Proceedings

Rule 5200 addresses the commencement of disciplinary proceedings and certain related matters. Rule 5200(a) identifies the three general categories of circumstances under which the Board may commence a disciplinary proceeding: when it appears to the Board that a hearing is warranted to determine whether (1) a registered public accounting firm or a person associated with such a firm has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions

of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, (2) such a firm, or its supervisory personnel, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of laws, rules, and standards, or (3) such a firm or a person associated with such a firm has failed to comply with an accounting board demand, given false testimony, or otherwise failed to cooperate in connection with an investigation.

Rule 5200(b) provides for an appointment of a hearing officer by the Board as soon as practicable after issuance of the order instituting proceedings. The rule is adapted from NASD Rule 9213(a). Under Rule 5200(b), the Board shall notify the parties of the hearing officer's assignment. The hearing officer shall have authority to do all things necessary and appropriate to discharge his or her duties, including, but not limited to, the matters specified in Rule 5200(b). The rule expressly subjects the hearing officer's authority to the limitations described in Rule 5402 (concerning hearing officer disqualification) and Rule 5403 (concerning *ex parte* communications).

Rule 5200(c) provides that the Board will observe certain separation of functions principles. The rule is based in part on Rule 121 of the Commission's Rules of Practice. Under Rule 5200(c), any Board employee or agent engaged in investigative or prosecutorial functions for the Board in a proceeding may not, in that same proceeding or a factually related proceeding, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. In addition, 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.

With respect to proceedings that involve a common question of law or fact, Rule 5200(d) provides that the Board or a hearing officer may, by order, consolidate the proceedings for hearing of any or all matters at issue in the proceedings. The rule is adapted from Rule 201 of the Commission's Rules of Practice. The rule provides that consolidation shall not prejudice any rights that any party may have under the Board's Rules of Procedure and shall not affect the right of any party to raise issues that could have been raised in the absence of consolidation.

Rule 5201 – Notification of Commencement of Disciplinary Proceedings

Rule 5201(a) provides that when the Board issues an order instituting proceedings, the Secretary shall give each person or firm charged appropriate notice of the order within a time reasonable in light of the circumstances. As described in the note to Rule 5201(a), in the case of emergency or expedited action, actual notice – by any means reasonably calculated to supply notice – may precede formal service of the order instituting proceedings.

Rule 5201(b) describes the content of an order instituting proceedings. The precise requirements concerning the content of the order vary depending upon whether the proceeding is commenced under Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3), but in each case the order shall specify in reasonable detail, with respect to each firm or person charged, the conduct alleged to form the basis for a disciplinary sanction. In the case of a hearing on a registration application commenced under Rule 5500, Rule 5201(c) provides that the notice of hearing shall state proposed grounds for disapproving the registration application.

Rule 5201(d) provides that either the Board or, on the motion of the interested division, a hearing officer, may amend an order instituting proceedings. The Board may do so at any time to include new matters of fact or law. A hearing officer may do so only

prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for filing final briefs with the Board. A hearing officer may amend an order only to include new matters of fact or law that are within the scope of the original order instituting proceedings, but may not initiate new charges or expand the scope of matters set for hearing beyond the framework of the Board's order instituting proceedings. The rule is adapted from Rule 200(d) of the Commission's Rules of Practice.

Rule 5202 – Record of Disciplinary Proceedings

Rule 5202(a) describes the material that shall make up the contents of the record in a disciplinary proceeding (Rule 5202(a)(1)) and the contents of the record on disapproval of an application for registration (Rule 5202(a)(2)). Under Rule 5202(b), any document offered as evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered part of the record but shall be maintained by the Secretary until all opportunities for Commission and judicial review have been exhausted or waived. Paragraphs (c)-(e) of Rule 5202 address the substitution of true copies for documents in the record, the preparation of the record and the certification of the record index, and the final transmittal of record items to the Secretary. The rule is adapted from Rules 350 and 351 of the Commission's Rules of Practice.

Rule 5203 – Public and Private Hearings

Section 105(c)(2) of the Act provides that any proceeding by the Board to determine whether to discipline a registered public accounting firm or an associated person thereof shall not be public unless otherwise ordered by the Board for good cause shown, with the consent of the parties to the hearing. Rule 5203 implements that requirement by providing that proceedings commenced pursuant to Rule 5200(a) shall not be public unless the Board so orders, for good cause shown, with the consent of the parties.

Rule 5203 also provides that all other Board hearings shall be nonpublic unless the Board otherwise orders. In practical effect, this provision applies only to a hearing on disapproval of a registration application, since that is the only type of hearing for which the rules provide other than the hearings expressly covered by Section 105(c)(2) of the Act. The proposed rule essentially creates a presumption that a hearing on disapproval of a registration application will be non-public. A disapproval hearing will, by its nature, involve a firm that is not yet a registered firm and may well involve a record that includes confidential information submitted as part of the registration application. The proposed rule reserves to the Board the flexibility to make the hearing public if warranted by unusual circumstances. In any event, if the Board decides, after a

hearing, to disapprove the application, that decision, along with the reasons for the decision, will be made public according to the provisions of Section 105(d) of the Act.

Rule 5204 – Determinations in Disciplinary Proceedings

Rule 5204(a) provides that, unless the Board orders otherwise, the hearing officer shall prepare an initial decision following a hearing. The rule provides that the initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and such other information as the Board may require. The rule is adapted from Rule 360 of the Commission's Rules of Practice.

The note to Rule 5204(a) sets out the Board's general expectations about the time frame within which a hearing officer should complete an initial decision in various types of cases. These time frames are nothing more than the Board's general expectations and do not create any right in any person to have an initial decision prepared within any particular period of time.

Rule 5204(b) governs the hearing officer's filing of the initial decision with the Secretary and the Secretary's service of the initial decision on the parties.

Rule 5204(c) provides the circumstances in which an initial decision of a hearing officer becomes the final decision of the Board as to a party. The rule is adapted from

Rule 360(d) of the Commission's Rules of Practice. Rule 5204(c)(1) provides that the initial decision becomes the Board's final decision as to a party upon issuance by the Secretary of a notice of finality. Rule 5204(c)(2) provides that the Secretary shall issue the notice of finality no later than twenty days after the lapsing of the time period for filing a petition for Board review (as described in Rule 5460), unless one of the two conditions described in Rule 5204(c)(3) has occurred. Rule 5204(c)(3) provides that the Secretary shall not issue a notice of finality as to any party who has filed a timely petition for Board review or with respect to whom the Board, on its own motion, has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205 – Settlement of Disciplinary Proceedings Without a Determination After Hearing

Rule 5205 governs certain matters related to possible settlement of disciplinary proceedings. The rule is adapted from Rule 240 of the Commission's Rules of Practice.

Rule 5205 provides that any person who is or is to be a party to a disciplinary proceeding may at any time propose in writing an offer of settlement. The rule imposes requirements for the content of the offer, and requires that it be signed by the person making the offer, not by counsel.

Rule 5205(c)(1) requires that the Director of Enforcement and Investigations present the offer to the Board along with a recommendation concerning the offer, except

that, if the recommendation is unfavorable, the Director shall not present the offer to the Board unless the person making the offer so requests.

Rule 5205(c)(2)-(3) set out various matters that the person making the offer must waive before the Board will consider the offer, including waiver of rights to hearings, rights to proposed findings of fact and conclusions of law, rights to proceedings before and an initial decision by a hearing officer, rights to post-hearing procedures, rights to judicial review, rights to have Board and Board staff observe separation of functions principles, and rights to claim bias or prejudgment by the Board based on consideration of or discussions concerning the settlement offer.

Rule 5205(c)(4) provides that if the Board rejects the offer, the offer will be deemed withdrawn and will not constitute a part of the record. Rule 5205(c)(4) further provides that rejection of the offer will not affect the continued validity of waivers of rights to claim bias or prejudgment on the basis of discussions concerning the settlement offer.

Rule 5205(c)(5) provides that Board acceptance of an offer will occur only upon the issuance of findings and an order by the Board.

A note to Rule 5205 points out that in hearings on disapproval of registration, settlement offers will be handled by the Director of Registration and Inspections, rather than the Director of Enforcement and Investigations, in accordance with Rule 5205.

Rule 5206 – Automatic Stay of Final Disciplinary Actions

Rule 5206 provides that no final disciplinary sanction of the Board shall be effective until either (a) the dissolution by the Commission of the stay provided by Section 105(e) of the Act or (b) the expiration of the period during which the Commission, on its own motion or upon application under Section 19(d)(2) of the Exchange Act, may institute review of the sanction.

Part 3 – Disciplinary Sanctions

Part 3 of the Board's Rules on Investigations and Adjudications consists of Rules 5300 through 5304. These rules describe the sanctions the Board may impose in disciplinary proceedings and various matters related to the effect of, and the termination of, such sanctions.

Rule 5300 – Sanctions

Rule 5300 describes sanctions that the Board may impose in disciplinary proceedings. Rule 5300(a) describes sanctions that the Board may impose in disciplinary proceedings instituted other than for non-cooperation in an investigation.

Subparagraphs (1) – (6) of Rule 5300(a) incorporate the sanctions expressly provided by Section 105(c)(4) of the Act, including revocation of registration, bar from association, suspensions, limitations on activities, civil money penalties, censures, and a requirement of additional professional education or training. A Note to subparagraph (3) of Rule 5300(a) contains a non-exclusive list of types of limitations on activities the Board may impose. Subparagraphs (7) – (10) of Rule 5300(a) identify other sanctions, pursuant to the authority given to the Board in Section 105(c)(4)(G) of the Act, including requiring a party to engage an independent monitor, to engage counsel or other consultants to design policies to effectuate compliance with the Act, to adopt or implement policies or undertake action to improve audit quality or to effectuate compliance with the Act, or to obtain an independent review and report on one or more engagements.

Rule 5300(b) describes the sanctions that the Board may impose in disciplinary proceedings for non-cooperation with an investigation. The sanctions include revocations, bars, and suspensions, as expressly provided by Section 105(b)(3)(A) of the Act. Rule 5300(b) also identifies other sanctions, pursuant to the authority given to the Board in Section 105(b)(3)(A)(iii), including civil money penalties, censures, limitations on activities, requiring a firm to engage a special master or independent

monitor to monitor and report on the firm's compliance with accounting board demands, or authorizing the hearing officer to retain jurisdiction to monitor compliance with accounting board demands.

When the Board revokes a firm's registration or bars a person from association with a registered public accounting firm, the sanction is permanent and will not expire of its own accord. In contrast, a suspension of registration or a suspension from association shall be for a fixed time period at the expiration of which a suspended firm shall resume its status as registered and a suspended person shall be free to associate with a registered firm.

In the case of a revocation of registration or a bar on association, the Board may provide for a specified period after which the firm may reapply for registration, or the person may petition for termination of the bar. Modification or termination of sanctions is discussed below in connection with Rule 5302.

A note to Rule 5300 points out that the rule does not preclude the imposition, on consent in the context of a settlement, of any other sanction not identified in the rule.

Rule 5301 – Effect of Sanctions

Rule 5301 describes the effect of certain sanctions imposed by the Board. Rule 5301(a) applies to persons who have been suspended or barred from association with a

registered public accounting firm or who have failed to comply with any other sanction imposed on them by the Board. Rule 5301 prohibits such persons from willfully becoming or remaining associated with any registered public accounting firm, unless they first obtain the consent of the Board, pursuant to Rule 5302, or of the Commission.

Rule 5301(b) applies to a registered public accounting firm. It prohibits a firm from permitting a person to become or remain associated with the firm if the firm knows, or in the exercise of reasonable care should have known, that the person is subject to a bar or suspension on such association, unless the firm first obtains the consent of the Board, pursuant to Rule 5302, or of the Commission.

The notes to Rule 5301(a) and Rule 5301(b) point out that the prohibition on association prohibits the person from receiving, and the firm from paying or crediting, any salary, bonus, profit, or other remuneration that results directly or indirectly from any audit fees earned during the period of the suspension or bar.

Rule 5302 – Application for Relief from, or Modification of, Revocations and Bars

Rule 5302 provides mechanisms by which a firm or person subject to a Board sanction may apply to the Board for relief from, or modification of, that sanction. Under Rule 5302(a), a firm that has had its registration revoked pursuant to a Board determination that permitted the firm an opportunity to reapply for registration after a

specified period of time may, after the expiration of the specified period, file an application for registration pursuant to Rule 2101. The revocation shall continue, however, unless and until the Board affirmatively approves such a registration application.

Under Rule 5302(b), a person subject to a bar on association that contains a provision allowing the person to seek termination of the bar after a specified period of time may, after the expiration of the specified period, file a petition to terminate the bar. Subparagraphs (2) – (5) of Rule 5302(b) govern the process related to such a petition.

Rule 5302(c) governs modification of revocations and bars that do not expressly provide a time period after which the firm may reapply for registration or the person may petition to terminate the bar. Such firm or person may at any time request leave to reapply for registration or leave to file a petition to terminate a bar. They may not file a registration application or a petition to terminate the bar unless the Board grants such leave. The revocation and bar shall continue until the Board has both granted such leave and approved a subsequent application or petition.

Under Rule 5302(d), a firm or person subject to an ongoing sanction imposed for non-cooperation with an investigation may file an application for termination of that sanction once the firm or person has remedied the non-cooperation that formed the

basis for the sanction. The sanction shall continue, however, unless and until the Board orders it terminated.

Under Rule 5302(e), any firm or person subject to a sanction described in subparagraphs (3), (6), (7), (8), (9), or (10) of Rule 5300(a) may file an application for termination of the sanction at any time. The Board may, in its discretion, grant a hearing on the application. The sanction shall continue, however, unless and until the Board orders it terminated.

Rule 5303 – Use of Money Penalties

Rule 5303 provides that all money penalties collected by the Board shall be used to fund a merit scholarship program as required by, and described in, Section 109(c)(2) of the Act.

Rule 5304 – Summary Suspension for Failure to Pay Money Penalties

Under Rule 5304, the failure of a registered public accounting firm or an associated person to pay money penalties imposed by the Board may result in summary suspension, and effective revocation, of the firm's registration and summary suspension or bar from association. Under Rule 5304(a), if a firm fails to pay a money penalty after the exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the firm's registration. Rule 5304(a) requires the

Board to provide the firm with written notice at least seven days before any such suspension. Once such a suspension is imposed, it shall terminate upon payment of the penalty by the firm within 90 days of the onset of the suspension. If payment is not made within 90 days, the firm's registration will effectively be revoked, and the firm can re-register only by paying the penalty, plus interest, and filing an application for registration under Rule 2101 and obtaining Board approval of that application.

Under Rule 5304(b), if an associated person fails to pay a money penalty after exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the person from association with a registered firm. Rule 5304(b) requires the Board to provide written notice at least seven days before any such suspension. Once a suspension is imposed, it shall terminate upon payment of the penalty, plus interest, within 90 days of the onset of the suspension. If payment is not made within 90 days, the Board may summarily bar the person from association with a registered firm.

Part 4 – Rules of Board Procedure

Part 4 of the Board's Rules on Investigations and Adjudications consists of Rules 5400 through 5469. These rules are further divided into general rules (5400 through

5411), prehearing rules (5420 through 5427), hearing rules (5440 through 5445), and appeals to the Board (5460 through 5469).

Rule 5400 – Hearings

Rule 5400 provides for hearings to be held only upon order of the Board and to be conducted in a fair, impartial, expeditious and orderly manner. The rule is adapted from Rule 200 of the Commission's Rules of Practice.

Rule 5401 – Appearance and Practice Before the Board

Rule 5401 provides that a person may appear on his own behalf before the Board or may be represented by counsel. Rule 5401 further provides that a member of a partnership may represent the partnership and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. Rule 5401(c) imposes certain procedural requirements related to representation and withdrawal.

Rule 5402 – Hearing Officer Disqualification and Withdrawal

Rule 5402 allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402 also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233.

Rule 5403 – *Ex Parte* Communications

Rule 5403 prohibits a hearing officer from having *ex parte* communications with a party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The rule also prohibits a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules. The rule includes a specific exception allowing staff to discuss settlement offers with the Board when a party has provided the prejudgment waiver described in Rule 5205(c)(3). The rule is based in part on Rule 120 of the Commission's Rules of Practice.

Rule 5404 – Service of Papers by Parties

Rule 5404 requires service of papers on each party in a manner calculated to bring the paper to the attention of the party served.

Rule 5405 – Filing of Papers With the Board: Procedure

Rule 5405 governs procedures for filing papers with the Board.

Rule 5406 – Filing of Papers: Form

Rule 5406 governs the form of papers to be filed with the Board.

Rule 5407 – Filing of Papers: Signature Requirement and Effect

Rule 5407 requires every paper filed to be signed either by the party, if the party represents himself or herself, or by counsel if the party is represented by counsel. Because the Board expects most papers to be filed electronically, a note to the rule states that the signature should be scanned into an electronic document where practicable, but that otherwise certain indicia of electronic signature will suffice.

Rule 5408 – Motions

Rule 5408 describes procedures and length limitations related to motions and supporting briefs.

Rule 5409 – Default and Motions to Set Aside Default

Rule 5409 describes the circumstances that shall constitute a default and the procedure for seeking to set aside a default. The rule is adapted from Rule 155 of the Commission's Rules of Practice.

Rule 5410 – Time Computation

Rule 5410 describes the method by which the Board shall compute time for purposes of complying with deadlines in the Board's rules.

Rule 5411 – Modifications of Time, Postponements and Adjournments

Rule 5411 provides that the Board maintains discretion, except as otherwise provided by law, to adjust the time limits prescribed by the rules or to postpone or adjourn any hearing.

Rule 5420 – Leave to Participate to Request a Stay

Rule 5420 provides a procedure by which certain entities may seek a stay of a hearing. The entities that may seek such a stay are the Commission, the United States Department of Justice or any United States Attorney's Office, and any criminal prosecutorial authority of a state or political subdivision of a state. Under Rule 5420, an authorized representative of any such entity may seek leave to participate on a limited basis to request a stay. Rule 5420 provides that a stay shall be granted upon a showing that a stay is necessary to protect an ongoing Commission investigation, and that a stay shall otherwise be favored upon a showing that it is in the public interest or for the protection of investors.

Rule 5421 – Answer to Allegations

Rule 5421 governs the filing of answers to orders instituting proceedings. A party may file an answer in any matter, but is not required to file an answer unless ordered to do so in the order instituting proceedings.

Rule 5422 – Availability of Documents for Inspection and Copying

Rule 5422 governs the obligations of Board staff to make documents available to a party for inspection and copying. Under the proposed rule, the staff's obligation varies according to whether the proceeding is commenced under Rule 5200(a)(1)-(2) for violations or failures reasonably to supervise, Rule 5200(a)(3) for non-cooperation, or Rule 5500 concerning disapproval of a registration application.

Rule 5422(a)(1) applies in proceedings commenced under Rule 5200(a)(1) or Rule 5200(a)(2). The rule provides that in those proceedings, the Division of Enforcement and Investigations shall make available all documents in three specific categories: (1) accounting board requests, subpoenas, and accounting board demands for documents, testimony, or information issued in the investigation or in the informal inquiry, if any, that preceded the investigation, (2) responses to those accounting board requests, subpoenas, and accounting board demands, including any documents produced in response, and (3) testimony transcripts and exhibits, and any other verbatim records of witness statements.

Rule 5422(a)(1) also requires the staff to make available a fourth category of documents, subject to certain limitations. Specifically, Rule 5422(a)(1)(iv) requires the staff to make available all other documents prepared or obtained by the Division of

Enforcement and Investigations in connection with the investigation prior to the institution of proceedings. Within that broad category, however, there are certain subcategories of documents that the rule expressly provides that the staff need not make available. First, the staff need not make available any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation or disciplinary proceeding. Second, the staff need not make available any document that is protected by a privilege or by the attorney work product doctrine. Third, the staff need not make available any document that would disclose the identity of a confidential source. Finally, the staff need not make available any document that the hearing officer or the Board allows the staff to withhold on the ground of lack of relevance or otherwise for good cause.

In a proceeding commenced under Rule 5200(a)(3), for non-cooperation with an investigation, Rule 5422(a)(2) requires that the Division of Enforcement and Investigations make available all documents on which the Division intends to rely in seeking a finding of non-cooperation. The rule expressly provides that the Division shall not be required to make available any other documents in a proceeding based on non-cooperation.

There are two reasons for this strict limitation. First, the only issue for determination in such a proceeding will be whether the party charged has failed to comply with an accounting board demand, has given testimony that is false or misleading or that omits material information, or has otherwise failed to cooperate in connection with an investigation. These questions are independent of whether the party has otherwise violated any law, rule, or standard enforceable by the Board, and portions of the Board's investigative records relating to other such violations will not be relevant to the question of non-cooperation.

Second, the Board intends that non-cooperation proceedings generally be commenced as soon as the grounds for such a proceeding appear, rather than waiting until the conclusion of an investigation.[1/] An important objective of a non-cooperation proceeding will be not only to impose a sanction if appropriate, but also to compel the cooperation in question at a time when it is still meaningful to the investigation. At that point in time, to require the staff to make available any portion of the investigative record

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[1/] The proposed rules do not preclude the Board from commencing a proceeding for non-cooperation after an investigation and prosecuting it separately from or consolidated with a proceeding for alleged violations of laws, rules, or standards enforceable by the Board. For example, the Board may, in its discretion, institute proceedings for violations of the Act and simultaneously institute proceedings for non-cooperation in an investigation against the same respondent for conduct (for example, false testimony) during the investigation.

other than that directly bearing on non-cooperation could compromise the staff's investigation, and might also compromise investigations by the Commission or other authorities. Indeed, to allow access to any portion of the investigative record in the course of a non-cooperation proceeding would supply a counterproductive incentive that might cause some persons to fail to cooperate specifically for the purpose of obtaining access to that record.

In a proceeding commenced under Rule 5500, on disapproval of a registration application, Rule 5422(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the Division in connection with the registration application prior to the notice of hearing, subject to the same exclusions discussed above in connection with Rule 5422(a)(1)(iv).

Rule 5422(b) provides that the hearing officer may require the interested division (Enforcement and Investigations in a proceeding commenced under Rule 5200(a)(1) or Rule 5200(a)(2), or Registration and Inspections in a proceeding commenced under Rule 5500) to submit a list of all documents withheld from a party on the ground that the document is privileged, is attorney work product, or would disclose the identity of a confidential source. The rule also allows the hearing officer to review any such document *in camera* and to order that any such document be made available to other

parties if the hearing officer determines that the document is not privileged, is not protected by the attorney work product doctrine, and would not disclose the identity of a confidential source.

A hearing officer is not authorized to require the staff to make available any document that is privileged, is protected by the attorney work product doctrine, or would disclose the identity of a confidential source. In addition, a hearing officer is not authorized to order the staff to make available any document prepared by a member of the Board or the staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with an investigation or disciplinary proceeding, nor is a hearing officer authorized to require the interested division to submit a list of such documents.

Rule 5422(c) governs the time period in which the staff must make the documents available. Under the rule, the staff must make the documents available within seven days of the institution of a proceeding under Rule 5200(a)(3) for non-cooperation, and within 14 days of the institution of proceedings under Rules 5200(a)(1), 5200(a)(2), and 5500. Rule 5422(d) provides that the staff shall make the documents available at the Board's office where the documents are normally maintained, or at such other place as the parties agree upon in writing. Rule 5422(d)

further provides that, except as subject to any specific contrary agreement with the staff, a party shall not have custody of the documents and shall not remove the documents from the Board's offices, though the party may make and retain copies of the documents. Rule 5422(e) provides that a party wishing to make copies of the documents must bear the cost of copying.

Rule 5422(f) addresses any failure by the interested division to make available any document that these rules required it to make available. The rule provides that, in that event, no person shall be entitled to a rehearing or redecision in a matter already heard or decided unless that person first establishes that the failure to make the document available did not constitute harmless error.

A note following Rule 5422 points out that the obligations of the interested division under this rule extend only to documents obtained by that division, and that this Rule does not require the interested division to make available documents located only in the files of other divisions or offices. The proviso, however, is not intended to relieve the interested division of the obligation to make available any such document that the division knows of and intends to introduce as evidence. Any such document should be treated, for purposes of Rule 5422, just as if it were physically located in the division's files.

Rule 5423 – Production of Witness Statements

Rule 5423(a) provides that a respondent may move that the interested division produce any statement of a person, called or to be called as a witness by the division, that pertains or is expected to pertain to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. The hearing officer shall have authority to grant such a motion and require production of any such statement. Rule 5423(b) provides, however, that the interested division's failure to produce any such statement shall not be grounds for rehearing or redecision of a matter already heard or decided unless the respondent first establishes that the failure to produce the statement was not harmless error. The rule is based on Rule 231 of the Commission's Rules of Practice.

Rule 5424 – Accounting Board Demands and Commission Subpoenas

Rule 5424 provides for mechanisms by which any party may seek to secure testimony or evidence relevant to a proceeding. Rule 5424(a) describes procedures by which any party may seek to have an accounting board demand served on any registered public accounting firm or associated person of such a firm, or seek to have an accounting board request served on any other person. Under the rule, the party must make a request to the hearing officer for issuance of the accounting board

demand or accounting board request. In the event of the hearing officer's unavailability, the party may present its request, through the Secretary, to any member of the Board, or any other person designated by the Board to issue such demands and requests.

The application for an accounting board demand or accounting board request may be denied, or may be granted with modifications, if it is unreasonable, oppressive, excessive in scope, or unduly burdensome. The rule provides that a person whose application for an accounting board demand or accounting board request has been denied or modified may not make the same application to another person and may not apply to the Board for a Commission subpoena covering the same testimony, documents, or information as the denied application covered or as was excluded by modification in granting an application.

Rule 5424(a) also provides that a party who applies for an accounting board demand or accounting board request to summon a witness shall pay the witness's reasonable expenses. Rule 5424(b) provides that the Board, on its own initiative or on the application of any party, may seek issuance of a subpoena by the Commission to any person in order to seek to secure testimony or evidence that the Board considers relevant or material to the proceeding.

Rule 5425 – Depositions to Preserve Testimony for Hearing

Rule 5425 provides procedures by which a party may seek a deposition for the purpose of preserving for a hearing the testimony of a person who may be unavailable to appear at the hearing. Rule 5425 does not provide for depositions taken for the purpose of discovery. The rule is adapted from Rule 233 of the Commission's Rules of Practice.

Under Rule 5425(a), a party seeking to take a deposition to preserve testimony must make a written motion setting out the reasons why the deposition is necessary and specifically including the reasons that the party believes the witness will be unable to testify at the hearing. The motion must also identify the witness, the matters on which the party intends to question the witness, and the proposed time and place of the deposition. Under Rule 5425(b), the hearing officer may grant the motion if the hearing officer finds that the witness will likely give testimony material to the proceeding, that it is likely the witness will be unable to appear at the hearing because of age, sickness, infirmity, imprisonment or other disability, or will otherwise be unavailable, and that the taking of the deposition will serve the interests of justice. Rules 5425(c)-(e) describe certain procedures governing any such deposition allowed by the hearing officer.

Rule 5426 – Prior Sworn Statements of Witnesses in Lieu of Live Testimony

Rule 5426 provides procedures by which a party may introduce into evidence a witness's prior sworn statement in lieu of live testimony by the witness. Rule 5426 is not a limitation on any party's ability to introduce a prior sworn statement with respect to a witness who appears in person and testifies (for purposes of impeachment, for example). But Rule 5426 does limit the circumstances in which a party may introduce a prior sworn statement in lieu of live testimony by the witness.

Rule 5426 identifies five circumstances in which the hearing officer may grant a motion to introduce a prior sworn statement in lieu of live testimony: (1) if the witness is dead, (2) if the witness is outside of the United States, unless it appears that the witness's absence from the country was procured by the party offering the prior sworn statement, (3) if the witness is unable to attend because of age, sickness, infirmity, imprisonment or other disability, (4) if the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand, or (5) if, in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In granting a motion to introduce a prior sworn statement, a hearing officer has the discretion, under Rule

5426, to require that all relevant portions of the statement be included or to exclude portions of the statement not relevant to the proceeding.

Rule 5427 – Motion for Summary Disposition

Rule 5427 provides for any party to make a motion for summary disposition. Under Rule 5427(a), the interested division may make such a motion only after the party against whom the motion is directed has filed an answer and has had documents made available to it pursuant to Rule 5422. Under Rule 5427(b), a respondent may make such a motion at any time.

Rule 5427(c) requires that any party that would move for summary disposition must first request and attend a pre-motion conference with the hearing officer. Under the rule, the hearing officer would, at the conference, set a due date for the motion. The hearing officer has discretion either to set a due date for a response to the motion or to spare the opposing party the need to prepare a response until the hearing officer has reviewed the motion. If the hearing officer chooses that approach, the hearing officer shall review the motion and then either deny the motion without any response being filed or shall give the opposing party an opportunity to file a response.

Rule 5427(d) provides that a hearing officer shall grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with any

affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law. A hearing officer may also enter a summary disposition that is limited to the issue of liability even though there may be a genuine and contested issue as to the appropriate sanction. Rule 5427(d) also provides that the denial of a motion for summary disposition is not subject to interlocutory appeal. Rule 5427(e) governs page limitations on briefs related to motions for summary disposition.

Rule 5440 – Record of Hearings

Rule 5440 describes procedures related to the creation, correction, and availability of hearing transcripts.

Rule 5441 – Evidence: Admissibility

Rule 5441 provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. Rule 5441 is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility, similar to the flexibility afforded administrative law judges in proceedings under Commission rules.

Rule 5442 – Evidence: Objections and Offers of Proof

Rule 5442(a) provides that any objections must be made on the record and must be in short form, stating the grounds relied upon. Under Rule 5442(a) any exception to a hearing officer's ruling on an objection need not be noted at the time of the ruling but will be deemed waived on appeal to the Board unless the exception was raised (1) on interlocutory review under Rule 5461, (2) in a proposed finding or conclusion filed under Rule 5445, or (3) in a petition for Board review of an initial decision filed under Rule 5460. Rule 5442(b) provides that when evidence is excluded from the record, the party offering the evidence may make an offer of proof which shall be included in the record. The excluded material itself would be retained under Rule 5202(b).

Rule 5443 – Evidence: Presentation Under Oath or Affirmation

Rule 5443 provides that witnesses at a hearing shall testify under oath or affirmation.

Rule 5444 – Evidence: Rebuttal and Cross-Examination

Rule 5444 provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall

determine the scope and form of evidence, rebuttal evidence, and cross-examination in any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

Rule 5445 – Post-hearing Briefs and Other Submissions

Rule 5445 provides procedures relating to the submission of post-hearing briefs and other submissions.

Rule 5460 – Board Review of Determinations of Hearing Officers

Rule 5460 concerns Board review of initial decisions. Under Rule 5460, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 10 days of an initial decision in a proceeding commenced under Rule 5200(a)(3) for non-cooperation, and within 30 days of an initial decision in other proceedings. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

Also under Rule 5460(a), if one party submits a timely petition for review, any other party then has an additional ten days to submit its own petition for review, even if its petition raises different issues than those raised by the first party to submit a petition.

The purpose of this rule is to avoid the unnecessary expenditure of Board resources in cases where no party would appeal if it knew that the other party would not appeal, but in which one or more parties nevertheless appeal because of a concern that failing to appeal will deprive it of the opportunity to raise its issues in any appeal lodged by another party. Under Rule 5460(a), no party need guess about the other party's intentions, and no party sacrifices anything by waiting to see whether another party files a timely petition for review.

Rule 5460(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460(c)-(e) set out procedural matters related to Board review.

Rule 5461 – Interlocutory Review

Rule 5461 concerns Board interlocutory review of hearing officer rulings. Under Rule 5461(a), the Board will not grant interlocutory review absent extraordinary

circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. § 1292(b).

Rule 5462 – Briefs Filed with the Board

Rule 5462 describes procedural requirements related to briefs and the filing of briefs. The rule is adapted from Rule 450 of the Commission's Rules of Practice.

Rule 5463 – Oral Argument Before the Board

Rule 5463 concerns oral argument before the Board. Under Rule 5463(a), the Board may order oral argument, with or without the motion of a party, on any matter. The rule provides that, in general, motions for oral argument will be granted unless exceptional circumstances make oral argument impractical or inadvisable. Rules

5463(b)-(c) provide for procedures relating to oral argument. Rule 5463(d) provides that a member of the Board who is not present for oral argument may nevertheless participate in the Board's decision as long as the Board member reviews a transcript of the argument before participating in the decision.

Rule 5464 – Additional Evidence

Rule 5464 provides that the Board may, upon its own motion or the motion of a party, allow the submission of additional evidence in connection with the Board's review of an initial decision. The rule is adapted from Rule 452 of the Commission's Rules of Practice.

Rule 5465 – Record Before the Board

Rule 5465 provides that the Board shall determine each matter on the basis of the record and provides certain requirements concerning the record. The rule is adapted from Rule 460 of the Commission's Rules of Practice.

Rule 5466 – Reconsideration

Rule 5466 provides procedures by which a party may seek reconsideration of a Board decision. The rule is adapted from Rule 470 of the Commission's Rules of Practice.

Rule 5467 – Receipt of Petitions for Commission or Judicial Review

Rule 5467 is intended to ensure that the Board has notice of any petitions filed by a party for review of a Board decision, or for review of a Commission order with respect to a Board decision. Rule 5467 is separate from, and in addition to, any notice or service requirements that the Commission imposes with respect to petitions for review filed with the Commission. Rule 5467, a registered public accounting firm must notify the Secretary, or any requirements of the Federal Rules of Appellate Procedure or any court within 10 days after the firm or any person associated with the firm files with the Commission a petition for review of a Board decision or files a petition for court review of a Commission order with respect to such a sanction. The rule is modeled in part on Rule 490 of the Commission's Rules of Practice.

Rule 5468 – Appeal of Actions Made Pursuant to Delegated Authority

As directed by Section 101(g)(2) of the Act, Rule 5468 provides procedures for seeking Board review of any action by someone other than the Board pursuant to authority delegated by the Board. The rule is adapted from Rule 430 of the Commission's Rules of Practice.

Rule 5469 – Board Consideration of Actions Made Pursuant to Delegated Authority

Rule 5469 provides procedures relating to Board consideration of petitions for review of actions made pursuant to authority delegated by the Board. The rule is adapted from Rule 431 of the Commission's Rules of Practice.

Part 5 – Hearings on Disapproval of Registration Applications

Part 5 of the Board's Rules on Investigations and Adjudications consists of Rules 5500 and 5501. These rules relate to adjudications on certain registration applications.

Rule 5500 – Commencement of Hearing on Disapproval of a Registration Application

Rule 5500 describes the procedure relating to the commencement of a Board adjudication proceeding to consider an application for registration. Under the Board's registration rules, if the Board is unable to make the determination necessary to approve a registration application, the Board will provide the applicant with notice of a hearing. Rule 5500 provides the procedures through which such a proceeding would be commenced.

Specifically, Rule 5500 provides that a proceeding would commence after the Board provides a notice of hearing under Rule 2106(b)(2)(ii) and the applicant timely files a request for a hearing date and notice of appearance, rather than opting to treat the Board's notice of hearing as a denial of the application. Under Rule 5500(b), a request for hearing must include a statement that the applicant has elected not to treat

the notice of hearing as a disapproval of its application and a statement describing with specificity why the applicant believes that the Board should not disapprove the application.

Rule 5501 – Procedures for a Hearing on Disapproval of a Registration Application

Rule 5501 provides that proceedings commenced pursuant to Rule 5500 are subject to the procedures set out in Parts 2 and 4 of Section 5 of the Board's rules.

PCAOB
Public Company Accounting Oversight Board

Exhibit 2(a)(2)

Tab Number	Comment Source
1	American Bar Association Committees on Law & Accounting and Federal Regulation of Securities of the Section of Business Law, *Authors: Thomas L. Riesenberg, Chair, Committee on Law & Accounting; and Dixie L. Johnson, Chair, Committee on Federal Regulation of Securities*, August 21, 2003
2	AICPA (American Institute of Certified Public Accountants) *Author: Richard I. Miller, General Counsel & Secretary*, August 14, 2003
3	AICPA (American Institute of Certfied Public Accountants) *Authors: William F. Ezzell, CPA, Chairman of the Board, and Barry C. Melancon, CPA, President & CEO*, August 18, 2003
4	BDO Seidman, LLP, August 19, 2003
5	Robert Chira & Associates, *Author: Robert Chira*, August 12, 2003
6	Deloitte & Touche, LLP, August 18, 2003
7	Deloitte & Touche, LLP, August 19, 2003
8	Ernst & Young LLP, August 18, 2003
9	Financial Services Agency, Government of Japan, *Author: Naohiko MATSUO, Director for International Financial Markets*, August 15, 2003
10	Freddie Mac, *Author: Shaun F. O'Malley*, Chairman of the Board, August 14, 2003
11	The Institut der Wirtschaftsprüfer (German Institute of Public Auditors) *Author: Klaus-Peter Naumann, Chief Executive Officer*, August 18, 2003
12	The Japanese Institute of Certified Public Accountants, *Author: Akio Okuyama, President & CEO*, August 18, 2003
13	KPMG, LLP, August 18, 2003
14	Most Horowitz & Company, LLP, *Author: Robert J. Sonnelitter, Jr., CPA*, August 7, 2003
15	NASBA (National Association of State Boards of Accountancy), August 18, 2003
16	PricewaterhouseCoopers LLP, August 18, 2003
17	The Swiss Institute of Certified Accountants and Tax Consultants, Authors: *Andreas Müller, Chairman, Walter Hess, General Secretary*, August 18, 2003

AMERICAN BAR ASSOCIATION
Section of Business Law
750 North Lake Shore Drive
Chicago, IL 60611

August 21, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: Rulemaking Docket Matter No. 005

Ladies & Gentlemen:

On behalf of the Committees on Law & Accounting and Federal Regulation of Securities of the Section of Business Law of the American Bar Association (the "Committees"), we are writing to express our views with respect to the Release No. 2003-012 of the Public Company Accounting Oversight Board (the "Board" or "PCAOB") in which the Board has proposed rules for the conduct of investigations and hearings. The views expressed herein are those of the Committees and have not been approved by the Section of Business Law or the House of Delegates or Board of Governors of the American Bar Association ("ABA"). Accordingly, they should not be construed as representing the policy of the ABA. This letter was drafted by a task force composed of members of the Committees whose names are set forth below, and the Committee Chairs and members of the task force are available to discuss the matters discussed herein with the Board and its staff.

General Comments

We would like to begin our comments by commending the Board and its staff for assembling a comprehensive and generally well-conceived set of rules for the conduct of investigations and hearings in the very limited period necessitated by the timetable prescribed by Congress in the Sarbanes-Oxley Act of 2002 (the "Act"). The proposed rules generally reflect a careful balancing of the need to protect the public and the rights of accounting practitioners whose lives and livelihoods will be greatly affected by the Board's actions arising out of its investigations and disciplinary hearings.

We appreciate that (a) the Board is acting on time constraints imposed by Congress in the Act, (b) many of its proposed rules are closely modeled after the Rules of Practice of the Securities and Exchange Commission (the "Commission" or "SEC"), and (c) those wishing to comment on the Board's proposals will have an additional opportunity to do so when they are again released for public comment by the Commission. Nevertheless, in view of the length and complexity of the proposed rules, their importance to the members of the accounting profession who audit public companies as well as to issuers, and the Board's simultaneous publication of proposed rules relating to firm inspections and firm withdrawals from registration, a three-week

comment period has not provided sufficient time for a thorough review and discussion of the proposal by our members.

Because of the severe time constraints imposed by the limited comment period, our comments are largely focused on the issues that are addressed in the proposed rules. We have not had a full opportunity to consider those matters which might have been included in the proposed rules but have been omitted either by design or oversight.

For the sake of simplicity and ease of review, we have organized our comments based upon the order in which the subjects are addressed in the proposed rules, and not on the basis of their relative importance. Many of our comments are addressed to minor matters; we have proceeded on the basis that now is the appropriate time to correct minor mistakes.

Specific Comments

Rule 1001(h)(i). This rule includes within the definition of "hearing officer" one or more members of the Board so long as they constitute less than a quorum of the Board. We question the wisdom of having Board members serve as hearing officers as we do not believe that this would be a good use of their time, especially since hearings often can consume many full days. More importantly, serving as a hearing officer would disqualify any such Board member from reviewing the findings of the hearing officer, posing the potential problem of obtaining a quorum of Board members to consider an appeal from a ruling of the hearing officer. It should also be pointed out that under Rule 5200(b) hearing officers are appointed by the Secretary and it seems wholly inappropriate for the Secretary to have the power to appoint a member of the Board.

We are also concerned that the rule proposal would allow "any other person duly authorized by the Board" to serve as a hearing officer. There clearly are certain attributes that a hearing officer must have – lack of bias, judicial temperament, an understanding of relevant regulatory requirements, and so on. We would urge the Board to establish hearing officer positions within the Board staff, much like the role served by the SEC's Administrative Law Judges. These professional hearing officers would have the necessary attributes so that the public and the profession can have full confidence in the integrity of the administrative process.

Rules 5102(b)(3) and 5105(a)(1). These provisions require that the Board's staff include a description of the subject matter of the testimony in a demand for testimony only in the case of testimony of a "registered public accounting firm." We see no reason why the requirement for the subject matter of the testimony should not also apply to demands served on persons associated with a registered public accounting firm. This appears to be a drafting oversight.

Rule 5102(c)(3). This rule limits the persons allowed to be present during the taking of investigative testimony and provides that the witness may only be represented by legal counsel. Since the subject matter of the Board's investigations are likely to involve technical accounting issues, as to which legal counsel may lack appropriate understanding, we believe that adequate representation may only be achieved by allowing legal counsel to be assisted by an accounting expert.

Rule 5102(e). This rule requires a witness to request changes to the transcript of his or her testimony given in a Board investigation within 10 days of being notified that the transcript is available. This seems to be an unnecessarily short period of time, and we recommend that the period be extended to at least 30 days.

Rule 5105(a)(2). In referring to the individual to be examined on behalf of a person that is an entity, this rule refers to the designated individual as a "person." This implies that an entity can designate another entity to testify on its behalf. We suggest that the "designated person" be referred to as an "individual."

Rule 5106. This rule addresses the assertion of privilege in an investigatory proceeding and requires the respondent to provide a host of information in order to assert a privilege. Some of that information will not always be readily available. We, therefore, believe that a certain amount of flexibility must be drafted into this provision. We also are concerned that the failure to provide the required information would place the respondent in the uncomfortable position of either having to waive a privilege or risk being cited for non-cooperation with the Board's investigation.

Rule 5109(a). This rule permits the Director of Enforcement and Investigations to honor a respondent's requests for a copy of a formal order of investigation. We strongly believe that respondents should have this right and believe that it should not be a matter of discretion. If necessary, the Board's rules should require the requesting party to agree to certain limitations upon his or her use of the order.

Rule 5109(d). This rule affords a respondent in an investigation the opportunity to submit a "statement of position" to the Board in defense of his or her actions which are the subject of a possible request by the staff to initiate a disciplinary proceeding. Such a statement corresponds to a "Wells submission" in an SEC investigation. The rule, however, provides the staff with "discretion" as to whether it wishes to advise the respondent of the nature of its proposed allegations. We believe that such discretion defeats the purpose of a procedure that in SEC administrative practice has proven helpful in focusing the issues in dispute. Accordingly, we recommend that the staff not only be required to provide the respondent with information concerning its proposed charges, but also that the information identify all professional and regulatory provisions alleged to have been violated as well as the specific actions of the respondent that are the basis for the allegations.

Rule 5110. This provision authorizes the Director of Enforcement and Investigations to recommend to the Board that a disciplinary proceeding be instituted where a firm or associated person may have given false or misleading testimony or testimony that omits material information. We are troubled by this standard as we strongly believe that in any such circumstances the burden should be on the Board to establish that the question that was not properly addressed specifically requested the omitted information and that the omission was not inadvertent.

Rule 5200(a)(2). Under this provision, the Board has the power to commence a disciplinary proceeding against "supervisory personnel" for having failed to supervise an

associated person. Unfortunately, the term "supervisory personnel" is not defined in the Act or in the Board's rules and conceivably could cover a senior accountant performing field work with junior accountants. We recognize that in any audit engagement, there is a chain of command; however, we do not believe that all persons within that chain properly could be viewed as "supervisory personnel." Instead, we would limit supervisory responsibility to the partner in charge of the audit and the audit manager. Concurring partners, engagement partners and review partners, while fulfilling important roles, should not be burdened with supervisory responsibility. Similarly, we have concerns as to what constitutes a failure of "reasonable supervision." We believe that it will be necessary for the Board to spell out this new requirement in its rules because we are not aware of any body of professional literature discussing it.

Rule 5200(b). This rule enumerates the powers of the hearing officer. Absent from the list of such powers are the powers to resolve disputes relating to documentary disclosures. We also suggest the inclusion of an additional power to perform all other duties authorized elsewhere in the rules.

Rule 5201(a). The rule, which provides for notice of the commencement of a disciplinary proceeding, is silent as to the amount of notice that is required before the first hearing date. Considering the fact that the respondent will only have access to the investigatory files accumulated by the staff after the order initiated the hearing has been issued, hearings should not be permitted to commence until at least ninety days after such notice so as to provide the respondent a reasonable time in which to prepare his or her defense.

Rule 5201(b). This rule, which specifies the content of an order instituting proceedings, does not provide that the order would set the hearing date with respect to disciplinary proceedings under Rules 5200(a)(1) and (a)(2) but would set the hearing date with respect to proceedings pursuant to Rule 5200(a)(3). This may have been an oversight, or it may have been intended that the hearing officer would be given the power to set hearing dates, which would perhaps be a more logical means of setting hearings dates. We note, however, that in the list of powers provided to hearing officers in Rule 5200(b) no reference is made to the power to set hearing dates.

Rule 5204(a). In the third from last line the final "e" should be deleted from the word "therefore."

Rule 5301(a). In the note following this rule, it is stated that a person who is barred or suspended from being associated with a registered public accounting firm "may not in connection with the preparation or issuance of any audit report, (i) share in the profits of, or receive compensation in any other form from, any registered accounting firm, or (ii) participate as agent on behalf of such firm in any activity of that firm." This note is confusing in view of the fact that the Board or the Commission has the power to consent to the individual's continued employment by the firm. If a partner of a registered firm is barred, does that mean that the firm cannot return the partner's capital or pay that partner a separation payment as provided in the firm's partnership agreement? Similarly, if the barred employee is allowed to remain with the firm so long as he does not become involved with public company clients, may the firm pay him

or her a salary or other compensation not related to the firm's public company practice? We believe that the rules must address such questions.

Rule 5302. This rule provides that a person who has been subjected to a Board sanction may apply for the termination of "any continuing sanction" and the applicant may, in the Board's discretion, be afforded a hearing. While we believe that this is altogether appropriate, there are no provisions in the rules governing any such hearings. This appears to be an oversight.

Moreover, the form of petition for termination of ongoing sanctions imposes upon the applicant the burden of providing information that may not be readily available to him, such as the disciplinary history of other persons associated with the same registered public accounting firm. Such information is probably more readily available to the Board and is not particularly relevant to whether the individual may safely be employed by the firm.

Rule 5401(b). As noted earlier in this letter, we believe that fair representation of a respondent in a disciplinary hearing may require respondent's counsel to be assisted by an accounting expert. Although we assume that this provision was not intended to negate that possibility, we believe the Board should make this point explicitly.

Rule 5401(c). This rule raises the question of what is "practice before the Board" and the Board's power to regulate such persons, a subject which is not addressed in these rules. This has proven to be a troublesome issue in practice before the Commission, and we believe that it should be addressed in the Board's rules, although not necessarily in its rules relating to investigations and disciplinary proceedings.

This rule also raises the question of when an individual acting in a representative capacity may withdraw from a Board proceeding. We suggest that the rule be revised to provide that the Board, at the very least, may not unreasonably withhold its permission for such an individual to withdraw. We also have concerns that it may have the effect of requiring a respondent to continue with a legal representative in whom he has lost confidence. Thus, any request by the represented party should be honored in all cases.

Rule 5402(a). Under this rule, a motion for a hearing officer to recuse himself or herself is to be addressed to the hearing officer in the first instance. Such motions should be subject to an interlocutory appeal, with the Board having an offsetting power to impose fines for appeals that are deemed to be frivolous.

Rule 5402(b). When a replacement hearing officer has been appointed, we believe that the parties should have the right to move that certain testimony be reheard so that the replacement hearing officer can better judge the credibility of the witness. We do not disagree that the decision as to whether such rehearing is necessary should remain with the new hearing officer, whose decision thereon would be subject to Board review.

Rule 5408. The time and page limitations relating to motions appear to be unduly restrictive and assume that all motions to be presented to a hearing officer will be of a discreet nature. Moreover, whereas the hearing officer has the power to expand the page limitation, there

is no corresponding power with respect to extending the response period. We presume that this is an oversight.

Rule 5422. This rule specifies the documents that the staff must make available to the respondents. Although the scope of the documents required to be disclosed appears to be appropriate, there is no specification as to when the disclosure is to take place or how the copying is to be effected. Similarly, while subsection (e) specifies that the copying is to be at the respondent's expense, there is no attempt to state what the cost would be if the copying is to be effected by the Board. Does this mean that the respondent has the right to select a copying service to make the copies?

Rule 5424(a)(4). This rule provides that a non-party witness who is summoned to a hearing or deposition shall be reimbursed for his or her "reasonable expenses." Who is to make this determination and what are the criteria of "reasonableness." Does "expense" include hourly wages or charges?

Rule 5425(a). This rule would appear to limit the use of depositions solely to preserve testimony and not for discovery purposes. This places the respondent at a distinct disadvantage as the staff has virtually unlimited power to take testimony during the discovery period. Thus, the respondent is forced to ask questions of a witness at his peril during the hearing, not knowing in advance how the witness will testify. Under such circumstances, respondents might be reluctant to pursue questions that could be beneficial to their position. Moreover, it is not even clear when such a deposition can be taken as the rules do not address the criteria to be used by the hearing officer in setting the dates of the hearings. We, therefore, believe that in view of the dire consequences that could befall a professional in a Board disciplinary hearing, the rules should provide for discovery beyond that provided by the staff.

Rule 5425(d). This provision, which relates to the conduct of depositions, refers to a "deposition officer." Unfortunately, the rules do not address the qualifications or appointment or duties of this individual. We presume that this is simply an oversight.

Rule 5441. In our view, this section highlights the brevity in the proposed rules of any description of evidentiary rules that might apply to a Board hearing. Although it is explained in the "section-by-section analysis" that this is intended to afford the hearing officer flexibility in conducting the hearing, such flexibility does little to assure uniformity of practice or fairness when the hearing officer is employed by the prosecuting agency. Moreover, the criteria for excluding evidence does not include the prejudicial nature of the evidence, its competence or authenticity. While, as lawyers, we appreciate the potential complexity of evidentiary rules, we are concerned that the broad range of discretion provided to the hearing officer is inappropriate in disciplinary proceedings which have the power to preclude a professional from being able to continue practicing which is being decided by an employee of the Board. We, therefore, urge the Board to adopt greater structure for evidentiary rulings.

Other Comments

Missing from the proposed rules is a statement as to who has the burden of proof in a disciplinary hearing and the degree of that burden (i.e., "by a preponderance of the evidence", etc.). Under what circumstances would the burden shift?

It is also not clear what standard can be the basis of a disciplinary proceeding. For example, can a registered person be subjected to a disciplinary proceeding for a single act of negligence? This was an issue faced by the Commission in the *Checkosky* decisions, and it behooves the Board to address this issue and avoid protracted litigation on the subject. Sanctions are discussed in Rule 5300 which is silent on this point.

We hope that these comments will be of assistance in finalizing its rules with respect to the conduct of investigations and hearings. Members of our committees are available to discuss these and other comments. If you believe that such discussions would be helpful, please contact either of the undersigned.

Respectfully submitted,

Committee on Law & Accounting

/s/ Thomas L. Riesenberg

by Thomas L. Riesenberg,
Committee Chair

Committee on Federal Regulation
of Securities

/s/ Dixie L. Johnson

by Dixie L. Johnson
Committee Chair

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Dan L. Goldwasser, Chair
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August 14, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No.005

Members and Staff of the Public Company Accounting Oversight Board:

On behalf of the American Institute of Certified Public Accountants (the "AICPA"), we respectfully request that the Public Company Accounting Oversight Board (the "Board") consider extending the August 18, 2003 deadline for submitting written comments on the Board's proposed rules regarding investigations and adjudications involving registered public accounting firms (the "Proposal").

The AICPA is the largest professional association of certified public accountants in the United States, with more than 350,000 members in business, industry, public practice, government and education. The abbreviated comment period provided for in the Board's proposal provides the AICPA with limited time to solicit input from our numerous members and to prepare meaningful comments on the Board's important proposals. This difficulty is exacerbated, of course, by the fact that the Board issued three proposing releases on the same day and the comment deadline for each of these releases falls in the middle of August, a month in which many people are on vacation.

The AICPA fully recognizes the Board's goal of implementing some of the provisions in the Proposal prior to the October 22, 2003 registration deadline for registered public accounting firms. In view of the length, complexity and significance of the Proposal, however, we believe that both the Board and interested parties would benefit from a longer comment period with respect to those aspects of the proposal not specifically related to the Board's treatment of firm applications for registration.

Accordingly, while the AICPA expects to submit our written comments to the Board by the August 18, 2003 deadline, we would urge the Board to extend the comment period. In addition, we believe that the Board should permit parties who have submitted comments to the Board by the original deadline to supplement their prior submissions.

The AICPA is firmly committed to working with the Board as the Board implements the Sarbanes-Oxley Act of 2002 in a timely and effective manner. In that spirit, we urge the Board to provide interested parties with adequate time to provide meaningful comments that will assist the Board in its development of an extensive body of rules governing Board investigations and adjudications.

Very truly yours,

Richard I. Miller
General Counsel & Secretary

RIM:dw

August 18, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005

Members and Staff of the Public Company Accounting Oversight Board:

The American Institute of Certified Public Accountants ("AICPA") respectfully submits the following written comments on the Public Company Accounting Oversight Board's ("PCAOB" or the "Board") proposed rules regarding investigations and adjudications. The AICPA is the largest professional association of certified public accountants in the United States, with more than 350,000 members in business, industry, public practice, government and education.

The AICPA recognizes the enormous effort put forth by the PCAOB members and staff to implement the provisions of the Sarbanes-Oxley Act of 2002 (the "Act"). A cornerstone of the Act was the grant of authority to the PCAOB to investigate and discipline registered public accounting firms and associated persons of such firms for violations of the Act, rules of the Board, provisions of the federal securities laws relating to the preparation and issuance of audit reports, and professional standards. The AICPA is committed to working with the PCAOB to develop a fair and effective process to implement the Board's authority to investigate and discipline registered public accounting firms. To that end, the AICPA appreciates the opportunity to comment on the proposed rules regarding investigations and adjudications.

Overall, the AICPA is supportive of the proposed rules on investigations and adjudications. We believe, however, that the proposed rules could be clarified and improved in several respects and offer the following comments:

Proposed Rule 1001(h)(i) – Hearing Officers

Under proposed rule 1001(h)(i), a Board member or panel of Board members could serve as the hearing officer in a disciplinary proceeding instituted pursuant to the rules of the Board. We believe that permitting Board members to serve as hearing officers would be inappropriate for the following reasons.

The proposed rules contemplate that Board members would review information provided by the Director of Enforcement and Investigations or other sources in order to determine whether to initiate a formal investigation under proposed rule 5101 or to commence a disciplinary proceeding under proposed rule 5200. We believe that participating in a decision to commence such proceedings could result in a conflict of interest with respect to a Board member's ability to serve as an impartial hearing officer. A hearing officer should have no prior knowledge of or experience with the facts of a particular proceeding in order to ensure that the hearing officer has not prejudged the matter or developed a personal bias towards any of the parties. While proposed rule 5402 offers a means for parties to address perceived conflicts of interest involving hearing officers, we do not believe it is fair to require parties to make a formal motion for withdrawal in order to remedy an inherent procedural flaw.

In addition, proposed rule 5460 provides for Board review of initial hearing officer decisions and proposed rule 5461 allows the Board to grant interlocutory review of certain hearing officer rulings. Even if a Board member serving as the hearing officer were recused from these appeals, the proposed process would place the other Board members in the awkward position of reviewing *de novo* the decisions and rulings of one of their fellow Board members. We believe that the rules should be designed to ensure a meaningful review process and that permitting Board members to serve as hearing officers would give rise to unnecessary conflicts of interest and the possible prejudgment of issues meriting full and unbiased consideration by the Board.

Proposed Rule 5102 – Testimony of Registered Public Accounting Firms

Proposed rule 5102(c)(4) would require a registered public accounting firm to designate witnesses to testify on behalf of the firm in response to an accounting board demand. We recognize that proposed rule 5102(b)(1) requires the Board to provide reasonable notice of the time and place for the taking of testimony in general. We believe, however, that the proposed rules should expressly recognize that it may take time for an accounting firm to identify the appropriate persons to respond to a request to designate witnesses to testify on behalf of the firm regarding particular matters. Accordingly, we believe that the proposed rule should include a minimum amount of notice (such as 14 days) sufficient to allow a registered public accounting firm to identify the appropriate persons to testify on its behalf.

Proposed Rule 5102(c) – Use of Non-lawyer Technical Experts in Testimony

Proposed rule 5102(c) would address the conduct of oral testimony during Board investigations. Under proposed rule 5102(c)(3), a witness could be represented by counsel. In addition, "such other persons" as the Board or the Board's staff "determine are appropriate to permit to be present" could attend the examination. It is unclear from this language whether, under this standard, an accountant or other non-lawyer technical expert retained by an attorney to assist in the lawyer's representation of a witness generally would be allowed to attend the witness's examination.

In the context of SEC proceedings, courts have recognized this right, and we believe that the Board's rules should do so as well. Specifically, in *SEC v. Whitman,* 613 F. Supp. 48 (D.D.C. 1985), the court held that a witness subpoenaed to give testimony in an investigation was entitled

to representation by counsel who was assisted by a non-lawyer whose presence served to bridge the gap between the technical expertise of the witness's lawyer and the staff personnel questioning the witness. Accordingly, the court concluded that, to the extent that the SEC's Rules of Practice were construed to preclude the attendance of the non-lawyer adviser at the client's testimony, they inappropriately interfered with the client's right to effective counsel. We urge the Board to avoid any similar ambiguity in its rules by expressly providing that a non-lawyer technical expert may attend a witness's examination where the expert has been retained to assist the lawyer in the representation of the lawyer's client, so long as the expert in question has not been or is not reasonably likely to be separately examined during the Board's investigation.

Proposed Rule 5103 - Production of Audit Workpapers and Other Documents in Investigations

Proposed rule 5103 would require that, in a formal investigation, an accounting board demand for the production of audit workpapers or other documents set forth a reasonable time and place for such production. The section-by-section analysis provides that, as a general rule, the staff will allow at least 5 days before production is due. This time period may not allow registered public accounting firms enough time to reasonably obtain such documents. In contrast, proposed rule 5422 allows the Board 14 days to make documents available for inspection and copying. We recommend that Rule 5103 be revised, consistent with proposed rule 5422, to expressly allow accounting firms 14 days to produce audit workpapers and other documents.

Proposed Rule 5106 – Assertion of Claim of Privilege

Proposed rule 5106 requires a significant amount of information to be supplied in order to substantiate a privilege claim. As currently drafted, the proposed rules suggest that the failure to provide *each* of these items could subject a registered public accounting firm to a disciplinary action and sanctions for failing to cooperate with an investigation, even if the omitted information (*e.g.,* the precise date of a communication, or the identification of the place where it occurred) was not critical or necessary to assessing the good faith of a privilege claim or the information was not in the possession, or within the knowledge, of the party asserting the privilege. The Board should consider revising the proposed rules to acknowledge that a failure to cooperate proceeding will not be instituted against a party for failing to provide information pursuant to proposed rule 5106, absent a showing that (1) the information is readily available, and (2) the information is necessary to assess the good faith of a privilege claim.

Proposed Rule 5108 - Confidentiality of Investigatory Records

Proposed rule 5108 provides that investigatory records of the Board shall be confidential and privileged as an evidentiary matter and shall not be subject to civil discovery. As drafted, however, the proposed rule could be construed as diluting the protections mandated by Congress in two important ways.

First, proposed rule 5108 provides that the investigatory records would be "confidential in the hands of the Board," suggesting that documents prepared for the Board by an accounting firm might not be confidential in the hands of the accounting firm. The Act provides that "documents or information prepared or received by or specifically for the Board . . . in connection with an

inspection under Section 104 or with an investigation under this section, shall be confidential and privileged as an evidentiary matter . . . ." Accordingly, documents prepared by accounting firms "specifically for the Board" in connection with an inspection or investigation are confidential and protected from discovery whether in the hands of the Board or an accounting firm. We assume that the Board intended its proposed rule to be consistent with the Act and, in order to avoid any confusion, suggest that the phrase "in the hands of the Board" be omitted from the proposed rule.

Second, the proposed rule provides that "[u]nless otherwise ordered by the Board or the Commission," documents and information provided to the Board in connection with an inspection or investigation shall be confidential. The quoted phrase does not appear in the Act and, in our view, the Act does not contemplate that the Board or the Commission would have discretion to determine that investigatory material is no longer confidential. Section 105(b)(5)(A) clearly provides that all investigative material shall remain confidential "unless and until presented in connection with a public proceeding or released in accordance with [Section 105(c)]." Accordingly, we urge the Board to remove the phrase "[u]nless otherwise ordered by the Board or the Commission" from the proposed rule.

Proposed Rule 5109(a) – Review of Order of Formal Investigation

Proposed rule 5109(a) is adapted from the SEC's Rules of Practice and provides that the Director of Enforcement and Investigations may authorize the release of a formal order of investigation to a requesting party. Consistent with SEC practice, the Board should expressly authorize the Director of Enforcement and Investigations to delegate this authority to other members of his or her staff. Otherwise, requesting parties may experience extensive and unnecessary delays in obtaining access to formal orders.

Proposed Rule 5109(d) – Statements of Position

Proposed Rule 5109(d) states that, in its discretion, the Board's staff "may advise [persons who become involved in an informal or formal Board investigation] of the general nature of the investigation, including the indicated violations as they pertain to those persons and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Board." Although the proposed rule appears to attempt to set up a process similar to the SEC's "Wells Submission" process, it does not require the Board to provide a registered public accounting firm or its associated persons with a meaningful opportunity to submit their positions to the Board. As drafted, the proposed rule permits persons who become involved in formal and informal investigations to submit written statements setting forth their positions, but does not *require* the Board's staff to advise such persons of the specific nature of the contemplated allegations or the available time in which to make such submissions.

Specifically, in our view, the proposed approach is flawed in several respects. In 1972, then-SEC Chairman William J. Casey appointed a committee (chaired by John Wells and commonly referred to as the "Wells Committee"), to review and evaluate the Commission's enforcement policies and practices. Among the recommendations made by the Wells Committee was the following:

> Except where the nature of the case precludes, a prospective defendant or respondent should be notified of the substance of the staff's charges and probable recommendations in advance of the submission of the staff memorandum to the Commission recommending the commencement of an enforcement action and be accorded an opportunity to submit a written statement to the staff to be forwarded to the Commission together with the staff memorandum.

Clearly, the Wells Committee believed that notice and opportunity to submit a written statement to be forwarded to the Commission along with the staff's recommendation was extremely important and that potential respondents should be deprived of this opportunity only "where the nature of the case precludes" (*e.g.,* where exigent circumstances require immediate action). We recognize that the Commission implemented a Rule of Practice that was not as strict — and not as protective of prospective respondents' rights — as the one recommended by the Wells Committee. We believe, however, that the Board's proposal would be (1) inefficient because key points of fact or law might not be provided to the Board for its consideration, (2) inequitable because potential respondents in similar situations could be treated differently depending on the discretion of the Board's staff, and (3) unfair because accounting firms and their associated persons could be the subject of disciplinary proceedings — an event that may trigger disclosure to clients as well as state regulators — without a meaningful opportunity to state their positions before the Board. Moreover, we cannot fathom why the Board would not want to consider potential respondents' fully-informed positions at the time it is making such important decisions.

Accordingly, we believe that the proposed rule should be revised to expressly afford prospective respondents with the opportunity to make meaningful pre-hearing submissions by providing that (1) prospective respondents shall be notified of the staff's charges and probable recommendations in advance of the submission of the staff's memorandum to the Board, (2) prospective respondents shall be granted a reasonable period of time to prepare a submission, and (3) any statement submitted by a prospective respondent shall be submitted to the Board together with the staff's memorandum.

In addition, we believe the proposed rules would be enhanced by providing persons subject to an investigation with access to materials described in proposed rule 5422(a) at the point when the Board's staff determines to recommend that the Board institute a disciplinary proceeding. Providing persons under investigation with a clearer picture of the information to be presented to the Board would (1) facilitate meaningful submissions more directly addressing the issues the Board would be considering and (2) promote the more efficient resolution of matters because relevant evidence would be shared earlier in the process. In our view, these recommendations will assure maximum fairness to persons subject to these rules, without compromising the Board's need for effective and timely enforcement.

Proposed Rule 5110(a) – Grounds for Instituting Proceedings

Proposed rule 5110(a) contemplates that that the Board may institute a disciplinary proceeding against a registered public accounting firm or an associated person of such a firm for failure to cooperate with a Board investigation. Although the Institute agrees that a demonstrated failure to cooperate with a lawful Board inquiry or a reasonable Board request may warrant sanctions, we believe that instituting a disciplinary proceeding on the grounds that a witness "may have given testimony that . . . omits material information" would be unreasonable, as well as unworkable in practice.

In particular, a witness providing oral testimony during a Board examination can only be expected to answer the specific questions posed by the Board's staff, with the reasonable belief that, if the Board's staff has additional questions, they will pose such questions. The proposed rule, however, effectively would require a witness to anticipate, throughout the course of his or her testimony, whether the staff will or will not pose additional questions and, if not, whether the failure to provide additional information in response to a particular question might, in hindsight, be deemed a "material omission." It is manifestly unfair to expect a witness to consider the totality of his or her testimony as the examination is unfolding, a time when the witness should be focusing on truthfully answering the questions posed.

In this regard, we further note that neither the SEC's Rules of Practice nor the rules of the self-regulatory organizations such as the NASD and the NYSE provide for the imposition of sanctions on witnesses for omitting to provide material information that was not solicited by a specific question (as opposed to providing false testimony) during oral testimony. Accordingly, we believe that this approach is contrary to American jurisprudence and urge the Board to remove this language from the proposed rule.

Proposed Rule 5200(a)(2) - Supervisory Personnel

Proposed rule 5200(a)(2) implements Section 105(c)(6)(A) of the Act, which authorizes the Board to commence disciplinary proceedings when it appears that a registered public accounting firm, or its "supervisory personnel," has failed reasonably to supervise an associated person of the firm. The proposed rule would introduce a new basis upon which to sanction accountants, modeled after a provision of the Securities Exchange Act of 1934 (the "Exchange Act") governing the regulation of broker-dealers. Neither the Board's proposed rules nor the accompanying section-by-section analysis, however, provide a definition of, or any guidance for interpreting, the term "supervisory personnel."

In the context of Section 15(b)(4)(E) of the Exchange Act, there are many cases interpreting what it means to be "subject to" a broker-dealer's supervision. These cases address the potential liability of broker-dealer personnel ranging from "line" supervisors to legal and compliance officers. While they demonstrate the difficulty often involved in determining whether an individual is a supervisor under the statute, the supervisory structures of brokerage firms have evolved over an extended period of time to reflect both the statutory liabilities under the Exchange Act and various case-law developments.

In comparison, "failure to supervise" liability is an essentially new concept for the accounting profession, as is the statutory "safe harbor" defense under Section 105(c)(6)(B) for avoiding such liability where a firm has procedures in place "reasonably designed" to prevent and detect violations of applicable standards by associated persons of the firm and the supervisor of such persons had no reasonable cause to believe that the firm's procedures and systems were not being complied with. Under these circumstances, before the Board proceeds to adopt a rule that subjects "supervisory personnel" at an accounting firm to a range of sanctions for failing to supervise other firm personnel, the Institute respectfully submits that the Board should undertake to provide, preferably through a separate rulemaking, clear definitions as to the meaning of the term "supervisory personnel" for purposes of the Board's rules, as well as practical guidance as to when the safe-harbor provisions set forth in Section 105(c)(6)(B) of the Act generally would be deemed satisfied. Absent such additional guidance, both firms and their personnel will be left uncertain as to their responsibilities and potential liabilities under the Board's rules.

Proposed Rule 5201(a) – Notification of Commencement of Disciplinary Proceedings

Proposed rule 5201(a) provides that, whenever an order instituting disciplinary proceedings is issued, the Secretary of the Board shall provide the respondent "appropriate notice of the order within a time reasonable in light of the circumstances." The proposed rule does not specifically address, however, the amount of time a respondent would be granted prior to a hearing to prepare for the proceeding. Considering that, pursuant to proposed rule 5244(c), the interested division is not required to make relevant documents available to the respondent for inspection and copying until 14 days after the institution of proceedings, and that this represents the first time that a respondent would have access to such information, we believe that the proposed rule should expressly provide that hearings may not begin prior to 60 - 90 days, for example, after notice of the order has been given to the respondent.[1]

Proposed Rule 5300 – Standard Applicable to Imposition of Sanctions

Proposed rule 5300 sets forth the sanctions that the Board may impose as a result of a disciplinary proceeding. Section 105(c)(5) of the Act makes clear that certain sanctions may only be imposed in cases of (1) intentional or knowing conduct or (2) repeated instances of negligence. The proposed rule, however, does not articulate a standard that must be met in order to impose any other sanction on a registered public accounting firm or associated person thereof. We believe that the Board should establish clear standards applicable to the imposition of any sanction. Accordingly, except for those sanctions referenced in Section 105(c)(5) of the Act, we recommend that the Board adopt the standard articulated in Rule 102(e) of the SEC's Rules of Practice and that the proposed rule expressly provide that sanctions may be imposed by the Board only upon a showing that a registered firm or associated person engaged in the types of conduct identified in Rule 102(e).

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[1] We understand that the Board may want the ability, in extraordinary circumstances (*e.g.*, a clear and egregious instance of non-cooperation), to schedule an expedited hearing date. We believe, however, that the Board should not have the ability to expedite any other applicable timetable (*e.g.*, filing answers, post-hearing briefs and petitions for review).

Proposed Rule 5301 – Effect of Sanctions

Proposed rules 5301(a) and (b) would prohibit any person who is subject to a Board suspension or bar from becoming or remaining associated with any registered public accounting firm. As defined in Section 1001(p)(i), a "person associated with a public accounting firm" is any person who "in connection with the preparation or issuance of any audit report – (1) shares in the profits of, or receives compensation in any other form from, that firm; or (2) participates as agent on behalf of such accounting firm in any activity of that firm." In short, an associated person is any person who works on, or receives compensation from work performed on, audits of public companies (or "issuers").

We believe that the practical application of the proposed rule, as drafted, is unclear and potentially unfair. Accordingly, in order to assist registered public accounting firms in deciding whether there are circumstances in which they might reasonably continue to employ a suspended or barred person, the Board should clarify the nature of the work such persons may perform and the payments such persons may receive from the firm.

Because the definition of "associated person" requires participation or compensation "in connection with" a public company audit, a registered public accounting firm presumably may continue to employ a suspended or barred person, as long as that person does not participate in or receive compensation from public company audits. For example, the Board's proposing release expressly notes:

> In order to provide assurance that a firm that employs or continues to employ a barred person has not permitted the person to perform the activities of an associated person, the Board will consider, in connection with reporting requirements that it expects to develop in the future, whether to require such firms to provide regular reports on the activities and role within the firm of the barred person.

Accordingly, it appears that a suspended or barred person may continue to work for a registered public accounting firm, if the nature of his or her work does not relate to an "issuer" (*e.g.,* he or she engages in activities that an unregistered public accounting firm could undertake).

It is less clear, however, how a firm could compensate the suspended or barred person for such work. The note accompanying proposed rule 5301 provides that the prohibition on compensation includes "paying or crediting any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that the person might have earned during the period of the suspension or bar." While a firm may be able to identify and segregate bonuses or profit sharing units that directly relate to a particular audit engagement, it is not clear whether a firm can identify compensation resulting "indirectly from any audit fees." We agree that a suspended or barred person should not receive compensation that he or she "would have earned" for performing work on a public company audit or for securing a public audit engagement. It is not clear, however, whether the proposed rule also contemplates that registered public accounting firms would be required to segregate public and private audit work

fees and then attempt to trace all compensation paid to a suspended or barred person to particular fees. First, because money is fungible, it may be difficult to demonstrate the origin of every dollar of compensation paid to employees. Accounting firms generally do not classify salary and other forms of regular compensation (*e.g.,* payments other than bonuses or special compensation tied to individual performance) as having been derived from any particular fee. Second, compensation is often tied, at least in part, to the overall performance of the firm, including fees derived from both public and private audit work.

Given that the goal of this provision is to prevent suspended or barred persons from engaging in activities in connection with audits of issuers, we do not perceive any policy reason why the Board would be concerned with the amount or source of compensation such persons may receive for providing other services. Accordingly, while it seems that the proposed rules clearly permit a firm to continue to employ a suspended or barred person, we believe that the Board should clarify how a firm could compensate such person for permissible work without incurring the risk that those payments would not be deemed "indirectly" derived from prohibited activities.

Additionally, although not explicitly stated in the proposed rule, we assume that retirement benefits, which may be paid from current firm profits, would not be considered prohibited payments. Persons who are suspended or barred by the Board and have since retired from a registered public accounting firm, therefore, may receive retirement benefits from the firm. Given the importance of this matter, and to avoid possible confusion, we also encourage the Board to clarify that the prohibition from receiving payments does not include retirement benefit payments.

Proposed Rule 5302(b)(2)(iii)(D) – Form of Petition

Proposed rule 5302(b)(2)(iii)(D) requires that an individual seeking to terminate a bar provide the Board with a written statement describing, among other things, "the names of any other associated persons in the same registered public accounting firm who have previously been barred by the Board or the Commission, and whether they are to be supervised by the petitioner." We believe that this is an unnecessary burden to place on an individual petitioner, since the Board presumably would have access to the same information and the individual petitioner would, in any event, have to obtain the data from the firm. In addition, the individual petitioner would have no way to verify the accuracy of the information. The Board should consider relieving an individual petitioner of this requirement.

Proposed Rule 5401(c)(4) – Withdrawal of Representation

Under proposed rule 5401(c)(4), an attorney representing a registered public accounting firm or persons associated with such firm is required to obtain Board permission before he or she can withdraw from representation. While we recognize that there are similar local court rules with respect to withdrawal of representation, we urge the Board to be mindful that there are valid reasons for an attorney to withdraw from representation or for a client to terminate the attorney-client relationship. Accordingly, we recommend that the rule expressly state that the Board's consent will not be unreasonably withheld if satisfactory reasons for such withdrawal are provided in the motion.

Proposed Rule 5422(c) – Timing of Inspection and Copying

Proposed rule 5422(c) contemplates that, in connection with documents to be made available prior to a hearing, the relevant Board division shall "commence" making documents available to a respondent for inspection and copying within specified time frames. While this may not have been the Board's intent, this requirement, as drafted, apparently could be satisfied if the division began to make certain documents available by the specified dates and withheld other documents until significantly later. We do not believe this result would be consistent with the intent of the provision. Accordingly, the Board should consider revising the proposed rule to clarify that access to such documents may not be unreasonably withheld or delayed.

Expedited Timetable in Non-Cooperation Proceedings

The proposed rules include several provisions that expedite the timetable applicable to various filings in non-cooperation proceedings instituted by the Board under Rule 5200(a)(3) compared to the applicable timing for similar filings in proceedings instituted under Rules 5200(a)(1) and (2). For example, respondents in Rule 5200(a)(3) proceedings would be required to comply with shorter time periods (1) to file answers pursuant to Rule 5421(b), (2) to file post-hearing briefs pursuant to Rule 5445(a) and (b), and (3) to file petitions for review of initial hearing officer decisions under Rule 5460(a)(2). Similarly, hearing officers in Rule 5200(a)(3) proceedings would be required to comply with shorter time periods to prepare initial decisions under Rule 5204(a) and interested divisions would be required to comply with shorter time periods in which to commence making documents available to respondents pursuant to Rule 5422(c).

We believe that the adoption of expedited time periods applicable to Rule 5200(a)(3) proceedings presupposes that a respondent in a Board proceeding is, in fact, not cooperating with the Board and that it will be simple to gather and review the facts relevant to an assessment of a respondent's cooperation. Many situations potentially may arise, however, where there is a good-faith difference of opinion as to whether the respondent has cooperated with the Board. Whether or not a firm or individual has cooperated is an issue of fact and we believe that respondents in such proceedings should be treated equitably under the proposed rules, including the opportunity to prepare filings and submissions under the same timetable as any other respondent.

Proposed Rule 5463 – Oral Argument Before the Board

Proposed rule 5463(b) provides that "[r]equests for oral argument shall be made by separate motion accompanying the initial brief on the merits." This provision could be read to suggest that only the party appealing from a hearing officer's initial decision may request oral argument. While proposed rule 5463(a) would provide that oral argument may be ordered on "the motion of a party," we recommend that the Board address this ambiguity in the proposed rule by expressly providing that any party may request oral argument once an appeal has been filed.

Proposed Rule 5467(b) - Receipt of Petitions for Commission or Judicial Review

Proposed rule 5467(b) would require a registered public accounting firm to file with the Board a notice and copy of any petition for Commission or judicial review of a final disciplinary sanction filed by an associated person of the registered public accounting firm. We believe that the proposed rule should be revised to impose any such obligation on the party seeking review (in this situation, the associated person). We also believe that the Board should require an associated person to provide a notice and copy of any petition to his or her firm, as well as to the Board, so that the firm is afforded appropriate notice and opportunity to determine whether it should make a separate submission.

* * *

The AICPA appreciates the opportunity to provide comments on the proposed rules. We are firmly committed to working with the PCAOB in accomplishing the timely and effective implementation of the Act, and would welcome the opportunity to meet with you to clarify any of our recommendations.

Sincerely,

William F. Ezzell, CPA
Chairman of the Board

Barry C. Melancon, CPA
President & CEO

BDO Seidman, LLP
Accountants and Consultants

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August 19, 2003

Via E-mail

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005

Members and Staff of the Public Company Accounting Oversight Board:

We are pleased to provide our comments regarding the Board's proposed rules on investigations and adjudications. Generally, we believe the proposal reasonably reflects the provisions of the Sarbanes-Oxley Act of 2002. However, there are various provisions of the proposed rules that we believe should be clarified or which should be otherwise modified to reflect our concerns. Our comments are as follows:

1. Proposed Rule 1001(c)(ii). Definition of "Counsel"

   Proposed Rule 1001(c)(ii) defines the term "counsel" as "an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state." We believe that this definition is unclear. We suggest a definition of counsel that explicitly includes an attorney who is admitted to the bar of any state or province of the United States as long as he or she is a member in good standing.

2. Proposed Rule 1001(h)(i). Definition of "Hearing Officer"

   Proposed Rule 1001(h)(i) defines the term "hearing officer" to include "a panel of Board members constituting less than a quorum of the Board" as well as "an individual Board member." We believe that allowing individuals to serve as both Board members and hearing officers would create a conflict of interest for several reasons. First, the proposed rules require Board members to review evidence in order to determine whether to initiate an investigation or a disciplinary proceeding. Because of this review process, if a Board member were to serve as a hearing officer, he or she necessarily would have prior knowledge of the facts relating to a proceeding. We believe that, in order to ensure the absence of any prejudgment or bias, a hearing officer should have no prior knowledge of the facts of a proceeding. In addition, Proposed Rule 5460 provides for Board review of initial decisions by hearing officers and Proposed Rule 5461 allows the Board to grant interlocutory review of initial decisions. We believe that allowing a Board member to review his or her own decision would be inappropriate. In addition, a conflict of interest would still exist

even if a Board member who also has served as the hearing officer on a proceeding recused him/herself from the review process because the remaining Board members would be required to review the decision of a fellow Board member. For these reasons, we propose that the definition of hearing officer be limited to an appointed independent person who is not on the Board, but who is authorized by the Board to serve in that capacity.

3. Proposed Rule 5106. Assertion of Claim of Privilege

Proposed Rule 5106(a)(1) provides that upon asserting a claim of privilege in response to a demand for information, the person asserting the privilege must, among other things, indicate the relevant jurisdiction's privilege rule that is being invoked. This appears to raise a question regarding whether relevant state law privileges that do not have federal counterparts (e.g., state accountant-client privileges) will be applicable in these proceedings. We request that the Board provide further clarification as to whether state or federal law will apply in these proceedings.

4. Proposed Rule 5108. Confidentiality of Investigatory Records

Proposed Rule 5108 provides "[u]nless otherwise ordered by the Board or the Commission, informal inquiries and formal investigations, and any documents, testimony or other information prepared or received by the Board or the staff of the Board in connection with such inquiries and investigations, shall be confidential in the hands of the Board, … provided, however, that the Board may make information available …" to various entities, including "any appropriate State regulatory authority." We propose that a more specific description of state regulatory agencies be included. In that regard, we suggest that the language utilized in Proposed Rule 4004(a)(2) of the PCAOB's Proposed Rules on Inspections of Registered Public Accounting Firms which provides, in relevant part, that information on inspections may be shared with "each state, agency, board, or other authority that has issued a license or certification number to the firm or person … authorizing such firm or person to engage in the business of auditing or accounting" would be appropriate to use here as well.

5. Proposed Rule 5110. Non-cooperation with an Investigation

Proposed Rule 5110(a) purports to set forth the grounds upon which the Board could institute a proceeding based on a registered public accounting firm, or a person associated with such a firm, failing to cooperate in connection with an investigation. As an initial matter, we request some clarification as to what would be considered non-

cooperation by the Board. Further, we propose that a procedure for objecting to demands from the Board be instituted. As written, the Proposed Rules are unclear as to whether there is any legitimate reason for withholding documents or testimony absent a claim of privilege. However, we believe that there may be situations in which it would be appropriate for a firm to utilize an objection other than privilege when responding to a demand. Without an objection procedure in place a firm that believes it has a legitimate reason for withholding documents or testimony could be considered by the Board as having failed to cooperate and would be subject to severe sanctions. We believe such a result would be unjust.

6. Proposed Rule 5200. Commencement of Disciplinary Proceedings

Proposed Rule 5200(d) provides that "[b]y 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." It further provides that "[t]he 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." While this Proposed Rule provides a mechanism for the Board or hearing officer to consolidate a proceeding, it does not provide any procedure by which a registered accounting firm could object to consolidation. We believe that there are situations where consolidation would not be warranted even if the requisite conditions are met. Firms should have an opportunity to be heard on whether a matter should be consolidated. Although the Proposed Rule provides that "[c]onsolidation shall not prejudice any rights under these Rules of Procedure and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred," there may be instances where the act of consolidation itself would be prejudicial and firms should have a process by which they could object.

7. Proposed Rule 5201. Notification of Commencement of Disciplinary Proceedings

Proposed Rule 5201(a) provides that "[w]henever an order instituting proceedings is issued by the Board, the Secretary shall give each firm or person charged appropriate notice of the order within a time reasonable in light of the circumstances." We believe that "a time reasonable in light of the circumstances" is too vague a timeframe and could result in delays in notification. We believe that there should be a deadline by which notification must occur and propose that the following italicized language be added to the Proposed Rule. "Whenever an order instituting proceedings is issued by the Board ... within a time reasonable in light of the circumstances*, but in any event not later than 30 days from the date of issuance of such order*."

8. Proposed Rule 5203. Public and Private Hearings

Proposed Rule 5203 provides that "[n]o hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties." We believe it is unclear as to what will occur if one of the parties does not consent to a hearing being public. It appears that absence of one party's consent would be sufficient to result in a hearing remaining private; however, we think it would be helpful if the Board could provide some clarification on this point.

9. Proposed Rule 5300. Sanctions

Proposed Rule 5300 sets forth the sanctions the Board might impose as a result of a disciplinary proceeding. There is not, however, a clear articulation of which sanctions might be imposed for any particular conduct. Specifically, Proposed Rule 5300(a) provides that the imposition of sanctions would be made "subject to the applicable limitations under Section 105(c)(5) of the Act." Section 105(c)(5) of the Act makes clear that certain sanctions may be imposed only in cases of intentional conduct or repeated instances of negligent conduct. We would request that the Board provide clarification in the Proposed Rule as to which sanctions will be applicable to certain conduct.

We also do not believe that there is enough specificity in Proposed Rule 5300(b) as to which sanctions might be imposed in connection with a proceeding instituted pursuant to Rule 5200(a)(3). Proposed Rule 5300(b)(1) provides that "the sanctions described in subparagraphs (1) – (5) of paragraph (a) of this Rule" may be imposed in connection with a proceeding instituted pursuant to Rule 5200(a)(3). It is unclear which monetary penalties might be assessed in this situation since it appears that paragraphs (1) – (5) encompass penalties for both intentional and unintentional conduct. We do not understand if there is meant to be a distinction between intentional and unintentional conduct, as we believe there is meant to be in part (a) of the Proposed Rule, however, if there is to be a distinction, we are unclear as to how such a distinction might be made.

Finally, Proposed Rule 5301(a) and (b) would prohibit any person who is suspended or barred from being associated with a registered public accounting firm without the consent of the Board. The note accompanying this Proposed Rule specifies that such a person "may not, in connection with the preparation of or issuance of any audit report, (i) share in the profits of, or receive compensation in any other form from, any registered public accounting firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm." The note goes on to provide that "[t]his prohibition includes

receiving any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that might have been earned during the period of the suspension or bar." It appears that a suspended or barred person may continue to work for a firm as long as such work does not involve "the issuance of any audit report." It is unclear, however, how a firm would compensate such person for that work, as it would be impracticable if not impossible to segregate money that results directly or indirectly from audit fees. Therefore, it appears that this Proposed Rule would have the perhaps unintended consequence of requiring that a registered public accounting firm terminate its relationship with a suspended or barred person. We request that the Board provide some clarification in the Proposed Rule on this point.

10. Proposed Rule 5401. Appearance and Practice Before the Board

Our comment on this Proposed Rule concerns the process of withdrawal that is contained in Rule 5401(c)(4). The Proposed Rule indicates that withdrawal may be permitted, however, it does not enumerate any grounds that the Board would consider adequate for withdrawal. We believe that it would be of assistance if the Board could provide some guidance on this point.

* * *

An effective investigation and disciplinary process is a critical element of the Board's oversight role. We appreciate the efforts that have been undertaken by the Board in addressing this important area and stand ready to work with the Board in developing the final rules. We also appreciate this opportunity to express our views to the Board. We would be pleased to answer any questions the Board or its staff might have about our comments. In that regard, please contact Barbara Taylor at 212-885-8322 or via electronic mail at btaylor@bdo.com.

Very truly yours,

/s/ BDO Seidman, LLP

BDO Seidman, LLP

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August 12, 2003

Office of the Secretary
PCAOB
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: Rulemaking Docket No. 005: Proposed Rules on Investigations and Adjudications

Dear Sir/Madam:

I am an attorney with no affiliation to any public accounting firm required to register with the Public Company Accounting Oversight Board (the "Board"). I commend the Board on its proposed rules relating to its investigations and adjudications, but offer the following comment.

In its Release No. 2003-012 dated July 28, 2003 and its related Working Paper dated April 21, 2003, both concerning the Board's proposed rules for its investigations and disciplinary proceedings, I do not believe the Board has made sufficient disclosure of its authority under Section 105 of the Sarbanes-Oxley Act (the "Act") to conduct "an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate...**professional standards**...", which is defined in Section 2 of the Act to mean not just "auditing standards" but also **accounting principles** which are "relevant to audit reports for particular issuers." (emphasis added).

Thus, the Board has statutory authority to investigate and discipline registered firms and their associated persons regarding matters similar to those set forth in the following recent examples of Commission enforcement proceedings: (i) Pricewaterhouse Coopers, LLP for that firm and its engagement partner's failure to comply with "Generally Accepted Auditing Standards" ("GAAS") due to improper restructuring reserves of its client's financial statements which did not conform to Generally Accepted Accounting Principles" ("GAAP")[1]; (ii) Arthur

[1]Securities Exchange Act of 1934, Release No. 47900, May 22, 2003, Order Instituting

Andersen LLP for its materially false and misleading audit reports on Waste Management, Inc.'s financial statements which were not presented fairly, in all material respects, in conformity with GAAP[2]; or (iii) the Commission's complaint filed against KPMG and four of its partners for engaging in fraud by permitting Xerox Corporation to manipulate its accounting practices to fill a $3 billion gap between actual operating results and those reported, in violation of GAAP.[3]

I would suggest that the Board spell out more clearly, with examples, that the Board's authority to investigate and discipline registered accounting firms and their key personnel includes failures by its clients to conform to GAAP in financial statements reported on as being presented fairly in conformity with GAAP, and not merely to such accounting firm's and associated persons' failures to comply with GAAS in conducting their audit..

Very truly yours,

Robert Chira

Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice.

[2] AAER Release No. 1405, Securities Release No. 34-4444, dated June 19, 2001, Order Instituting Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice.

[3] SEC v. KPMG LLP, et al, Civil Action No. 03-CV-0671, U.S.D.C., S.D.N.Y., filed Jan. 29, 2003.

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Deloitte
& Touche

August 18, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005 -- Proposed Rules on Investigations and Adjudications, and PCAOB Rulemaking Docket Matter No. 006 -- Proposed Rules on Inspections of Registered Public Accounting Firms

Deloitte & Touche LLP would like to inform the Office of the Secretary of its intention to submit comment letters on the above referenced proposed rules. Due to circumstances related to the widespread power outage in the northeast region which began this past Thursday, we have not been able to finalize our comment letters by today's deadline of 5:00 pm (EDT). These proposed rules are of significant importance to us, and we will be submitting our comment letters to the Board within the next one or two days.

Very truly yours,

/s/ Deloitte & Touche LLP

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Deloitte & Touche

August 19, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005
Proposed Rules on Investigations and Adjudications

Deloitte & Touche LLP is pleased to respond to the request for comments from the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") on its *Proposed Rules on Investigations and Adjudications*, PCAOB Rulemaking Docket Matter No. 005 (July 28, 2003).

INTRODUCTION

We support the goals of the Sarbanes-Oxley Act of 2002 (the "Act") in restoring investor confidence as well as the Board's efforts to implement the Act faithfully. Section 105 of the Act authorizes the Board to conduct investigations of registered public accounting firms and associated persons, to institute disciplinary proceedings against such firms and persons in the event that the Board has detected potentially improper conduct, and to impose certain sanctions on such firms and persons through those disciplinary proceedings.

Section 105(a) of the Act requires the Board to establish "fair procedures for the investigating and disciplining of public accounting firms and the associated persons of those firms" within the limits of the Act. In this comment letter, we have sought to identify aspects of the proposed rules that should be modified or clarified to ensure that Congress's mandate under Section 105(a) of the Act is carried out.

As a general matter, the Board's rules regarding investigations and adjudications must be crafted with particular care. Congress established the Board as a private "non profit corporation" and did not designate the Board a "self regulatory organization" like the National Association of Securities Dealers.[1] The Board's rules, however, must be approved by the Securities and Exchange Commission, which is a government agency and which, therefore, must act in accordance with the Constitution, the Administrative Procedure Act, and other federal statutes regarding agency action. Even to the extent that the Board may not be directly subject to these requirements, we believe that the Board's proposed rules will be more efficient, fair, and effective if they reflect the values and protections inherent in the Constitution and the Administrative Procedure Act.

It is significant that the Board has drawn many parts of its proposal from the Commission's codified Rules of Practice. The Board's use of this model, however, must recognize that the Commission's actual practices are not defined solely by a set of codified regulations, but have been augmented and supplemented by agency custom, informal guidance, and decisional law. Additionally, the Commission's rules are implemented with the understanding that the Constitution, the Administrative Procedure Act, and a variety of other

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[1] Act, § 101(b).

statutes would govern the Commission's proceedings as well. While the Commission may have decided not explicitly to include a particular procedural protection in its Rules of Practice because the protection was provided elsewhere by governing law, the Board cannot make that same assumption. Accordingly, we suggest in certain places that the Board make explicit in its rules certain procedural protections that may not be stated in the Commission's rules. These suggestions draw on the Commission's long experience, and important constitutional and statutory principles that may not be reflected in the Commission's regulatory text, but nonetheless govern its proceedings.

To that end, we encourage the Board to make certain that registered public accounting firms and associated persons are guaranteed certain fundamental safeguards. There are several areas on which we have focused our comments, including: (1) developing more workable rules for the proposed non-cooperation proceedings; (2) recognizing the burdens on registered public accounting firms and associated persons presented by the Board's investigative procedures; (3) providing fair access to information in disciplinary proceedings; (4) ensuring impartiality through more structured separation of function rules; and (5) avoiding the use of unfair summary disposition procedures. Our comments below track the order of the proposed rules in the Board's Release No. 2003-012, dated July 28, 2003 (the "Release").

I. General Provisions And Definitions

A. The Definition Of "Disciplinary Proceeding"

The proposal uses the term "professional standards" in several places, including the definition of a "disciplinary proceeding" under Proposed Rule 1001(d)(i), the grounds for initiating both informal and formal investigations under Proposed Rules 5100(a)(4) and 5101(a)(1), and the description of sanctionable conduct under Proposed Rule 5300. Unlike the term "auditing and related professional practice standards," which is defined to include those

guidelines central to the Board's regulatory authority over the audit reports of issuers, the term "professional standards" includes generally accepted accounting principles.

Without clarification, the Board's definition of "professional standards" may subject accounting firms to discipline for departures by issuers from generally accepted accounting principles even when a firm has acted with due professional care.[2] We do not believe that registered accounting firms and associated persons should be subject to Board disciplinary proceedings and potentially severe penalties based solely on errors involving generally accepted accounting principles. Although a departure from generally accepted accounting principles might trigger an inquiry by the Board, a violation of an "auditing and professional practice standard"—which is tailored to the Board's mandate to preserve the integrity of public company audits—should serve as the touchstone to determine if a disciplinary proceeding should be commenced.

B. THE DEFINITION OF "HEARING OFFICER"

Under the proposed definition of "hearing officer," the Board may authorize "any person" to preside over a disciplinary proceeding.[3] As drafted, the Board could appoint a staff

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[2] *Compare Proposed Rules on Inspections of Registered Public Accounting Firms*, Release No. 2003-13, Proposed Rule 1001(p)(iv) (referring only to "accounting standards") *with* AU 100 (Generally Accepted Auditing Standards) ("Due professional care is to be exercised in the performance of the audit and the preparation of the report.") *and* AU 230.13 (Due Professional Care in the Performance of Work) ("Since the auditor's opinion on the financial statements is based on the concept of obtaining reasonable assurance, the auditor is not an insurer and his or her report does not constitute a guarantee. Therefore, the subsequent discovery that a material misstatement, whether from error or fraud, exists in the financial statements does not, in and of itself, evidence (a) failure to obtain reasonable assurance, (b) inadequate planning, performance, or judgment, (c) the absence of due professional care, or (d) a failure to comply with generally accepted auditing standards.").

[3] Proposed Rule 1001(h)(i).

member of the Board's Division of Enforcement and Investigations to serve as the "hearing officer" in a disciplinary proceeding.[4] While the Commission's Rules of Practice contains a similar definition of "hearing officer,"[5] the Commission elsewhere has required the officer presiding in a disciplinary proceeding to be an "administrative law judge."[6] The Commission has established a separate Office of Administrative Law Judges so that an administrative law judge cannot be a member of the interested division in a SEC proceeding.[7]

The Board's proposed rules provide no such safeguards, permitting the Secretary to choose any person that falls within the broad proposed definition to be the hearing officer.[8] The Board should follow the Commission's practice and require the use of administrative law judges from outside the interested division to preside over disciplinary proceedings. At a minimum, the Board's rules should provide that the Board will not authorize the appointment of hearing officers from an interested division. Such a limitation is essential to ensure that the "hearing officer" who is selected does not present a conflict of interest and that the appearance of impartiality is preserved.

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[4] *See* Proposed Rule 1001(i)(iv) (defining interested division). In most disciplinary proceedings, the interested division will be the Board's Division of Enforcement and Investigations. Release at A2-iv. For hearings that concern the denial of a registration application, the interested division would generally be the Division of Registration and Inspections. *Id.*

[5] 17 C.F.R. § 201.101(a)(5).

[6] *See* 17 C.F.R. § 201.110; 17 C.F.R. § 200.30-10.

[7] *See* 17 C.F.R. § 200.30-10; 17 C.F.R. § 200.14.

[8] *See* Proposed Rule 5200(b) (authorizing the Secretary of the Board to appoint the hearing officer for a disciplinary proceeding).

II. INQUIRIES AND INVESTIGATIONS

A. THE BOARD SHOULD ADOPT THE COMMISSION'S *WELLS* NOTICE AND INVESTIGATION CLOSURE PROCEDURES

The proposal provides investigated public accounting firms and persons with neither adequate notice, nor a sufficient opportunity for them to state their case to the Board, nor a procedure by which they might seek the closure of a formal investigation. These omissions are inconsistent with the Commission's long-established practices and imperil the ability of firms and persons to participate productively in a Board investigation.

While Proposed Rule 5101(a) provides procedures for initiating a formal investigation, the proposal does not suggest that the Board will inform a firm or associated person of its intent to recommend the commencement of disciplinary proceedings.[9] In doing so, the Board proposes a different path from the one embodied in the Commission's so-called *Wells* procedures. The Commission's staff generally provides an investigated party, without an explicit request, with a *Wells* notice—which states that the Commission's staff has conducted a formal investigation and that it intends to recommend the commencement of proceedings against the party, and which describes the grounds for its tentative recommendation.[10] At that point, the investigated party is

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[9] *See* Proposed Rule 5101(a). To be sure, Proposed Rule 5109(d) allows a public accounting firm or associated person to request a description of the "indicated violations" from the Board's staff, but the disposition of that request is left to the staff's "discretion." No part of the proposal indicates that the staff will affirmatively notify a public accounting firm or associated person of a formal investigation.

[10] *See*, *generally*, Securities and Exchange Commission, *Commencement of Enforcement Proceedings and Termination of Staff Investigations*, Release No. 5310 (Feb. 28, 1973) at 1.

provided an opportunity to submit a *Wells* statement in which the party can explain the allegedly improper conduct.[11]

The Commission's *Wells* procedures are the product of years of Commission experience and should be codified in the Board's rules.[12] In this regard, the proposed rule should specify that the staff will issue a notice that includes a concise statement of the allegedly improper conduct and the staff's preliminary recommendations. Without a right to notice and information similar to the Commission's *Wells* procedures, the right to submit a "statement of position" pursuant to Rule 5109(d) provides little protection, or indeed benefit to the Board's process of informed decisionmaking.

In addition, Proposed Rule 5101(b) allows the Director of the Division of Enforcement and Investigations to recommend that the Board close a formal investigation. The proposal, however, provides no process by which a registered public accounting firm or associated person can request the closure of a formal investigation.

The absence of such a procedure is inconsistent with the well-established practices of the Commission, which permit an investigated person to petition for the closing of an investigation. The Board should similarly adopt this practice as part of its rules. Without the ability to seek closure of an investigation, registered public accounting firms may have false concerns about

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[11] *Id.* *See also* William R. McLucas, *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53, 113 (1997) (noting that generally a one-month period for preparing a *Wells* submission is permitted).

[12] The Commission's *Wells* procedures have as a matter of custom become standard Commission practice and are expected by those who appear before the Commission. The Board does not, however, have that background of customary law on which to rely. Accordingly, it is vital that the Board explicitly incorporate these procedures into the Board's rules.

impending Board action. This paralyzing uncertainty can prevent long-term business planning and cause needless anxiety for innocent public accounting firms and persons. Board staff may not have a similar incentive to close stale investigations, even if their continuation has not been justified by the evidence uncovered. Registered public accounting firms and associated persons should be able to petition the Board to lift the shadow of a formal investigation when circumstances warrant.

B. Accounting Board Demands For Testimony Require Greater Notice And Clarified Procedures

We recognize that the Board has the authority under the Act to demand testimony from a registered public accounting firm or an associated person.[13] We also appreciate the Board's attempt to provide workable rules under which that authority will be exercised. We believe, however, that certain aspects of the Board's proposed rule should be modified or clarified to ensure that the system of Board testimonial demands operates fairly and efficiently.

Appropriately, Proposed Rule 5102(b)(1) requires the Board to give an examinee "reasonable notice" of the examination. The proposed rule's commentary, however, indicates that the Board may deem this "reasonable notice" requirement to be satisfied with less than five-business-days notice.[14] Less than five days will generally not be a sufficient amount of time to arrange for the representation of competent and informed counsel and to gather the data that will be required thoroughly to answer the Board's inquiries. This problem will be especially acute when the Board seeks the examination of a registered public accounting firm itself. In such a situation, the firm will be required to designate a person to testify, and that person will be

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[13] Act, § 105(b)(2)(A).

[14] Release at A2-x.

accountable for "matters known or reasonably available to the registered public accounting firm."[15] Accordingly, the Board should eliminate its guidance that notice constituting less than five business days may be deemed "reasonable" for purposes of the rule. To the extent that the Board wishes to provide a guideline regarding what would constitute reasonable notice, we believe that fifteen business days would generally be the minimum for reasonable notice.

Second, the Board should also refine the procedures for the examination of the public accounting firm under Proposed Rule 5102(c)(4). The proposed rule's requirement that the designated examinee testify as to "matters known or reasonably available to the registered public accounting firm" is very broad. The Board and public accounting firms have a mutual interest in ensuring that this standard is sufficiently clear such that the testimonial process is efficient, productive, and avoids the wasting of time and resources. To be sure, this rule replicates the standard set forth in Federal Rule of Civil Procedure 30(b)(6). The rules governing a Board demand, however, are different from those governing civil depositions and require that the standard for the scope of designated witness testimony be more limited. Failure to produce the information required by Federal Rule of Civil Procedure 30(b)(6) does not carry the severe sanctions provided for non-cooperation with an investigation under the Board's rules.[16] Moreover, those depositions are conducted under the ultimate supervision of a life-tenured judge. The Board's proposed rules also lack any procedure by which the examinee can supplement

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[15] Proposed Rule 5102(c)(4).

[16] *See* Proposed Rule 5300(b) (authorizing fines of up to $15 million for failure to comply with an accounting board demand for testimony, in addition to the termination of registration).

examination answers.[17] To the extent that the Board would consider, in a particular instance, an examinee's inability to provide information encompassed by this broad standard as non-cooperation, the Board's rules should explicitly allow the examinee to provide supplemental written responses at a later time.

Third, the proposed sequestration rule unreasonably limits the persons who can attend a demanded examination. The proposal permits the attendance of "the person being examined and his or her counsel."[18] The Board should revise this rule, however, to confirm that persons who are assisting counsel may attend the examination. Such a revision would be consistent with judicially imposed requirements for Commission examinations, under which the Commission permits the attendance of experts, accountants, and other persons retained by counsel for advice in the representation of the examinee.[19]

Similarly, the Board should confirm that the "counsel" permitted to attend the examination of an associated person may also represent that person's accounting firm. The proposal states that the attending counsel must "represent the witness;" and we agree that such counsel should take on all the professional responsibilities attendant to representing the individual examinee.[20] It is crucial, however, that an attorney not be disqualified from attendance merely because he also represents the associated person's public accounting firm.

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[17] The proposed rule does permit an examinee to review the transcript of the examination and to make changes. Rule 5102(e). It is not clear, however, whether this capability to make changes refers to correcting errors alone or providing entirely new material. *See*, *e.g.*, Fed. R. Civ. P. 30(e).

[18] Proposed Rule 5102(c)(3).

[19] *See Securities and Exchange Comm'n v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985).

[20] Proposed Rule 5109(b).

Any other regime would place even greater financial demands on associated persons as they respond to accounting board demands. The Commission has made precisely this clarification, and it should be codified in the Board's rule.[21]

C. ACCOUNTING BOARD DEMANDS FOR THE PRODUCTION OF DOCUMENTS PROVIDE INSUFFICIENT NOTICE AND SHOULD BE SUBJECT TO BOARD REVIEW

Proposed Rule 5103 requires that a Board demand for the production of documents "set forth a reasonable time and place for production." The Board has indicated in its section-by-section analysis, however, that it interprets the rule to provide no "minimum notice requirement before production shall be due."[22] The Release states that, while the Board "anticipates that the staff will provide at least five business days notice before production is due," such notice may also "be less than five days."[23]

We are concerned that the Board's baseline of five-days notice ignores the practicalities of responding to certain document production requests served on public accounting firms. Under the proposed rule, the Board's staff would be authorized to demand the production of broad categories of documents. In many cases, the demand would be the first indication for the firm that the Board is investigating a matter and, thus, firms would not have been preparing for the possibility of a document production. In response to such a demand, an accounting firm would be required to question hundreds of employees in order to locate responsive documents. Once identified, responsive documents that may be scattered across the firm's offices or in the

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[21] *See*, *e.g.*, William R. McLucas, then-Director of the Commission's Division of Enforcement, *Contact with Corporate Officers and Employees in SEC Investigations*, 9 INSIGHTS 2 (Mar. 1995).

[22] Release at A2-xii.

[23] *Id.*

possession of auditors working at the offices of audit clients would need to be gathered into a centralized location and reviewed by attorneys for relevance and completeness. Then, the firm would generally Bates stamp the documents and send them to vendors for copying.[24]

In order to preserve the firm's privileges, a public accounting firm would be required further to review the documents for privileged material before it could responsibly produce those documents. If an accounting firm produced privileged material in response to an accounting board demand, the firm would risk waiving that privilege even with regard to entities well beyond the Board.[25] These problems are aggravated by the Board's proposed rule governing the identification of privileged information, which requires extensive documentation about material claimed to be privileged and that such documentation be filed at the time the demand response is due.[26] The practicalities of production make a benchmark of five-days notice unworkable.

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[24] In this regard, Proposed Rule 5103(b) provides that "[u]nless an accounting board demand expressly requests or permits the production of copies, original documents shall be produced." The Board should revise this proposed rule to make clear that, in all but the rarest of circumstances, the production of copies will be a sufficient response to an accounting board demand. A registered accounting firm or associated person should be able to retain the originals in order to prepare for the defense of a disciplinary proceeding or to respond to discovery requests made in parallel civil litigation. Proposed Rule 5109(c), which permits a firm or person to request copies of the documents after they have been produced to the Board, is not an adequate solution for these concerns because the Board's staff may decline that request and because the investigated party is still deprived of the use of the documents for a potentially crucial period of time.

[25] *See*, *e.g.*, *In re Columbia / HCA Healthcare Corp. Billing Practice Litig.*, 293 F.3d 289 (6th Cir. 2002) (holding that the production of privileged documents to the SEC, even under a confidentiality agreement, waived the privilege as to private third parties).

[26] Proposed Rule 5106(a) (specifying the information necessary for a claim of privilege); Proposed Rule 5016(c) (requiring privilege documentation to be filed at the time that the response is due).

Because of the challenges presented by the production of documents, the Federal Rule of Civil Procedure 34 sets a thirty-day period for responding to a request for production.[27] We recommend that the Board adopt a workable standard similar to the time-tested approach of Federal Rule of Civil Procedure 34. Specifically, the Board should revise its rule to set a minimum period of thirty days for response to an accounting board demand, and to allow accounting board demands with response periods of less than thirty days only upon the order of the Commission. Such an approach would permit the staff the flexibility to obtain accounting board demands, under the supervision of the Commission, when truly emergent circumstances are presented and when the request for documents is reasonably targeted. In other circumstances, the Board's staff would be permitted to issue demands with a reasonable minimum response period of thirty days.

Similarly, the proposed rule provides for no Board review of the scope of an accounting board demand issued by its staff before production is required. The Commission's rules provide for a strong right of independent review over its subpoenas. Commission subpoenas are not self-executing; instead, the Commission must file a petition in a federal district court to enforce the subpoena. In the course of deciding whether a subpoena should be enforced, the Commission must convince an Article III, life-tenured judge that the subpoena is statutorily authorized, is reasonable in scope, is not unduly burdensome, and was not issued in bad faith by Commission

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[27] Fed. R. Civ. P. 34(b). Even within this thirty day period, Rule 34(b) only requires a written response to the request for production, not the actual documents requested. Moreover, the federal rules themselves do not require the detailed privileged log demanded under Proposed Rule 5108 at the time of production.

staff.[28] If the court finds that these minimum requirements are met, it may issue an order enforcing the subpoena. Only after that order is issued, however, can the respondent be subject to penalties for failure to comply with the subpoena.

At a minimum, the proposed rule should be revised to permit public accounting firms and associated persons to request that the Board quash or issue a protective order limiting the accounting board demand. This amendment to the proposed rule should permit parties subject to an accounting board demand to object on the basis that it seeks irrelevant documents, is redundant of other accounting board demands, is unduly burdensome, is unreasonable in scope, or extends beyond the authorization of the order instituting a formal investigation, the Act, or the Board's rules.

Under such a suggested revision, Board staff would not be required to initiate proceedings to enforce a demand. Instead, a person or registered public accounting firm could affirmatively petition the Board to quash or to issue a protective order limiting an accounting board demand issued by Board staff. In addition, the revision would not place the disposition of a motion to quash or for a protective order before an independent external tribunal in the first instance, but would allow registered public accounting firms and associated persons to seek review from the Board itself, under at least the same scrutiny as a Commission subpoena would be reviewed before enforcement. Without such a revision, registered public accounting firms

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[28] *See*, *e.g.*, *United States v. Miller*, 425 U.S. 435, 445-46 (1976) ("The Fourth Amendment requires that administrative agency subpoenas be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unduly burdensome."); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978) (considering the Commission's authority to issue the subpoena and the reasonableness of the subpoena's burdens and scope during enforcement proceedings).

and associated persons would be able to seek review of a demand only through non-compliance, exposing themselves to substantial sanctions in non-cooperation proceedings.

D. THE BOARD SHOULD PROVIDE BASIC PROCEDURAL PROTECTIONS TO THE FIRM DURING RULE 5104 EXAMINATIONS OF BOOKS AND RECORDS

The Act authorizes the Board to "inspect the books and records of such firm or associated person to verify the accuracy of any documents supplied" under an accounting board demand for documents.[29] The Board's rule repeats the Act's authorization with little specification. The Board, however, should provide basic procedural protections for applicant firms in the event of such an examination.

As currently drafted, the proposed rule permits the staff to conduct this examination in its own discretion once the Board has initiated a formal investigation. The Board should amend the proposed rule to require express Board approval before the staff conducts such an examination. The examination allowed by Proposed Rule 5104 is an extraordinary act. To be sure, the Commission is authorized to perform examinations of the books and records of broker-dealers, but that authority is expressly designed to prevent the time-sensitive possibility of illegal fund transfers. There is no such need in this case.

Another potential concern is that the proposed rule provides no protection for privileged information contained in a public accounting firm's books or records. If permitted to examine any book or record in the accounting firm's protection, the Board's staff may have effective access to otherwise privileged information, eviscerating any protection established by Proposed Rule 5106. The Board should revise the rule to allow public accounting firms to designate certain records as privileged and to withhold them from examination. Alternatively, the Board

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[29] Act, § 105(b)(2)(B).

should establish a procedure for moving to quash an examination, much like a search warrant, on the basis of protecting privileged information. (At the very least, the Board's rule should reinforce that any privileged information discovered by Board's staff during their investigation cannot be used, either in assistance of the Board's investigation or as evidence in a disciplinary hearing.)

E. The Board Should Take Steps To Maintain The Confidentiality Of Investigatory Records When Disclosed To Other Regulatory Agencies

Proposed Rule 5108 permits the Board to disclose investigatory records to the Securities and Exchange Commission, the Attorney General of the United States, an "appropriate Federal functional regulator," state attorneys general, and "any appropriate State regulatory authority." Although we understand that making investigatory records available to these agencies is contemplated by the Act,[30] we are concerned that, unless clarified, such availability may be administered in a manner inconsistent with the Act's provisions protecting the confidentiality of this information. We suggest the following revisions in order to ensure that, as provided by the Act, the Board's investigatory information remains confidential and privileged even when provided to the agencies listed in the Act.[31]

First, the Board should release investigatory information to another agency only under a confidentiality agreement. The Board's proposed rule states in its first Note that the information shared with an agency "shall be confidential and privileged *as an evidentiary matter* (and shall not be subject to civil discovery or other legal process) in any proceedings in any federal, or

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[30] Act, § 105(b)(5)(B).

[31] Act, § 105(b)(5)(B)(ii)(IV) (requiring that "each of [the agencies receiving Board investigatory information] shall maintain such information as privileged and confidential.")

State court or administrative agency."[32] Although this Note may prevent state or federal agencies from introducing Board investigatory information *as evidence in judicial or administrative proceedings*, the Note's terms do not explicitly prevent such an agency from disclosing Board investigatory information to the public on its own initiative. If the Board were to require the agency to enter into a confidentiality agreement as a condition of receiving investigatory information, that agreement would bar the agency from releasing the information to the public, and would thereby carry out Congress's mandate that the agency keep the information confidential. Alternatively, the Board could specify explicitly in its rule that a receiving agency is prohibited from disclosing the Board's investigatory information to anyone outside the receiving agency and could require the Board's staff to advise the recipient agency of these obligations.

Second, the final rule should explicitly confirm that state law is preempted to the extent that state law would otherwise require a state agency in receipt of the Board's investigatory information to disclose it. The Note to Rule 5108 states that the Board's investigatory information "shall be exempt from disclosure, in the hands of an agency or establishment of the federal government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise." This language, however, does not directly cover the status of the information in the hands of state attorneys general and other "appropriate State regulatory authorit[ies]." If the Board were to give investigatory information to a state agency, the state agency might be required by various state "freedom of information acts" or similar state laws to disclose that information whether or

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[32] Rule 5108(b) Note (emphasis added).

not requested by the public.[33] Notwithstanding the proposed rule's measures to keep investigatory information "confidential," disclosure to a state agency may effectively subject such information to public discovery if the rule's language is not clarified. Accordingly, the final rule should expressly confirm that state law is preempted to the extent that it would otherwise permit or require the receiving state agency to disclose investigatory information shared by the Board. Such a confirmation would faithfully implement the Act's requirement that receiving state agencies "maintain such information as confidential and privileged."

Third, the Board's rules should be modified to require the notification of the investigated registered public accounting firm or associated person when a Rule 5108 disclosure is made. Such a notification would enable a firm or person to protect the information more securely from disclosure by various federal and state agencies that have received the information. Public accounting firms and persons that are the subject of the investigatory information could, if given sufficient notice, intervene to seek protection from the inappropriate disclosure of confidential information in proceedings before agencies and courts. Without such notification, recipient agencies may disclose confidential Board investigatory information without challenge, if only because no entity would have both the incentive and the necessary information to seek to preserve confidentiality.

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[33] *See*, *e.g.*, Cal. Gov't Code § 6250 *et seq.*; Tex. Gov't Code § 552.001 *et seq.*; 5 Ill. Comp. Stat. 140/1, *et seq.*; N.Y. Pub. Off. Law § 84, *et seq.* Even if the agency decided not to disclose this information to the public, public interest groups and private litigants could still seek this information in the absence of preemption.

F. THE BOARD SHOULD SPECIFICALLY SET FORTH THE ACTS CONSTITUTING NON-COOPERATION WITH AN INVESTIGATION

Proposed Rule 5110 authorizes the Board to initiate a disciplinary proceeding in the event that a public accounting firm or associated person fails to cooperate with an investigation. Under the proposed rule, disciplinary proceedings may be initiated if a public accounting firm or an associated person "may have failed to comply with an accounting board demand, may have given testimony that is false or misleading or that *omits material information*, or may *otherwise have failed to cooperate in connection with an investigation*." We believe that the proposed rule's listing of those acts that will constitute non-cooperation is too vague to afford notice of prohibited conduct. Clarity and adequate notice are crucial for potential non-cooperation charges because of the grave penalties, including the termination of registration and $15 million civil penalties, and the expedited proceedings for imposing those sanctions that the Board has authorized.

First, the proposed rule prohibits a public accounting firm from "otherwise fail[ing] to cooperate in connection with an investigation." This catchall term potentially places a wide range of seemingly innocent conduct in question. For example, this broad term might expose to severe punishment the good faith adherence to a point of privilege or situations where cooperation is complicated by a parallel civil or criminal proceeding. We believe that the terms regarding false testimony and the refusal to comply with properly issued accounting board demands cover the full range of conduct that could reasonably be subject to the proposal's severe

penalties for non-cooperation.[34] If the Board believes that there is still other punishable conduct, the Board should specify those particular acts that would constitute non-cooperation for purposes of Rule 5110.

Second, we believe that the Board should not be able to initiate disciplinary proceedings directly for failure to comply with an accounting board demand issued by the staff. Instead, the Board's staff should be required to submit to the Board a motion to compel compliance. The motion to compel proceedings would provide the Board with an opportunity to exercise reasonable control over the issuance of demands by the Board's staff, and would give the investigated party one last opportunity to comply with the demand under the terms specified by the Board. If a public accounting firm or associated person were to fail to comply with the demand after the Board grants a motion to compel, the Board would then be reasonably entitled to take the grave step of initiating a disciplinary proceeding for non-cooperation.

Third, the proposed rule suggests, by designating as non-cooperation the "omi[ssion of] material information," that the failure to disclose material information to the Board constitutes punishable conduct. Nowhere does the Release specify, however, what information, in the absence of a request, a public accounting firm or associated person must disclose during an investigation. Indeed, the creation of a duty to disclose information in the absence of an appropriate inquiry to which it would be responsive would exceed the cooperation requirements

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[34] In this regard, the Board should clarify that a registered public accounting firm will not be liable for non-cooperation if a foreign public accounting firm on the opinion of which the registered firm relies refuses to produce audit workpapers. *See* Act, § 106(b)(2)(B).

for other types of investigations.[35] Without clarification, a firm that responds completely and truthfully to every inquiry made by the Board may still be exposed to liability for non-cooperation. The Board should, therefore, delete this language from the final rule because the remainder of the rule otherwise ensures that a public accounting firm will respond truthfully to the Board's inquiries.

Fourth, the Board should clarify that a registered public accounting firm is not responsible for the "non-cooperation" of one of its employees in responding to an accounting board demand directed to that employee *as an associated person*. Instead, a registered public accounting firm should at most be liable for non-cooperation with regard to an accounting board demand for documents or testimony from the firm itself. In the specific case of testimony, the firm should only be liable for violations committed in the testimony of the person designated on behalf of the firm pursuant to Proposed Rule 5102(c)(4). Given the substantial penalties for non-cooperation proceedings and the ability of the Board to gather information from a registered public accounting firm directly, respondeat superior liability is not appropriate in the context of the Board's proposed non-cooperation proceedings.

Finally, we believe that the "expedited proceedings" proposed in the Release are not appropriate for the types of matters that will be raised in non-cooperation proceedings. Specifically, the proposal establishes expedited procedures for the adjudication of non-cooperation charges, including: standards allowing less detailed allegations in the order

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[35] *See*, *e.g.*, *United States v. Larson*, 796 F.2d 244, 246-47 (8th Cir. 1986) (holding that private persons have no general duty to disclose information to the government that is material to a prosecution); *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (stating that an individual has no duty to disclose material information during questioning by the government).

instituting proceedings;[36] abbreviated deadlines for answering that order;[37] the discretion to eliminate post-hearing briefing in which respondents would ordinarily make their closing argument;[38] a shortened period for filing a petition for Board review;[39] and significantly limited discovery.[40] As proposed, non-cooperation proceedings will present very complex factual and legal issues. For example, the Board has included, under the cover of non-cooperation procedures, allegations of giving false testimony during a Board investigation. Adjudicating those charges may entail significant inquiries into events and facts entirely external to the proceedings themselves, such as the respondent's state of mind.[41] In addition, the Board has chosen to authorize very substantial penalties in non-cooperation proceedings, including enormous fines and the termination of registration. The penalties are sufficiently severe that they ought not be the product of "expedited" procedures.

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[36] *See* Proposed Rule 5201(b)(3); *see also* Part III.C. below.

[37] *See* Proposed Rule 5421(b); *see also* Part V.E.2. below.

[38] *See* Proposed Rule 5445(b).

[39] *See* Proposed Rule 5460(a)(2)(iii).

[40] *See* Proposed Rule 5422(a)(2); *see also* Part V.C.1. below.

[41] An example of these challenges would be the initiation of non-cooperation proceedings for testifying that a firm complied with Generally Accepted Auditing Standards in a particular engagement. If the Board's staff believed that statement was false, it could initiate non-cooperation proceedings. The resolution of those proceedings, however, would directly implicate the subject of the investigation itself and matters that would ordinarily be addressed in primary disciplinary proceedings.

According to the Release, these expedited procedures are essential to ensure prompt cooperation and to avoid the delay of a time-sensitive investigation.[42] The severe potential sanctions, however, will generally provide more than sufficient incentive for prompt cooperation. In contrast, the expedited proceedings for non-cooperation charges threaten the accuracy and fairness of the Board's determinations. Moreover, because the Board has not yet provided for procedures by which registered public accounting firms or associated persons can seek review of accounting board demands, non-cooperation proceedings will often present good faith disagreements with Board staff on discovery and cooperation matters. These truncated proceedings are inappropriate given the scope of actions that are subject to non-cooperation charges. The Board should eliminate these expedited procedures throughout its proposal.

G. Actions To Enforce Commission Subpoenas Requested By The Board Should Be Filed Under Seal

Proposed Rule 5111 authorizes the Board to seek the issuance of a subpoena by the Commission. While we recognize that the Board has this authority under Section 105(a)(2)(C) of the Act, we encourage the Board specifically to provide that any judicial action to enforce a Commission subpoena arising out of a Board investigation will be filed under seal. As explained above, Commission subpoenas are not self-executing and require the initiation of judicial proceedings for their enforcement. The initiation of judicial proceedings, however, may reveal the existence of a Board investigation concerning certain registered public accounting firms or associated persons. Such a public disclosure of this information through filing an action to enforce a subpoena is inconsistent with the Act's requirement that Board investigations remain

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[42] Release at A2-xlv.

confidential and privileged.[43] Although the recipient of a Commission subpoena could maintain the confidentiality of the investigation through immediate compliance, these recipients will generally not be the registered accounting firms and associated persons over whom the Board has regulatory authority.[44] Accordingly, these recipients will not have the same incentives to maintain the confidentiality of the investigation.

H. THE BOARD SHOULD BE EXPRESSLY PROHIBITED FROM INITIATING INVESTIGATIONS IN AID OF OTHER PROCEEDINGS

Proposed Rule 5112 requires the Board to alert the Commission of a formal investigation and permits the Board to refer an investigation to the Commission and certain other agencies. The Board should amend Proposed Rule 5112 to make clear that its cooperation with other agencies does not extend to initiating investigations in aid of another agency's parallel proceedings. Because the Board will have unique investigatory powers over registered public accounting firms and associated persons, the Board may often be called upon to gather information for use in another agency's proceedings. We believe that procuring information for another agency's proceedings would be an inappropriate and unauthorized use of the Board's investigatory powers. Instead, the proposal should expressly prohibit the Board from initiating an investigation unless it has made an independent determination that an investigation is warranted for the sole purpose of deciding whether to institute a Board disciplinary proceeding.

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[43] *See* Act § 105(b)(5)(A); Proposed Rule 5108.

[44] The Board will not generally be required to seek Commission subpoenas against registered public accounting firms and associated persons because of the availability of accounting board demands.

III. DISCIPLINARY PROCEEDINGS

A. THE BOARD SHOULD ADOPT A STRONGER SEPARATION OF FUNCTIONS RULE

The Board's proposed separation of functions rule would bar "employees or agents" of the Board who are "engaged" in the investigation or prosecution of a particular proceeding or a "factually related proceeding" to "participate or advise in a decision, or a Board review of the decision" in that proceeding.[45] As currently drafted, the proposed rule would separate those persons directly involved in the prosecution or investigation of a firm or associated person from the adjudication of the claims against that respondent. Because the rule refers to persons rather than divisions, however, the proposed rule may permit members of the Division of Enforcement and Investigations to participate or to advise in the decision of a disciplinary proceeding—as long as they are not working on the prosecution or investigation of that particular proceeding or one that is factually similar.

We believe that a rule that excludes staff members of the Division of Enforcement and Investigations from the adjudication of any disciplinary proceeding would best preserve the fairness and impartiality of the adjudicatory process. Even if a member of the Division of Enforcement and Investigations were not directly involved in the investigation of the particular firm or type of violation, it would be difficult for him to place his prosecutorial role aside. In addition, the application (for example) of an auditing standard in one case may have significance for other cases being litigated by a staff member of the Division of Enforcement and Investigations. At the very least, the participation of a Board employee who typically acts in a prosecutorial function in the adjudication of a disciplinary proceeding would raise the appearance of impartiality and would threaten the perceived integrity of the Board's adjudication

[45] Proposed Rule 5200(c).

process. For similar reasons, we have suggested that the Board exclude Division of Enforcement and Investigations staff from eligibility for hearing officer positions.[46]

B. THE ABILITY TO CONSOLIDATE DISCIPLINARY PROCEEDINGS SHOULD BE NARROWED

Proposed Rule 5200(d) permits the Board to consolidate any disciplinary proceedings involving "a common question of law or fact." We believe that this standard is excessively broad and, thus, threatens the capability of the Board to guarantee fair and individualized adjudications of the charges against a public accounting firm or an associated person. If the capability to consolidate proceedings is not sufficiently cabined, the individualized facts and other issues attendant to a particular respondent's circumstances may not receive appropriate consideration in multi-respondent hearings, leading to judgments poorly calibrated to a particular respondent's responsibility for conduct that is allegedly prohibited.

For this reason, both the federal civil and criminal joinder rules are substantially narrower, authorizing the consolidation of actions only when the claims arise out of the "same transaction or occurrence."[47] Under the standard used in federal courts, only those actions that share a core bundle of facts concerning the liability-causing event are permitted to be consolidated. In contrast, under the proposed rule, disciplinary proceedings may be consolidated if they share an abstract question of law that requires resolution. Such an approach carries obvious risks of unfairness and threatens the erroneous imposition of the grave penalties authorized by the Act and the Board's proposed rules.

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[46] *See* Part I.A above (suggesting that the definition of "hearing officer" be revised to exclude members of the "interested division").

[47] Fed. R. Civ. P. 19; Fed. R. Crim. P. 8.

That the proposed consolidation standard is only *one* of the several minimum requirements for maintaining a class action in a civil case is instructive.[48] Federal Rule of Civil Procedure 23 contains additional procedural protections that the proposed rule lacks, including the requirement that such common questions of law or fact "predominate" over individualized questions. Moreover, civil class actions are a poor model for the Board's consolidation rule in disciplinary proceedings. Whereas class actions are primarily designed to provide an efficient method for the adjudication of civil claims that plaintiffs may not otherwise have the incentive to prosecute separately, the Board's disciplinary proceedings entail substantial sanctions for respondents. Class actions, unlike Board disciplinary proceedings, are also conducted before a life-tenured Article III judge. Before the Board imposes the grave sanctions authorized by the Act, a respondent firm or associated person is entitled to an appropriately individualized hearing on the merits. The Board should adopt the time-tested joinder standard used in federal courts and permit consolidation only if the respondents are accused of participating in the same allegedly impermissible "transaction or occurrence."

C. THE PROPOSAL'S REQUIREMENTS FOR THE ORDER INSTITUTING DISCIPLINARY PROCEEDINGS FAIL TO GIVE RESPONDENTS EFFECTIVE NOTICE OF THE CHARGES

The order instituting disciplinary proceedings is of crucial importance in enabling a respondent public accounting firm or associated person to answer the order,[49] to prepare a

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[48] Fed R. Civ. P. 23(a)(2).

[49] Proposed Rule 5421 authorizes the Board to require a respondent to file an answer to the order instituting disciplinary proceedings. In that answer, the respondent must admit or deny the allegations and advance any affirmative defenses on which the respondent intends to rely. The order, however, must be sufficiently specific so that the respondent can assess which affirmative defenses may apply and respond intelligently and accurately to the allegations. The need for specificity is particularly strong because the proposal lacks any procedure for

[Footnote continued on next page]

defense, and to participate effectively in a disciplinary proceeding. Proposed Rule 5201(b) requires the Board to "specify in reasonable detail" the "conduct alleged to" be prohibited, as well as the legal basis for that prohibition. The Board, however, should amend the proposed rule in order to provide minimum requirements for the facts that must be alleged in the order instituting proceedings. Some standards of detail, for example, would not be adequate to place a respondent on notice regarding the events that will be subject of a disciplinary proceeding. The "notice pleading" standard of the Federal Rules of Civil Procedure, for example, would not be appropriate for Board disciplinary proceedings.[50] Whereas the assumption of the Federal Rules of Civil Procedure is that civil defendants will be able to determine the contours of the plaintiff's claims through liberal discovery rules, the proposal grants respondents very limited discovery against the Board and specifically forbids respondents to question Board staff regarding the basis for its charges through depositions or even written interrogatories.[51] Accordingly, it is essential to the fairness of the Board's disciplinary proceedings that the order instituting proceedings supply at least some semblance of the detail that the respondent would ordinarily obtain through civil discovery.

One potential standard for the detail that the Board should require in its order instituting proceedings is the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).

[Footnote continued from previous page]
the respondent to request a more definite statement before the answer is due. *See*, *e.g.*, Fed. R. Civ. P. 12(e).

[50] *See* Fed. R. Civ. P. 8(a).

[51] *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002) ("The [Federal Rules of Civil Procedure's] simplified pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

Under such heightened pleading requirements, the Board should, at a minimum, be required to specify where and when the allegedly prohibited conduct occurred, who committed the relevant acts, and any specific statements or acts alleged to be prohibited.

Aggravating these notice problems is the Board and the hearing officer's broad authority to amend the order instituting proceedings. Proposed Rule 5201(d) authorizes the Board to amend the order instituting disciplinary proceedings at any time during the proceedings. The order initiating proceedings is designed to serve the function of a complaint, informing the respondent of the charges or claims against him. This broad authority to amend, however, prevents the order from serving as effective notice. Under the proposed rule, the Board's authority to amend the order is completely unfettered: the Board could add new charges arising out of the same incident or completely different events. Because of the possibility that a Board amendment may fundamentally transform the nature of the case, respondents cannot reliably plan their defense.

Similarly, the power afforded to the hearing officer to amend the order imperils the respondent's ability to prepare its defense. Even the Federal Rules of Civil Procedure limit the court's ability to grant amendments of civil complaints during proceedings if amendment would "prejudice" the defendant.[52] At the very least, the Board should add a "prejudice" limitation to Proposed Rule 5201(d)(2), providing that the hearing officer may not amend if it would unfairly prejudice the respondent.

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[52] *See* Fed. R. Civ. P. 15(b).

D. THE BOARD SHOULD REVISE ITS SETTLEMENT PROCEDURES TO PROMOTE EFFICIENT SETTLEMENTS AND TO PRESERVE IMPARTIALITY OF THE ADJUDICATION PROCESS

While we share the Board's belief that the proposed rules should provide for settlement procedures, there are aspects of Proposed Rule 5205 that threaten the efficiency of settlement discussions, the confidentiality of information in settlement proceedings, and the impartiality of the adjudication process. We suggest, therefore, three modifications to the rule to make the rule more workable and more consistent with prevailing settlement procedures.

First, the proposed rule includes a broad waiver provision—requiring the respondent to waive any right to either judicial or Board review of any matter in the proceedings.[53] As drafted, the Board deprives the settling parties of discretion as to what rights should be waived by making certain waivers mandatory. Specifically, the proposed rule's requirement that the respondent waive any right to Board or judicial review forecloses the possibility of conditional pleas or settlements. Under a conditional plea or settlement, if the Board and the respondent disagreed on only one discrete legal issue, the parties could resolve the remainder of the case and the respondent could seek hearing officer, Board, and judicial consideration of the one legal question in dispute. Traditionally, conditional pleas or settlements have been a means of conserving judicial resources by focusing the questions in dispute. For example, Federal Rule of Criminal Procedure 11(a)(2) enables defendants, with the consent of the government, to reserve the right of appellate review on discrete issues, even when pleading guilty.

The Board could provide its staff maximum flexibility in obtaining efficient settlements of disciplinary proceedings by leaving the rights that will be waived through settlement to the

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[53] Rule 5205(c)(2)-(3).

terms of the settlement agreement itself. As a matter of course, many of the waivers in the proposed rule may become terms of most settlements; but removing the mandatory waivers from the rule would prevent the breakdown of settlement negotiations because of unacceptable waiver terms. Alternatively, the Board could modify the rule to permit, but not to require, the Board's staff to seek the waiver of the rights listed in Proposed Rule 5205(c)(2)-(3).[54]

Second, the Board should delete Proposed Rule 5205(c)(3)(i), which would permit any employee of the Board, including members of the Division of Enforcement and Investigations prosecuting the defendant, to advise the Board or the hearing officer regarding an offer of settlement. This provision appears both to require a waiver of the separation of functions requirement and to permit ex parte communications between the prosecutorial staff and the Board. This provision is unnecessary and threatens the impartiality of the adjudications process.

To be sure, the prosecutorial staff should be able to *advocate* their position on the settlement to the Board or a hearing officer. Any arguments or recommendations the staff might have, however, should be *on the record with an opportunity for the respondent to respond*. Under the proposed waiver rule, the prosecutorial staff may make all sorts of claims about the facts in the case that the respondent will not be permitted to test adversarially. This impact on the fairness of the process extends far beyond the determination of whether the settlement offer should be rejected or accepted. If the offer is rejected, the Division of Enforcement's ex parte advice and recommendations, including assertions about the facts in the case, could taint the subsequent adjudication of responsibility. This provision endangers the proposal's attempt to

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[54] To accomplish this change, the Board could substitute the following text for Proposed Rule 5205(c)(2): "Before recommending an offer of settlement, the Division of Enforcement and Investigations may require the offer, subject to acceptance, to waive:" The rule could then list the authorized waivers.

ensure that a respondent has a fair hearing before an impartial judge through adversarially tested arguments. Accordingly, the Board should delete Proposed Rule 5205(c)(3)(i).

Third, the rule should explicitly provide that settlement negotiations and offers are both privileged and confidential. These protections are explicitly provided to parties in federal civil and criminal judicial proceedings.[55] It is true that other parts of the proposal are designed to ensure that disciplinary proceedings are protected from disclosure to the general public. However, generally settlement offers and discussions are also privileged against evidentiary use in the proceedings themselves. The extension of privilege to settlement negotiations and offers is designed to enable candid and productive settlement discussions between the parties. Providing for the privileged and confidential nature of settlement negotiations and offers will facilitate the settlement process and advance the efficient resolution of disciplinary proceedings without the unnecessary consumption of Board resources.

IV. THE RULES OF BOARD PROCEDURE

A. PARTIES SHOULD BE PERMITTED AN IMMEDIATE INTERLOCUTORY APPEAL FOR DENIAL OF A MOTION FOR HEARING OFFICER WITHDRAWAL

Rule 5402 allows a party to move for the withdrawal of the assigned hearing officer from a disciplinary proceeding if the party "has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned."[56] After such a motion is made, the hearing officer himself may deny the motion and "continue to preside over the proceeding." The

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[55] *See* Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 408.

[56] Proposed Rule 5402(a).

rule itself does not directly provide for Board review of the hearing officer's decision on the motion until after a final order concludes the proceedings.[57]

We believe that prompt interlocutory review of denials of motions for withdrawal is necessary to preserve the appearance of impartiality in the adjudication process. Under the proposed rules, the Board will not, in advance, exercise any discretion over the selection of a hearing officer in a particular proceeding.[58] Providing for interlocutory appeals when such a selection is contested will permit the Board efficiently to exercise control over the selection process. Moreover, such interlocutory review will avoid wasteful proceedings that may be irredeemably tainted by the invalid selection of a hearing officer. These problems could be especially common given the proposed broad eligibility of Board staff for appointment as a hearing officer.[59] Accordingly, the Board should state in the rule that a party may immediately appeal the denial of a motion for withdrawal to the Board.

B. THE EX PARTE COMMUNICATIONS PROHIBITION SHOULD BE EXPANDED

Proposed Rule 5403(b) prohibits a "*party*" from communicating with the hearing officer or a member of the Board about "a fact in issue . . . without notice and opportunity for all parties to participate." Proposed Rule 5403(b) is only a prohibition on a "party," which is elsewhere defined to include the private party that is the subject of the proceedings and "the interested

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[57] As a general matter, the proposal suggests that interlocutory review by the Board of a non-final order will occur "only in extraordinary circumstances." Proposed Rule 5461(a). Proposed Rule 5461 does not provide much comfort that prompt review of the denial of a motion for withdrawal will be realistically available.

[58] *See* Proposed Rule 5200(b) (providing that the Secretary of the Board shall assign a hearing officer to a particular proceeding).

[59] *See* Part I.B. above.

division" of the Board.[60] The "interested division" definition is limited to refer to "a division or office of the Board assigned *primary responsibility* by the Board to participate in a particular proceeding."[61]

Under the Board's proposed definitions, staff of the Board who are representing the Board or otherwise participating in disciplinary proceedings, but who are not members of the division "assigned primary responsibility" for prosecuting a particular matter, may communicate with the hearing officer or members of the Board about facts in issue.[62] The ex parte prohibition is, thus, incomplete. In order to preserve the fairness of the proceedings, no Board employee with any responsibility for participating in a disciplinary proceeding should be permitted to communicate ex parte with the hearing officer or a member of the Board about a fact in issue. The Board should revise the proposed rule so that it applies symmetrically to the Board and the respondent and prohibits any representative of either side from any ex parte communications.

C. THE DISCOVERY MEASURES AVAILABLE TO RESPONDENT FIRMS AND ASSOCIATED PERSONS ARE INADEQUATE

The proposed rules provide the Board's prosecutorial staff with a battery of discovery measures for use against respondents. Just as an example, the proposed rule authorizes the Board and, under certain circumstances, its staff to issue "accounting board demands" for the testimony of registered public accounting firms or associated persons and for the nearly

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60 Proposed Rule 1001(p)(iii).

61 Proposed Rule 1001(i)(iv) (emphasis added).

62 Indeed, the definition of "interested division" does not even make clear that *every employee* of the division with primary responsibility to participate in a proceeding is covered by the bar. Without clarification, the ex parte communications bar may only prevent communicating official statements of the interested division's position ex parte.

immediate production of original documents under severe penalties for non-compliance.[63] In contrast, the Board has provided respondent firms and associated persons with some discovery tools, but has imposed significant and often inexplicable limitations on their scope. This asymmetrical availability of discovery promises fundamentally to undermine the fairness, and indeed the accuracy, of the Board's disciplinary proceedings. We identify below the limitations on respondent discovery that are particularly problematic and propose modifications that would resolve those problems. These proposals reflect procedural protections that are afforded defendants in civil and criminal proceedings throughout federal and state courts, as well as before the Securities and Exchange Commission.

1. The Proposed Rule Protects Certain Types Of Documents From Discovery Without Justification

The proposed rule prevents certain types of documents from discovery by respondents—including documents that a plaintiff or prosecuting authority would be required to produce in any civil or criminal judicial proceeding. The Board offers no compelling reasons for the withholding of these documents.

First, Proposed Rule 5422(a)(1)(iv)(A) allows the Board to withhold from inspection any document that has been prepared by any member of the Board's staff and shared only inside the Board or with persons retained by the Board in connection with the investigation or disciplinary proceeding. This limitation on the Board's production would permit the prosecuting division to share documents with Board members (who may ultimately review or serve as a hearing officer during a disciplinary proceeding) or even with the hearing officer (who may be part of the

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63 *See* Proposed Rules 5102, 5103, and 5300(b).

Board's staff).[64] As a matter of fairness, a respondent should be able to inspect every document reviewed by a Board official who may ultimately participate in the decision of a respondent's case.

We understand that this provision may have been designed to ensure that the Division of Enforcement and Investigations may prepare confidentially for a case, just as a U.S. Attorney's office or a private law firm should be able to prepare private memoranda evaluating the facts and law candidly. This concern, however, is fully addressed by the proposed rule exempting documents covered by the attorney-work-product protection from disclosure.[65] Alternatively, the Board could revise the rule to protect documents prepared by the Division of Enforcement and Investigations and not disclosed outside *that division* other than to persons retained by the division for assistance in the investigation. Such a revision would remove the exception from discovery for documents disclosed to Board members and other Board staff outside the Division of Enforcement and Investigations. These changes are necessary to preserve the appearance of impartiality and to provide the respondent an opportunity to respond to documents previously provided to those Board members and staff that will participate in the decision of the case.

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[64] Although the ex parte communication prohibition may prevent some of this activity once proceedings have been initiated, the proposed rule would exclude from discovery documents regarding the events at issue to which the Board or a potential hearing officer had been exposed before the initiation of proceedings.

[65] *See* Proposed Rule 5422(a)(1)(iv)(B). In this regard, the Board should make clear that its proposal incorporates the full definition of the attorney work product protection from Federal Rule of Civil Procedure 26(b)(3). Thus, the proposed rule should state that a respondent would be able to obtain materials prepared by the Division of Enforcement in preparation for the disciplinary proceedings if the respondent "has a substantial need of the materials in the preparation of [the respondent's] case and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Second, Proposed Rule 5422(a)(1)(iv)(D) allows the hearing officer to permit the withholding of a document obtained or prepared by the Division of Enforcement and Investigations in connection with an investigation "for good cause shown." This broad and vague exception threatens the limited rights to discovery that the proposed rule does provide respondents. The Board should delete this exception. If the Board is concerned that there are other documents that must be withheld, the Board should, at a minimum, specify the precise types of documents that a hearing officer may permit the Division to withhold.

Third, the proposed rule arbitrarily cuts off the respondent's discovery when disciplinary proceedings are initiated. Under the proposed rule, the Board is required to make available for inspection and copying "documents prepared or obtained by the Division of Enforcement and Investigations in connection with the investigation *prior to the initiation of proceedings*."[66] There is no reason, however, why this duty should not continue during the pendency of proceedings. Terminating discovery of this material upon the initiation of proceedings is inconsistent with the most basic constitutional requirements that attach to a typical criminal proceeding. A criminal prosecutor's obligations to disclose *Brady v. Maryland* material to defendants, for example, continue after indictment and at least until the conviction is final. The Board's disclosure requirements should be no less demanding.

In this regard, the Commission has recognized that it must disclose at least as much information as would be required of a prosecutor in criminal judicial proceedings. Accordingly, the Commission requires the affirmative disclosure to the respondent of all exculpatory information that would meet the requirements of *Brady v. Maryland*, if it were obtained in a

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[66] Proposed Rule 5422(a)(1)(iv) (emphasis added).

typical criminal case.[67] In contrast, the Board's proposal places no general requirement on the Division of Enforcement and Investigations even to grant the respondent access to exculpatory information in the Division's possession, much less actively to disclose such information to the respondent. The Board's production requirements should continue throughout the proceedings and, at the very least, provide for disclosure of exculpatory material at any time.

Fourth, Proposed Rule 5422(a)(1)(iv)(C) excludes from discovery "any document that would disclose the identity of a confidential source." The Board should make clear, however, that this restriction is coterminous with the common law confidential informant privilege.[68] At common law, the government's privilege against revealing a confidential source is "by no means absolute," and does not extend to an informant "who was a participant, an eyewitness, or a person who was otherwise in a position to give direct testimony concerning the" allegedly illegal conduct and whose testimony, therefore, may assist in the respondent's defense.[69] If this proposed rule were interpreted to protect from discovery any document concerning an informant "who would prefer to remain anonymous," the rule would unjustifiably expand the traditional privilege and would aggravate the respondent's distinct informational disadvantage in the Board's disciplinary proceedings. Accordingly, the Board should amend its proposed rule by restricting from disclosure only "any document that would be covered by the common law confidential informant privilege."

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[67] 17 C.F.R. § 201.230(b)(2).

[68] *See*, *e.g.*, *Roviaro v. United States*, 353 U.S. 53 (1957).

[69] *United States v. Warren*, 42 F.3d 647, 654 (D.C. Cir. 1995).

Fifth, the Proposed Rule 5422(a)(2) discovery obligations of the Board in non-cooperation proceedings are wholly insufficient. As drafted, the rule requires Board officials to make available only those documents "upon which the Division intends to rely in seeking a finding of non-cooperation." The rule is essentially an invitation to the Division to withhold exculpatory evidence on which the Division, of course, would not rely. The Board suggests that this disclosure is limited because not all investigation documents will be relevant to non-cooperation proceedings and their disclosure would slow the process.[70] The Board, however, could solve this problem by limiting disclosure to documents relevant to the non-cooperation allegations. The Board is also concerned that disclosures in non-cooperation proceedings (which may occur before disciplinary proceedings for violations of the Act or Board rules) could compromise its investigation.[71] If that were true, however, the Board has the option of delaying non-cooperation proceedings until the commencement of other disciplinary proceedings when it would have to disclose that information.[72] At the very least, the proposed rule should require the Division of Enforcement and Investigations to make some showing that the disclosure of the information otherwise relevant to the non-cooperation charges will actually jeopardize an investigation.

The Release suggests that non-cooperation proceedings will be straight forward, will not involve extensive factual disputes, and therefore will not require significant discovery. However, under the title of non-cooperation, for example, the proposal allows prosecution for

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[70] Release at A2-xlv.

[71] Release at A2-xlv-xlvi.

[72] *See* Proposed Rule 5422(a)(1).

allegedly providing false testimony. The disposition of such false testimony charges will inevitably require the examination of events investigated by the Board.[73] The Board has established grave sanctions for non-cooperation, and respondent firms and associated persons are entitled to documents relevant to their defense.

2. THE PROPOSED RULE DENIES RESPONDENT FIRMS AND ASSOCIATED PERSONS REMOTELY EQUAL PROCEDURAL PROTECTIONS IN DISCOVERY

In addition to withholding substantive categories of documents relevant to the defense of a disciplinary proceeding, the proposed rule also provides a two-track discovery procedure that unfairly disadvantages the respondent. First, the proposed rule provides the respondent no means to interview witnesses or to secure testimony outside of the disciplinary proceeding itself. Well before the beginning of proceedings, the proposal authorizes the Board to demand the testimony of registered public accounting firms and associated persons and to seek the issuance of Commission subpoenas for the testimony of others. The Board is able to use these examinations not only as an investigative tool, but also in preparation for disciplinary proceedings. The Board has afforded the target of an investigation no right even to be present at these proceedings, much less to ask questions of the examinees.[74]

While respondents are permitted to request the Board to issue accounting board demands for the testimony of registered public accounting firms or associated persons or to seek the issuance of subpoenas by the Commission for the testimony of others, these measures are for the

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[73] *See* Part II.F. above.

[74] *See* Proposed Rule 5102(c)(3).

exclusive purpose of securing the presence of witnesses at the disciplinary proceeding itself.[75] Respondents are granted no procedure by which they can require the attendance of fact witnesses at pre-proceeding depositions or interviews.[76] Even with regard to this limited power to seek the attendance of witnesses at the hearing itself, the proposal leaves the issuance of demands and requests for subpoenas to the discretion of the hearing officer. Conversely, the Division of Enforcement and Investigations requires no such hearing officer or Board permission to issue accounting board demands.[77] In effect, the proposal creates a discovery system that will not provide for a vigorous adversarial process to test the accuracy of evidence—it would permit the Board significant advance preparation and leave the respondent to hear witness testimony for the first time at the hearing.

Second, the Division of Enforcement and Investigations need not produce to the respondent a log of withheld documents.[78] Instead, the hearing officer "may" order that such a log be submitted to the hearing officer. No provision is made for the respondent to gain access to such a log. Without such access, respondents cannot even begin to contest Board decisions to withhold documents. In contrast to the Division's reporting responsibilities, a respondent is required to produce to the Division a privilege log that extensively describes the documents

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[75] Proposed Rule 5424(a) (permitting respondents to request accounting board demands that "call for the attendance and testimony of a witness *at the designated time and place of the hearing*") (emphasis added); Proposed Rule 5424(b) (allowing respondents to ask the Board to seek the issuance of Commission subpoenas "in connection with any hearing ordered by the Board").

[76] Indeed, the proposal expressly denies to respondents the use of depositions for discovery purposes. Proposed Rule 5425(a), Note.

[77] Proposed Rules 5102(a).

[78] Proposed Rule 5422(b).

withheld from an accounting board demand for documents.[79] This inequitable distinction between the Board and the respondent again deprives the respondent of the ability to participate in the proceedings to the same extent as the Board and compromises the fairness of the proceedings.

D. Resolving Disciplinary Proceedings Against Respondents On Motions For Summary Disposition Is Inappropriate

Proposed Rule 5427 would permit the Board's enforcement division to seek summary judgment, without an evidentiary hearing, in a disciplinary proceeding. Such a procedure, similar to Fed. R. Civ. P. 56 proceedings, is inappropriate in this quasi-criminal context. Moreover, because a respondent firm or associated person is limited in the extent to which it can seek discovery before a hearing by the Board's current proposed rules, the respondent will be unfairly handicapped in its ability to set forth evidence establishing a genuine issue of material fact. This rule should be deleted, or modified only to permit such summary proceedings in favor of the respondent. The latter solution would be fair because the Board has access to a full battery of pre-hearing discovery tools.

E. Other Board Procedural Rules Should Be Modified

We have several other suggested changes that would enhance the consistency of the rules.

1. Proposed Rule 5420 Concerning Motions To Participate

Proposed Rule 5420, concerning the ability of parties other than the Board and the respondent to participate, should require those participating entities not to disclose information

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[79] Proposed Rule 5108(a).

from those proceedings. This revision would be consistent with the Board's general requirement that disciplinary proceedings be kept confidential.[80]

2. Proposed Rule 5421 Concerning Procedures For Answering Orders Initiating Disciplinary Proceedings

Proposed Rule 5421(b) allows responding parties only five days to file an answer to an order instituting non-cooperation proceedings. The proposed rule requires a respondent to admit or deny the allegations set forth in the answer and to state any affirmative defenses, suggesting that defenses not so stated will be waived. This five-day period is far too short for a party to gather the information required by the answer. Lawyers will have to determine the relevant personnel and to investigate many of the facts before they can responsibly plead.[81] The answer period should be no less than the twenty days provided by the proposed rule for other types of disciplinary proceedings. At the very least, the proposed rule should explicitly permit a respondent to provide an amended answer within twenty days and that such an amended answer will be sufficient to preserve any issue pleaded therein.

3. Proposed Rule 5468(a) Petitions For Review Of Delegated Authority

Proposed Rule 5468(a) permits only five days to seek Board review of an action taken under delegated authority. The petition for review must contain relevant facts and legal support. This time period is not sufficient for an affected party to compile the requisite filing.

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[80] *See*, *e.g.*, Proposed Rule 5203.

[81] This task is all the more onerous without sufficient requirements for detail in the order initiating proceedings. *See* Part III.C. above. Without such detail, respondents will have an every greater difficulty answering in this unreasonably short time period.

CONCLUSION

Due to the short time period within which the Board has requested comments and the complicated nature of the proposed rules, it may be useful to discuss these issues with you further. If you have any questions or would like to discuss these issues further, please contact Robert J. Kueppers at (203) 761-3579 or Philip R. Rotner at (212) 492-4012.

Very truly yours,

/s/ Deloitte & Touche LLP

cc: William J. McDonough, Chairman
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VIA ELECTRONIC FILING AND HAND-DELIVERY

August 18, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

PCAOB Rulemaking Docket Matter No. 005, Proposed Rules on Investigations and Adjudications

Dear Sir or Madam:

Ernst & Young is pleased to submit comments on the Public Company Accounting Oversight Board's proposed rules establishing procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms.

We believe that for the most part the Board's proposed procedures will provide fair and reasonable mechanisms for investigating potential violations of relevant laws and regulations and will allow the Board to carry out its statutory mandate. Most of the proposed rules were adapted from similar rules of the Securities and Exchange Commission or the National Association of Securities Dealers. Those organizations have developed and refined their procedural requirements over the last several decades, and accordingly they provide an appropriate basis for the PCAOB's rulemaking. We have only a few comments on the proposals.

1. **Proposed Rule 1001(h)(i) (Definition of "Hearing Officer"):** The proposal would allow an individual Board member or "any other person duly authorized by the Board" to serve as a "hearing officer" for a PCAOB adjudication. We suggest that the rules place certain limitations on who can serve as a hearing officer, such as requiring that the person have demonstrated a lack of bias and impartiality as to the subject matter of the hearing.

2. **Proposed Rule 5100 (Informal Inquiries):** The Board should be required to close an informal inquiry within a specific time period (e.g., 90 days). In addition, a firm or its associated person should be given prompt notice of the commencement of either an informal or formal investigation.

3. **Proposed Rules 5102 (Testimony of Registered Public Accounting Firms and Associated Persons in Investigations) and 5109 (Rights of Witnesses in Inquiries and Investigations)**: Subparagraph 5102(c)(3) lists the persons who are permitted to be present when the PCAOB staff takes investigative testimony. It allows the person being examined to be represented by legal counsel, as does Rule 5109(b). Rule 5102(c)(3) also states that the Board will allow "such other persons as the Board, or the staff of the Board designated in the order of formal investigation, determine are appropriate to permit to be present." Thus, although the Board or its staff might determine it "appropriate" to allow other persons also to be present during testimony, it suggests that the normal course would be not to do so.

   We are concerned that the Board does not intend to permit lawyers who are representing accountants during testimony to be accompanied by accounting experts to assist the lawyer in a consulting capacity. Board investigations will frequently involve complex accounting and auditing issues, and most lawyers need assistance from accounting experts on such matters. Based on our experience in SEC investigations and private litigation, the presence of such accounting consultants during testimony of an accounting witness not only helps ensure that the witness' rights are fully protected but also helps produce a better and more accurate investigative record.

   Indeed, a court has recognized that expert accounting consultants are so important that it effectively *required* the SEC to allow such consultants to be present during testimony. In *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985), an accountant called as a witness in an SEC investigation sought to have another accountant present during the testimony to assist the witness's counsel in representing the witness. The court refused to enforce an SEC subpoena to the extent that the Commission's Rules of Practice excluded the accounting consultant. The court stated that, given "the extraordinary complexity of matters raised in agency investigations in this modern day, counsel trained only in the law, no matter how skillful, may on occasion be less than fully equipped to serve the client in agency proceedings." *Id*. at 49. The court therefore concluded that "it would be arbitrary and capricious to systematically deny a witness's counsel the assistance of a technical expert by his side." *Id.* at 50.

   In addition, we believe that the rule should explicitly permit counsel to represent both the firm and an associated person of the firm.

   Finally, we are concerned by the breadth of Rule 5102(a), which requires the testimony of "any person associated with a registered public accounting firm" relating to "any matter that the Board considers relevant or material to an investigation." A similarly broad requirement relates to production of documents under Rule 5104. By their terms these rules could require production of documents and testimony from members of the Office of the General Counsel, from attorneys as well as from accountants who assist attorneys in handling investigations and litigations. General Counsel personnel could, of course, assert a claim of privilege under Rule 5106, but the process for asserting a privilege is extremely burdensome (requiring a description of every document and every oral communication for which privilege is being asserted). We expect that as to both rules – Rules 5102 and 5104 – the Board would follow the traditional approach of the

SEC and other agencies and not seek testimony or documents from members of the firm's General Counsel's Office.

4. **Proposed Rule 5103(b) (Time and Manner of Production of Workpapers and Other Documents in Investigations):** This proposed rule states that "[u]nless an accounting board demand expressly requests or permits the production of copies, original documents shall be produced." It further states that "[u]nless an accounting board demand expressly requests or permits printed copies of electronic documents, documents that exist in electronic form shall be produced in that form." We suggest that the rule instead provide that copies of documents, including copies of electronic documents, may be produced unless the Board's demand expressly states otherwise. We have handled a great many SEC and private litigation subpoenas, and have found that production of original workpapers can often be disruptive to ongoing audit engagements. Particularly in view of Rule 5104, which would allow the Board or the Board's staff to examine the original records "to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation," the requirement that originals rather than copies of documents seems unnecessary.

5. **Proposed Rule 5108 (Confidentiality of Investigatory Records):** This rule makes the record of the investigation confidential, including testimony and responses to requests for information and other materials prepared for the Board or the PCAOB staff in connection with informal and formal investigations. This protection presumably covers the "Statements of Position" (which are similar to Wells Submissions under SEC rules) as provided under Proposed Rule 5109(d), although the rule might make this coverage explicit.

   More significantly, as the Board discusses in a "Note" to Proposed Rule 5108, the relevant statutory provision, Section 105(b)(5) of the Sarbanes-Oxley Act, states that the documents described in Rule 5108 are "confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the federal government, under the Freedom of Information Act (5 U.S.C. 552a) or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c)" of Section 105 of the Act. It is not clear why the Proposed Rule refers to the "confidentiality" of the investigative record but not to the "privileged" nature of the record, as set forth in the statute. As the Board is presumably aware, SEC investigative transcripts and other elements of an investigative record are eagerly sought and usually obtained by plaintiffs' attorneys who seek to "piggyback" private securities lawsuits on SEC enforcement actions. Accordingly, the language of the rule should track the wording of the statute.

   Finally, the rules should authorize the Board's staff to enter into confidentiality agreements to supplement the Act's confidentiality protections. Although courts are divided on the issue, at least two recent cases hold that entering into certain confidentiality agreements with the SEC protects against a waiver of work-product

protection. *See Saito v. McKesson HBOC, Inc.,* 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) and *McKesson HBOC, Inc. v. Adler*, 562 S.E.2d 809 (Ga. App. 2002).

6. **Proposed Rule 5109 (Rights of Witnesses in Inquiries and Investigations):** As noted above, Section (d) of this Proposed Rule would permit Wells-type submissions. It states that the Board's staff "in its discretion" may advise persons of the nature of the investigation and the potential violations that might be the basis of a Board disciplinary proceeding. We recommend that the rule be revised to state that such a Wells-type notice would be given to firms and associated persons absent extraordinary circumstances. The Wells process has proven to be an effective means for the SEC Commissioners to weigh the pros and cons of enforcement actions recommended by its Division of Enforcement, and we believe that it would be similarly useful to the members of the PCAOB. Wells notices are almost always given in SEC enforcement proceedings, and the same process should be followed by the PCAOB.

   In addition, there should be a provision for prompt availability of a witness's transcripts and for the Board's staff to provide copies to the witness of all exhibits introduced in the witness's testimony. The time period for the Statement of Position should not begin to run until the transcripts and exhibits are provided. Finally, there should be some assurance of sufficient time for preparation of the Statement of Position.

7. **Proposed Rule 5110(a) (Non-Cooperation with an Investigation):** Proposed rule 5110(a) provides that the Board may institute a disciplinary proceeding against a registered public accounting firm or an associated person of such a firm for failure to cooperate with a Board investigation. One of the bases for such a proceeding is where a witness "may have given testimony that is false or misleading or that omits material information." We recommend that the Board delete the phrase "or that omits material information."

   Whether a witness provides all "material information" during his or her testimony depends on the questions that are asked. No witness can be expected to determine, at the conclusion of the staff's questioning, whether there are any questions that should or might have been asked by the examiner but were not. Neither the SEC's Rules of Practice nor the NASD's rules have such a requirement. Witnesses should of course be required to answer questions truthfully and completely. If they do not do so, the answer could be deemed "false or misleading" and would be prohibited by those words in the proposed rule. Accordingly, the phrase "or that omits material information" is unnecessary and confusing. Moreover, under the Board's approach, witnesses in Board investigations would likely feel compelled to volunteer information that might not actually be of interest to the Board simply to ensure that the Board would not later second-guess them as to whether they have "omitted material information," a result which would be wasteful and inefficient.

8. **Proposed Rule 5200 (Commencement of Disciplinary Proceedings):** Section (a) of this Proposed Rule sets forth the grounds for commencement of disciplinary proceedings. It states, at subsection (a)(1), that a proceeding may be initiated to determine "whether a

registered public accounting firm, or the supervisory personnel of such a firm, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise . . ." The concept of a duty to supervise in this Proposed Rule tracks the statutory requirement in Section 105(c)(5) of the Act, which in turn was modeled after a similar requirement applicable to registered broker-dealers in Section 15(b)(4)(E) of the Securities Exchange Act. We acknowledge that, in view of Section 105(c)(5), the Board properly should discipline firms and associated persons for a failure to supervise. Further, Proposed Rule 5200 suggests that the Board will develop rules in this area. We comment on this provision merely to note for the Board that the supervisory structure for major accounting firms is completely unlike the structures in place at broker-dealers. We believe that the nature of this new statutory duty will need to be carefully examined by the Board, with the opportunity for considerable input from the accounting profession.

In addition, Section (a) provides for the commencement of a disciplinary proceeding when "it appears to the Board" that a firm or associated person has violated a law or regulation. We believe this standard is too low. A more appropriate standard for commencement of proceedings is where there is a "reasonable basis" for concluding that a violation has occurred.

9. **Proposed Rule 5300 (Sanctions):** We suggest that the Board provide guidance regarding when a particular sanction will be applied. For example, the Board might state that a permanent revocation or bar is intended to be an extraordinary sanction reserved for the most serious matters, such as those involving gross misconduct, derogation of professional responsibility, or significant harm to investors.

10. **Proposed Rule 5301 (Effect of Sanctions):** The Proposed Rule states that a person who is suspended or barred from being associated with a registered accounting firm may not become associated with such a firm without the consent of the Board. The Note to Section (a) further states that such a suspended or barred person may not receive "any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees that might have been earned during the period of the suspension or bar." We have several issues relating to this prohibition.

    First, the Board appears to contemplate that the suspended or barred person may continue to be associated with the accounting firm, as long as he or she does not participate in public company audits. In particular, the proposing release (at page 9) states:

    > In order to provide assurance that a firm that employs or continues to employ a barred person has not permitted the person to perform the activities of an associated person, the Board will consider, in connection with reporting requirements that it expects to develop in the future, whether to require such firms to provide regular reports on the activities and role within the firm of the barred person.

    However, the wording of the proposed rule suggests that the continued employment of suspended or barred persons in any capacity might be impossible. The note's prohibition

on compensation that results "directly or indirectly from any audit fees" would mean that a firm would be required to segregate its income from public company audit work from other work, but that is not how firms typically compensate their partners and employees. Compensation is generally tied, at least in part, to the overall performance of the firm. Accordingly, the Board should make clear that continued employment of suspended or barred persons is acceptable as long as they have no involvement whatsoever on public company audits.

Second, it is not clear if this prohibition would extend to retirement, health, disability, life insurance, or other benefits paid to suspended or barred personnel who are no longer associated persons of the firm. If it is so intended, we urge the PCAOB to reconsider. Such payments are generally paid from current firm profits and should not be considered prohibited payments.

11. **Proposed Rule 5404 (Service of Papers by Parties):** The Proposed Rule provides for service of papers on each party "in a manner calculated to bring the paper to the attention of the party to be served." It would seem preferable for the rule to be more precise. It should specify a process – most likely, service of papers by first-class mail – that would be used unless the hearing officer specifies otherwise.

12. **Foreign Firms as "Associated Persons":** In the past three weeks, representatives of Ernst & Young and other major accounting firms have been engaged in discussions with the Board staff of an issue that was not made clear in the Board's registration rules adopted earlier this year. Board staff members have advised us that the Board would consider foreign accounting firms to be "associated persons" of the U.S. accounting firm if they otherwise meet the definition of associated persons in Rule 1001(p)(i) – that is, if among other things they "receive compensation" in connection with the preparation or issuance of any audit report.

    This position has significant impact on many elements of the proposed investigations/adjudication rules. In its rulemakings relating to registration and inspections, the Board has specifically recognized the presence of important international comity and international jurisdictional concerns raised by the rule. For example, in its release on the proposed rule on inspections, the Board recognized that "special issues" relate to foreign firms and stated that it is "committed to finding ways of accomplishing the goals of the Act without subjecting non-U.S. firms to unnecessary burdens or conflicting requirements." Release No. 2003-013 at page 10.

    The same recognition of foreign firms' conflicting legal obligations should apply to the investigation/adjudication rule proposal as well. Under the Board staff's approach to foreign firms as "associated persons," a firm that performs very little work in connection with the audit of U.S. issuer, and thus is not required separately to register with the PCAOB, will nonetheless be subject to the full range of investigative and disciplinary requirements set forth in the Proposed Rules. That approach will clearly raise a wide range of issues relating to foreign firms' compliance obligations. Those issues cannot be resolved in the context of this rulemaking, but the Board should acknowledge their

existence and repeat its commitment to working with foreign firms and foreign regulators in dealing with them.

13. **Additional issues:** We have three minor additional comments.

First, Proposed Rule 5103, "Production of Audit Workpapers and Other Documents in Investigations," provides procedures for accounting board demands for production of documents in the possession of a registered public accounting firm and its associated persons. It is parallel to Rule 5105, which is titled "Requests for Testimony or Production of Documents from Persons Not Associated With Registered Public Accounting Firms," and it complements Rule 5102, which is titled "Testimony of Registered Public Accounting Firms and Associated Persons in Investigations." We believe that it might be helpful to caption Rule 5103 so that these rules would more clearly relate to the two types of Board investigative procedures – accounting board "demands" (applicable to registered firms and associated persons) and accounting board "requests" (applicable to others). Thus, a better caption for this rule might be "Demands for Production of Audit Workpapers and Other Documents in Possession of Registered Public Accounting Firms and Associated Persons."

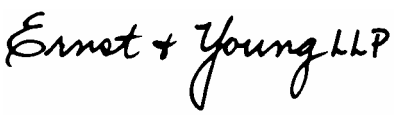
Second, in Proposed Rule 5424 (Accounting Board Demands and Commission Subpoenas) the Board generally uses the word "party" to refer to an registered firm or an associated person who is a respondent in a Board administrative proceeding and the word "person" to refer to the hearing officer "or other person designated by the Board" to issue accounting board demands. However, the words are not used consistently in this fashion (*see, e.g.,* the following sentence in Section (a) – "A person whose application for such a demand or request has been denied . . ."). And, in subsection (a)(3), the rule uses the word "applicant" instead of the word "party." Accordingly, we suggest some minor technical fixes to avoid confusion.

Third, words appear to have been omitted from the following sentence in the Section-by-Section analysis relating to Proposed Rule 5467 on Page A2-lx: "Rule 5467, a registered public accounting firm must notify the Secretary, or any requirements of the Federal Rules of Appellate Procedure or any court within 10 days after the firm or any person associated with the firm files with the Commission a petition for review of a Board decision or files a petition for court review of a Commission order with respect to such a sanction."

* * *

Again, we commend the Board for proposing, in very little time, a thorough and thoughtful set of rules. We appreciate the opportunity to provide these comments, and we would welcome discussion of any points that require further explanation.

Respectfully submitted,



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August 15, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: Proposed Rules on Investigations and Adjudications (PCAOB Rulemaking Docket Matter No. 005)

Dear Secretary:

As the Director for International Financial Markets of the Financial Services Agency of Japan (" FSA "), I am pleased to submit this letter on behalf of the FSA in response to the request of the Public Company Accounting Oversight Board ("PCAOB") for comments on the Proposed Rules on Investigations and Adjudications ("Proposed Rules") as contained in PCAOB Release No. 2003-012 (July 28, 2003)("Release") .

(Importance of dialogues and cooperation between the PCAOB and the FSA)

We appreciate that the PCAOB acknowledges in the Release special issues relating to Non-U.S. firms and the need for dialogues between the Board and its foreign counterparts. Such acknowledgement by the PCAOB is consistent with the acknowledgement, encouragement and urge by the Securities and Exchange Commission ("SEC") contained in its Release No. 34-48180 in which the SEC granted approval of the PCAOB's proposed rules relating to registration system. As the auditor oversight body in Japan, the FSA is also willing to continue constructive and practical dialogues and cooperation with the PCAOB in order to solve the serious issues of the oversight over Japanese audit firms by the PCAOB in a mutually satisfactory way. My visit to the PCAOB at the end of June was a first step toward such purpose.

(Request for an appropriate exemption from the oversight by the PCAOB)

The PCAOB's oversight, including investigations and adjudications, of foreign public accounting firms would raise a much more serious problem than the registration requirement. This raises not only the issue of imposing "unnecessary burdens or conflicting requirements" as stated by the SEC and PCAOB, but also the *more fundamental issue concerning the need to respect foreign jurisdictions' sovereignty and equivalent auditor oversight systems*, as shown in our public comment letter to the PCAOB dated March 28 and as I mentioned at the Roundtable on Registration and Oversight of Non-U.S. Public Accounting Firms on March 31. We would like to add that on May 30 the Japanese Diet passed a bill for the comprehensive revision of the Japanese CPAs Law, and through this revision, which will be effective next April, the Japanese auditor oversight system will be even more substantially equivalent to that provided under the Sarbanes-Oxley Act.

Japanese audit firms should not be subject to the oversight powers of the PCAOB. Legal powers of the PCAOB, including investigations, should not be, and could not be, conducted or enforced within the Japanese jurisdiction as a matter of sovereignty. In addition, since the FSA and CPAAOB (CPAs and Auditing Oversight Board) to be established next April under the revised CPAs Law have the power to require Japanese audit firms to report and produce documents, the FSA has the power to conduct investigations for the purpose of taking disciplinary actions against Japanese audit firms, and the JICPA (Japanese Institute of CPAs) also has the power to require Japanese audit firms to report pursuant to its charter under the revised CPAs Law, *it is not necessary or appropriate for the PCAOB to conduct investigations of Japanese audit firms.* In addition, since the FSA has the power to take disciplinary actions against Japanese audit firms, *it is not necessary or appropriate for the PCAOB to take disciplinary proceedings against Japanese audit firms* which do not have physical presence in the United States.

From this viewpoint, there is a problem in the Proposed Rules because they do not include any provision to deal with non-U.S. firms, including Japanese audit firms. Although the Release states that "the Board's proposed rules are not intended in any way to signal that the Board has already determined how its oversight should operate as to those firms, or to preclude any adjustments to the rules that may be appropriate in light of those discussions," non-U.S. firms would be subject to the same investigations and adjudications by the PCAOB as the U.S. firms if the Proposed Rules were not adjusted. Such an outcome would not be in line with the emphasis by the SEC

and the PCAOB on dialogues with foreign counterparts. The sequence of steps which should be taken should be as follows:

・ First, registered foreign accounting firms should be exempted from the Proposed Rules.

・ Second, the PCAOB and its foreign counterparts (the FSA and the JICPA) should continue dialogues and reach a mutually satisfactory conclusion.

・ Third, the PCAOB's Rules on Investigations and Adjudications should be adjusted as necessary based on the above conclusion.

Therefore, *we respectfully request the PCAOB to provide an appropriate exemption from the Proposed Rules to Japanese audit firms.*

(Other comments)

Based on this premise, we would like to make further comments on the Proposed Rules.

Proposed Rule 5105 provides for "accounting board requests" for testimony or production of documents from persons not associated with a registered public accounting firm, including "any client of a registered public accounting firm." Although the PCAOB could only request, not require, testimony or production of documents from such persons, the PCAOB could seek issuance by the SEC of a subpoena to require the testimony and production of documents, pursuant to proposed Rule 5111. We would like to note that any such a request by the PCAOB or subpoena by the SEC would not be enforceable in foreign jurisdictions such as Japan.

(Conclusion)

We respectfully request that the PCAOB will take full account of our comments in promulgating the final rules.

Yours Sincerely,

Naohiko MATSUO

Director for International Financial Markets

Financial Services Agency, Japan

Freddie Mac

August 14, 2003

Shaun F. O'Malley
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Office of the Secretary, PCAOB
1666 K Street N.W.
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Dear Sir or Madam:

PCAOB Rulemaking Docket
Matter No. 005
Proposed Rules on Investigations and Adjudications

During 1999 – 2000 I served as chair of the panel on Audit Effectiveness whose report and recommendations were issued on August 31, 2000. The panel agreed that the disciplinary system covering the accounting profession suffered from a number of limitations and was in need of significant improvement. Our recommendations for improvement were dependent upon the establishment of more centralized regulation of the profession. This has now been brought about through the establishment of the PCAOB.

With regard to the Board's proposed approach, I am in general agreement and believe they will bring a more focused, standardized approach to the disciplinary process, an approach which will be viewed as real by the practitioners while affording the public with the satisfaction that an appropriate disciplinary system is in place.

I do believe however, that there needs to be clarification regarding the so-called "coordination" between the SEC and the Board. As presently contemplated, one could assert that there is a type of double jeopardy wherein a firm or an individual agrees to a finding, sanction, or settlement with the Board only to have the SEC set aside that agreement or settlement and begin the process all over.

In addition, referring to the need for an "orderly resolution of the Commission review" page 8 (as well as page 7) of the summary, refer to Rule 5207, but closer examination reveals that there is no Rule 5207.

In any event I think the proposed rules need to be carefully reviewed to ensure that the dual roles of the Board and the SEC do not render the process inefficient or subject individuals or firms to a type of double jeopardy.

Overall I believe the proposals properly address the disciplinary process and should be enacted and implemented without more delay than is absolutely necessary.

Sincerely,

Shaun F. O'Malley

INSTITUT
DER
WIRTSCHAFTSPRÜFER
IDW

August 18, 2003

Office of the Secretary
PCAOB
1666 K Street, N.W.
Washington, D.C.20006-2803
USA

Dear Sirs

Re.: PCAOB Rulemaking Docket Matter No. 005
Proposed Rules on Investigations and Adjudications

PCAOB Rulemaking Docket Matter No. 006
Proposed Rules on Inspections of Public Accounting Firms

PCAOB Rulemaking Docket Matter No. 007
Proposed Rule on Withdrawal from Registration

The Institut der Wirtschaftsprüfer [German Institute of Public Auditors] (IDW) is pleased to have the opportunity to comment on the PCAOB's proposals (the Proposed Rules on Investigations and Adjudications, Inspections of Public Accounting Firms and Withdrawal from Registration) for oversight over non-U.S. accounting firms that audit the financial statements of U.S. public companies. We would like to assure you that, as noted in previous correspondence, we share U.S. concerns regarding investor confidence and support the objectives of the Sarbanes-Oxley Act, if not all of the individual provisions of the Act or the rules or proposed rules for its implementation. We agree with the PCAOB's stated commitment to finding ways of accomplishing the goals of the Sarbanes-Oxley Act in respect of inspections of registered public accounting firms without subjecting non-U.S. firms to unnecessary burdens or conflicting requirements.

We understand that the next meeting of representatives of the PCAOB with representatives of the EU Commission will take place in September 2003 and presume that this meeting will continue and enhance the dialogue that has been taking place

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between the EU Commission and the PCAOB on issues of mutual concern in relation to the Sarbanes-Oxley Act. In this context, we are pleased to note the PCAOB's commitment to dialogue between the PCAOB and its foreign counterparts in item 6 of Docket No. 5 and item 7 in Docket No. 6.

In our opinion, the proposed dialogue on the currently proposed rules is absolutely necessary because the German legal system differs so significantly from that of the U.S., that implementation in Germany of certain provisions of the Sarbanes-Oxley Act, in particular, numerous aspects of the proposed rules relating to inspection, investigation and adjudications would be legally impossible and implementation of others would place extremely onerous burdens on German public accounting firms.

However, we would like to express our disappointment that the PCAOB did not seek to follow the recommendations of ECOFIN and the European Commission to provide an exemption for registration with the PCAOB for public accounting firms in the European Union as would have been permitted under Section 106. (c) of the Sarbanes-Oxley Act. We would like to point out that such an exemption based upon the recognition of the establishment of appropriate enforcement and oversight mechanisms by national governments and regulatory authorities in the European Union would have obviated the need for complex dialogue on the many difficult implementation issues associated with the proposals noted above.

Given the major adjustments that we believe are necessary due to the impact of the proposed rules on German public accounting firms we will limit our comments to general concerns arising from the proposed rules by addressing the major problem categories by means of examples. These examples do not purport to be an extensive or complete list of all such matters, but are intended as an illustration of the complexity of the issues that must be taken into consideration.

Confidentiality and Consent to Waiver by Client

In Germany the auditing profession is subject to professional confidentiality obligations set forth in the legislation governing the profession and audits of financial statements. This legislation prevents our members from providing the PCAOB, as a third party, access to any or all facts and circumstances with which they are entrusted or of which they become aware during the course of their professional work. The German Penal Code makes undue disclosure by an accountant a criminal offence [§ 203 Strafgesetzbuch]. Furthermore, the contract between a public accountant and the client carries an implied duty of confidentiality.

The confidentiality restrictions can only be waived with consent of the client; data security restrictions (see the treatment of data security below) would require the con-

sent of all those whose data is affected. For such consent by a client to be valid, the client must have a proper understanding of the scope of the information, the disclosure of which he or she is permitting. The PCAOB does not propose to limit the scope of information to which it has access, but rather intends to exercise its discretionary powers. Consequently, the courts in Germany would view this "proper understanding" test as not having been met.

Furthermore, client waivers of confidentiality restrictions do not in any way diminish the testimonial or documentary privileges of the public accountant (see below).

Testimonial and Documentary Privilege

The German public accountant is afforded the right to refuse to testify in civil, criminal and tax proceedings (testimonial privilege). Similarly, legislation (§ 97 Strafprozessordnung) prohibits the seizure of his working papers in criminal proceedings to the extent that the public accountant has exercised his right to refuse to testify. German civil procedure is similarly restrictive. Some of these restrictions on criminal proceedings and civil procedure are in part based upon requirements of the German Constitution and its interpretation by the German constitutional court and cannot be changed by an act of the Federal Parliament alone.

The rules allowing the PCAOB to call persons to testify also pose a problem. An employer in Germany is unlikely to be able to force an employee to testify unless this matter has been specifically addressed in the contract of employment. A further relevant factor is that in German employment law certain questions, mainly concerning criminal convictions, could be deemed inadmissible and therefore an employee may opt not to answer or may give a false answer. In such cases the law prohibits the employee from being exposed to any negative consequences from such refusal or false answer. A further factor is that in the event that a works council operates within a firm approval of that body is required before an employer can question its employees.

Hence, even if the legal confidentiality requirements were to be circumvented in some way, it is likely that data security legislation will prevent German public accounting firms from making information and documents available to the PCAOB.

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Data Security

In Germany, data protection legislation was amended in 2001 in order to implement the EC Directive 95/46/EC. A transfer of data under the German Data Protection Act would be deemed to have occurred if data were made available to the PCAOB either as part of the registration documentation or by permitting the PCAOB to conduct inspections on the firms' premises. Public accounting firms hold personal data relating to their staff, their clients, their clients' staff and third party individuals e.g. customers and suppliers of their clients.

Any consent to exception would be needed from every *individual* affected, and specifically not only the corporate clients. Further legal restrictions apply; the consent must be freely given, specific and informed. These definitions are subject to legal interpretation. Furthermore, consent must be express and in writing. This would create an extremely onerous obligation for public accounting firms.

Even if consent were to be obtained from those affected, the German courts may well not interpret such consent as having been freely given, due to the employee-employer relationship.

Considerations of personal interest, privacy rights and the overriding concept of "legitimate interest" sensitive data, employee confidentiality, business secrecy and employment law liability complicate the matter further.

The German Data Protection Act only permits the processing of personal data required to meet German legal obligations. Foreign legal obligations are not recognized in this legislation. It should be noted that data security legislation in Germany is based on the German Constitution and jurisprudence.

Since the PCAOB is not in a position to deal with the intricacies of investigations or inspections within a German legal context, we believe that it would be in the interest of the SEC and the PCAOB to engage in constructive dialogue with both the European Commission and German authorities, regulators and oversight bodies to see whether arrangements of mutual benefit could be established.

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We hope that our comments will be useful in your assessment of the nature and extent of the problems involved in applying in a German legal context what are essentially rules and statutes designed for a U.S. legal environment. Consequently, we believe it to be in our mutual interest that the PCAOB give the concerns we have due consideration. We would be pleased to be of assistance in these matters.

Yours truly

Klaus-Peter Naumann
Chief Executive Officer

495/541

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August 18, 2003

Office of the Secretary,
Public Company Accounting Oversight Board
1666 K Street, NW
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U. S. A.

Re: PCAOB Rulemaking Docket Matter No. 005

Dear Sirs/Madams,

We are pleased to make comments regarding the proposed rules on investigations and adjudications.

In our comment letter dated March 31, 2003, we argued that the U.S. law could not require Japanese professionals who are qualified under a Japanese law and provide professional services in Japan to register with the PCAOB and provide it with certain confidential information. We have been proposing that the PCAOB grant an exemption under Section 106 (c) of the Sarbanes-Oxley Act to the members of the Japanese Institute of Certified Public Accountants (JICPA) on the grounds that the auditor oversight system in Japan is essentially equivalent to that in the U.S. We believe that the auditor oversight system in Japan should be relied upon, which would eliminate the necessity of PCAOB inspection over Japanese public accounting firms.

We also believe that some proposed investigation procedures would constitute extraterritorial application of U.S. regulation. We again propose that careful consideration be given to auditor oversight mechanism as to non-U.S. public accounting firms.

As a matter of principle, we do not agree to PCAOB investigation requirements for Japanese public accounting firms. In addition to reiterating this position of ours, we would like to identify one example of the unfairness your proposed rules contain.

The proposed rule explains (in the last paragraph of "4. Rules of Board Procedure for the Conduct of Hearings") that Board sanctions would be appealable to the U.S. Courts of Appeals. However, it would be exceedingly difficult for foreign public accounting firms to apply such appeal procedures. We do not think it is appropriate for the PCAOB to apply sanctions against Japanese accounting firms. Therefore another appropriate arrangement must be made between the Japanese regulator and the PCAOB in the cases where certain disciplinary arrangements are to apply to Japanese public accounting firms.

Yours sincerely,

Akio Okuyama,
President and CEO
The Japanese Institute of Certified Public Accountants

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August 18, 2003

Dear Mr. Secretary:

Rulemaking Docket Matter No. 005

KPMG appreciates the opportunity to comment on the Public Company Accounting Oversight Board's *Proposed Rules on Investigations and Adjudications* (Proposed Rule), which was released on July 28, 2003. The Proposed Rule has been issued pursuant to Sections 102 and 105 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act").

The overarching objective of the provisions of Sarbanes-Oxley is one of furthering the public interest through improving financial reporting, governance, and audit quality. KPMG wholeheartedly supports the efforts of the Board in striving to achieve this objective.

In this instance, we believe there are several aspects of the proposed rules that should be reconsidered by the Board. As an initial matter, the period that the Board has given parties to comment on the Proposed Rule is extremely short. The subject matter of the Proposed Rule will significantly impact the accounting profession and the manner in which services are provided to thousands of public companies. The livelihood of individual auditors also could be dramatically affected by the shape of the final rules. Providing a mere three-week comment period is inadequate to address the important public-policy issues at stake; that inadequacy is exacerbated by the length of the Proposed Rule, and the overlap between the comment period and the firm registration period imposed by Sarbanes-Oxley. In future rulemakings, KPMG hopes the Board will embrace more reasonable comment deadlines that are conducive to more considered notice and comment rulemaking.

In the Proposed Rule, the Board proposes to establish a regime that would allow it to conduct investigations of registered public accounting firms and associated persons, to initiate disciplinary proceedings against such firms and persons, and to impose sanctions on regulated firms and persons. Sarbanes-Oxley of course grants the Board considerable authority to establish this regime; however, in doing so, Congress required that the Board

establish "*fair procedures* for the investigating and disciplining of public accounting firms and the associated persons of those firms" within the limits of the Act. *See* Section 105(a) of Sarbanes-Oxley (emphasis added). Our comments below focus primarily on the requirement that Board procedures be fair.

We present several general areas in this comment letter where we believe the proposed rules can be modified to more adequately reflect and fulfill Congress's mandate under Section 105(a) of Sarbanes-Oxley. Within each area, we discuss in more detail our comments on the Proposed Rule and present recommendations, where appropriate, to improve the Board's investigations and adjudications rules. We look forward to working with the Board to create an investigatory and disciplinary regime that is fair, effective, and consistent with public interest.

1. Definitional Issues

We have several concerns with the definitions in the Proposed Rule. Our concerns are particularly acute with respect to the terms identified below because the potential adverse impact of these definitional issues cascades throughout the proposal.

"Professional Standards" – In its release relating to inspections, the Board proposes to define "professional standards" to include "accounting principles."[1] This term appears several times throughout the Proposed Rule where its usage will be problematic. For example, the definition of "disciplinary proceeding" under Proposed Rule 1001(d)(i) refers to "professional standards," as do Proposed Rules 5100(a)(4), 5101(a), and 5300, which relate to initiation of informal and formal investigations and sanctionable conduct, respectively. We believe this construction could subject registered firms and associated persons to investigations or discipline where generally accepted accounting principles ("GAAP") simply may be deemed to have been misapplied. This could be the case even where a firm has acted with due professional care and/or the application of GAAP in a particular circumstance is debatable and no clear answer lies in the professional literature.

Instead, we believe the Board's final rules should replace the term "professional standards" with "auditing and related professional practice standards" because the latter term, which has already been separately defined by the Board, appropriately reflects the role of the auditor in the audit process.[2] In this way, the Board would focus on the auditor's conduct and would create an appropriate link between serving as an issuer's auditor and

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[1] *See* PCAOB Rulemaking Docket Matter No. 006 (Proposed Rules on Inspections of Registered Public Accounting Firms), Release No. 2003-013, July 28, 2003. (There appears to be a typographical error with respect to "Rule 1001(p)(iv)" in that the Board has given the same rule designation to the definitions of both "person" and "professional standards.")

[2] *See* Rule 1001(a)(viii).

the actual scope of the auditor's role, rather than expanding such exposure to include accounting principles.

"Hearing Officer" (Rule 1001(h)(i)) – To counter criticism that a Board proceeding is not sufficiently objective, the Board should modify the definition of "hearing officer" in the Proposed Rule. As drafted, "any person" could be designated by the Board to oversee a disciplinary proceeding.[3] In contrast, the U.S. Securities and Commission (the "Commission") requires that an individual overseeing a hearing must be an administrative law judge.[4] The Board should follow the Commission's example in this regard and also provide that hearing officers must be administrative law judges or their functional equivalents at the Board level to ensure their familiarity with Board procedures and standards and to ensure sufficient impartiality. At a minimum, the final rule should provide that the Board may not designate as a hearing officer any Board staff or third party who is or has been involved in the investigation or prosecution of a firm or an associated person. These suggested revisions will help minimize claims that hearing officers lack impartiality.

2. Non-cooperation Proceedings

Proposed Rule 5110(a) grants the Board expansive authority to institute disciplinary proceedings for the perceived failure to cooperate with an investigation or for providing testimony that "may" have been "false or misleading or that omits material information." Instead, these standards are so vague as to be unworkable.

The application of this proposed standard could subject firms and associated persons to disciplinary proceedings, and the draconian sanctions that can result from these proceedings, for objectively harmless conduct. For example, an insignificant disagreement between an examinee and the Board's staff could expose a firm or an associated person to a disciplinary proceeding under this proposal. Similarly, a firm could be subject to non-cooperation proceedings simply for asserting in good faith a legal privilege or position with which the Board or its staff disagrees or for denying that auditing standards were violated. Moreover, the Board's proposal does not enumerate the types of information that must be disclosed during the course of an investigation. Thus, firms and associated persons have no guidance as to when they may be deemed, after the fact, to have failed to provide "material information." These vague standards fail to provide fair or discernable rules for instituting disciplinary proceedings for non-cooperation.

Our concerns regarding the potential for abuse that could result from this proposal are only amplified when considering that under Proposed Rule 5110(b), special expedited procedures will govern those disciplinary proceedings instituted for non-cooperation. In

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[3] Proposed Rule 1001(h)(i).

[4] *See* 17 C.F.R. 201.110; 17 C.F.R. 200.30-10.

the course of those proceedings, under the proposed rules respondents would have only five days to answer a potentially complex order instituting proceedings; be subject to arbitrarily limited discovery; and have no right to submit post-trial briefs. In addition, these expedited procedures could lead to harsh sanctions, such as suspension, termination of registration and up to $15 million in penalties. In view of these concerns, we believe the Board's final rule should expressly identify the particular acts that will constitute non-cooperation; and should ensure that all procedures connected with the Board's authority to institute non-cooperation proceedings are both fair and workable.

3. Privilege And Confidentiality Concerns.

Sarbanes-Oxley repeatedly makes clear that information gathered during Board investigations and disciplinary proceedings is to remain generally confidential. Nevertheless, the proposal, in several different areas, does not clearly provide adequate protection for information arising out of investigations and disciplinary proceedings. Similarly, we believe that the proposed rules are often insensitive to the legitimate privilege protections of registered public accounting firms, associated persons, and their clients. In particular, the proposed rules below could be improved to ensure fairness and compliance with the intent of Sarbanes-Oxley.

Rule 5104 – Proposed Rule 5104—which permits the Board to "inspect the books and records of such firm or associated person to verify the accuracy of any documents supplied" under an accounting board demand for documents—provides no protection for privileged information in those books or records. Undoubtedly, a public accounting firm's books and records will contain some privileged information. Nevertheless, the proposed rule as drafted does not allow public accounting firms to designate certain records as privileged and to withhold them from examination. Without such a protection, the Board, although it is restricted from obtaining privileged documents under Proposed Rule 5106, may, in fact, end up reviewing such information during a Rule 5104 examination.

Rule 5108 – Proposed Rule 5108 permits the Board to disclose investigatory records to the Securities and Exchange Commission, the Attorney General of the United States, an "appropriate Federal functional regulator," state attorneys general, and "any appropriate State regulatory authority." The Act requires, however, that "each of [the agencies receiving Board investigatory information] shall maintain such information as privileged and confidential."[5] We believe that Proposed Rule 5108 does not adequately implement this statutory requirement.

For example, no investigatory information should be released without a confidentiality agreement with the receiving agency. Without such an agreement, the recipient agencies

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[5] Act, § 105(b)(5)(B)(ii)(IV).

could disclose this information to the public. The Note to the Board's proposed rule is not sufficiently protective in this regard. While the Note may protect the information from introduction into evidence or discovery in civil litigation, the Note does not explicitly bar a recipient agency from disclosing the information to the public.[6] The Note is, therefore, an incomplete implementation of the Act, which also requires the recipient agency to "maintain the confidential and privileged nature of the information."

In addition, the Board should also develop rules that protect shared information from disclosure under the requirements of state law. The Note does not address, for example, the appropriate treatment of information shared with state agencies under state public records and "freedom of information" acts, which may require disclosure of this type of information when in the hands of a state agency. In order to carry out the Act's requirement that state agencies maintain the confidentiality of shared information, the Board should explicitly state its intention to preempt contrary state law by rule, to the extent that such state law would require the disclosure of shared information. Similar confidential treatment should be accorded to the "discussions" identified in the second note to Rule 5108.

Finally, we suggest that a firm or person that is the subject of the shared information be notified when the Board makes a disclosure to an authorized agency. These notifications would further secure the confidentiality of information shared under Rule 5108 by allowing affected persons to protect their rights in any applicable state or federal court proceeding regarding the disposition of that information.

4. Procedural Protections In Investigations

The procedural protections for both formal and informal investigations under the Proposed Rule should be modified to allow firms and associated persons the ability to participate fairly and productively in Board investigations. We believe the issues identified below relating to investigations can be cured by incorporating elements of procedural protections offered in analogous contexts by the Commission and by otherwise clarifying vague language.

Rule 5101 – In addition to the concern discussed above regarding the Board's proposed authority to initiate a formal investigation under Rule 5101(a)(1) on the basis of a violation of "professional standards," this proposal does not require notification of firms and associated persons in the event a formal investigation is initiated. Firms and associated persons should be provided appropriate notice regarding the initiation of a formal investigation in order to gather relevant documentation and materials related to the inquiry, and

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[6] Rule 5108(b) Note (stating that the shared information "shall be confidential and privileged *as an evidentiary matter* (and shall not be subject to civil discovery or other legal process) in any proceedings in any federal, or State court or administrative agency.") (emphasis added).

to engage counsel. In this regard, the notice of formal investigation should detail the relevant subject matter of the investigation and its scope.

Rules 5102 – Proposed Rule 5102(a) authorizes the Board and its staff to require testimony from firms and associated persons regarding any matter that the Board considers "relevant or material" to an investigation. While we do not mean to suggest that the Board need adopt qualitative standards for relevance or materiality, the Board should incorporate a "reasonableness" standard into the general authority that it has under Rule 5102(a) so that the Board and its staff cannot simply institute a formal investigation in order to set out on unfettered fishing expeditions into a firm's practice and business.

Additionally, the Board should clarify that in permitting "counsel" for an examinee to attend an examination under Proposed Rule 5102(c)(3), such counsel may be either in-house counsel or outside counsel retained by the examinee. The Board would place unjustified economic burdens on associated persons by acting otherwise. The Board also should clarify that even in those instances where an examinee retains outside counsel, in-house counsel for the firm may be permitted to attend the examination, in the examinee's discretion. Finally, the rules should clarify that, as has long been recognized in SEC proceedings, attendance by a non-attorney with technical expertise who is assisting counsel in his or her representation of a client is normally appropriate.

Rule 5103 – Proposed Rule 5103(a) similarly requires that firms and associated persons will have to produce audit work papers and other documentation that the Board or the staff considers "relevant or material" to an investigation. Again, because compliance with a production demand under 5103(a) will turn on subjective analysis of these terms, the Board should incorporate a "reasonableness" standard into its final rules on this point.

Additionally, we assume that where Rule 5103(b) indicates that "original documents shall be produced," this is intended to mean only that the originals need be made available for inspection and copying, not that firms or associated persons be required to turn over originals to the Board indefinitely, or in cases where the staff is satisfied with the production of copies.

Rule 5109 – Proposed Rule 5109 permits a registered public accounting firm or associated person to submit a "statement of position" to the Board regarding the contents of an investigation. Because the proposal does not also require the Board's staff to notify a registered public accounting firm or associated person of their intention to recommend disciplinary proceedings, this "right" to submit a statement is meaningless as a practical matter. In this regard, the Board's procedures deviate from those of the Commission and

deprive a potential respondent of the ability to avoid disciplinary proceedings when such proceedings are patently unjustified.[7]

Although Proposed Rule 5109(d) allows a public accounting firm or associated person to request a description of the "indicated violations" from the Board's staff, whether the request is granted is left to the staff's "discretion." Moreover, without any provision for notice, an investigated person or firm generally would not have any reasons to request such information from the Board. Unlike the Commission's *Wells* procedures, the proposed rule does not provide that the staff will affirmatively notify a public accounting firm or associated person that it is about to recommend the initiation of disciplinary proceedings. Given the draconian effects that would flow from the mere pendency of a disciplinary proceeding, a registered public accounting firm or associated person should have a *meaningful* right to persuade the Board not to initiate a proceeding. The Board would also benefit from the Commission's experience under the *Wells* procedure, by being able to draw upon detailed explanations from firms and associated persons, as appropriate, and to focus its reasoning more efficiently as a result.

5. Procedural Protections In Disciplinary Proceedings

The procedural protections offered in Board disciplinary proceedings also require supplementation. Without significant revision, the proposal threatens disciplinary proceedings that will be neither fair nor likely to produce results that are in the public interest. Below we have set forth our most significant concerns.

Overly Broad Power To Consolidate Disciplinary Proceedings

In Proposed Rule 5200(d), the Board reserves to itself and its hearing officers the power to consolidate any proceedings that "involv[e] a common question of law or fact." This proposal is based on the laudable goal of ensuring that similarly situated respondents receive similar treatment and are not prejudiced by inconsistent factual findings or legal conclusions reached in separate proceedings. However, we urge the Board to recognize that joinder will often prejudice respondents by depriving them of the ability effectively to present individualized elements of their case. Although ensuring a consistent resolution of identical legal questions from case to case is important, we are confident that this end can be achieved through meaningful, searching review by the Board of initial decisions.

Inadequate Notice of Charged Conduct

The Board has taken a positive step by requiring that the initial notice of a proceeding to investigate misconduct give the associated person or firm some notice of the allegations

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[7] *See* Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, Securities Act Release No. 5310, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) P79,010, at 82,183-86 (Sept. 22, 1972).

at issue. However, we are concerned that proposed Rule 5201 may not provide adequate notice, for two reasons. First, the rule does not provide any minimum standards for the adequacy of notice, stating only that it must contain reasonable detail about the alleged misconduct. Second, Rule 5201(d) confers a virtually unlimited power to the Board and the hearing officer to amend the order instituting proceedings or notice of hearing, effectively depriving a respondent of any assurance of reasonable notice. These two issues are related: the hearing officer's power to grant amendments to the order or notice raises the concern that the initial order or notice will be deliberately phrased as vaguely as possible in order to leave room for subsequent amendment.

To address the first concern, the Board should provide a more specific list of disclosures required for the order, such as: the time period during which the misconduct is alleged to have occurred; the persons alleged to be involved in the conduct; the places at which the conduct occurred; and the mental state (such as willfulness or negligence) with which the respondent is charged with having acted. Alternatively, the Board could use the standard it has already incorporated into its draft rule for subpoenas, proposed Rule 5408(a): that the alleged misconduct be stated "with particularity." Although we understand that the Board wishes to preserve its flexibility, we urge the Board to consider that the order or notice is the functional equivalent of a government complaint and should provide an equivalent degree of notice, particularly because respondents are given extremely limited discovery rights and therefore have little opportunity beyond the order to discover the basis for the charges.

To address the second concern, the Board should be able to amend an order or notice only to add questions of law or fact that are germane to those already included. Of course, the Board would retain its authority to open a new disciplinary proceeding should it uncover evidence of wrongdoing that is outside the scope of the first proceeding. The Board should also provide respondents with notice that it is considering amending the initial order.[8] Finally, the Board should expressly provide that neither it nor a hearing officer may amend an order or notice if it would unfairly prejudice a respondent. This minimal limitation, which applies even to most amendments to federal civil complaints, would be particularly valuable, given the proposed rules' lack of any guarantee that respondents will receive adequate preparation time between the initiation of a proceeding and the holding of a hearing.

Severity of Sanctions

In Proposed Rule 5300(a), the Board has appropriately reserved the right to impose severe sanctions in response to particularly outrageous wrongdoing, precisely as Congress

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[8] Respondents are already guaranteed a limited degree of notice and opportunity to respond when the hearing officer orders amendment, because under proposed Rule 5201(d)(2) the hearing officer can amend only on motion, and under proposed Rule 5408(b) respondents have five days to respond to motions.

intended in passing subsection 105(c)(4) of the Sarbanes-Oxley Act. We also appreciate that with the phrase "subject to the applicable limitations under Section 105(c)(5) of the Act," the Board has incorporated into this proposed rule the limitation that Congress crafted to ensure that the most stern punishments are reserved for the most egregious offenses. We note, however, one possible ambiguity that arises from the Board's incorporation of the Section 105(c)(5) limitation by reference: that limitation might be read not to apply to proceedings instituted pursuant to Rule 5200(a)(2) for failure to supervise, because Sarbanes-Oxley mentions those proceedings in a separate subsection. The Board should make explicit that the most severe penalties, *i.e.*, those in Rule 5300(a)(1)-(3) and (4)(ii), can be imposed only on a finding of intentional wrongdoing or repeated negligence, whether the respondent is charged with a primary violation or a failure to supervise.

Similarly, the Board should make clear that it will impose the severe sanctions for a failure to cooperate listed in proposed Rule 5200(b)(1) only when the failure to cooperate is clearly undertaken with intent to obstruct the investigation. As we have discussed above, the proposed rules give the Board extremely broad power to impose discipline for the highly amorphous and ill-defined offense of "failure to cooperate." Even if (as we recommend) the Board defines this offense more narrowly, it still may encompass a category of less-than-willful acts for which draconian sanctions are inappropriate. The Board should therefore make clear that the harshest penalties, such as revocation of registration, may be imposed only where there is a clear intent to obstruct the investigation. Leaving such matters, unstated, to the Board's discretion will not serve the Board's interests in the long run; in a highly charged case, for example, the Board will benefit from the existence of a clearly stated rule, adopted generally and not for the matter before it.

We also note that by cross-referencing Proposed Rule 5200(a)(4), Proposed Rule 5200(b)(1) permits the Board to impose monetary sanctions for failure to cooperate, of up to $750,000 on an individual or $15 million on an accounting firm. The Board's statutory basis for imposing such a monetary penalty for failure to cooperate is uncertain. The Act specifies that the penalties for failure to cooperate may include suspension, barment, or revocation, or appropriate "lesser sanctions." It is not at all clear that a $15 million fine is a permissible "lesser sanction." We think the better reading is that "lesser sanctions" are those for which the Act does not prescribe a scienter requirement, such as censure or additional professional education or training. We accordingly urge the Board to amend proposed Rule 5200(b)(1) to cross-reference proposed Rule 5200(a)(1)-(3) and (a)(5)-(6).

Firms' Reasonable Care In Discovering A Suspension Or Bar

The proposed rules do not specify the standard of "reasonable care" that accounting firms must exercise in verifying that none of their associated persons has been suspended or barred. Of course, a firm that acts reasonably should not be subject to discipline, and we agree that "reasonable care" may appropriately be retained as the catchall standard.

However, we encourage the Board to define at least one specific procedure that, if followed, is deemed to be "reasonable care" *per se*.

Such a "safe harbor" might include obtaining from all applicants a signed, written certification that they are not precluded by any disciplinary order of the Board from becoming an associated person of a registered public accounting firm, and requiring employees to make a similar certification on a regular basis. It is particularly important that the Board give some definition to the standard of "reasonable care" because the Board sanctions regime is new and there is as yet no generally accepted, suitably efficient procedure for researching an individual accountant's disciplinary history with the Board.

6. Discovery Procedures

We believe that it is crucial that the Board's procedures be, and be perceived to be, fair and objective. To that end, there is a significant need to reconsider the effect of several of the proposed rules governing discovery procedures and how they are applied.

The proposed rule gives the Board a robust array of discovery tools. The Board may issue a "demand" for testimony of an accounting firm or associated person or for the production of documents from an accounting firm or associated person. As discussed in Section 2 above, the Board can leverage this power with its authority to bring "non-cooperation" proceedings, in which a vague, subjective finding of "non-cooperation" can result in severe sanctions. The Board has already signaled its intent to use non-cooperation proceedings in this way, conceding that an "important objective" of the non-cooperation proceedings will be to "compel the cooperation in question at a time when it is still useful to the investigation."[9] The Board also may issue a "request" for testimony or documents from parties other than accounting firms and associated persons. In addition, the Board may request that the Commission issue a subpoena on its behalf. These formal discovery mechanisms supplement the investigative tools that the Board has assumed in connection with its regular inspections of accounting firms.

The Proposed Rule does not give respondents a commensurate set of tools to facilitate their response. While the Board has granted the Division of Enforcement and Investigations a broad power to compel testimony, a respondent's ability to summon people to testify is severely limited. For example, a respondent's right to compel the testimony of witnesses is limited to testimony "at the designated time and place of the hearing."[10] A respondent's decision to compel a witness's testimony or to compel the production of documents is subject to the approval of the hearing officer. *Id*. In addition, should the Board's enforcement division summon the testimony of a third party, the respondent has

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9 Release at A2-xlv.

10 Proposed Rule 5424(a).

no right to attend that person's interview. These provisions are simply unfair. Fundamental fairness suggests that the subject of an investigation be given the right to collect the information that is relevant to the case, but the discovery tools proposed in the rule leave the target without adequate discovery mechanisms.

The Proposed Rule also unreasonably limits the extent to which evidence that has been gathered would be disclosed to the respondent. For some documents, the Proposed Rule only requires the Division of Enforcement and Investigations to make available "documents prepared or obtained . . . *prior to the institution of proceedings*." Proposed Rule 5422 (emphasis added). This rule diverges sharply not only from the traditional constitutional protections afforded to criminal defendants, but also from the rules of the Commission. The Commission's rule explicitly incorporates the doctrine of *Maryland v. Brady*, 373 U.S. 83, 87 (1963), in which the Supreme Court held that the prosecutors have an ongoing constitutional obligation to disclose exculpatory evidence to a defendant. *See* 17 C.F.R. § 201.230(b)(2). The Commission's rules implicitly recognize that an enforcement proceeding is quasi-criminal in nature, and respondents are entitled to protections that are similar to those to which a criminal defendant is entitled. The Board's enforcement proceedings are similar in nature and therefore, the Board's proposed rule, at a minimum, should be made to conform with the rule adopted by the Commission.

Proposed Rule 5424(a)(1)(iv)(A) would allow the Board to withhold "any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board . . . ." Proposed Rule 5424(a)(1)(iv)(A). This provision would allow the Board to withhold documents that were shown to and discussed with Board members and other Board personnel, even though the same Board members might review the respondent's matter on appeal, and other personnel might serve as hearing officers. This rule would protect, and therefore encourage, *ex parte* contacts between the Board's enforcement division staff, other Board personnel, and Board members.

The effects of this provision are particularly pronounced when viewed in conjunction with Proposed Rule 5403. As discussed in Section 7 below, Proposed Rule 5403 purports to prohibit *ex parte* contacts between hearing officers and parties, but the Rule defines "parties" to exclude all Board divisions except that which has "primary responsibility" for the matter. Personnel from other divisions that may have substantial, but not "primary," involvement in the matter are not prohibited from talking to hearing officers about cases and facts in issue. Consequently, Proposed Rules 5403 and 5424(a)(1)(iv)(A) work in tandem to allow the Board to share information and opinions that might eventually influence the outcome of hearings. These provisions create a zone of secrecy that the respondent cannot penetrate, potentially undermining the fairness and impartiality that the Board seeks. The respondent should be entitled to inspect, copy, and respond to every non-privileged document that has been shown to a Board member or other person who

might later be called to hear his matter. Proposed Rule 5424(a)(1)(iv)(A) therefore should be deleted.

Under the Proposed Rule, the Division of Enforcement and Inspections itself is relieved of certain burdens of discovery that fall heavily upon respondents. For example, the Board's enforcement division is not required to maintain a log of the documents it withholds, absent a specific request from the hearing officer. *See* Proposed Rule 5244(b). Even under these circumstances, there is no requirement that the log be produced to the respondent. *See id*. By contrast, the respondent is required to maintain an extensive log, which must "identify the nature of the privilege (including attorney work product) that is being claimed; . . . the type of document; . . . the general subject matter of the document; the date of the document; and such other information as is sufficient to identify the document . . . including, . . . the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other . . . ." Proposed Rule 5106(a). Such disproportionate obligations potentially compromise the actual and perceived fairness of the Board's adjudicatory process and should be corrected.

Proposed Rule 5427 also provides allows for disciplinary proceedings to be resolved against a respondent on summary disposition. The division, however, has greater access to pre-hearing discovery and, thus, the division has a distinct advantage in proving its motions for summary disposition. Indeed, under the proposal, the respondent will be unable to examine any witnesses who do not voluntarily appear until the hearing itself. Faced with such a motion by the division, the respondent, with limited access to the evidence, will not always be able to establish persuasively the existence of a genuine issue of material fact sufficient to defeat the motion. In light of the inequitable discovery provisions, serious reconsideration should be given to whether the Division of Enforcement and Inspections should have the power to move for summary disposition or, indeed, whether summary judgment mechanisms are appropriate to resolve disciplinary proceedings at all in most instances.

7. Ex Parte Contacts.

Proposed Rule 5403 would prohibit *ex parte* contacts between hearing officers and parties. However, the proposed rule defines "party" to include only the "interested division" of the Board; that is, the division that the Board has given "primary responsibility" for the matter. Proposed Rules 1001(h)(ii), 1001(p)(iii). This definition ignores the fact that multiple divisions may have substantial involvement in a matter, even if only one division has "primary responsibility" for it. In order to preserve the impartiality and fairness of the hearing process, the definition of "interested division" should be broadened to include all divisions with substantial involvement in a matter.

8. Timing Concerns.

Although we generally appreciate the Board's attempt to craft its rules in a manner that allows for the speedy resolution of proceedings, the Board risks sacrificing fairness for perceived efficiency. We submit that the Board will effectively enhance the efficiency of proceedings if it adopts deadlines that parties perceive as reasonable from the outset rather than inviting protracted squabbles over extensions and other due process concerns. Our timing concerns apply throughout the proposal, but several examples follow below.

For instance, Proposed Rule 5102(b)(1) requires the Board to give an examinee "reasonable notice" of the examination. The commentary to the proposal, however, indicates that less than five-business-days may qualify as "reasonable notice."[11] It is simply not reasonable to think that less than five days constitutes "reasonable notice" in the context of a Board investigation. Firms and associated persons will need at a minimum 21 days to begin gathering relevant materials and engage competent counsel, and the Board should modify its final rule to take such needs into account accordingly.

Similarly, the Board's discussion of Proposed Rule 5103 relating to production of documents undercuts the terms of the rule itself, which as drafted requires that a Board demand for the production of documents "set forth a reasonable time and place for production." Notwithstanding the plain "reasonableness" standard set forth in the text of the rule, the commentary indicates that there is no "minimum notice requirement before production shall be due," and that while the Board "anticipates that the staff will provide at least five business days notice before production is due," such notice may also "be less than five days."[12] This commentary disregards the complexities of document production requests and makes no accommodation for the time it takes to identify and to gather the responsive documents—which in many instances will be extremely voluminous, held in several different locations, and maintained in different forms—and to assess confidentiality and privilege claims with respect to these documents. Accordingly, we request that the Board maintain the "reasonableness" standard in the final rule and provide guidance in its commentary to the final rule this standard will mean not less than 21 days from the date of receipt of a production request.[13]

In addition, we agree that, when the Board imposes a money penalty on a registered firm or an associated person, the Board should be able to impose further sanctions for subsequent noncompliance with the pending order. However, we are concerned that as a prac-

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[11] Release at A2-x.

[12] Release at A2-xii.

[13] The Federal Rules of Civil Procedure provide for a similar thirty-day period within which to respond to a request for production. *See* Fed. R. Civ. P. 34(b).

tical matter, Proposed Rule 5304 simply does not allow a sufficient period of time for payment in full before the Board is allowed to summarily suspend the registered firm or associated person. Although suspensions imposed for nonpayment are rescinded if the penalty is paid within 90 days, this does not adequately address the problem, especially in the case of firms, which would be obliged to cease all audit work – and likely suffer a permanent loss of clients – as soon as the suspension took effect.

We think that this problem is readily resolved by specifying when the Board may issue the written notice giving the respondent seven days to render payment. The rule should provide that if a money penalty is not paid within 30 days after exhaustion of all reviews and appeals, and the termination of any stay, the Board may issue the written notice currently provided for in the proposed rule. The Board's power to order the suspension seven days after the respondent receives the notice and the respondent's ability to cure the breach by paying within 90 days would remain unchanged.

Proposed Rule 5421 allows responding parties only five days to file an answer to an order instituting non-cooperation proceedings. To answer accurately and effectively, however, respondents or their counsel would have to conduct a complete investigation into the surrounding facts and circumstances, which would be impossible under the proposed rule. The time period therefore should be extended to at least 21 days.

Finally, Proposed Rule 5468(a) allows only five days to seek Board review of an action taken by the staff or third parties under authority delegated by the Board. This time period is not sufficient to compile the facts and legal support that a petition for review would require. The time period therefore should be extended to at least 21 days.

10. Implications For Non-U.S. Firms.

Based on recent experience with the firm registration process, the use of the term "associated person," as defined in Rule 1001(p)(1) in any Board rule has important, and often seemingly unintended, consequences for non-U.S. foreign public accounting firms. This is also the case with the Board's investigation and adjudication proposal, which essentially appears to subject "associated persons," as well as firms, to the entire panoply of rules regarding investigations, proceedings, and sanctions.

As the Board discussed at length in its final release regarding registration, however, foreign public accounting firms are subject to "unique" issues and accommodations need to be made in view of these issues.[14] In addition, the Board and foreign regulators are en-

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[14] PCAOB Release 2003-007 (May 6, 2003) at 14 (recognizing "that the registration of foreign public accounting firms raises unique issues"). The Board also realized that complications involving foreign firms were compounded by the difficulty of determining the potential conflicts with non-U.S. law, and

gaged in a continuing dialogue regarding application of the Board's rules to non-U.S. firms.

In view of the unique issues raised by application of the Board's rules to non-U.S. firms, including associated persons, and the ongoing dialogue between the Board and foreign regulators, the Board should engage in supplemental rulemaking that specifically addresses the application of the investigations and disciplinary proceedings regime to non-U.S. firms. In doing so, the Board should temporarily exempt non-U.S. firms from the definition of "associated persons" for purposes of the final rule, until the supplemental rulemaking is concluded. We look forward to working with the Board on these issues regarding non-U.S. firms and to commenting on future rulemaking addressing application of the investigations and disciplinary proceedings rules to non-U.S. firms.

11. Supplementary Constitutional And Administrative Procedures Act Protections.

Congress stated in Section 101(b) of Sarbanes-Oxley that the Board is not "an agency or establishment of the United States Government." In previous comment letters to the Board, KPMG has expressed its belief that the Board is, indeed, a quasi-governmental agency whose procedures must comport with due process, and, moreover, that the interests of the Board and the public are best served by ensuring that Board rules and conduct comport with the standards of constitutional due process. The same procedural protections that serve as a backdrop to the Commission's rules by virtue of the Commission's status as a governmental agency should, we believe, also apply to the Board's rules.

The Commission's rules do not always expressly reflect the gamut of procedural protections to which a respondent is entitled because these rules are supplemented by the significant protections inherent in the Constitution and numerous other federal statutes, including the Administrative Procedure Act. Express provisions that mirror these supplemental protections in all material respects should be spelled out in the final rules. Therefore, consistent with our comments, we believe the Board should strive to incorporate the protections inherent in the Constitution and the Administrative Procedure Act into its final rules in order to promulgate efficient and equitable rules, as Congress mandated under Section 105(a) of Sarbanes-Oxley.

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KPMG International is a Swiss non-operating association which functions as an umbrella organization to approximately 100 KPMG member firms in countries around the world, to whom it licenses the KPMG name. Each KPMG member firm is autonomous, with its own separate ownership and governance structure. The KPMG member firms do not

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thus adopted Rule 2105, which allows information to be withheld on the basis of a demonstrated conflict with non-U.S. law.

share profits amongst themselves, and they are not subject to control by any other member firm or by KPMG International.

If you have questions regarding any of the information included in this letter, then please call or write to Michael J. Baum, (212) 905-5604, mjbaum@kpmg.com.

Yours sincerely,

KPMG

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August 7, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005
Proposed Rules on Investigations and Adjudications

Dear Board Members and Staff:

I believe that the proposed rules for conducting investigations and adjudications are reasonable. I have the following comment relating to the conduct of investigations by the Board and the practical aspects of conducting an audit of an entity's financial statements by a public accounting firm.

Proposed Rule 5103 — Production of Audit Workpapers and Other Documents in Investigations

Proposed Rule 5103 should define "audit workpapers" and recognize the process by which they are accumulated and finalized. In the normal course of performing an audit of an entity's financial statements audit workpapers are revised as a result of their preparers becoming aware of more accurate information and as a result of the supervisory review process. Thus, workpapers change during the course of an audit because of new information and because preparers do not always have the knowledge and insight of their supervisors. Because of this process, a workpaper originally intended for inclusion by its preparer may not ultimately become a part of the final audit workpapers and older versions of an audit workpaper may be replaced with updates. Even though all aspects of fieldwork are completed on or before issuance of an auditors' report, the final audit workpapers are not always formally organized and filed until after the completion of fieldwork. In addition, audit staff and others may not always discard older versions of specific audit

workpapers and there may be other documents in a firm's possession that pertain to a client but which are not considered directly relevant to the audit.

I believe that the Board should recognize these practical aspects of performing and documenting audit work in the following ways:

(1) Allow each public accounting firm to specifically designate the documents (including electronic documents) that are to be considered as "audit workpapers."

(2) Designate a specific time period following the completion of field work, within which a firm must organize and formally close its complete audit workpaper files for each engagement. During that time period it should be permissible to destroy documents, such as workpapers overruled by supervisors, managers, and partners, not deemed suitable for the final audit workpaper files for an engagement. This time period should also be used to collect and destroy unsuitable workpapers and other documents from staff.

(3) Allow each public accounting firm to specifically designate other documents (including electronic documents) that the firm does not consider to pertain to its audits and thus should not be considered "audit workpapers."

(4) Allow each public accounting firm to specifically designate certain documents (including electronic documents) as documents that were inadvertently not destroyed under item (2) above.

Thank you for the opportunity to comment. The above comment is the view of the author and not necessarily that of the partners of Most Horowitz & Company, LLP.

Sincerely,

s Robert J. Sonnelitter, Jr.
Robert J. Sonnelitter, Jr., CPA
Director of Quality Control
Most Horowitz & Company, LLP

August 18, 2003

Samantha Ross, Chief of Staff
Michael Stevenson, Associate General Counsel
Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006-2803

VIA E-mail to Comments@pcaobus.org

Re: PCAOB Rulemaking Docket Matter No. 005
PCAOB Release No. 2003-012, July 28, 2003
(Proposed Rules on Investigations and Adjudications)

To PCAOB:

We appreciate the opportunity to offer comments to the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") on its proposed rules on investigations and adjudications. The Board is considering the proposed rules for adoption and submission to the Securities and Exchange Commission (the "Commission" or the "SEC") pursuant to the Sarbanes-Oxley Act of 2002 (the "Act").

The National Association of State Boards of Accountancy (NASBA) is the national organization of the accountancy regulators of all states and other U.S. jurisdictions (collectively, the "states"). NASBA's member boards (the "State Boards") are government agencies composed of both licensees and non-licensee public members. As the only authorities empowered to grant or revoke licenses of certified public accountants (CPAs), the State Boards understand the delicate balance between the need for swift discipline and the necessity of procedural fairness.

NASBA's ongoing primary focus is upon rules and policies relating to enforcement (including the collection of information that will facilitate enforcement in appropriate cases), with special attention to fostering federal/state cooperation. We believe that close cooperation and a working partnership of the PCAOB and the SEC with NASBA and the State Boards will result in more effective regulatory efforts than otherwise would be achieved. We are pleased that the Commission Order approving PCAOB rules for a registration system expressly encouraged "continued close cooperation" between the PCAOB and state regulatory bodies.

I. General Comments.

In general, NASBA urges that these and other new regulations promote vertical clarity so that State Boards can easily translate PCAOB and SEC case results into swift, equitable and defensible disciplinary actions against licensed audit firms and individual licensees (or unlicensed firms or accountants for whom a license is required) implicated in violations. In so doing, the PCAOB and the SEC will be able to place greater practical reliance upon an effectively administered State Board

licensing and discipline function that puts offending licensees at risk of losing not just their SEC clients but their certificates and their livelihoods as CPAs.

We applaud the thoroughness and thoughtfulness of the proposed rules and the related substantial effort of the PCAOB board members and staff. We are pleased to see provisions in the proposed rules for cooperation of the PCAOB with the State Boards by providing information from informal inquiries and formal investigations as contemplated by the Act. However, as reflected in our specific comments below, we do note with some concern the possible implications of conditions that might limit the flow of information to State Boards that may be useful for their enforcement activities. We urge, and trust, that the PCAOB will exercise its discretion so that it generally will forward information in a spirit of mutual cooperation between the PCAOB and the State Boards.

II. Comments on Selected Provisions of the Proposed Rules.

Proposed Rule 5108. Confidentiality of Investigatory Records.

Proposed Rule 5108 provides that the PCAOB may make information from informal inquiries and formal investigations available to, among others, any appropriate state regulatory authority, "in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors" (which condition follows the language of Section 105(b)(5)(B)(ii) of the Act). We believe that in most instances the sharing of such information with appropriate State Boards would be *necessary* to protect investors fully. For example, in the case of professional misconduct by an individual CPA, the PCAOB can suspend or bar such person from being associated with a registered public accounting firm (and in the case of professional misconduct by the firm can suspend or revoke the registration of the firm with the PCAOB). However, it would take action by a State Board to suspend or revoke that individual's license to practice as a CPA (or that firm's license to practice as a CPA firm). Certainly if there is egregious professional misconduct by the person or the firm, State Board action regarding his or her license to practice (or the firm's license to practice) should be taken without delay. Further, even if the professional misconduct is not egregious, it would still be appropriate for the PCAOB to facilitate prompt State Board focus on the matter. For example, State Boards may impose suitable remedial requirements upon the individual or firm such as practice limits, pre-issuance reviews, accelerated peer reviews or reprimands. Regardless, prompt State Board action would be *necessary* to protect investors in entities that are not SEC issuers from the risk that a CPA suspended or barred from being associated with a registered public accounting firm (or that a firm whose registration is suspended or revoked) could become involved in audits for entities that are not SEC issuers. Evidence of individual unethical conduct can cast a shadow upon all levels of professional regulation, consumer protection and public confidence.

We believe that in most instances the sharing of information from informal inquiries and formal investigations with appropriate State Boards would be necessary and appropriate. We trust that the PCAOB generally will forward information in a spirit of mutual cooperation between the PCAOB and the State Boards.

Proposed Rule 5112. Coordination and Referral of Investigations
and
Possible Additional Rule Regarding Reporting of Sanctions

Proposed Rule 5112(c) provides that at the direction of the Commission, the PCAOB may refer an investigation to, among others, an appropriate state regulatory authority. We are pleased to see this provision (which is parallel to Section 105(b)(4)(B)(iii) of the Act) included in the proposed rules.

We believe it also would be useful to provide with similar clarity in the rules for PCAOB reporting of sanctions to any appropriate state regulatory authority, as provided in Section 105(d)(1)(B) of the Act. [This section of the Act provides that if the PCAOB imposes a disciplinary sanction, it shall report the sanction to, among others, "any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified."]

However, as contemplated in our other comments, we believe that the most important areas for cooperation in federal and state enforcement activities include coordination of investigations and related sharing of information. We hope, and trust, that the PCAOB will pursue a policy of information sharing in a spirit of mutual cooperation between the PCAOB and the State Boards.

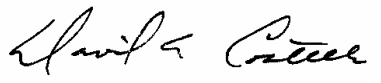
Proposed Rule 5420. Leave to Participate to Request a Stay

Proposed Rule 5420 (in the set of prehearing rules) provides that the PCAOB or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, the United States Department of Justice, a United States Attorney or a criminal prosecutorial authority of a state or political subdivision of a state for the purpose of requesting a stay of a hearing. The proposed rule further provides that a stay shall be granted upon a showing that it is necessary to protect an ongoing Commission investigation. A stay otherwise would be favored upon a showing that it is in the public interest or for the protection of investors.

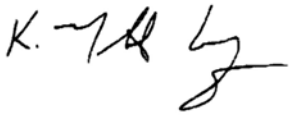
We urge that the PCAOB add appropriate state regulatory authorities to the list of persons that may be granted leave to request a stay. The State Boards generally are more actively involved in the discipline of licensed accountants and firms than are state criminal authorities. Violation of accountancy laws in most states constitute crimes, but some State Boards are not, by statute, "criminal prosecutorial authorities." However, we expect that only rarely would a State Board need to request a stay; and the decision whether to grant the stay would remain with the PCAOB. Thus, we request that the PCAOB revise the proposed rule to contemplate the possibility of a State Board seeking a stay rather than attempting to preclude that possibility.

Conclusion. NASBA appreciates the opportunity to provide these comments. Should you have questions about our thoughts on the proposed rules or other matters, please contact us. We look forward to ongoing communication and cooperation with the PCAOB and the SEC.

Sincerely,



David A. Costello, CPA
President / CEO



K. Michael Conaway, CPA
Chair, NASBA

PRICEWATERHOUSECOOPERS

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August 18, 2003

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 005, Proposed Rules Relating to Investigations and Adjudications

Dear Mr. Secretary:

PricewaterhouseCoopers LLP appreciates the opportunity to comment on the Proposed Rules establishing procedures for investigations and adjudications. The following are our comments.

The Privileged and Confidential Nature of Investigatory Material

The Scope of the Privilege and Confidential Treatment

Proposed Rule 5108 provides for confidentiality of investigatory material. The first note to Proposed Rule 5108 sets forth the language provided under section 105(b)(5)(A) of the Sarbanes-Oxley Act (the "Act") with respect to the confidential and privileged nature of investigatory material. Unlike the Act and the note, the Proposed Rule provides that investigatory material -- documents, testimony, or other information -- is confidential "in the hands of the Board." That language implies that confidentiality would not extend to the same material in the hands of the member firms and associated persons or counsel for the member firms or associated persons. The insertion of the "in the hands of the Board" language blurs whether the Board intends to afford confidential treatment to other investigatory material that is apparently protected by the statute -- for example (i) documents in the possession of a member firm or associated person that were prepared by that member firm or associated person and were transmitted to the Board; and (ii) documents shared by the Board or its staff with a member firm or associated person.

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The potential limitation of confidentiality to material "in the hands of the Board" under the Proposed Rule creates a distinction between confidential material and privileged material that is not found in the Act. Under the Act, "any information gathered in the course of the investigation is to be confidential and privileged for all purposes (including civil discovery), unless and until particular information is presented in connection with a public proceeding."[1] The Act -- and specifically, the key confidentiality provision, section 105(b)(5) -- does not distinguish between material that is "confidential" and material that is "privileged." Both terms refer to the same universe of documents and information enumerated in the Act. (Section 105(b)(5) ("documents and information prepared or received by or specifically for the Board . . . in connection with an investigation . . . shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process).") Although the scope of the privilege is ultimately defined by the Act, Rule 5108 seeks to redefine the scope of the confidentiality clause in a way that departs from the Act's definition of confidentiality as well as its definition of privilege.

To eliminate any confusion and unnecessary litigation as to the scope of the protection provided under the Proposed Rule, to further Congress's intent that investigatory material not be available to "outsiders," and to foster the sharing of information between the Board and its staff and the member firms, we propose that the language of the Proposed Rule conform to the Act by striking "in the hands of the Board." Alternatively, we would propose amending Proposed Rule 5108 to read as follows: "shall be confidential in the hands of (1) the Board; (2) the member firm being investigated and its associated persons; (3) the associated person being investigated and the member firm to which that associated person belongs; (4) the issuer whose audit forms the basis for an investigation; (5) any witness who provides testimony or documents in connection with an inquiry or investigation, and (6) counsel for any of the foregoing."

The Materials To Be Afforded Privileged and Confidential Treatment

Proposed Rule 5108 affords confidential treatment to "any documents, testimony, or other information prepared or received by or specifically for the Board or the staff of the Board" in connection with an inquiry or investigation. To clarify the type of documents and information that is confidential, we believe it would be helpful to insert the following language after "in connection with such inquiries and investigations":

> including originals and/or copies of transcripts procured by a witness pursuant to Rule 5109(c), Statements of Position submitted pursuant to Rule 5109(d), materials made available to

[1] Senate Rep. No. 107-205 (Jul. 3, 2002).

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> parties pursuant to Rules 5422 and 5423, offers of settlement pursuant to Rule 5205, and motions or other work product submitted to or filed with the Board or the staff of the Board,

The additional clarification will serve to remove any doubt created by either the Act or the Proposed Rule about the type of documents and information that is to be treated as confidential. For instance, any argument that audit working papers submitted to the Board or its staff become confidential simply because those documents have been "received by" the Board would be negated by the type of information listed in the language proposed above.

The Loss of the Privilege and Confidential Treatment

Under the Act, confidential and privileged investigatory material loses its protection only if such material is presented in connection with a public hearing or is released in accordance with section 105(c). The Proposed Rule nevertheless provides that confidential protection will also be lost if "otherwise ordered by the Board or the Commission." The Act expressly enumerates the circumstances under which investigatory material loses its protections, which does not include the discretion of the Board or the Commission. We would, therefore, recommend that the phrase "Unless otherwise ordered by the Board or the Commission" be deleted from the Proposed Rule.

Informal Investigations

Proposed Rule 5100(b) provides that the Director of Enforcement and Investigation can request documents, information, or testimony from any person in connection with an informal inquiry. At the start of an informal inquiry, requests for broad categories of documents – such as all documents relating to an audit, which might include drafts, e-mails, and desk files of individual auditors – could create an unnecessary burden for the enforcement staff. For the member firms, such requests are not only burdensome, but very costly. In many instances, however, the matter can be expeditiously and efficiently resolved without propounding a broad request and instead requesting readily available documents and/or an interview of a knowledgeable person. We believe that the information gained by reviewing the available documents – i.e., documents retained by the member firm pursuant to 17 C.F.R. § 210.2.06 – and interviewing the knowledgeable person would sometimes eliminate the need for a broad request and thereby resolve the matter at a lesser cost to the Board and the responding firm. We, therefore, suggest that the following Note be added to Proposed Rule 5100(b):

> Note: The Board is cognizant of the expense to the Board and the responding persons of any request for information or documents made pursuant to this Rule, and therefore encourages the Director of Enforcement and Investigations and the Director's staff to

commence informal inquiries with a request for relevant documents retained by the registered public accounting firm pursuant to 17 C.F.R. § 210.2-06 and/or an interview of a knowledgeable person and seek discrete reviews of readily available documents, before propounding broad requests for all relevant documents and testimony.

A Witness's Right to Testimony and Other Evidence

Proposed Rule 5109(c) allows a witness who has provided testimony or other evidence in connection with an inquiry or investigation to obtain a copy of such testimony or evidence, "except that prior to such evidence or testimony being presented in connection with a proceeding or released in accordance with Section 105(c) of the Act, and the Board's rules thereunder, the Director of Enforcement and Investigations may for good cause deny such request." The reference to "released in accordance with section 105(c) of the Act" is confusing and unnecessary. The Director of Enforcement and Investigations may also deny a request for good cause if that language is omitted. Thus, for the sake of clarity, the reference to section 105(c) should be stricken so that the exception reads "except that prior to such evidence or testimony being presented in connection with a proceeding, the Director of Enforcement and Investigations may for good cause deny such request."

In addition, the Proposed Rule does not provide a mechanism for determining "good cause." We would suggest adding at the end of Proposed Rule 5109(c) the following language: "Any decision by the Director of Enforcement and Investigations to withhold the testimony or evidence of a witness from that witness is reviewable."

Grounds for Instituting Proceedings for Noncooperation

Proposed Rule 5110(a) provides that a disciplinary proceeding can be instituted if it appears that a member firm or associated person "may have given testimony that is false or misleading or omits material information." We agree that by providing false and misleading testimony a witness is not cooperating with the Board's investigation. However, we think that, if, as seems likely, the inclusion of the phrase "or omits material information" is intended to track the language of the securities laws pertaining to fraud violation, it would be helpful to insert the phrase "necessary in order to make the statement made not misleading" after "omits material information". Otherwise, the phrase might mean the omission of any information that may turn out to be material, which would impose an unusual and unfair duty on the witness because it would require the witness to volunteer all information that the witness believes might be material. Normal practice is for the witness to answer the questions asked, and for the investigator to formulate questions that will further the inquiry.

* * * * *

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We appreciate the opportunity to express our views and would be pleased to discuss our comments or answer any questions that the staff may have. Please do not hesitate to contact Walter Ricciardi at (646) 471 1125 or Ted Senger at (415) 498 7135 regarding our submission.

Sincerely,

PricewaterhouseCoopers LLP

Swiss Institute of Certified Accountants and Tax Consultants

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Location/Date Zurich, August 18, 2003

Recipient Secretary, Public Company Accounting Oversight Board

Sender Andreas Müller, Chairman, Walter Hess, General Secretary

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Subject **PCAOB Rulemaking Docket Matter No. 006**
PCAOB Rulemaking Docket Matter No. 007

General comments regarding PCAOB Release No. 2003-012: Proposed Rules 5000 through 5501, and PCAOB Release No. 2003-013: Proposed Rules 4000 through 4010

Also by e-mail comments@pcaobus.org
PCAOB
Office of the Secretary
1666 K Street, N.W.
Washington, D.C. 20006-2803
U.S.A.

Dear Mr. Secretary,

The Swiss Institute of Certified Accountants and Tax Consultants (the "Institute") appreciates the opportunity to submit our general comments on the Proposed Rules, *Proposed Rules on Investigations and Adjudications* (PCAOB Rulemaking Docket Matter No. 005, "Proposed Rules 005") and *Proposed Rules on Inspections of Registered Public Accounting Firms* (PCAOB Rulemaking Docket Matter No. 006, "Proposed Rules 006", collectively the "Proposed Rules 005 and 006") of the Public Company Accounting Oversight Board (the "PCAOB" or the "Board"), by which it implements Section 102, 104 (a) and 105 of the Sarbanes-Oxley Act of 2002 (the "Act").

In two previous letters to the PCAOB and the SEC dated March 27, 2003 (our "March Letter") and July 2, 2003 (the "July Letter"), we have provided comments as to how the Act and the proposed Registration System for Public Accounting Firms will affect our members. We refer to the March Letter and the July Letter and consider integral parts of this submission, as many of our comments made therein apply to the Board's Proposed Rules 005 and 006 as well. We attach the March Letter and the July Letter for your convenience.

We acknowledge and appreciate, that in both the Proposed Rules 005 and 006 the PCAOB has expressly acknowledged the "Special Issues Relating to Non-U.S. Firms", in particular that:

- "the nature and scope of the Board's oversight over non-U.S. accounting firms that audit the financial statements of U.S. public companies will be the subject of dialogue between the Board and its foreign counterparts";

- "the Board is committed to finding ways of accomplishing the goals of the Act without subjecting non-U.S. firms to unnecessary burdens or conflicting requirements"; and

- "the Board's Proposed Rules are not intended in any way to signal that the Board has already determined how its oversight should operate as to those firms".

In the context of the above-mentioned points, we would like to re-emphasize the following points from the Swiss perspective:

We have the same intention and are striving for the same goal as the PCAOB, namely "to protect the interests of investors and further the public interest through the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors" (Sec. 101(a) of the Act).

Nevertheless, the Board's Rules regarding registration adopted by the SEC as well as to the continuing inspection, investigation, and sanctioning powers of the Board set forth in the Proposed Rules 005 and 006, would create serious conflicts with Swiss law. We certainly welcome the PCAOB's stated intention of opening a dialogue with its foreign counterparts regarding the implementation of the Act and the adoption of appropriately modified rules in lieu of the Proposed Rules 005 and 006 regarding inspections and disciplinary procedures in foreign jurisdictions. However, we would like to mention that we have significant doubts as to whether such dialogue can be carried through and that an effective solution can be found between the PCAOB and the respective Swiss organizations within the Board's intended timeframe.

It follows that we recommend the timeframe for implementing these Proposed Rules be extended by at least one year (*i.e.*, until April 2005) for Swiss public accounting firms (and any other non-U.S firms). This additional time would allow the Swiss legislature (and the legislature of any other jurisdiction in a comparable situation) to put in place the envisaged legal framework as well as give the Swiss government an opportunity to implement a Swiss public accounting oversight system on a practical level. Furthermore, this additional time would enable the PCAOB to establish the means and processes of cooperation with the Swiss oversight body and to secure compliance with the spirit and intent of the Act by building on compliance with, and local enforcement through, the corresponding Swiss oversight system, and not by unilaterally imposing a duplicative and potentially conflicting oversight system. Any other approach would lead to unnecessary complication and inefficiency in the effort to reach the abovementioned goal, not only on the part of our members, but also for the PCAOB and the Swiss government.

With a Swiss accounting oversight system in effect, it is our position that the Board should neither directly inspect nor sanction Swiss public accounting firms. Rather, the Board should exercise its powers through, and in cooperation with, the Swiss accounting oversight body within the framework of a protocol to be established. Such indirect oversight would sufficiently protect the interests of investors and the public once the Board have familiarized themselves with the Swiss accounting oversight system and has found a common ground for a cooperative, bilateral oversight system rather than two unilateral, duplicative and (potentially) conflicting oversight systems.

We appreciate the opportunity to express our concerns that the Proposed Rules 005 and 006 should not set the benchmark for inspections, investigations and adjudications regarding public accounting firms established in Switzerland (and other non-US jurisdictions), but that implementation of the Act regarding those public accounting firms should follow different principles as set forth above and in our March Letter and July Letter. We look forward to continuing this discussion until a solution has been found that achieves our common cause, while fairly balancing the sometimes conflicting interests of the parties involved.

Respectfully submitted,

Swiss Institute of Certified Accountants and Tax Consultants

Andreas Müller
Chairman

Walter Hess
General Secretary

Attachment: Letter of the Institute to the PCAOB dated March 27, 2003
Letter of the Institute to the SEC dated July 2, 2003

Swiss Institute of Certified Accountants and Tax Consultants

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Location/Date: Zurich, 27th March 2003 (Oer)

Recipient: Office of the secretary, PCAOB

Sender: Andreas Müller, Chairman, Walter Hess, General Secretary

---

Subject: **PCAOB Rulemaking Docket Matter No. 001**

Comments to proposed Rules 1000, 1001, 2100 through 2105, 2300, and Form 1

PCAOB
Office of the Secretary
Attn. Mr. Gordon Seymor, Acting General Counsel
Attn. Mr. Stanley Macel III, Senior Counsel Office of International Affairs
1666 K Street, N.W.
Washington, D.C. 20006-2803
U.S.A

We refer to the PCAOB Release No. 2003-1 dated March 7, 2003 that has been proposed by the Public Company Accounting Oversight Board ("PCAOB" the or your "Board") on March 4, 2003 with regard to its plan for a registration system for public accounting firms under the Sarbanes Oxley Act of 2002 (the "Act"). Therein you invite interested parties to submit comments in writing to the proposed PCAOB Rules 1000, 1001, 2100 through 2105 and 2300 (the "Rules") and the PCAOB Form 1 (the "Form"). In addition, you invite our comments to a series of questions relating to the registration of foreign public accounting firms (the "Questions").

We appreciate the opportunity to comment on the Rules and the Form and respond to the Questions on behalf of the Swiss Institute of Certified Accountants and Tax Consultants (the "Institute"), the organization, among others, of the Swiss accounting industry. The membership of the Institute comprises approx. 900 corporations and 4,500 individuals of various business sizes.

Of our members, the accounting firms referred to as the "Big Four" and a series of others will be affected by the Act. In their role as foreign public accounting firms issuing audit reports for issuers, or as accounting firms that play a substantial role in the preparation or furnishing of audit reports, they would be required to register under the Act, or as associated persons of a public accounting firm, they would have to give the required consents (all terms used in these comments and defined in the Act or the Rules are used with the meaning as so defined).

Table of Contents

I. Shared spirit and intentions

Our Institute fully supports the spirit and intentions that underlay the Act. In fact our Institute has been instrumental in implementing a system of auditor independence and quality control in Switzerland that is similar to the one to be instituted under the Act, and is presently actively engaged in consultations with the Swiss Federal Government regarding the current efforts to put in place a Swiss accounting oversight legislation. Our Institute is doing this with the goal to assure adherence by Swiss accounting firms to auditing standards regarding methodology, quality, ethical standards, personal and institutional independence, and compliance with all applicable laws in a way that is coherent with and equivalent to the standards and goals pursued by your Board and the Commission under the Act.

While we support in principle registration under and adherence to the Act by our members, we can only recommend that they do so if the Act is being implemented with regard to them in a way that allows them to continue to respect the laws of Switzerland. Otherwise , they would be exposed to conflicts and deadlocks that are not warranted by the spirit and intentions of the Act.

II. Conflicts between the obligations imposed bythe Act and Swiss law

Unless the necessary exemptions are granted, the obligations imposed by the Act, as implemented by the Rules and the Form on foreign public accounting firms will potentially cause serious, without such exemptions irresolvable conflic ts with Swiss law, in particular and without limitation regarding the following provisions (unofficial English translations attached for your convenience):

(1) Violation of secrecy obligations

(a) Swiss Penal Code ("SPC") Article 321: Violation of Professional Secrecy

Article 321 SPC protects information that accountants have acquired when acting under the secrecy obligation of Article 730 Swiss Code of Obligations ("SCO"). The criminal and penal secrecy obligation covers any information gathered in an auditing and assurance function with regard to an audited client and any third parties. Thus to allow disclosure of audit work papers and other related information to the Board or the Commission or any other third party, the consent of the audited company, and also of any third parties affected would be required insofar as secrets of such third parties are concerned. In practice, it would appear highly unlikely that such third party consents could be obtained.

(b) SPC Article 162 Violation of Production and Business Secrets

Article 162 covers information gained by an accounting firm in the course of assignments other than and outside of its audit assignment. The same principles and concerns apply as regarding SPC Article 321 (*cf.* section II(1)(a) above).

(c) Banking Act ("BA") Article 47: Banking Secrecy, and Federal Act on Stock Exchanges and Securities Trading ("SESTA") Article 43: Professional Secrecy Obligations of Securities Traders

The Articles of the BA and the SESTA protect the relationship between a bank or securities trader and its clients. As such, the Articles of the BA and the SESTA protect the related confidentiality interests of the audited banks that are issuers, and of their clients.

Again, in order to permit access and disclosure of work papers and information to the Board and the Commission, consent of the audited issuer bank and of any third parties affected would be required.

(2) Violation of public interest laws

(a) SPC Article 273 Economic Espionage

Article 273 SPC renders it an offense to make a production or business secret accessible to a foreign organization. It protects all of the elements of Swiss economic life for which there is an interest of non-disclosure to foreign public officials or private organizations.

Para. 1 of Article 273 SPC would apply to and penalize any investigative activity conducted by agents of your Board, the Commission and any other foreign authority within Switzerland as well as to any person facilitating access to such secrets.

(b) SPC Article 271 Illegal Acts in Favor of a Foreign State

A Swiss accounting firm that permits an inspection or investigation of its files in Switzerland by representatives of the Board, the Commission, or any other foreign public authority, or collects information from third parties in Switzerland and sends this information to a non-Swiss auditing firm in order for this information to be made accessible to the Board, may be found guilty of violation of Article 271 SPC.

We have to assume that activities conducted by your Board and its agents, or by a Swiss public accounting firm in assisting such activities, would be considered to fall under this provision, because the qualification of the Board as a private entity pursuant to Sec. 102(b) of the Act would not change the inherent public nature of its activities.

(c) Data Protection Act ("DPA")

Personal data may not be transferred to the Board (without the explicit consent of the persons concerned) since it declares in advance that it will not treat the data confidentially (*cf.* Section 105(b)(5)(B) of the Act). For personal, highly sensitive data, as would be required in answering Part V of the Form (see section IV (5) To Part V below), consent of the persons concerned would be required in any circumstance. While we expect that consent of the audit client can be obtained, audit work papers may contain personal data of third parties whose consent may practically not be obtainable.

(3) Conclusion regarding conflicts with Swiss law

Although we are not in a position to give a final interpretation of Articles 271 and 273 SPC as they relate to disclosure of and granting access to work papers or other information in favor of the Board or rendering testimony before the Board, we could not recommend to our members to subject themselves unconditionally to the Act without these issues being clarified.

In addition, distinguishing between information and documents which would require third party consents for production to your Board and information and documents that would not, may be difficult, and it is unlikely that such third party consents could be obtained where necessary.

In our opinion, any Swiss public accounting firm that subjects itself to the inspection and investigation powers of the Board runs into a direct conflict with Swiss law and as a result exposes itself to criminal penalties and civil actions for damages that could put its very existence in peril.

This conflict is a matter of great concern to the entire accounting industry in Switzerland as well as to the Swiss Governmental Authorities. We trust that the Board and the Commission understands these concerns and will work with the Swiss Government and the Swiss accounting industry to find ways and means to implement the spirit and intentions of the Act while removing or minimizing the effects of any potential conflict with Swiss law.

III. Swiss legislation regarding accounting standards

(a) Present Swiss legislation

(i) Listing Rules of SWX Swiss Exchange

Issuers registered with SWX Swiss Exchange must appoint accounting firms registered with the SWX, whereby registration is granted upon request and is conditioned upon the respective accounting firm's agreement to become subject to the sanctioning rules and powers of the SWX. For violations of duties under the listing rules, sanctions can be imposed on the

auditors, *e.g.* reprimanding, replacement of the responsible accountant, imposing a fine, revocation of registration, publication of the violation and the sanctions imposed. Most Swiss issuers registered with the SEC have a primary listing with the SWX, and as such the oversight of the SWX applies to practically all of the Swiss accounting firms auditing issuers.

(ii) Swiss Statute on Banks and Savings Institutions

Audits of banks and savings institutions licensed to do business in Switzerland must be carried out by authorized bank auditors. The Swiss Federal Banking Commission ("SFBC") grants these authorizations and exercises an oversight over authorized bank auditors. Authorization to audit banks in Switzerland is granted by the SFBC if the auditors meet several conditions regarding, *e.g.*, adequate organization, reputation of management and auditors in charge, independence from the audited banks and the banking business in general. Most of the accounting firms auditing issuers registered with the SEC or Swiss subsidiaries of issuers in Switzerland are also registered bank auditors, so that this oversight by the SFBC over authorized bank auditors assures adherence to the respective standards over practically all of the Swiss public accounting firms affected by and subject to the registration and consent requirements of the Act.

(b) Envisaged Swiss legislation

Talks are under way between representatives of the private sector and the Swiss Government regarding a Swiss public accounting oversight system, involving legislation as basis for a Swiss accounting oversight board (the "Swiss PCAOB") and a mechanism that assures the application of a set of accounting standards regarding, *e.g.*, quality, ethical standards and independence. It is too early to set forth any details of the envisaged legislation and the position, duties and powers of the Swiss PCAOB within the envisaged accounting oversight system.

In these discussions, our Institute is guided by the following ideas:

(i) The Swiss public accounting oversight system will be aimed at assuring standards and principles for the Swiss accounting industry that are similar, in many ways identical, and in all instances at least equivalent to those of the Act;

(ii) the Swiss PCAOB will be independent of the accounting industry;

(iii) the Swiss PCAOB will have duties and powers necessary and appropriate to implement and enforce the standards and principles of the respective Swiss legislation; and

(iv) one of the tasks of the Swiss PCAOB will be to act as the counterpart of your Board and the Commission in an ongoing dialogue and interplay.

The details of all of this would need to be worked out.

Without giving due consideration to the equivalence of U.S. and Swiss legislations and to the necessity of a dialogue and interplay between oversight authorities, however, we believe that Swiss applicants would face a system of double oversight that would very likely result in conflicting requirements for and double jeopardy to them to the detriment of the Swiss accounting industry and the Swiss issuers, and without any benefit to the U.S. securities market.

IV. Response to Questions raised in Release No. 2003-1 Part B.2

Q1: *Is it feasible for foreign public accounting firms to register within 180 days of the date of the Commission's determination that the Board is capable of operating?*

Compiling the information and documentation necessary for registration within the timeline set forth by your Board is not in itself impossible, with the exceptions and exemptions discussed below where compilation and delivery would be impossible, and our members are committed to devote the necessary attention and resources to this task. For the reasons set forth in section II above, however, it would be impossible for our members to subject themselves unconditionally to the inspection and investigation (testimony and document production) power of the Board over registered public accounting firms pursuant to Sec. 104 and 105 of the Act without certain exemptions being granted pursuant to Sec. 106(c) of the Act. Such exemptions may be granted on a temporary and conditional basis, as more fully set forth in our response to Q6 below.

Should foreign public accounting firms be afforded some longer period (e.g., an additional 90 days) within which to register?

For the above reasons, we ask that the timeline for the registration, and in particular for (a) submitting the information and documentation, (b) submitting the consents required pursuant to Part VIII of the Form, and (c) submitting to and application of the investigation, inspection and disciplinary powers of the Board by and to Swiss applicants be extended by at least one more year. This extension would allow for the time necessary to work out an understanding between the Board, the Commission and the Swiss Government and the Swiss accounting industry regarding the scope and nature of the proposed exemptions and the complementary measures to be put in place in Switzerland, and would give the necessary time to the Board and the Commission to grant and implement these exemptions and to the Swiss legislator to adopt the corresponding legislative measures.

The practical impact of such extension should not be too great, since no Swiss public accounting firm would audit more than 100 issuers, so that inspections can be expected to be conducted in a rhythm closer to three years than one year (*cf.* Section 104(b)(1)(B) of the Act).

The same extended timeline should apply for the consents by Swiss accounting firms that have to be provided by U.S. applicants as part of their own application for registration.

Q2: *Are there any portions of Form 1 that are inapplicable, or that should be modified, in the case of non-U.S. applicants?*

We will here comment on the Form, following the order of items in the Form. Further comments to the Form and the Rules are contained in section V below.

(1) To General Instructions, Item 5:

We refer to our separate comments in section V(6) regarding confidential treatment.

(2) To Part I, Item 1.6 (*Associated Entities* of Applicant):

This requirement should relate to entities associated otherwise than through the network of which the respective Swiss accounting firm is a party (that means for practically all Swiss Applicants associated entities in Switzerland only), in order to avoid double notifications.

(3) To Part II, Item 2.4 (Issuers for which Applicant *Played, or Expects to* Play, a *Substantial Role in* Audit):

This requirement should relate to issuers for which the applicant knows or has reason to believe that he plays a substantial role. An accounting firm may not in all circumstances know the share of its work in comparison to the overall audit work. Accordingly, the accounting firm that has primary responsibility for the audit should be responsible for notification and compliance with the Act and the Board's requirements. Further, the information should be treated confidentially.

(4) To Part III (Applicant Financial Information):

The demarcation line between items (b) through (e) is difficult to draw when using historic data that had not been gathered in light of these criteria, so some of our members may have to take recourse to estimates when it comes to allocating revenues to the different items of clause 3.1.

This type of information has never been made public, as all of our member firms concerned are private entities that are not required to release financial information. The information should be treated as confidential.

(5) To Part V (Proceedings involving the Applicant's Audit Practice):

Compiling this information and disclosing it to the Board poses an extraordinary burden on our members and may in some instances even be impossible.

Information of the type sought has not been centrally collected and kept by our members and is considered confidential by all of the accounting firm, its associated person or persons and the third party or parties affected. Also the fluctuation of personnel typical for our industry would require a search through archives of third-party firms or firms now defunct, what would practically not be possible to execute. Obtaining consent form third parties affected, which would be necessary for confidentiality and data protection purposes, might be difficult if not impossible to obtain. We also would like to draw your attention to the fact that this type of information has never been made public, and public disclosure of information of this type would be a novelty for Swiss businesses.

Public disclosure of this type of information would *de-fact* lead to a discrimination of Swiss registered accounting firms against other accounting firms in Switzerland not subject to the Act, and might also expose them to the risk of law suits (of an imitative or consequential nature) that otherwise would not have been brought against the respective Swiss firm.

Given the practical difficulty if not impossibility of gathering the information sought, the conflict with Swiss criminal provisions against economic espionage and acting in favor of a foreign state, and the potentially serious practical consequences for a Swiss public accounting firm that may audit only one or two issuers with a secondary listing in the U.S., we propose that disclosure under items 5.1 through 5.4 be limited to (i) procedures pending (as stated in section 102 (b) (2) (F) of the Act), and (ii) being in connection with issuers or the U.S. securities market in general, and in relation to such procedures limited to (iii) information and documents at hand with the respective applicant and their associated entities or persons associated with such public accounting firm, and (iv) information and data whose release would not require consent from third parties other than the associated entities of or persons associated with such public accounting firm or conflict with the Swiss criminal provisions referred to above except where information and documents can be submitted on a no-name basis.

The Swiss public accounting firms also would have to receive in advance assurance of confidential treatment of the respective information (see section V(5) To Rule 2300 (c) below).

The information should at any rate be treated as confidential.

(6) To Part VII, Item 7.2 (Listing of *Accountants* Associated with Non-U.S. Applicants):

We consider it incommensurate and not warranted by the spirit and intentions of the Act to disclose information on all persons associated with the public accounting firm, whether or not active on the audit engagement for any issuer.

We propose to restrict the list to:

(a) all partners of the public accounting firm who provide audit, review or attest services for any issuer;

(b) all persons which are members of the audit engagement team and provide more than ten hours of audit, review or attest services for any issuer p.a. (*cf*. Release No. 33-8183, SEC Final Rule Strengthening the Commission's Requirements Regarding Auditor Independence, Part II.A);

(c) but (b) not extending to persons engaged only in clerical and ministerial tasks (*cf.* Sec. 2(a)(9)(B) of the Act).

(7) To Part VIII, Item 8.1 (Consents to Cooperate with the *Board*):

As indicated above, the required consents and statements can only be provided once a common understanding of the scope and nature of the exemptions and the complementary measures to be put in place in Switzerland has been reached and these exemptions have been granted.

Q3: *In addition to the information required by Form 1, is there any additional information that should be sought from non-U.S. applicants?*

The Board should seek detailed information of the laws of such jurisdiction that could potentially conflict with the Act and its implementation as envisaged, of the accounting oversight system in the home country of the foreign public accounting firms, and of ways and means to collaborate with national oversight authorities and Governments in view of implementing the spirit and intentions of the Act without conflicts and deadlocks.

Q4: *Do any of the Board's registration requirements conflict with the laws of any jurisdiction in which foreign public accounting firms that will be required to register are located?*

Regarding the general conflicts of legal systems caused by the requirements of the Act, we refer to section II above.

As noted above, the consents required in Part VIII of the Form can only be provided and the powers of inspection and investigation of the Board can only be implemented once a common understanding of the scope and nature of the exemptions and the complementary measures to be put in place in Switzerland has been reached and these exemptions have been granted.

Q5: *In the case of non-U.S. firms that are required to register because they play a substantial role in the preparation or furnishing of an audit report on a U.S. issuer, is the definition of "substantial role" in Rule 1001(n) appropriate?*

In our view it is appropriate.

In particular, should the 20 percent tests for determining whether a foreign firm's services are material to the audit, or whether the foreign firm performs audit procedures with respect to a significant subsidiary, be changed? Would a 10 percent threshold more realistically capture firms that materially participate in the preparation or furnishing of an audit report?

No change should be made. The 20 percent test is realistic. We refer to our response to Q2 (3), To Part II, Item 2.4 of the Form (primary responsibility for the lead accounting firm to determine substantial role).

Q6: *Should the requirements to register be different for foreign public accounting firms that are "associated entities" (as defined in the Board's rules) of U.S. registered public accounting firms than for foreign firms that are not associated with U.S. registered firms?*

There should not be any differentiation. See our response to Q2 (2) To Part I, Item 1.6.

Q7: *Should registered foreign public accounting firms be subject to Board inspection?*

In our view, Swiss accounting firms, even if registered, should not be subject to the inspection and investigation powers of the Board, including the power to hear testimony, to request document production and to impose disciplinary sanctions. In particular the Board could not conduct any evaluation and testing or inspections in Switzerland through its agents and staff, and could not request any agent or other representative of a Swiss registered public accounting firm to appear before the Board to render testimony.

Could the Board, in some cases, rely on home-country regulation in lieu of inspection of foreign public accounting firms?

The Board could and should rely on Swiss actual and prospective legislation in lieu of direct inspection, investigation and sanctioning.

If so, under what circumstances could this occur?

We refer to section III above. In the period until the new Swiss accounting oversight legislation is put in place, this could be done on the basis of a temporary exemption and in reliance on the present Swiss legislation. Our Institute and, we trust, the competent bodies of the administration of the Swiss Government would be willing to share with you information on the methodology applied to assure professional standards regarding quality ethical standards, independence etc. of the Swiss accounting industry. Information concerning individual cases of misconduct could be shared on the basis of existing mechanism of information exchange (between SEC and SFCB in the banking sector, through judicial assistance mechanisms, etc.).

After the Swiss accounting oversight legislation has been put in place, your Board could do this on the basis of a partial exemption and in reliance on the accounting oversight system put in place by Swiss legislation.

Q8: *Aside from Board inspection, are there other requirements of the Act from which foreign public accounting firms should be exempted? If so, under what circumstances?*

In our opinion, the nature and scope of the exemptions that are necessary for Swiss registered public accounting firms can only be determined through a process of discussion between your Board, the Commission, the Swiss Governmental Authorities, and the Swiss accounting industry. At any rate the exemptions must be of a nature to take into consideration the legal conflicts and practical problems set forth in these comments.

Q9: *Are there requirements different from those the Act imposes on all registered public accounting firms that the Board should apply to foreign public accounting firms?*

We refer to our response to Q6 and Q8. The Board should not apply any other requirements to Swiss registered public accounting firms.

Q10: *Should the Board's oversight of foreign registered public accounting firms that are "associated entities" (as defined in the Board's rules) of U.S. registered public accounting firms be different than its oversight of foreign public accounting firms that are not associated entities of U.S. registered firms?*

In principle we refer to our response to Q6 above, but note that a non-U.S. accounting firm not associated or affiliated with a U.S. accounting firm is not subject to the provisions of the SEC Practice Section of the American Institute of Certified Public Accountants relating to international firms and international associations of firms, in particular AICPA SEC Practice Section Manual § 1000.08(n) regarding inspection procedures to be carried through by an expert in U.S. accounting, auditing, and independence requirements. The fact that such review is being conducted should facilitate the granting of an exemption from the inspection and investigation powers of the Board to the respective Swiss firms.

Should the U.S. registered firm have any responsibility for the foreign registered firm's compliance with the Board's rules and standards?

No, we refer to our response to Q2, item 2.4, Q5 and Q6 above.

V. Comments to Rules not addressed in section IV above.

(1) To Rule 1001 Item (a)(Accountant) (2) and (3)

In a Swiss, and continental-European, context, a reference to an undergraduate degree is not meaningful. We propose to refer to "higher professional or university degrees".

(2) To Rule 1001 Item (c)(Associated Entity)

See our comments at IV(2) above.

(3) To Rule 1001 Item (q)(Rules or Rule of the Board)

As a very limited number of Rules of the Board have been published so far, our comments may need to be modified or elaborated upon after publication of further Rules of the Board.

(4) To Rule 2001 (Application for Registration)

The Board should confirm receipt of the application immediately.

(5) To Rule 2005 Item (c)(Requests for More Information)

This Rule should only apply if the Board requests additional information because the application is deemed incomplete. If the application is complete in regard of the Rules and Form, a request for further information should not cause the date of submission of the application to be postponed or the application to be deemed not received.

(6) To Rule 2300 Item (c)(Confidential Treatment Request) and (d) (Application Procedures)

Certain types of information provided by Swiss Applicants should be granted confidential treatment on a global basis, given that certain information has not been made publicly available before and publication may trigger negative and harmful consequences for the applicant (see sections II, IV(4) and IV(5) above). There should be a procedure by which the applicant can receive a binding response on whether information of a certain type will be treated confidential or not before the applicant has submitted such information.

(7) To Rule 2300 Item (h)

Also the Commission should treat information as confidential that has been granted confidential treatment by the Board.

VI. Conclusions.

(1) Timeline

The timeline should be extended by at least one more year for the registration by Swiss public accounting firms.

(2) Exemptions

The Board, the Commission and the Swiss Governmental Authorities and the Swiss accounting industry, considering the complementary legislative measures to be put in place in Switzerland, should seek an understanding on the scope and nature of the exemptions to be granted to Swiss applicants from the requirements

(a) to furnish certain types of information otherwise required for registration that cannot be collected and provided by Swiss accounting firms for legal reasons, third party consent requirements or practical difficulties (see section IV Q2(5) To Part V above)

(b) to furnish the consents required under part VIII (see section N Q2 (1) to Part VIII above) of the Form, and

(c) to subject to the investigation (testimony, work paper production), inspection and disciplinary powers of the Board.

(3) Dialogue and interplay

Your Board, the Commission and the Swiss Governmental Authorities should establish an appropriate mechanism of dialogue and interplay between your Board and the envisaged Swiss PCAOB.

We appreciate the opportunity you offer for a discussion regarding the ways and means how to implement the Act, and we hope to be able to continue this discussion until a solution is being found that takes into consideration its different, at times even conflicting, aspects.

Yours sincerely

Swiss Institute of Certified Accountants and Tax Consultants

Andreas Müller
Chairman

Walter Hess
General Secretary

Enclosures

- mentioned

Unofficial translation of the provisions of Swiss law

referred to in the Comments by the Swiss Institute of Chartered Accountants and Tax Advisers, dated March 26, 2003

Swiss Code of Obligations (SCO)

Article 321a Employee's Duty of Care and Loyalty

1 The employee must carefully perform the work assigned to him, and loyally safeguard the employer's legitimate interests.
2 …
3…
4 In the course of an employment relationship, the employee shall not make use of or inform others of any facts to be kept secret, such as, in particular, manufacturing or business secrets that come to his knowledge while in the employer's service. Also, after termination of the employment relationship, he shall continue to be bound to secrecy to the extend required to safeguard the employer's legitimate interests.

Article 730 Violation of Professional Secrecy of Auditors

1 When reporting and giving information, the auditors shall safeguard the business secrets of the Company.

2 Auditors are prohibited from communicating to individual shareholders or third parties any observations they have made while carrying out their duties. The duty to inform a special auditor remains reserved.

Swiss Federal Act on Data Protection (DPA)

Article 6 Transborder data flows

1 No personal data may be transferred abroad if the personal privacy of the persons affected could be seriously endangered, and in particular in cases where there is a failure to provide protection equivalent to that provided under Swiss law.

2 Whoever wishes to transmit data abroad must notify the Federal Data Protection Commissioner beforehand in cases where:
a) there is no legal obligation to disclose the data and
b) the persons affected have no knowledge of the transmission.

3 The Federal Council shall regulate the notification procedure in detail. It may provide for a

simplified notification procedure or exemptions from the duty to notify in the event that the processing does not endanger the privacy of the persons affected.

Article 35 Breach of Professional Secrecy

1 Whoever willfully and without authorization discloses confidential and sensitive personal data or personal profiles that have come to his knowledge in the course of professional activities that require that he has knowledge of such data, shall be punishable on application for prosecution by a term of detention or by fine.

2 Whoever willfully and without authorization discloses confidential and sensitive personal data or personal profiles that have come to his knowledge in the course of his activities for persons who are subject to a duty of professional secrecy or in the course of his vocational training with such persons, shall also be punishable on application for prosecution by a term of detention or a fine.

3 The illegal communication of confidential and sensitive data or personal profiles shall also be punishable after the relevant person has ceased to practise his profession or has completed his vocational training.

Federal Law on Banks and Savings Banks (Banking Act, BA)

Art. 47

1 Whoever divulges a secret entrusted to him or of which he has become aware in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as representative of the Banking Commission, officer or employee of a recognized auditing company and whoever tries to induce others to violate professional secrecy, shall be punished by imprisonment for not more than six months or by a fine of not more than SFr. 50,000.
2 If the act has been committed by negligence, the penalty shall be a fine not exceeding SFr. 30,000.
3 The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.
4 Federal and Cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall apply.

Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act, SESTA)

Art. 43 Breach of professional secrecy

1 Whosoever:

a. discloses a secret which has been confided to him in his capacity as a member of a governing body, employee, mandatary or liquidator of a stock exchange or a securities dealer, as a member of one of the governing bodies or employee of recognized auditors, or of which he has become aware in any such capacity; or

b. attempts such breach of professional secrecy by inducement,

shall be punished by imprisonment or with a fine;

2 Whosoever breaches professional secrecy after termination of office or his employment shall nevertheless remain liable to punishment.

3 The federal and cantonal provisions relating to the duty to testify and the duty to provide information to the authorities remain reserved.

Swiss Criminal Code (Swiss Penal Code, SPC)

Article 162 Violation of manufacturing or business secrets

Whoever reveals a manufacturing or business secret which he is obliged to keep by legal or contractual obligations,
whoever uses such revelation for the benefit of himself or another person,
shall be, upon request for prosecution, sentenced to imprisonment or fined.

Article 271 Prohibited Activities for a Foreign State

1. Whoever conducts, without authorization, for a foreign State on Swiss territory acts that are within the competence of public authorities or public officials,
whoever conducts such acts for a foreign party or another foreign organization,
any person aiding in such acts,
shall be sentenced to imprisonment, in severe cases to penal servitude.

2. .....

3. .....

Article 273 Economic Intelligence Service

Whoever searches out manufacture or business secrets in order to make them accessible to a foreign official public body, foreign organization, to a foreign private company or their agents, shall be sentenced to imprisonment or, in severe cases, penal servitude. In addition, a fine may be imposed.

Article 321 Violation of Professional Secrets

1. Clergymen, barristers, defense counsels, notaries, examiners being sworn to secrecy, doctors, chemists, midwifes, and their assistants who reveal a secret which they were told or of which they took knowledge while exercising their profession, shall be, upon request for prosecution, sentenced to imprisonment or fined.
The same goes for students, revealing a secret of which they took knowledge during their studies.
Violations of professional secrets are punishable after the end of the studies or professional activities as well.

2. The offender remains exempt from punishment if the secret has been revealed because of the consent of the party entitled or following the written permission of the competent or supervising authority, issued on the offender's request.

Swiss Institute of Certified Accountants and Tax Consultants

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Location/Date Zurich, July 2, 2003

Recipient Secretary, Securities and Exchange Commission

Sender Andreas Müller, Chairman, Walter Hess, General Secretary

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Subject **PCAOB-2003-03**

Registration System for Public Accounting Firms
Comments to PCAOB Release No. 2003-007: proposed Rules 1001, 2100 through 2106, 2300, and Form 1

Securities and Exchange Commission
Secretary
Attn. Mr. Jonathan G. Katz
450 Fifth Street, N.W.
Washington, D.C. 20549-0609
U.S.A

PCAOB Release No. 2003-007: Registration System for Public Accounting Firms

Dear Mr. Katz:

The Swiss Institute of Certified Accountants and Tax Consultants (the "Institute") appreciates the opportunity to submit comments on the proposal of the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") implementing the accounting firm registration requirements of the Sarbanes-Oxley Act ("the Act"). Our comments refer to the PCAOB Release No. 2003-7, comprising the proposed PCAOB Rules 1001, 2100 through 2106, and 2300 (the "Rules"), and the PCAOB Form 1 (the "Form"), which was submitted to the Securities and Exchange Commission (the "SEC" or "your Commission") on May 8, 2003, and to which your Commission has issued Release No. 34-47990, File No. PCAOB-2003-03, published in the Federal Register of June 11, 2003. Therein you invite interested parties to submit comments in writing to the Rules and the Form.

The Institute is the professional body representing, among others, the Swiss accounting profession. In our letter of March 27, 2003 to the PCAOB (our "March Letter"), we stated our position and provided comments on how the Act, Rules, and Form (in the version of March 7, 2003) will affect our members. We attach the March Letter for your convenience and consider it to be an integral part of this submission. In the event of differences between the two, this letter takes precedence over our March Letter.

All terms used in these comments and defined in the Act, the Rules, or our March Letter are used with the meaning as so defined, except if defined differently herein.

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I. Shared Spirit and Local Actions

(1) Shared Spirit in the U.S., Switzerland, and other Jurisdictions

Our Institute continues to fully support the spirit and intentions that underlie the Act. Our Institute also feels, and countless talks to colleagues, industry organizations, and governmental entities within and outside of our country have confirmed, that the same is true with regard to the countries of the EU and other jurisdictions. Our members are affected by the Act and its implementation in many ways similar to public accounting firms within the EU and other jurisdictions.

(2) Equal Treatment of non-U.S. Applicants

We appreciate your stated intention to treat all non-U.S. applicants who anticipate or experience difficulties in registering in accordance with the proposed rules or in subjecting themselves to the enforcement powers of the PCAOB in a uniform and equal way. We trust that this will continue to be the case, and that there will be no discrimination of non-U.S. applicants due to their nationality.

(3) Planned Legislation Regarding Swiss Oversight System

This position and general attitude of shared spirit and intent has guided not only our Institute vis-à-vis the SEC and the PCAOB regarding the steps and regulations proposed for implementing the Act, but also the Swiss government with regard to Swiss legislation. For details regarding the legislative process, we refer to the letter on behalf of the Swiss Authorities that this letter accompanies.

(4) Extension of Timetable for Registration

We strongly feel that registering with and subjecting ourselves to the inspection and disciplinary regime of the PCAOB within the currently proposed timeframe, while a Swiss oversight system is simultaneously being enacted and implemented, would expose our members to a practical burden and risks associated with conflicts of legal systems that are not warranted by the spirit and intent underlying the Act.

We also are of the strong opinion that it would be unfair and unjust to require Swiss applicants to register while so many issues regarding effects of registration remain open, given that “the nature of the oversight to be exercised over registered foreign public accounting firms is a matter the Board has yet to resolve”. Rather registration should only occur once the scope and nature of the investigative and disciplinary powers of the Board have been determined conclusively or at least to a degree that gives the certainty necessary for Swiss applicants to conduct their business.

We thus emphatically request that the registration process for Swiss applicants (and any other non-U.S. applicants in jurisdictions where a local public accounting oversight system is being put in place) be delayed by another period of 360 days and that the effective date for the inspection and disciplinary powers of the Board be postponed by an addition period of 360 days. This would allow the Swiss legislature (and the legislature of any other jurisdiction in a comparable situation) to put in place the envisaged legal framework, and the Swiss government to implement the Swiss public accounting oversight system on a practical level. It would also enable the PCAOB and your Commission to establish the means and processes of cooperation with the Swiss oversight body and to secure compliance with the spirit and intent of the Act by building on compliance with and local enforcement through the corresponding Swiss oversight system (PCAOB Release No. 2003-007, Part B.3, page 20), not by unilaterally imposing a duplicative and potentially conflicting oversight system. Any other approach would lead to a waste of time and efforts both on the side of our members and on the side of the PCAOB, your Commission, and the Swiss government.

This time and these efforts should indeed be spared and saved for what is our common goal and intention, namely "to protect the interests of investors and further the public interest through the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors" (Sec. 101(a) of the Act).

(5) Effects of Registration Limited to Contacts between Oversight Bodies

Once the Swiss accounting oversight system has come into effect, it is our position that the Board should neither directly inspect nor sanction Swiss public accounting firms. Rather the Board should exercise its powers through and in cooperation with the Swiss accounting oversight body within the framework of a protocol to be established. Such indirect oversight would sufficiently protect the interests of investors and the public once the Board and your Commission has familiarized themselves with the Swiss accounting oversight system and found a common ground for a cooperative, bilateral oversight system rather than two unilateral, duplicative, and (potentially) conflicting oversight systems.

II. Conflicts between Obligations Imposed by the Act and Swiss Law

We shall not reiterate the provisions of Swiss law that could be violated by implementation of the Rules and submission of the completed Form, nor shall we reference the individual clauses and provisions of the Rules and the Form that would cause these violations.

(1) Attenuation of Certain Conflicts with Swiss Law

We appreciate that the amendments applied by the Board to the Rules and the Form (version of March 7) have attenuated, if not removed, some of these conflicts. We will not comment on these modifications in detail.

(2) Reservation for Conflicting non-U.S. Laws

We also appreciate the opportunity offered by Rule 2105 to submit evidence of conflicting non-U.S. laws where the submission of information requested as part of the registration would cause the applicant to violate such non-U.S. law, including a copy of the relevant portion of the non-U.S. law and a legal opinion buttressing the position of the applicant. We will comment further on proposed Rule 2105 in Section III(3) below.

It is unfortunate, however, that this remedy has been limited to the submission of information as part of the registration process, whereas the consequences of registration, including but not limited to the continuing inspection, investigation, and sanctioning power of the Board, is prone to create conflicts with Swiss law that are at least as serious as those created by the registration process. We therefore repeat our proposal with all due emphasis that the remedy concerning conflicting non-U.S. law expressed in Rule 2105 be extended to all conflicts created or threatened by the implementation of the Act (cf. also Section V below.)

(3) No Third-Party Consents

We understand that public accounting firms shall obtain consent from the issuers whose audit is at stake, and from their associated persons insofar as necessary for compliance with the Act, the Rules, and the Form. Swiss applicants should not, however, be asked to obtain consents from third parties, in particular from contract partners of issuers insofar as such third parties have a *bona fide* confidentiality interest. Rather a global exemption should be granted covering such instances. Anything else would interfere with audit clients' business, distort competition, and create intolerable complications.

III. Comments on Certain Rules

The following comments are based on our current knowledge and understanding of the implications of the situation. Additional comments may come up at a later stage, in particular as a consequence of the evolving Swiss legislative process.

(1) To Rule 1001 Item (a)(iv)(Associated Entity)

We refer to our comment in the March letter to Rule 1001 Item (c) and repeat that this definition should exclude entities associated with the Swiss public accounting firm through the

network to which the respective Swiss accounting firm is a party. It should include only subsidiaries, the parent company, and sister companies of the Swiss public accounting firm within Switzerland (and, exceptionally, also abroad, in particular in the Principality of Liechtenstein), in order to avoid double notification and unwarranted administrative burdens.

Issues arising from the fact that the Principality of Liechtenstein is a jurisdiction separate and apart from Switzerland, but that several of our members audit clients or maintain subsidiaries or branch offices in Liechtenstein would have to be addressed separately.

(2) To Rule 1001 Item (p)(ii)(Play a Substantial Role in the Preparation or Furnishing of an Audit Report)

We refer to our comment in the March Letter to Rule 1001 Part II, Item 2.4 (Issuers for which Applicant *Played, or Expects to* Play, a *Substantial Role in* Audit). The accounting firm that has primary responsibility for the audit should have exclusive responsibility for notification and compliance with the Act and the Board's requirements regarding the "material service" test. Further, the information should be treated as confidential.

(3) To Rule 2105 (Conflicting Non-U.S. Laws)

While we in principle welcome the limitations regarding non-U.S. law offered by this Rule, we would like to point out that legal impediments arise not only from non-U.S. laws being violated as a consequence of the submission of the information requested (and in general of compliance with the Act), but also from laws where submission of information or compliance with the Act would expose the Applicant to negative consequences sufficiently severe to warrant an exemption and where necessary consents and waivers by third parties are not obtainable (*e.g.*, consents from customers of a Swiss audit client, *cf.* item II(3) above).

(4) To Rule 2106 Item (c)(Requests for More Information)

We refer to our comment in the March Letter to Rule 2005 Item (c). This Rule should only apply if the Board requests additional information because the application is deemed incomplete. If the application is complete insofar as the information requested in the Form has been submitted, the application should be deemed received irrespective of a subsequent request for additional information.

(5) To Rule 2300 Item (b)(Confidential Treatment Request) and (c) (Application Procedures)

Certain types of information provided by Swiss applicants should be granted confidential treatment on a global basis, given that certain information has not been made publicly available before and publication may trigger harmful and unforeseeable consequences for the applicant, associated entities, associated persons, and third parties affected (see section IV(7) below).

(6) To Rule 2300 Item (g)

Information that has been granted confidential treatment by the Board should also be handled confidentially by the Commission. Submitting certain types of information would be unacceptable, even if the hurdles of Swiss law could be overcome, if it could not be excluded that such information will be made available to third parties (principle of non-proliferation), including the Attorney General of the United States, federal regulators other than your Commission, or state attorneys general (*cf*. Sec. 105(b)(5)(A) of the Act). We refer in that regard to our March Letter, section II.

IV. Comments on Individual Items of the Form

We will comment on the Form, following the order of items in the Form.

(1) To General Instructions, Item 6:

We refer to our separate comments in section III(5) above regarding confidential treatment.

(2) To Part I, Item 1.6 (*Associated Entities* of Applicant):

We refer to section III(1) above.

(3) To Part I, Item 1.7 (Applicant's Licenses):

This requirement should not relate to Swiss applicants, since the Swiss regulators (SWX, Federal Banking Commission, etc.) who issue licenses or similar authorizations do not normally associate any numbers therewith.

(4) To Part II (Listing of Applicants Public Company Clients):

While U.S. applicants will have to register in October 2003, non-U.S. applicants will have to register in April 2004 (or later, *cf*. section I(4) above). Thus the "Current Calendar Year" and the "Preceding Calendar Year" will be different for U.S. and non-U.S. applicants.

(5) To Part II, Item 2.1 (Issuers for which Applicant prepared Audit Reports during the Preceding Calendar Year) and 2.2 (Issuers for which Applicant Prepared Audit Reports During the Current Calendar Year), paragraphs c., d., and e.:

This demarcation between *audit services*, *other accounting services,* and *non-audit services* is difficult to draw for non-U.S. public accounting firms that are not used to these categories, and will be further complicated by the change of system occurring on December 15, 2003. This will force some of our members to take recourse to estimations and best guesses as to

which categories certain services fall into. We recommend instead using a two-pronged approach, differentiating (only) between audit services and non-audit services. This is the customary differentiation for most corporate governance regimes outside the U.S.

Further, information of the type sought here should generally be treated as confidential, as it will not be available in that form elsewhere.

(6) To Part II, Item 2.4 (Issuers for which Applicant *Played, or Expects to* Play, a *Substantial Role in* Audit):

Cf. section III(2) above.

(7) To Part V (Listing of Certain Proceedings Involving the Applicant):

Information of the type sought is considered confidential by all of the Swiss accounting firms, their associated persons, and third parties affected. Consent from third parties affected (other than issuers), which would be necessary for confidentiality and data protection purposes, would be impossible to obtain (*cf.* item II(3) above). We also would like to draw your attention to the fact that this type of information has never been made public before, and public disclosure of information of this type would be a novelty for Swiss business, and not in accordance with the Swiss legal system.

Public disclosure of this type of information would violate the personal rights of persons involved, and the confidentiality interests of employees, clients, and third parties with potentially disastrous effects. The disclosure of pending procedures would also violate the principle of presumed innocence.

Public disclosure of this type of information would lead to a *de facto* discrimination of Swiss registered accounting firms with respect to accounting firms in Switzerland not subject to the Act, and might also expose them to the risk of law suits (of an imitative or consequential nature) that otherwise would not have been brought against the registered Swiss firm.

Given the practical difficulty if not impossibility of gathering the information sought, the conflict with Swiss criminal provisions against economic espionage and acting in favor of a foreign state, and the potentially serious practical consequences for a Swiss public accounting firm, we propose that disclosure under items 5.1 through 5.4 of the Form be limited to (i) procedures pending in connection with issuers, and (ii) information and data whose release: (a) would not require consent from third parties other than the associated entities or associated persons of such public accounting firm; (b) would not conflict with the Swiss criminal provisions referred to above; or (c) could be effected on a no-name basis.

The information should in all cases be treated as confidential.

(8) To Part IV Item 6.1

Since this type of information is already being filed and made publicly available, we consider this requirement duplicative and superfluous.

(9) To Part VIII, Item 8.1 (Consents to Cooperate with the *Board*):

As indicated above, the required consents and statements could not be given at this moment in time, and can most likely not be given in March or April 2004 either

We therefore propose that the requirement to submit consents covering the issues addressed in Items 8.1 a. through c. be postponed until a common understanding of the scope and nature of the exemptions and the effects of the Swiss legislative measures has been reached between your Commission, the PCAOB, and their Swiss counterparts.

Alternatively, the wording of these Consents would have to be amended to reflect the limitations of non-U.S. law in a way that corresponds to Rule 2105.

V. Consents to be Provided by Foreign Public Accounting Firms

The Rules and Form do not address the issue of the consents deemed given by foreign public accounting firms who issue an opinion or otherwise perform material services within the meaning of Sec. 106(b) of the Act. The same limitations as to non-U.S. law that apply to the information submitted in the course of the registration pursuant to Rule 2105 should apply to such deemed consents.

VI. Conclusions

(1) Timetable

The timetable should be extended by at least one additional 360 day period for the registration by Swiss public accounting firms, and by a subsequent 360 day period for the investigative and disciplinary powers of the Board to take effect. This is necessary in order to give the Commission and the Board on the one hand and the Swiss Governmental Authorities and the Swiss accounting profession on the other hand the time necessary to establish the Swiss accounting oversight system and, on the basis of such Swiss oversight system, to establish a mutual understanding on the scope and nature of the investigative and disciplinary powers of the Board and on the exemptions to be granted to Swiss applicants from the related requirements:

(a) to furnish certain types of information otherwise required for registration that cannot be collected and provided by Swiss accounting firms for legal reasons, lack of third party consent, or due to practical difficulties

(b) to furnish the consents required under part VIII of the Form, and

(c) to subject themselves to the investigative (testimony, work paper production) and disciplinary powers of the Board.

(2) Limitations of non-U.S. Law

The limitations of non-U.S. law as set forth in Rule 2105 should apply also to the consents required under Item 8 of the Form, to the investigative and disciplinary powers of the Board, and to the deemed consents pursuant to Sec.106(b) of the Act.

(3) Dialogue, Interplay, and Equal Treatment

The Board, your Commission, and the Swiss Governmental Authorities should establish an appropriate mechanism of dialogue and interplay between the Board and the envisaged Swiss public accounting oversight body. In any event we trust that Swiss applicants will be treated equally with other non-U.S. applicants in a comparable situation.

We appreciate the opportunity to express our concerns and to offer you our insights on implementing the Act. We look forward to continuing this discussion until a solution has been found that achieves our common cause, while fairly balancing the sometimes conflicting interests of the parties involved.

Respectfully submitted,

Swiss Institute of Certified Accountants and Tax Consultants

Andreas Müller
Chairman

Walter Hess
General Secretary

Attachment: Letter of the Institute to the PCAOB dated March 27, 2003

PCAOB
Public Company Accounting Oversight Board

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RULES ON INVESTIGATIONS AND ADJUDICATIONS	PCAOB Release No. 2003-015 September 29, 2003 PCAOB Rulemaking Docket Matter No. 005

Summary: After public comment, the Public Company Accounting Oversight Board ("Board" or "PCAOB") has adopted rules on investigations and adjudications. The rules would govern investigations and hearings in disciplinary proceedings, pursuant to Section 105 of the Sarbanes-Oxley Act ("Act"), and hearings on registration applications pursuant to Section 102 of the Act. The Board will submit these rules to the Securities and Exchange Commission ("Commission") for approval pursuant to Section 107 of the Act. The Board's rules will not take effect unless approved by the Commission.

Board Contacts: Samantha Ross, Chief of Staff (202/207-9093; rosss@pcaobus.org); Michael Stevenson, Associate General Counsel (202/207-9054; stevensonm@pcaobus.org).

* * *

Section 105 of the Act grants the Board broad investigative and disciplinary authority over registered public accounting firms and persons associated with such firms. To implement this authority, Section 105(a) directs the Board to establish, by rule, fair procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms. As directed by the Act, the Board has adopted rules relating to investigations and adjudications.

The rules on investigations and adjudications consist of 64 rules (PCAOB Rules 5000 through 5501), plus certain definitions that would appear in Rule 1001 and a rule on time computation that would be Rule 1002. Appendices 1 and 2 to this release contain, respectively, the text of these rules and a section-by-section analysis of the rules. Section A of this release provides a general overview of the operation of the rules. Section B of this release describes the changes made to the rules in response to public comments.

A. Operation of the Rules on Investigations and Adjudications

Under the rules, the Board and its staff may conduct investigations concerning any acts or practices, or omissions to act, by registered public accounting firms and persons associated with such firms, or both, that may violate any provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. The Board's rules require registered public accounting firms and their associated persons to cooperate with Board investigations, including producing documents and providing testimony. The rules also permit the Board to seek information from other persons, including clients of registered firms.

When violations are detected, the Board will provide an opportunity for a hearing, and in appropriate cases, impose sanctions designed to deter a possible recurrence and to enhance the quality and reliability of future audits. The sanctions may be as severe as revoking a firm's registration or barring a person from participating in audits of public companies. Lesser sanctions include monetary penalties and requirements for remedial measures, such as training, new quality control procedures, and the appointment of an independent monitor.

The Board may also hold hearings on registration applications, pursuant to Section 102 of the Act. Under the Board's registration rules, if the Board is unable to determine that a public accounting firm has met the standard for approval of an application, the Board may provide the firm with a notice of a hearing, which the firm may elect to treat as a written notice of disapproval for purposes of making an appeal to the Commission under Section 107. If such a firm chooses instead to request a hearing, the Board would, in appropriate circumstances, afford the firm a hearing pursuant to the rules.

With the exception of the changes discussed in Section B below, the rules adopted today are substantially similar to the rules proposed by the Board on July 28, 2003. The operation of those rules was summarized in greater detail in PCAOB Release No. 2003-012 (July 28, 2003).

- Special Issues Relating to Non-U.S. Firms

The nature and scope of the Board's oversight over non-U.S. accounting firms that audit the financial statements of U.S. public companies is the subject of an ongoing dialogue between the Board and its foreign counterparts. As the Board has previously stated, the Board is committed to accomplishing the oversight goals of the Act by coordinating in areas where there is a common programmatic interest without subjecting non-U.S. firms to unnecessary burdens. The adoption of these rules is not intended in any way to signal that the Board has already determined how its oversight should operate as to those firms. Before non-U.S. accounting firms are required to register with the Board, the Board intends to issue a release describing how it will carry out its investigative and disciplinary responsibilities with respect to such firms.

B. Public Comment Process and Board Responses

The Board proposed rules on investigations and adjudications, and released them for public comment, on July 28, 2003. The Board received 17 written comment letters.[1/] In response to these comments, the Board's final rules both clarify and modify certain aspects of the proposal. Most importantly, the changes include –

- Clarifying the Board's views of what privileges may be invoked in Board proceedings, including that the Board will not treat proper invocations of the Fifth Amendment privilege against self-incrimination as noncooperation;

- Reducing the reach of noncooperation sanctions in the context of testimony, by eliminating the possibility that omitting material information, can, by itself, be grounds for a noncooperation proceeding;

[1/] The Board's responses to the comments are discussed in more detail in the section-by-section analysis in Appendix B. The comment letters are available on the Board's website – www.pcaobus.org – and will be attached to the Board's Form 19b-4, to be filed with the Commission.

- Specifying that the Board staff bears the burden of proof by a preponderance of the evidence in a disciplinary proceeding;

- Clarifying that the Board will not withhold material exculpatory evidence from a respondent;

- Requiring that any exercise of the Board's authority to conduct an examination to verify information supplied in an investigation must be approved by the Director of the Board's Division of Enforcement and Investigations;

- Clarifying how a bar or suspension of an associated person affects the ways in which a firm may compensate that person;

- Clarifying in the rules that all staff in the Board's Division of Enforcement and Investigations will be excluded from participating in the adjudication of any disciplinary proceeding;

- Revising the definition of "hearing officer" to provide that neither a Board member nor interested staff may serve as a hearing officer;

- Expanding the scope of the Board's staff that is covered by restrictions on ex parte communications with the Board after a disciplinary proceeding is authorized;

- Providing that firms can produce copies of documents in response to a demand for the production of documents, unless the accounting board demand expressly requires originals to be produced;

- Providing that permission for an attorney to withdraw as counsel in a proceeding before the Board or a hearing officer will not be unreasonably withheld;

- Extending the time for witnesses to request changes to the transcript of their testimony;

- Requiring Board staff to provide a "privilege log" for certain documents that the staff withholds from respondents based on a claim of privilege;

- Revising the procedures for appeals to the Board of actions taken by Board staff under delegated authority;

- Allowing state regulatory authorities to participate in a proceeding for purposes of requesting a stay of the proceeding; and

- Clarifying when a firm's registration may be suspended for failing to pay a money penalty.

* * *

On the 29th day of September, in the year 2003, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ J. Gordon Seymour
Acting Secretary

September 29, 2003

APPENDICES –

1. Rules Relating to Investigations and Adjudications

2. Section-by-Section Analysis of Rules Relating to Investigations and Adjudication

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Appendix 1 – Proposed Rules Relating to Investigations and Adjudications

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Public Company Accounting Oversight Board

RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

Rule 1000. [Reserved]

Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires –

(a)(ix) Accounting Board Demand

The term "accounting board demand" means a command to produce documents and/or to appear at a certain time and place to give testimony.

(a)(x) Accounting Board Request

The term "accounting board request" means a request to produce documents and/or to appear at a certain time and place to give testimony.

(b)(ii) Bar

The term "bar" means a permanent disciplinary sanction prohibiting a person from being associated with a registered public accounting firm.

(c)(ii) Counsel

The term "counsel" means an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

(d)(i) Disciplinary Proceeding

The term "disciplinary proceeding" means a proceeding initiated by an order instituting proceedings, held for the purpose of determining whether or not a registered public accounting firm, or any person associated with a registered public accounting firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards; or has failed reasonably to supervise an associated person in connection with any such violation by that person; or has failed to cooperate with the Board in

connection with an investigation; and whether to impose a sanction pursuant to Rule 5300.

(d)(ii) Document

The term "document" is synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to audit work papers.

(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 to preside at a hearing.

(i)(iv) Interested Division

The term "interested division" means a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding.

(o)(ii) Order Instituting Proceedings

The term "order instituting proceedings" means an order issued by the Board commencing a disciplinary proceeding.

(p)(iii) Party

The term "party" means the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

(p)(iv) Person

The term "person" means any natural person or any business, legal or governmental entity or association.

(r)(iii) Revocation

The term "revocation" means a permanent disciplinary sanction terminating a firm's registration.

(s)(iii) Secretary

The term "Secretary" means the Secretary of the Board.

(s)(iv) Suspension

The term "suspension" means a temporary disciplinary sanction, which lapses by its own terms, prohibiting –

(1) a registered public accounting firm from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer; or

(2) a person from being associated with a registered public accounting firm.

Rule 1002. Time Computation

In computing any period of time prescribed in or allowed by these Rules or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed by rule or order for service by mail. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a federal legal holiday.

Note: The Secretary will maintain a list of federal legal holidays.

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SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

Rule 5000. General

A registered public accounting firm, and any person associated with such a firm, shall comply with all Board orders to which the firm or person is subject.

Part 1 – Inquiries and Investigations

Rule 5100. Informal Inquiries

(a) Commencement of an Informal Inquiry

The Director of Enforcement and Investigations may undertake an informal inquiry where it appears that, or to determine whether, an act or practice, or omission to act, by a registered public accounting firm, any associated person of that firm, or both, may violate –

(1) any provision of the Act;

(2) the Rules of the Board;

(3) the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act; or

(4) professional standards.

(b) Informal Inquiry Activities

In an informal inquiry, the Director of Enforcement and Investigations may request documents, information or testimony from, or an interview with, any person.

Rule 5101. Commencement and Closure of Investigations

(a) Commencement of Investigations

(1) Order of Formal Investigation

Upon the recommendation of the Director of Enforcement and Investigations or the Director of Registration and Inspections, or upon the Board's own initiative, or otherwise, the Board may issue an order of formal investigation when it appears that an act or practice, or omission to act, by a registered public accounting firm or any person associated with a registered public accounting firm may violate any provision of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards.

(2) Designation of Staff

In an order of formal investigation, the Board may designate members, or groups of members, of the Board's staff to issue accounting board demands to, and otherwise require or request cooperation of, any person pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent the information sought is relevant to the matters described in the Board's order of investigation.

(b) Closure of Investigations

Upon the recommendation of the Director of Enforcement and Investigations, or on its own initiative, the Board may issue an order terminating or suspending, for a specified period of time, a formal investigation.

Rule 5102. Testimony of Registered Public Accounting Firms and Associated Persons in Investigations

(a) General

The Board, and the staff of the Board designated in an order of formal investigation, may require the testimony of any registered public accounting firm or any

person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation.

(b) Accounting Board Demand for Testimony

The Board, and the staff of the Board designated in an order of formal investigation, shall require testimony by serving an accounting board demand that –

(1) gives reasonable notice of the time and place for the taking of testimony;

(2) states the method or methods by which the testimony shall be recorded, which may be by sound or sound-and-visual, but shall include by stenographic means; and

(3) if the person to be examined is a registered public accounting firm, a description with reasonable particularity of the matters on which examination is requested.

(c) Conduct of Examination

(1) Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

(2) General

Examinations shall be conducted before a reporter designated by the Board's staff.

(3) Persons Permitted to be Present

Persons permitted to be present at an examination pursuant to this Rule are limited to –

(i) the person being examined and his or her counsel, subject to Rule 5109(b);

(ii) any Board member or member of the staff of the Board;

(iii) the reporter; and

(iv) such other persons as the Board, or the staff of the Board designated in the order of formal investigation, determine are appropriate to permit to be present; provided, however, that in no event shall a person other than the witness who has been or is reasonably likely to be examined in the investigation be present.

(4) Examinations of Registered Public Accounting Firms

A registered public accounting firm subject to an accounting board demand shall designate one or more individuals who consent to testify on its behalf, and may set forth, for each individual designated, the matters on which the individual will testify. The individuals so designated shall testify as to matters known or reasonably available to the registered public accounting firm.

(d) Transcript

A witness shall have 15 days, or such longer period as the Director of Enforcement and Investigations may allow, after being notified by the reporter that the transcript, or, where applicable, video or other recording, is available in which to review the transcript or other recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the witness for making them. The reporter shall make a certificate in writing to accompany the transcript, which shall indicate –

(1) that the witness was duly sworn by the officer and that the transcript is a true record of the testimony given by the witness; and

(2) whether the witness requested to review the transcript and, if so, that the reporter has appended any changes made by the witness during the period allowed.

Rule 5103. Demands for Production of Audit Workpapers and Other Documents from Registered Public Accounting Firms and Associated Persons

(a) General

The Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board demand for the production of audit work papers or any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board or its staff considers relevant or material to the investigation.

(b) Time and Manner of Production

An accounting board demand shall set forth a reasonable time and place for production. Unless an accounting board demand expressly requires the production of original documents, copies of the requested documents may be produced. If the originals are not produced, they shall be maintained in a reasonably accessible manner, shall be readily available for inspection by the staff, and shall not be destroyed without the staff's consent. Unless an accounting board demand expressly requests or permits printed copies of electronic documents, documents that exist in electronic form shall be produced in that form.

Rule 5104. Examination of Books and Records in Aid of Investigations

Upon demand and without regard to the Board's Rules under Section 104 of the Act, the Board, and, with the approval of the Director of Enforcement and Investigations, the staff of the Board designated in an order of formal investigation, may examine the books and records of any registered public accounting firm or associated person to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation.

Rule 5105. Requests for Testimony or Production of Documents from Persons Not Associated With Registered Public Accounting Firms

(a) Testimony

The Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board request for the testimony of any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation.

(1) Requests for Testimony

An accounting board request for testimony pursuant to subparagraph (a) of this Rule shall –

(i) give appropriate notice, subject to the needs of the investigation of the time and place for the taking of testimony;

(ii) state the method or methods by which the testimony shall be recorded, which may be by sound or sound-and-visual, but shall include by stenographic means; and

(iii) if the person to be examined is an issuer, an association, a governmental agency, or other organized entity, provide a description with reasonable particularity of the matters on which examination is requested.

(2) Conduct of Examination and Transcript

An examination requested pursuant to this Rule shall be conducted consistent with Rules 5102(c) and a transcript shall be prepared consistent with Rule 5102(d). If the person to be examined is an issuer, or a partnership or association or governmental agency, the person to be examined shall designate one or more individuals who consent to testify on its behalf and may set forth, for each individual designated, the matters on which the individual will testify. The individuals so designated shall testify as to matters known or reasonably available to the organization.

(b) Documents

The Board, and the staff of the Board designated in an order of formal investigation, may issue an accounting board request to any person, including any issuer, for the production of any document that is relevant or material to an investigation, with appropriate notice, subject to the needs of the investigation. A request issued pursuant to this Rule shall set forth a reasonable time and place for production, subject to the needs of the investigation.

Note: Failure to comply with an accounting board request pursuant to Rule 5105 may result in a Board request for the issuance of a Commission subpoena, pursuant to Rule 5111.

Rule 5106. Assertion of Claim of Privilege

(a) Required Information Supporting Assertion

When a claim of privilege is asserted in objecting to any accounting board demand for information, including but not limited to testimony or an examination under Rule 5104, and an answer or document is not provided on the basis of such assertion,

(1) the person asserting the privilege, or his or her attorney, shall identify the nature of the privilege (including attorney work product) that is being claimed and indicate the relevant jurisdiction's privilege rule being invoked; and

(2) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information –

(i) for documents: (A) the type of document, (e.g., letter or memorandum); (B) the general subject matter of the document; (C) the date of the document; and (D) such other information as is sufficient to identify the document for a Commission subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other; and

(ii) for oral communications: (A) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (B) the date and place of communication; and (C) the general subject matter of the communication.

(b) Claims During Testimony

Where a claim of privilege is asserted during testimony, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) shall be furnished –

(1) at the deposition, to the extent it is readily available from the witness or otherwise; or

(2) to the extent the information is not readily available at the deposition, in writing within five business days after the deposition session at which the privilege is asserted, unless otherwise agreed by the staff of the Board.

(c) Claims Other than During Testimony

Where a claim of privilege is asserted in response to an accounting board demand for information other than during testimony, the information set forth in paragraph (a) shall be furnished in writing at the time of the response to such accounting board demand, unless otherwise agreed by the Board or its staff.

Rule 5107. Uniform Definitions in Demands and Requests for Information

(a) General

The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all accounting board demands. This Rule shall not preclude (1) the definition of other terms specific to the particular inquiry or investigation, (2) the use of abbreviations, or (3) a more narrow definition of a term defined in paragraph (c).

(b) Scope

This Rule is not intended to broaden or narrow the scope of the Board's authority to request information permitted by the Act.

(c) Definitions

The following definitions apply to all accounting board demands –

(1) Communication

The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) Document

The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to audit work papers.

(3) Identify (with respect to person)

When referring to a person, to "identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person

has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent requests for the identification of that person.

(4) Identify (with respect to documents)

When referring to documents, to "identify" means to give, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document; and (iv) author(s), addressee(s) and recipients(s).

(5) Person

The term "person" is defined as any natural person or any business, legal or governmental entity or association.

(6) Concerning

The term "concerning" means relating to, referring to, describing, evidencing or constituting.

(d) Rules of Construction

The following rules of construction apply to all discovery requests –

(1) All/Each

The terms "all" and "each" shall be construed as all and each.

(2) And/Or

The connectives "and" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the request for information all responses that might otherwise be construed outside of its scope.

(3) Number

The use of the singular form of any word includes the plural and vice versa.

Rule 5108. Confidentiality of Investigatory Records

(a) Informal inquiries and formal investigations, and any documents, testimony or other information prepared or received by or specifically for the Board or the staff of the Board in connection with such inquiries and investigations, shall be confidential in the hands of the Board, unless and until presented in connection with a public proceeding or released in accordance with Section 105(c) of the Act, and the Board's Rules thereunder; provided, however, that the Board may make such information available –

(1) to the Commission; and

(2) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors, to the following –

(a) the Attorney General of the United States;

(b) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

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

(d) any appropriate State regulatory authority.

(b) Nothing in paragraph (a) of this rule shall prohibit the Board or the staff of the Board from disclosing any documents, testimony, or other information to any other person as is reasonably necessary to carry out the Board's responsibility, under Section 105 of the Act, to conduct investigations according to fair procedures.

Note: Under Section 105(b)(5) of the Act, the documents described in Rule 5108 "shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the federal government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until

presented in connection with a public proceeding or released in accordance with subsection (c)" of Section 105 of the Act.

Note: The Director of Enforcement and Investigations may engage in and may authorize members of the Board's staff to engage in discussions with persons identified in Rule 5108, or their staff, concerning information obtained in an informal inquiry or a formal investigation.

Rule 5109. Rights of Witnesses in Inquiries and Investigations

(a) Review of Order of Formal Investigation

Any person who is compelled to testify or produce documents pursuant to a subpoena issued pursuant to Rule 5111, or who testifies or produces documents pursuant to an accounting board demand or request, shall, upon request, be shown the Board's order of formal investigation. In the discretion of the Director of Enforcement and Investigations, a copy of the order of formal investigation may also be furnished to such a person for his or her retention, subject to such limits on dissemination as the Director may require.

(b) Right to Counsel

Any person compelled to testify pursuant to a subpoena issued pursuant to Rule 5111, or who appears pursuant to an accounting board demand or request, may be accompanied, represented and advised by counsel, subject to Rule 5102(c)(3), provided, however, that the counsel provide the Board's staff with a notice of appearance that states, or state on the record at the commencement of testimony, that the counsel represents the witness.

(c) Inspection and Copying

Upon written request to the Director of Enforcement and Investigations and proper identification, a witness may inspect the official transcript of the witness's own testimony. Upon written request and payment of the appropriate fees to cover the cost of production or reproduction, a person who has submitted documentary evidence or testimony in an informal inquiry or formal investigation may procure a copy of such evidence or the transcript of such testimony, except that prior to such evidence or testimony being presented in connection with a proceeding or released in accordance

with Section 105(c) of the Act, and the Board's Rules thereunder, the Director of Enforcement and Investigations may for good cause deny such request.

(d) Statements of Position

Registered public accounting firms, and persons associated with firms, who become involved in an informal inquiry or a formal investigation may, on their own initiatives, submit a written statement to the Board setting forth their interests and positions in regard to the subject matter of the investigation. Upon request, the Board's staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to those persons and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Board for the commencement of a disciplinary proceeding. In the event a recommendation for the commencement of a disciplinary proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Board in conjunction with the staff recommendation.

Rule 5110. Noncooperation with an Investigation

(a) Grounds for Instituting Proceedings

The Board may institute a disciplinary proceeding pursuant to Rule 5200(a)(3) for noncooperation with an investigation if it appears to the Board, on the recommendation of the Director of Enforcement and Investigations or otherwise, that a registered public accounting firm, or a person associated with a such a firm –

(1) may have failed to comply with an accounting board demand;

(2) may have knowingly made any false material declaration or made or used any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration;

(3) may have abused the Board's processes for the purpose of obstructing an investigation; or

(4) may otherwise have failed to cooperate in connection with an investigation.

(b) Special and Expedited Procedures

Disciplinary proceedings instituted pursuant to Rule 5200(a)(3) for noncooperation with an investigation shall be subject to special and expedited procedures as described in Rules 5201(b)(3), 5300(b), 5302(d), 5421(b), 5422(a)(2), 5422(d), 5445(b), and 5460(a)(2)(ii).

Rule 5111. Requests for Issuance of Commission Subpoenas in Aid of an Investigation

(a) General

The Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and the production of, any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation.

(b) Application for a Subpoena

An application for a subpoena submitted to the Commission shall include –

(1) a completed form of subpoena; and

(2) such other information as the Commission may require.

Rule 5112. Coordination and Referral of Investigations

(a) Commission Notification of Order of Formal Investigation

As soon as practicable after entry of an order of formal investigation pursuant to Rule 5101 that involves a potential violation of the securities laws, the Secretary of the Board shall send a copy of the order to the Commission, or any staff of the Commission designated to receive orders of formal investigation by the Board, and Board staff shall thereafter coordinate their work with the work of the Commission's Division of Enforcement, as necessary to protect any ongoing Commission investigation.

(b) Board Referrals of Investigations

The Board may refer any investigation to the Commission and, in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), to such regulator.

(c) Commission-directed Referrals of Investigations

At the direction of the Commission, the Board may refer any investigation to –

(1) the Attorney General of the United States;

(2) the attorney general of one or more States; and

(3) an appropriate State regulatory authority.

Part 2 – Disciplinary Proceedings

Rule 5200. Commencement of Disciplinary Proceedings

(a) Grounds for Commencement of Disciplinary Proceedings

The Board may commence a disciplinary proceeding when –

(1) it appears to the Board, as the result of an investigation or otherwise, that a hearing is warranted to determine whether a registered public accounting firm, or an associated person of such a firm, has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards;

(2) it appears to the Board, as the result of an investigation or otherwise, that a hearing is warranted to determine whether a registered public accounting firm, or the supervisory personnel of such a firm, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards, and such associated person commits a violation of the Act, or any of such rules, laws, or standards;

(3) it appears to the Board that a hearing is warranted pursuant to Rule 5110.

(b) Appointment of a Hearing Officer

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) obtaining a court reporter to administer oaths and affirmations;

(2) issuing accounting board demands pursuant to Rule 5424;

(3) receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(4) regulating the course of a proceeding and the conduct of the parties and their counsel;

(5) holding prehearing and other conferences and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(6) recusing himself or herself upon motion made by a party or upon his or her own motion;

(7) ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(8) subject to any limitations set forth elsewhere in these Rules, considering and ruling upon all procedural and other motions;

(9) preparing an initial decision as provided in Rule 5204;

(10) upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board;

(11) informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods; and

(12) scheduling hearing dates, except that a hearing officer may not, absent the approval of the Board, change a hearing date set by Board order.

(c) 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) 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 5201. Notification of Commencement of Disciplinary Proceedings

(a) Notice

Whenever an order instituting proceedings is issued by the Board, the Secretary shall give each firm or person charged appropriate notice of the order within a time reasonable in light of the circumstances. If the order instituting proceedings sets a hearing date, each party shall be given notice of the hearing within a time reasonable, in light of the circumstances, in advance of the hearing.

Note: Paragraph (a) requires that appropriate notice of an order instituting proceedings be given. Where emergency or expedited action is sought, notice of a hearing may be given prior to formal service of the order instituting proceedings by any means calculated to give actual notice that a hearing will be held.

(b) Content of Order Instituting Proceedings

An order instituting proceedings issued pursuant to subparagraph (a) shall include a short and plain statement of the matters of fact and law to be considered and determined with respect to each person charged, including –

(1) in the case of a proceeding instituted pursuant to Rule 5200(a)(1) –

(i) the conduct alleged to have violated the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports or the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act and professional standards; and

(ii) the rule, statute or standard violated;

(2) in the case of a proceeding instituted pursuant to Rule 5200(a)(2) –

(i) the failure to supervise alleged to have violated the Rules of the Board or to have failed to prevent violations of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports or the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act and applicable professional standards; and

(ii) the violative conduct of the supervised associated person and the rule, statute or standard violated; or

(3) in the case of a proceeding instituted pursuant to Rule 5200(a)(3) –

(i) the conduct alleged to constitute the failure to cooperate with an investigation; and

(ii) a hearing date.

(c) Notice of a Hearing on a Registration Application

In the case of a proceeding pursuant to Rule 5500, the notice of a hearing shall state proposed grounds for disapproving the registration application.

(d) Amendment to Order Instituting Proceedings

(1) By the Board

Upon motion by the interested division, the Board may, at any time, amend an order instituting proceedings, or a notice of a hearing, to include new matters of fact or law.

(2) By the Hearing Officer

Upon motion by the interested division, the hearing officer may, at any time prior to the filing of an initial decision or, if no proposed initial decision is to be filed, prior to

the time fixed for the filing of final briefs with the Board, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

> Note: Where amendments to an order instituting proceedings are intended to correct an error, to conform the order to the evidence or to take into account subsequent developments which should be considered in disposing of the proceeding, and the amendments are within the scope of the original order, either a hearing officer or the Board has authority to amend the order. Since, however, the Board has not delegated its authority to authorize orders instituting proceedings, hearing officers do not have authority to initiate new charges or to expand the scope of matters set down for hearing beyond the framework of the original order instituting proceedings.

Rule 5202. Record of Disciplinary Proceedings

(a) Contents of the Record

(1) Record of a Disciplinary Proceeding

A hearing record shall consist of –

(i) the order instituting proceedings, each notice of hearing and any amendments;

(ii) each application, supplemental application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(iii) each stipulation, transcript of testimony and document or other information admitted into evidence;

(iv) each written communication accepted by the hearing officer pursuant to Rule 5420;

(v) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal pursuant to Rule 5402, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(vi) all motions, briefs and other papers filed on interlocutory appeal;

(vi) any proposed findings and conclusions;

(viii) each written order or notice issued by the hearing officer or the Board; and

(ix) any other document or item accepted into the record by the Board or the hearing officer.

(2) Record on Disapproval of Application for Registration

The record on a disapproval of an application with respect to which the applicant has elected to waive its opportunity for a hearing pursuant to Rule 5500 shall consist of –

(i) the application for registration, and any supplemented application;

(ii) any additional information provided by the applicant;

(iii) any other information obtained by the Board in connection with the application;

(iv) the notice of a hearing and any written order issued by the Board; and

(v) any other document or item accepted into the record by the Board.

(b) Documents Not Admitted

Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any documents offered in evidence but excluded until all opportunities for Commission and judicial review have been exhausted or waived.

(c) Substitution of Copies

A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this Rule.

(d) Preparation of Record and Certification of Record Index

Promptly after the close of a hearing, the hearing officer shall transmit to the Secretary an index of any motions, exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any party may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. The initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(e) Final Transmittal of Record Items to the Secretary

After the close of a hearing, the hearing officer shall transmit to the Secretary originals of exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer, and any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

Rule 5203. Public and Private Hearings

No hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.

Rule 5204. Determinations in Disciplinary Proceedings

(a) Burden of Proof

In any disciplinary proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3), the interested division shall bear the burden of proving an alleged violation or failure to supervise by a preponderance of the evidence.

(b) Initial Decision of a Hearing Officer

Unless the Board directs otherwise, a hearing officer shall prepare an initial decision in any proceeding in which the Board directs a hearing officer to preside at a hearing. An initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and such other information as the Board may require.

Note: Unless the Board has directed otherwise, the Board expects hearing officers in proceedings instituted pursuant to Rule 5200(a)(1) or Rule 5200(a)(2) to prepare initial decisions within 60 days after the deadline for filing post-hearing briefs or other submissions; the Board expects hearing officers in proceedings instituted pursuant to Rule 5200(a)(3) to prepare initial decisions within 30 days after deadline for filing post-hearing briefs; and the Board expects hearing officers in proceedings pursuant to Rule 5500 to prepare initial decisions within 45 days after the deadline for filing post-hearing briefs or other submissions.

(c) Filing, Service and Publication

The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties. In a public proceeding, the Secretary shall as soon as practicable thereafter publish the initial decision, unless the Board otherwise directs.

(d) When Final

(1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary.

(2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.

(3) The Secretary shall not issue a notice of finality as to any party

(i) who has filed a timely petition for review; or

(ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205. Settlement of Disciplinary Proceedings Without a Determination After Hearing

(a) Availability

Any firm or person who is notified that a proceeding may or will be instituted against him or her, or any firm or person that is a party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) Procedure

An offer of settlement shall state that it is made pursuant to this Rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(2) and (3) of this Rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the Director of Enforcement and Investigations.

(c) Consideration of Offers of Settlement

(1) The Director of Enforcement and Investigations shall present an offer of settlement to the Board with his or her recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Board unless the person making the offer so requests.

(2) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer –

(i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of post-hearing briefs or other submissions, proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(3) By submitting an offer of settlement the person further waives –

(i) such provisions of the Rules of Board Procedure or other requirements of law as may be construed to prevent any member of the Board's staff from participating in the preparation of, or advising the Board as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any right to claim bias or prejudgment by the Board based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(4) If the Board rejects the offer of settlement, the person making the offer shall be notified of the Board's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. Rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(3) of this Rule with respect to any discussions concerning the rejected offer of settlement.

(5) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Board.

Note: In a hearing on disapproval of registration, an offer of settlement will be considered and handled by the Director of Registration and Inspections in accordance with Rule 5206 as if the Director of Registration and Inspections were the Director of Enforcement and Investigations.

Rule 5206. Automatic Stay of Final Disciplinary Actions

No final disciplinary sanction of the Board shall be effective until the later of –

(a) Commission action to dissolve the stay provided by Section 105(e) of the Act; or

(b) the expiration of the period during which, on its own motion, or upon application pursuant to Section 19(d)(2) of the Exchange Act, the Commission may institute review of the sanction.

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Part 3 – Disciplinary Sanctions

Rule 5300. Sanctions

(a) Sanctions in Proceedings Instituted Pursuant to Rule 5200(a)(1) or Rule 5200(a)(2)

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to the applicable limitations under Section 105(c)(5) of the Act, including –

(1) temporary suspension or permanent revocation of registration;

(2) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(3) temporary or permanent limitation on the activities, functions or operations of such firm or person (other than in connection with required additional professional education or training);

Note: Limitations on the activities, functions or operations of a firm may include prohibiting a firm from accepting new audit clients for a period of time, requiring a firm to assign a reviewer or supervisor to an associated person, requiring a firm to terminate one or more audit engagements, and requiring a firm to make functional changes in supervisory personnel organization and/or in engagement team organization.

(4) a civil money penalty for each such violation, in an amount equal to –

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

(ii) in any case to which Section 105(c)(5) of the Act applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(5) censure;

(6) require additional professional education or training;

(7) require a registered public accounting firm to engage an independent monitor, subject to the approval of the Board, to observe and report on the firm's compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards;

(8) require a registered public accounting firm to engage counsel or another consultant to design policies to effectuate compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards;

(9) require a registered public accounting firm, or a person associated with such a firm, to adopt or implement policies, or to undertake other actions, to improve audit quality or to effectuate compliance with the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards; and

(10) require a registered public accounting firm to obtain an independent review and report on one or more engagements.

(b) Sanctions in Proceedings Instituted Pursuant to Rule 5200(a)(3)

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm, or a person associated with such a firm, has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, including –

(1) the sanctions described in subparagraphs (1) – (5) of paragraph (a) of this Rule;

(2) requiring a registered public accounting firm to engage a special master or independent monitor, appointed by the hearing officer, to monitor and report on the firms' compliance with an accounting board demand or with future accounting board demands; or

(3) authorizing the hearing officer to retain jurisdiction to monitor compliance with an accounting board demand or with future account board demands and to rule on future disputes, if any, related to such demands.

Note: Rule 5300 does not preclude the imposition of any sanction, on consent, in the context of a settlement, notwithstanding that the sanction is not listed in the Rule.

Rule 5301. Effect of Sanctions

(a) Effect on Persons

No person that is suspended or barred from being associated with a registered public accounting firm, or has failed to comply with any sanction pursuant to Rule 5300, may willfully become or remain associated with any registered public accounting firm, without the consent of the Board, pursuant to Rule 5302, or the Commission.

Note: A person who is suspended or barred from being associated with a registered public accounting firm may not, in connection with the preparation or issuance of any audit report, (i) share in the profits of, or receive compensation in any other form from, any registered public accounting firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm. See Rule 1001(p)(i).

(b) Effect on Registered Public Accounting Firms

No registered public accounting firm that knows, or, in the exercise of reasonable care should have known, of the suspension or bar of a person may permit such person to become or remain associated with it, without the consent of the Board, pursuant to Rule 5302, or the Commission.

Note: Rule 5301(b) prohibits a registered public accounting firm from permitting a person subject to a suspension or bar, in connection with the preparation or issuance of any audit report, to (i) share in the profits of, or receive compensation in any other form from, such firm, or (ii) participate as agent on behalf of such a firm in any activity of that firm. See Rule 1001(p)(i).

Rule 5302. Applications for Relief From, or Modification of, Revocations and Bars

(a) Application for Registration After a Revocation of Registration

Unless the Board orders otherwise, any public accounting firm whose registration has been revoked pursuant to a Board determination that permitted the firm an opportunity to reapply for registration after a specified time period has lapsed may file an application for registration pursuant to Rule 2101 after the specified time period has lapsed. The revocation of the firm's registration shall continue, however, unless and until an application for registration is approved pursuant to Rule 2106(b)(1).

(b) Petition to Terminate a Bar

(1) Scope

Any person subject to a bar imposed by an order that contains a proviso that a petition to terminate the bar may be made to the Board after a specific period of time may file a petition for Board consent to associate, or to change the terms and conditions of association, with a registered public accounting firm.

(2) Form of Petition

A petition to terminate a bar shall be supported by an affidavit that addresses the factors set forth in subparagraph (b)(4) of this Rule and shall include as exhibits –

(i) a copy of the Board order imposing the bar;

(ii) a copy of any Commission or court order concerning the bar;

(iii) a written statement by the proposed registered public accounting firm with which the petitioner wishes to associate that describes –

(A) the terms and conditions of employment and supervision to be exercised over such petitioner and, where applicable, by such petitioner;

(B) the qualifications, experience, and disciplinary records of the proposed supervisor(s) of the petitioner;

(C) the compliance and disciplinary history, during the two years preceding the filing of the petition, of the registered public accounting firm with which the petitioner wishes to be associated; and

(D) the names of any other associated persons in the same registered public accounting firm who have previously been barred by the Board or the Commission, and whether they are to be supervised by the petitioner.

(3) Required Showing

The petitioner shall make a showing satisfactory for the Board to be able to determine that the proposed association would be consistent with the public interest.

(4) Factors to be Addressed

The affidavit required by paragraph (b)(2) of this Rule shall address each of the following –

(i) the time period since the imposition of the bar;

(ii) any restitution or similar action taken by the petitioner to recompense any person injured by the misconduct that resulted in the bar;

(iii) the petitioner's compliance with the order imposing the bar;

(iv) the petitioner's employment during the period subsequent to the imposition of the bar;

(v) the capacity or position in which the applicant proposes to be associated;

(vi) the manner and extent of supervision to be exercised over such petitioner and, where applicable, by such petitioner;

(vii) any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her reassociation; and

(viii) any other information material to the petition.

(5) Notification to Petitioner and Written Statement

In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this rule, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall have 30 days to submit a written statement in response.

(c) Application for Termination of Other Revocations and Bars

Unless the Board orders otherwise, any firm or person that is subject to a revocation or bar pursuant to a Board determination that does not provide for an opportunity to reapply for registration, or to terminate a bar, may request leave to file an application for registration, or a petition to terminate a bar, at any time. The sanction shall continue, however, unless and until the Board has permitted and granted such an application or petition for good cause shown.

(d) Application for Termination of Sanctions for Noncooperation

Unless the Board orders otherwise, any firm or person that has remedied the noncooperation that formed the basis for a disciplinary sanction may file an application for termination of any such sanction that is ongoing. The sanction shall continue, however, unless and until it has been terminated by the Board.

(e) Applications for Termination of Other Sanctions

Unless the Board orders otherwise, any firm or person subject to a sanction pursuant to subparagraphs (3), (6), (7), (8), (9) or (10) of Rule 5300(a) may file an application for termination of any continuing sanction at any time, and the applicant may, in the Board's discretion, be afforded a hearing. The sanction shall continue, however, unless and until it has been terminated by the Board for good cause shown.

Rule 5303. Use of Money Penalties

Subject to the availability in advance in an appropriations act, all civil money penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, administered by the Board or by an entity or agent identified by the Board.

Rule 5304. Summary Suspension for Failure to Pay Money Penalties

(a) Registered Public Accounting Firms

If, thirty days after exhaustion of all reviews and appeals, and the termination of any stay authorized by law or the Rules of the Board, a registered public accounting firm has failed to pay a money penalty imposed pursuant to Rule 5300(a)(4), the Board may, after seven days' notice in writing, summarily suspend the registration of the registered public accounting firm. Such a suspension of registration shall lapse upon payment, within 90 days, of the money penalty, plus interest. If payment is not made within 90 days, a suspension of registration shall be lifted only upon –

(1) payment of the money penalty, plus interest; and

(2) the filing of an application for registration pursuant to Rule 2101, and Board approval of that application pursuant to the Board's Rules relating to registration.

(b) Associated Persons

If, thirty days after exhaustion of all reviews and appeals, and the termination of any stay, authorized by law or the Rules of the Board, an associated person has failed to pay a money penalty imposed pursuant to Rule 5300(a)(4), the Board may, after seven days' notice in writing, summarily suspend the associated person. If such a money penalty is not paid within 90 days of such notice, the Board may summarily bar such person.

Part 4 – Rules of Board Procedure

GENERAL

Rule 5400. Hearings

Hearings for the purpose of taking evidence shall be held only upon order of the Board. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

Rule 5401. Appearance and Practice Before the Board

A person shall not be represented before the Board or a hearing officer except as stated in paragraphs (a) or (b) of this Rule or as otherwise permitted by the Board or a hearing officer.

(a) Representing Oneself

In any proceeding, an individual may appear on his or her own behalf.

(b) Representing Others

In any proceeding, a person may be represented by counsel; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(c) Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal

(1) Representing Oneself

When an individual first makes any filing or otherwise appears on his or her own behalf before the Board or a hearing officer, he or she shall file with the Secretary both an electronic and a mailing address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours, and the individual shall promptly advise the Secretary of changes to that information during the course of the proceeding.

(2) Representing Others

When a person first makes any filing or otherwise appears in a representative capacity before the Board or a hearing officer, that person shall file with the Secretary, and keep current, a written notice stating the name of the proceeding; the representative's name, mailing address, electronic address and telephone number; and the name and electronic and mailing addresses of the person or persons represented; and, if the person is an attorney, a declaration that the attorney is admitted to practice before the Supreme Court of the United States or the highest court of any state, as defined in Section 3(a)(16) of the Exchange Act.

(3) Power of Attorney

Any individual appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the Board showing his or her authority to act in such capacity.

(4) Withdrawal

Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Board or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal. Leave to withdraw shall not be withheld absent good cause.

Rule 5402. Hearing Officer Disqualification and Withdrawal

(a) Motion for Withdrawal

A party who has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned, may make a motion to the hearing officer that the hearing officer withdraw, which shall be filed with the Secretary. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding. A motion for withdrawal shall be filed within 15 days after the later of –

(1) when the party learned of the facts believed to constitute the basis for the disqualification; or

(2) when the party was notified of the assignment of the hearing officer.

(b) Appointment 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, the Secretary will appoint a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is appointed 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.

Rule 5403. Ex Parte Communications

Except to the extent permitted for the disposition of ex parte matters as authorized by law or the Board's Rules –

(a) the person presiding over an evidentiary hearing may not consult a person or party on a fact in issue, unless on notice and with opportunity for all parties to participate; and

(b) neither a party, nor any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing, may –

(1) communicate with the person presiding over an evidentiary hearing on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) communicate with the Board or any member of the Board on a fact in issue, unless on notice and opportunity for all parties to participate or under circumstances in which a party excluded from the communication has waived the rights described in Rule 5205(c)(3) with respect to the matters that are the subject of the communication.

Rule 5404. Service of Papers by Parties

In every proceeding, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in a manner calculated to bring the paper to the attention of the party to be served.

Rule 5405. Filing of Papers With the Board: Procedure

(a) When to File

All papers required to be served by a party upon any person shall be filed with the Board at the time of service or promptly thereafter. Papers required to be filed with the Board must be received within the time limit, if any, for such filing.

(b) Where to File

Unless otherwise permitted by the Secretary, filing of papers with the Board shall be made by electronically filing them with the Secretary.

Note: When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Secretary, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date received electronically by the Secretary. Upon request, the Secretary may permit regulators granted permission to participate on a limited basis (to request a stay), amici curiae, nonparties and others to file in paper form. Where practicable, the Secretary will scan such a filing into the docket file.

Rule 5406. Filing of Papers: Form

(a) Specifications

Papers filed in connection with any proceeding shall –

(1) be formatted in a Portable Document Format on pages measuring 8½ x 11 inches, except that, upon consent of the Secretary for good cause, a document may be filed in paper form;

Note: To the extent that the reduction of larger documents would render them illegible, the Secretary may consent to the filing of such documents on larger paper, in electronic or paper form.

(2) include at the head of the paper, or on a title page, the name of the Board, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(3) be paginated with margins at least 1 inch wide; and

(4) be double-spaced in a 12-point font, with single-spaced footnotes and single-spaced indented quotations.

(b) Form of Briefs

All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

Rule 5407. Filing of Papers: Signature Requirement and Effect

Following the issuance of an order instituting proceedings, every filing of a party who represents himself or herself shall sign his or her individual name and state the date and his or her address and telephone number on every filing. A party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number.

Note: If practicable, a party's or an attorney's signature should be scanned into an electronic document. In any event, however, the use of an attorney's electronic mail address, or password for the Board's electronic filing system, shall constitute the signature of that attorney.

Rule 5408. Motions

(a) Generally

Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. Unless otherwise ordered by the Board or the hearing officer, if a motion is properly made to the Board concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Board. No oral argument shall be heard on any motion unless the Board or the hearing officer otherwise directs.

(b) Opposing and Reply Briefs

Except as provided in Rule 5427, and unless otherwise ordered by the Board or a hearing officer, a brief in opposition to a motion shall be filed within five days after service of the motion. Reply briefs are only permitted with leave of the hearing officer.

(c) Length Limitation

Except as provided in Rule 5427, a brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The hearing officer may grant requests for leave to file briefs in excess of 10 pages, upon a showing of good cause.

Rule 5409. Default and Motions to Set Aside Default

(a) Default

A party to a proceeding may be deemed to be in default and the Board or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings or notice of a hearing, the allegations of which may be deemed to be true, if that party fails –

(1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer when required to do so by a Board order, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Board or the hearing officer.

(b) Motion to Set Aside Default

A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Board at any time, may for good cause shown set aside a default.

Rule 5410. Additional Time For Service by Mail

If service is made by mail, three days shall be added to the prescribed period for response.

Rule 5411. Modifications of Time, Postponements and Adjournments

Except as otherwise provided by law, the Board, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision, may, for good cause shown, extend or shorten any time limits prescribed by these Rules for the filing of any papers and may, consistent with paragraph (b) of this Rule, postpone or adjourn any hearing.

Rules 5412. – 5419. [Reserved]

PREHEARING RULES

Rule 5420. Stay Requests

(a) Leave to Participate to Request a Stay

The Board or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, an appropriate state regulatory authority, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a Commission investigation or proceeding, a criminal investigation or prosecution, or a state regulatory proceeding, arising out of the same or similar facts that are at issue in the pending Board or disciplinary proceeding. Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. A stay granted pursuant to this Rule may be granted for such a period and upon such conditions as the Board or the hearing officer deems appropriate.

(b) Stay to Protect Ongoing Commission Investigation

Upon a showing that a stay requested pursuant to this Rule is necessary to protect an ongoing Commission investigation, the motion for the stay shall be granted.

(c) Other Stays

Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for the stay shall be favored.

Rule 5421. Answer to Allegations

(a) When Required

In its order instituting proceedings, the Board may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer.

(b) When to File

Unless additional time is granted by the hearing officer or the Board, a party filing an answer as provided in paragraph (a) of this Rule shall do so within 20 days after service upon the party of an order instituting proceedings pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, and within 5 days after service upon the party of an order instituting proceedings pursuant to Rule 5200(a)(3). If the order instituting proceedings is amended, the Board or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) Contents of Answer and Effect of Failure to Deny

Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

Rule 5422. Availability of Documents For Inspection and Copying

(a) Documents to be Available for Inspection and Copying

(1) Proceedings Commenced Pursuant to Rule 5200(a)(1) and 5200(a)(2)

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5200(a)(1) or Rule 5200(a)(2), the Division of Enforcement and Investigations shall make available for inspection and copying by any party to the proceeding –

(i) each request, subpoena, or accounting board demand for documents, testimony, or information issued in the investigation or in the informal inquiry, if any, that preceded the investigation or disciplinary proceeding;

(ii) responses to any such requests, subpoenas, and accounting board demands, including any documents produced in response;

(iii) testimony transcripts and exhibits, and any other verbatim records of witness statements;

(iv) all other documents prepared or obtained by the Division of Enforcement and Investigations in connection with the investigation prior to the institution of proceedings, except that the Division need not produce any documents described in subparagraph (b) that it does not intend to introduce as evidence.

(2) Proceedings Commenced Pursuant to Rule 5200(a)(3)

Unless otherwise provided by this Rule, or by order of the Board, the Division of Enforcement and Investigations shall make available for inspection and copying by any party to the proceeding all documents upon which the Division intends to rely in seeking a finding of noncooperation but shall not be required to make available any other documents.

(3) Proceedings Commenced Pursuant to Rule 5500

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5500, the Division of Registration and Inspections shall make available for inspection and copying by the applicant documents obtained by that division in connection with the registration application prior to the notice of hearing, except that the Division need not produce any documents described in subparagraph (b) that it does not intend to introduce as evidence.

(b) Documents That May Be Withheld

(1) The interested division may decline to make available for inspection and copying –

(i) any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration;

(ii) any other document that is privileged, including any other document protected by the attorney work product doctrine;

(iii) any document that would disclose the identity of a confidential source; and

(iv) any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(2) Nothing in this paragraph (b), or in paragraph (a)(2) above, authorizes the interested division in connection with a disciplinary proceeding or hearing on disapproval of registration to withhold documents that contain material exculpatory evidence.

(c) Procedures Concerning Withheld Documents

(1) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the respondent with a log of

documents withheld pursuant to paragraph (b)(1)(ii) of this Rule. The log shall provide the same information that a person would be required to supply to the Board under Rule 5106 in connection with a privilege assertion. On a motion by any respondent, a hearing officer may, in his or her discretion, require the interested division to submit any document listed on the log for inspection by the hearing officer in camera. A hearing officer may order that any such document be made available to a respondent for inspection and copying only if the hearing officer determines that the document is not a document described in paragraph (b)(1)(ii).

(2) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the hearing officer and each respondent with a list of documents withheld pursuant to paragraph (b)(1)(iii) or (b)(1)(iv) of this Rule and a brief description of the reason for withholding each document. The list provided to the respondent may be redacted as necessary to protect interests related to the interested division's reason for withholding the document. The hearing officer may require the interested division to submit any such document for inspection by the hearing officer in camera. The hearing officer may order that any such document be made available to the respondent for inspection and copying only if the hearing officer determines that –

(i) with respect to any document withheld pursuant to paragraph (b)(1)(iii) –

(A) producing the document would not have the effect of identifying a confidential source; or

(B) the document contains material, exculpatory evidence, provided, however, that to the extent such evidence can be disclosed without disclosing the identity of a confidential source, such identity shall not be disclosed.

(ii) with respect to any document withheld pursuant to paragraph (b)(1)(iv) –

(A) the document is relevant to the subject matter of the proceeding and no good cause exists for withholding it; or

(B) the document contains material, exculpatory evidence.

(d) Timing of Inspection and Copying

Unless otherwise ordered by the Board or the hearing officer, the interested division shall make documents available for inspection and copying to any respondent who is not in default under Rule 5409 no later than 14 days after the institution of proceedings pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, and no later than 7 days after proceedings have been instituted pursuant to Rule 5200(a)(3).

(e) Place of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to a party for inspection and copying at the Board office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A party shall not be given custody of the documents or leave to remove the documents from the Board's offices pursuant to the requirements of this Rule other than by written agreement of the interested division. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) Copying Costs and Procedures

A party may obtain a photocopy of any documents made available for inspection. The party shall be responsible for the cost of photocopying. The respondent shall be given access to the documents at the Board's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) Failure to Make Documents Available – Harmless Error

In the event that a document required to be made available to a party pursuant to this Rule is not made available by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the party shall establish that the failure to make the document available was not harmless error.

Note: The interested division's obligation under this Rule relates to documents obtained by that division. Documents located only in the files of other divisions or offices are beyond the scope of the Rule, except that documents located in the

files of other divisions and that the interested division intends to introduce as evidence shall, for purposes of this Rule, be treated as if they have been obtained by the interested division and must therefore be made available under this Rule.

Rule 5423. Production of Witness Statements

(a) Availability

Upon motion by any respondent in a disciplinary proceeding, the hearing officer may order that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce - Harmless Error

In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the interested division, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

(c) Definition of Statement

For purposes of this Rule, the term "statement" shall have the meaning set forth in 18 U.S.C. § 3500(e).

Rule 5424. Accounting Board Demands and Commission Subpoenas

(a) Accounting Board Demands and Requests

In connection with any hearing ordered by the Board, a party may request the issuance of an accounting board demand of a registered public accounting firm or an

associated person of such a firm, or an accounting board request of any other person. Such a demand or request may call for the attendance and testimony of a witness at the designated time and place of the hearing or for the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, an application for issuance of such a demand or request shall be made in writing and served on each party. A party whose application for such a demand or request has been denied or modified may not submit any other application seeking substantially the same testimony or other evidence specified in the denied application or excluded from an otherwise granted application.

(1) Unavailability of Hearing Officer

In the event that the hearing officer assigned to a proceeding is unavailable, any member of the Board, or other person designated by the Board for this purpose, may grant an application for the issuance of an accounting board demand or request. A party seeking such issuance may submit the application to the Secretary, who shall direct it to a person authorized to grant the request, deny the request, or grant the request with modifications.

(2) Signing May be Delegated

A hearing officer may authorize issuance of an accounting board demand, or an accounting board request, and may delegate the manual signing of the demand or request to any other person.

(3) Standards for Issuance

Where it appears that an application for an accounting board demand or request is reasonable in scope and is reasonably calculated to encompass, or lead to the discovery of, admissible evidence, the application shall be granted. If it appears that the accounting board demand or request sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, designed to seek irrelevant information, or sought for the purpose of harassment or delay, the application shall be denied. The hearing officer or other person ruling on the application may, in his or her discretion, as a condition precedent to the issuance of the demand or request, require the party seeking the demand or request to show the general relevance and reasonable scope of the testimony or other evidence sought. After consideration of all the circumstances, the hearing officer or other person ruling on the application may grant the application

upon such conditions or with such modifications as fairness requires. In making the determination, the hearing officer or other person ruling on the application may inquire of the parties whether they will stipulate to the facts sought to be proved.

> Note: Whenever possible, the parties should explore the extent to which stipulations of fact may obviate the need for issuance of accounting board demands and requests to non-parties, and the hearing officer or other person ruling on an application for issuance of an accounting board demand or request should encourage the parties to reach such stipulations when possible.

(4) Witness Fees

A witness, other than a party, who is summoned to a Board proceeding pursuant to an accounting board demand, or an accounting board request, or who is deposed pursuant to Rule 5425, shall be paid his or her reasonable expenses by the party at whose instance the witness appears.

(b) Commission Subpoenas

In connection with any hearing ordered by the Board, and upon the application of any party or on its own initiative, the Board may seek issuance by the Commission of a subpoena to any person, including any client of a registered public accounting firm, requiring the person to provide any testimony or produce any documents that the Board considers relevant or material to a Board proceeding.

Rule 5425. Depositions to Preserve Testimony for Hearing

(a) Procedure

Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

Note: Depositions under the Rules of Board Procedure are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not permitted for purposes of discovery.

(b) Required Finding When Ordering a Deposition

In the discretion of the Board or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, or otherwise unavailable, and that the taking of a deposition will serve the interests of justice.

(c) Procedure at Depositions

A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(d) Objections to Questions or Evidence

Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted in the transcript, but no person other than the hearing officer shall have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence during the deposition shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) Filing of Depositions

The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

Rule 5426. Prior Sworn Statements of Witnesses in Lieu of Live Testimony

At a hearing, any person wishing to introduce a prior, sworn statement of a nonparty witness otherwise admissible in the proceeding, in lieu of live testimony may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement in lieu of live testimony may be granted if –

(a) the witness is dead;

(b) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(c) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(d) the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand; or,

(e) in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rule 5427. Motion for Summary Disposition

(a) For Interested Division

After a party has filed an answer and documents have been made available to that respondent for inspection and copying pursuant to Rule 5422, or after service of a motion for summary disposition by the respondent, the interested division may make a motion for summary disposition of the proceedings with respect to that respondent.

(b) For Respondent

A respondent party may at any time make a motion for summary disposition of the proceeding with respect to that respondent.

(c) Pre-motion Conference Required

A party seeking summary disposition shall request and attend a pre-motion conference with the hearing officer before filing its motion for summary disposition.

(1) Due-date for Filing

At the pre-motion conference, the hearing officer will schedule a due-date for the submission of the motion for summary disposition and may, but is not required to, schedule a due-date for the submission of a response to the motion for summary judgment.

(2) Review and Decide Procedure

If the hearing officer has not scheduled a due-date for a response to the motion for summary judgment, upon review of the motion the hearing officer may decide to deny the motion or to require a response to the motion. A hearing officer shall not grant a motion for summary disposition until after the due-date for filing a response to the motion has passed.

(d) Decision on Motion

The hearing officer shall promptly grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law. A summary disposition, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to a sanction. A hearing officer's decision to deny a motion for summary disposition is not subject to interlocutory appeal.

(e) Lengths of Briefs

Neither a brief in support of a motion for summary disposition, nor a brief in response to such a motion, shall exceed 25 pages in length, without leave of the hearing officer. Reply briefs are discouraged and are not permitted without leave of the hearing officer.

Rules 5428. – 5439. [Reserved]

CONDUCT OF HEARINGS

Rule 5440. Record of Hearings

(a) Recordation

All hearings shall be recorded and a written transcript thereof shall be prepared.

(b) Availability of a Transcript

Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings shall be available for purchase only by parties, provided, however, that any person compelled to testify at a hearing may purchase a copy of that person's own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or other submissions, or within such earlier time as directed by the Board or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Rule 5441. Evidence: Admissibility

The Board or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Rule 5442. Evidence: Objections and Offers of Proof

(a) Objections

Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Board, however, unless raised –

(1) pursuant to interlocutory review in accordance with Rule 5461;

(2) in a proposed finding or conclusion filed pursuant to Rule 5445; or

(3) in a petition for Board review of an initial decision filed in accordance with Rule 5460.

(b) Offers of Proof

Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 5202(b).

Rule 5443. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 5444. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding, a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, shall be determined by the Board or the hearing officer in each proceeding.

Rule 5445. Post-hearing Briefs and Other Submissions

(a) At the end of the hearing in any proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500 in which an initial decision is to be issued, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which post-hearing briefs or other submissions are to be filed. Unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary –

(i) the party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing; and

(ii) the total period within which all such filings and any opposition and reply submissions are to be filed shall be no longer than 90 days after the end of the hearing.

(b) In any proceeding instituted pursuant to Rule 5200(a)(3), the hearing officer may, in his or her discretion, render an initial decision without allowing for post-hearing briefs or other submissions, or may allow for such briefs or other submissions according to an expedited schedule.

Rules 5446. – 5459. [Reserved]

APPEALS TO THE BOARD

Rule 5460. Board Review of Determinations of Hearing Officers

(a) Petition for Review of Initial Decision by Hearing Officers

Any party to a hearing may obtain Board review of an initial decision by filing a petition for review that –

(1) sets forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception; and

(2) is filed –

(i) in a proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500, within 30 days after service of the initial decision on the petitioner or within 10 days after the filing of a petition for review by another party, whichever is later; or

(ii) in a proceeding instituted pursuant to Rule 5200(a)(3), within 10 days after service of the initial decision on the petitioner.

(b) Review on Board's Initiative

The Board may, on its own initiative, order review of any initial decision, or a portion of any initial decision, at any time before the initial decision becomes final pursuant to Rule 5204(d).

(c) De Novo Review

Based on a petition for review, or on its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper based on the record.

(d) Limitations on Matters Reviewed

Review by the Board of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 5462(a). On notice to all parties, however, the Board may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) Summary Affirmance

The Board may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Board.

Rule 5461. Interlocutory Review

(a) Availability

The Board will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Board may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this Rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Board may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) Certification Process

A ruling submitted to the Board for interlocutory review shall be certified in writing by the hearing officer as appropriate for interlocutory review and shall specify the basis for certification. The hearing officer shall certify a ruling only if –

(1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that –

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(c) Proceedings Not Stayed

The filing of an application for interlocutory review or the grant of interlocutory review shall not stay proceedings before the hearing officer unless he or she, or the Board, shall so order. The Board will not consider the motion for a stay unless the motion has first been made to the hearing officer.

Rule 5462. Briefs Filed with the Board

(a) Briefing Schedule Order

Upon a timely and valid petition for review, or upon its own timely motion to review an initial decision, other than review ordered pursuant to Rule 5469, the Board shall issue a briefing schedule order directing the parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs may be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board. The briefing schedule order shall be issued –

(1) at the time the Board orders review on its own initiative pursuant to Rule 5460(b), or orders interlocutory review on its own motion pursuant to Rule 5460; or

(2) within 21 days, or such longer time as provided by the Board, after –

(i) the last day permitted for filing a petition for review pursuant to Rule 5204(d);

(ii) certification of a ruling for interlocutory review pursuant to Rule 5461(b).

(b) Contents of Briefs

Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) Length Limitation

Opening and opposition briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Board.

Rule 5463. Oral Argument Before the Board

(a) Availability

The Board, on its own motion or the motion of a party, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Board will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Board determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) Procedure

Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Board shall issue an order as to whether oral argument is

to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Board, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) Time Allowed

Unless the Board orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Board may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

Note: The term "side" is used in this Rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. If multiple parties have a common interest, they may constitute only a single side.

(d) Participation of Board Members

A member of the Board who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

Rule 5464. Additional Evidence

Upon its own motion or the motion of a party, the Board may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Board. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Any other party may file a response to the motion within 5 days after the motion is filed, or such longer time as the Board may allow. The Board may accept or hear additional evidence, or it may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

Rule 5465. Record Before the Board

The Board shall determine each matter on the basis of the record.

(a) Contents of the Record

In proceedings for final decision before the Board, the record shall consist of –

(1) all items part of the hearing record below in accordance with Rule 5202(a);

(2) any petitions for review, cross-petitions or oppositions; and

(3) all briefs, motions, submissions and other papers filed on appeal or review.

(b) Transmittal of Record to Board

Within 14 days after the last date set for filing briefs or such later date as the Board directs, the Secretary shall transmit the record to the Board.

(c) Review of Documents Not Admitted

Any document offered in evidence but excluded by the hearing officer or the Board and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Board on appeal but shall be transmitted to the Board by the Secretary if so requested by the Board. In the event that the Board does not request the document, the Secretary shall retain the document not admitted into the record until the later of –

(1) the date upon which the Board's order becomes final, or

(2) the conclusion of any Commission and judicial review of that order.

Rule 5466. Reconsideration

(a) Scope of Rule

A party may file a motion for reconsideration of a final order issued by the Board.

(b) Procedure

A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Board may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Board, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Board.

Rule 5467. Receipt of Petitions for Commission or Judicial Review

A registered public accounting firm –

(a) that has filed a petition for Commission review of a final disciplinary sanction of the Board pursuant to Section 19(d)(2) of the Exchange Act, or a petition for court review of a Commission order with respect to such a sanction pursuant to Section 25(a)(1) of the Exchange Act, or

(b) that is associated with a person, other than a person primarily associated with another registered public accounting firm, who has filed such a petition,

shall file a notice and copy of the petition with the Secretary within 10 days after the petition is made.

Note: Appeals of final disciplinary sanctions by the Board are instituted by the filing of a petition for review in accordance with the Commission's Rules of Practice. Unless directed otherwise by statute, appeals of Commission orders and decisions on a sanction imposed by the Board to a court of appeals are instituted by the filing of a petition for review in accordance with the Federal Rules of Appellate Procedure. See Fed. R. App. P. 15(a).

Rule 5468. Appeal of Actions Made Pursuant to Delegated Authority

(a) Notice of Intention to Petition for Review

A person intending to seek Board review of an action made pursuant to delegated authority shall file a written notice of intention to petition for review within five days after actual notice to the petitioner of the action or service of notice of the action, whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to Rule 5401(c). The Board will allow late filing of a notice of intention to petition for review upon a showing that a delay in service, through no fault of the petitioner's, made compliance with the time limit set forth in this paragraph impossible or unreasonably burdensome.

(b) Petition for Review

Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (a) of this Rule, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form. The Board will review all actions made pursuant to delegated authority with respect to which timely notices of intention to petition for review, and timely petitions for review, have been filed.

Rule 5469. Board Consideration of Actions Made Pursuant to Delegated Authority

(a) Board Review

Upon a petition for review, or upon its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to delegated authority. The Board may, in its discretion, act summarily on the basis of the petition, act on the basis of the petition and any written response provided by the staff and served on the petitioner, or request the submission of additional statements in support of or in opposition to the petition.

(b) No Stay of Effect of Delegated Action

An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Board. The effect of any action made pursuant to delegated authority shall not be stayed, and no petition for review shall operate as a stay, unless otherwise ordered by the Board.

Rules 5470. – 5499. [Reserved]

Part 5 – Hearings on Disapproval of Registration Applications

Rule 5500. Commencement of Hearing on Disapproval of a Registration Application

The Board may commence a proceeding to determine whether to approve or disapprove a public accounting firm's application for registration when, based on review of an application for registration as a registered public accounting firm –

(a) the Board determines, pursuant to Rule 2106(b)(2)(ii), to provide the applicant with written notice of a hearing to determine whether to approve or disapprove the application; and

(b) within such period, as the Board permits, after the date of service of a notice of a hearing whether to approve or disapprove an application for registration pursuant to Rule 2106(b)(2)(ii), the public accounting firm served with such notice files with the Secretary a written request for a hearing date and a notice of appearance pursuant to Rule 5401(c), and includes with the request –

(1) a statement that the public accounting firm has elected not to treat the notice as a written notice of disapproval for purposes of Section 102(c) of the Act; and

(2) a statement describing with specificity why the public accounting firm believes that the Board should not issue a written notice of disapproval.

Rule 5501. Procedures for a Hearing on Disapproval of a Registration Application

Proceedings instituted pursuant to Rule 5500 shall be subject to procedures as described in Parts 2 and 4 of Section 5 of the Board's Rules.

PCAOB
Public Company Accounting Oversight Board

Appendix 2 – Section-by-Section Analysis of Rules Relating to Investigations and Adjudications

The Board has adopted 64 rules relating to investigations and adjudications along with definitions that will appear in Rule 1001 and a general rule on time computation as Rule 1002. Each of the rules and definitions is discussed below.

Rule 1001 – Definitions of Terms Employed in Rules

Rule 1001 contains definitions of terms used in the Board's rules. The rules relating to investigations and adjudications employ certain terms that the Board is adding to the terms defined in Rule 1001.

Accounting Board Demand

Rule 1001(a)(ix) defines "accounting board demand" as a command to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term only to identify demands made upon registered public accounting firms and associated persons of such firms. Under the Act, the Board has authority to require those firms and persons to provide any testimony or documents sought by the Board in furtherance of its responsibilities under the Act, and including in particular any testimony or documents that the Board considers relevant to an investigation.

Accounting Board Request

Rule 1001(a)(x) defines "accounting board request" as a request to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term to distinguish the Board's efforts to obtain documents and testimony from

persons other than registered public accounting firms and their associated persons.

Bar

Rule 1001(b)(ii) defines "bar" as a permanent disciplinary sanction prohibiting a person from being associated with a registered public accounting firm. The rules distinguish between the concepts of "bar" and "suspension." Both sanctions, when applied to an associated person, prohibit the person from being an associated person of a registered public accounting firm. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the person may resume being an associated person without any other action by the person or the Board. In contrast, a bar is a permanent sanction that does not expire unless the person petitions the Board for termination of the bar, pursuant to the provisions of the rules, and the Board grants the petition. In some cases, the Board may impose a bar that expressly provides that a person may petition for termination of the bar after a fixed period. In other cases, the Board may impose a bar with no such provision.

Counsel

Proposed Rule 1001(c)(ii) defined "counsel" as an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state. One commenter suggested that the Board add a "good standing" requirement to the definition, and we have incorporated that suggestion in the final rule. The commenter

also suggested that we revise the definition to encompass persons admitted to practice in any state "or province" of the United States. We have not incorporated that suggestion. The definition of "counsel" uses the term "state," which both Section 2(a)(16) of the Act and rule 1001(s)(iii) separately define to include the District of Columbia, Puerto Rico, the Virgin Islands, and any other territory or possession of the United States.

Disciplinary Proceeding

Rule 1001(d)(i) defines "disciplinary proceeding" as a proceeding initiated by an order instituting proceedings, held for the purpose of determining whether a registered public accounting firm, or any person associated with a registered public accounting firm (1) has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Securities and Exchange Commission (the "Commission") issued under the Act, or professional standards; or (2) has failed reasonably to supervise an associated person in connection with any such violation by that person; or (3) or has failed to cooperate with the Board in connection with an investigation; and (4) whether to impose a sanction pursuant to Rule 5300. The provision concerning failure to supervise has been added to the final rule to make the

rule consistent with 5200(a) concerning the grounds for commencing disciplinary proceedings.

Some commenters expressed concern about the relationship between the prospect of Board discipline for violations of "professional standards" and the Board's definition of "professional standards" as set out in proposed rule 1001(d)(i) as part of the Board's proposing release concerning inspection rules. These commenters stated that because "professional standards" is defined to include accounting principles, the Board's proposed framework creates the specter of auditor liability for the audit client's violation of generally accepted accounting principles ("GAAP").

We have not changed the proposal. Both the definition of "professional standards" and the Board's responsibility to discipline auditors for violations of professional standards come directly from the Act. We note, however, that we do not read these provisions to expand the scope of the liability that an auditor may face with respect to an issuer's failure to comply with GAAP, beyond the scope that existed at the time the Act became law.

Document

Rule 1001(d)(ii) defines "document" as synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a

separate document within the meaning of this term. In no event shall the term "document" be construed to be limited to auditwork papers.

Hearing Officer

Rule 1001(h)(i) defines "hearing officer." The Board proposed a definition that included a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing. Several commenters expressed the view that neither Board members nor staff of the interested division should ever serve as hearing officers. We never intended to permit staff of the interested division to serve as hearing officers, and we have revised the rule to exclude that possibility. Nor did we intend to provide for a Board member to serve as a hearing officer except in an extraordinary situation, and we are now persuaded that the rule should exclude that possibility as well. In general, we intend to rely on a corps of qualified persons whose service to the Board is strictly limited to the role of hearing officer. We may rely on consultants for this purpose, or we may employ a staff of hearing officers, or we may rely on a combination of the two.

Although we exclude the possibility of a Board member serving as a hearing officer, we do not agree with all of the reasons suggested by commenters for doing so. In particular, we reject the suggestion that there is any unfairness or conflict of interest in the prospect of a Board member participating in the decision to initiate an

investigation or disciplinary proceeding and then serving as a hearing officer in that matter. Even among federal agencies subject to the Administrative Procedure Act (to which the Board is not subject) such a practice is well-established as comporting with fair procedural principles.

One commenter suggested that the rule should require a hearing officer to demonstrate a lack of bias on each matter. The comment seems premised on the notion that a hearing officer should be presumed to be biased unless he or she demonstrates otherwise. We decline to adopt that presumption. We expect that hearing officers will be unbiased and that they will take appropriate steps in situations in which their impartiality might fairly be questioned. In addition, the rules provide an opportunity for a party to show why a hearing officer should be recused.

Interested Division

Rule 1001(i)(iv) defines "interested division" as a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding. As a general matter, the interested division in a disciplinary proceeding will be the Division of Enforcement and Investigations, and the interested division in a hearing on disapproval of a registration application will be the Division of Registration and Inspections. The definition is adapted from Rule 101(a)(6) of the Commission's Rules of Practice.

Order Instituting Proceedings

Rule 1001(o)(ii) defines "order instituting proceedings" as an order issued by the Board commencing a disciplinary proceeding.

Party

Rule 1001(p)(iii) defines "party" as the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

Person

Rule 1001(p)(iv) defines "person" as any natural person or any business, legal or governmental entity or association.

Revocation

Rule 1001(r)(iii) defines "revocation" as a permanent disciplinary sanction terminating a firm's registration. The rules distinguish between the concepts of "revocation" and "suspension." Both sanctions, when applied to a firm, prohibit the firm from preparing or issuing, or participating in the preparation or issuance of, audit reports. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the firm may resume such work without any other action by the firm or the Board. In contrast, revocation is a permanent sanction that does not expire unless the firm, with the Board's permission, reapplies for registration

pursuant to the provisions of the rules, and the Board approves the application. In some cases, the Board may impose a revocation that expressly provides that a firm may reapply for registration after a fixed period. In other cases, the Board may impose a revocation with no such provision.

Secretary

Rule 1001(s)(iii) defines "Secretary" as the Secretary of the Board.

Suspension

Rule 1001(s)(iv) defines "suspension" as a temporary disciplinary sanction which lapses by its own terms and prohibits (1) a registered public accounting firm from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer; or (2) a person from being associated with a registered public accounting firm. A suspension is distinct from a bar (as to an associated person) and a revocation (as to a firm) in that a suspension is a sanction that expires by its own terms at a fixed time, with no further action required of the associated person, the firm, or the Board.

Rule 1002 – Time Computation

Rule 1002 describes the method by which the Board shall compute time for purposes of complying with deadlines in the Board's rules. We proposed this rule as rule 5410. As such, its application was limited to the adjudication process. In response

to comments received on our proposed rule on withdrawal from registration, we believe that it is appropriate to apply the substance of the time computation rule more generally to the Board's processes. We have adopted it as a part of our general rules, with minor technical changes.

Rule 5000 – General

Rule 5000 requires that registered public accounting firms and any associated persons of such firms comply with all Board orders to which they are subject. The Act authorizes the Board to take certain action with respect to, or require certain things of, registered public accounting firms and their associated persons. For example, the Act authorizes the Board to require such firms and persons to produce documents or to provide testimony, and the Act authorizes the Board to impose significant disciplinary sanctions on such firms and persons for various violations and for noncooperation with Board investigations. In exercising its authority, the Board will frequently act through the vehicle of a Board order. A requirement of compliance with such orders is implicit in the authority to take the action, and Rule 5000 makes that requirement explicit.

Part 1 – Inquiries and Investigations

Part 1 of the Board's Rules on Investigations and Adjudications consists of Rules 5100 through 5112. These rules address procedural matters concerning the conduct of informal inquiries by Board staff and formal Board investigations.

Rule 5100 – Informal Inquiries

The Board contemplates that the staff of the Division of Enforcement and Investigations will sometimes conduct informal inquiries to determine whether to recommend that the Board open a formal investigation on a matter. Rule 5100 describes generally the circumstances in which the staff may conduct an informal inquiry (Rule 5100(a)) and the scope of the activity in which the staff may engage in an informal inquiry (Rule 5100(b)).

Under Rule 5100(a), the staff may undertake an informal inquiry where it appears to the staff that an act or practice, or an omission to act, by a registered public accounting firm or an associated person may violate the Act, the Board's rules, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Under Rule 5100(b), the staff may pursue an informal inquiry by requesting documents, information, or testimony from any person. The staff may not, in an informal inquiry, issue accounting board demands.

One commenter suggested that the Board should be required to close an informal inquiry within a specified period of time. Another commented that the rule should include a note that would exhort the staff to begin informal inquiries with the

narrowest possible request for information, rather than broad requests for all relevant documents. We have adopted the rule as proposed, rather than with the suggested modifications.

These comments, like a number of comments made with respect to many of the proposed rules, seem premised on a concern that the Board and its staff might not always act reasonably unless Board rules expressly require all steps that might be reasonable and expressly prohibit unreasonableness. We do not accept this premise and, as a general matter, we have not adopted commenters' suggestions along these lines. In adopting this set of rules, we proceed from the premise that both the Board and the staff will act reasonably, and that it is generally not the role of these rules to define what is reasonable for all circumstances.

With respect to the particular comments on this rule, we expect that the staff will not keep informal inquiries open beyond the time reasonably necessary to determine whether a formal investigation is warranted, and we expect the staff to seek and review any documents relevant to making that determination. If we perceive over time that the staff's exercise of its discretion develops into practices that impose unreasonable burdens or that needlessly prolong uncertainty, we can take corrective steps.

Rule 5101 – Commencement and Closure of Investigations

Rule 5101 describes generally the processes by which the Board will commence and close formal investigations. The Board may commence a formal investigation when it appears that an act or practice, or omission to act, by a registered public accounting firm or any person associated with such a firm may violate any provision of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Rule 5101(a)(1) provides that the way the Board will commence an investigation is by issuing an order of formal investigation. Rule 5101(a)(2) provides that the Board may, in the formal order, designate Board staff members, or groups of staff members (such as a particular division or office) authorized to issue accounting board demands and otherwise require or request the cooperation of any person in connection with the investigation. Rule 5101(b) provides that the Board may issue an order suspending a formal investigation for a specified period of time or terminating a formal investigation.

Some commenters suggested that the rules should provide that firms and associated persons would receive prompt notice of the commencement of an investigation concerning them. We decline to adopt this suggestion. Notice of the

onset of an investigation may, in many situations, be inconsistent with a sound approach to conducting the investigation. The absence of a notice requirement is common in other investigative contexts that are generally analogous to the Board's processes (such as Commission investigations and NASD investigations), and we perceive no unfairness in declining to provide notice.

Moreover, the persons whose conduct might provide the original reason for the investigation may not be the persons (or may not be the only persons) as to whom the staff recommends enforcement action at the conclusion of the investigation. Identifying the investigative evidentiary threshold that would somehow trigger an obligation to provide notice to a new person would be unworkable as a practical matter. It would also give rise to unproductive peripheral disputes about whether notice was unfairly delayed or withheld while the staff obtained documents or information from the person. In the context of a Board investigation, a person's rights do not vary depending on whether the person is in some sense a subject of the investigation. A registered firm and an associated person have the same rights and the same obligation to cooperate either way. Notice would serve no purpose that relates to either the efficiency or the fairness of the investigation, and a notice requirement would serve no purpose other than to generate peripheral points of dispute.

One commenter also noted that Commission practices permit a person to petition for the closing of an investigation. The rules we have adopted do not provide a procedure for such a practice but, as we understand it, neither do Commission rules. Nothing in our rules prevents the development of a practice by which persons might request the closing of an investigation, and the Board and its staff will consider such requests.

Rule 5102 – Testimony of Registered Public Accounting Firms and Associated Persons in Investigations

Section 105(b)(2)(A) of the Act authorizes the Board to promulgate rules requiring the testimony of any registered public accounting firm or any associated person of such a firm with respect to any matter that the Board considers relevant or material to an investigation. Rule 5102(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require such testimony. Paragraphs (b) through (e) of Rule 5102 describe procedures related to obtaining and recording that testimony.

Two comments addressed the scope of Rule 5102(a), although from slightly different perspectives. One commenter expressed concern that the breadth of the rule might allow the Board to seek testimony from a firm's general counsel. This commenter suggested the Commission has a practice of not seeking testimony from a firm's general counsel and urged that we follow the Commission's example. Another commenter

suggested adding a "reasonableness" standard so that the Board cannot embark on "fishing expeditions."

We have adopted the rule as proposed. The scope of permissible testimony demands reflected in the rule is the scope provided by the Act, and we decline to narrow it. The standard is broad enough to allow the Board to seek information that a firm's general counsel may have, although, as discussed below in connection with Rule 5106, we do not intend to invade the attorney-client privilege. Again, we anticipate that the staff's practices in this regard will be reasonable, and we decline to adopt a rule based on a contrary premise.

Rule 5102(b) provides that the Board or staff shall require testimony by serving an accounting board demand. Under the rule, the demand must give reasonable notice of the time and place for taking testimony, must describe the methods by which the testimony will be recorded, and, if the demand is directed to a firm rather than to a natural person, must supply a description with reasonable particularity of the matters on which examination is requested.

The rule does not impose any minimum period of notice for testimony, but does require reasonable notice. The section-by-section analysis accompanying our proposing release stated that we anticipated that the staff would, as a general matter, provide at least five business days notice. Several commenters interpreted that as an

indication that five days would be the norm, regardless of the nature of the matter in which testimony is sought. Commenters suggested that the rule should prescribe a specific period of notice, much longer than five days. Suggestions included 14 days, 15 days, and 21 days. We decline to codify a particular period of notice, because there will be circumstances in which there is no compelling reason why 21, or even 14, days notice is necessary, and there may be legitimate reasons for requiring the testimony sooner. We also anticipate, however, that it will not be unusual for the staff to provide two to three weeks notice. We reiterate our premise that Board staff will act fairly and reasonably, and we emphasize that we expect firms and associated persons to cooperate with requirements that are reasonable under the circumstances. We will enforce that expectation through disciplinary proceedings for noncooperation where appropriate.

One commenter also suggested that Rule 5102(b)(3)'s requirement to provide a description of the matters on which examination is requested should be broadened to apply to demands made to individuals as well as to firms. We decline to adopt the suggestion. The requirement to provide a description to a firm is based on Rule 30(b)(6) of the Federal Rules of Civil Procedure, which requires a description when seeking the testimony of an entity, so that the entity may supply the appropriately knowledgeable individuals to testify on its behalf, and may take steps to ensure that the

individuals have the right information. No similar rationale applies when seeking testimony from an individual. An individual should be prepared to testify from his or her personal knowledge with respect to whatever questions the staff has that are relevant to the investigation.

Rule 5102(c) describes procedures related to the actual conduct of the examination. Rule 5102(c)(1) provides that each witness shall be required to declare that the witness will testify truthfully, by oath or affirmation. The oath or affirmation provision of the rule is adapted from Federal Rule of Evidence 603. The authority to administer and obtain such an oath or affirmation is implicit in the Board's authority to require testimony.

Rule 5102(c)(2) provides that examinations shall be conducted before a reporter designated by the Board's staff to record the examination. Rule 5102(c)(3) imposes restrictions on who may be present during the examination. Persons who may be present are limited to the witness, the witness's counsel (subject to Rule 5109(b), discussed below), any member of the Board or the Board's staff, the reporter, and any other person whom the Board or the staff designated in the order of formal investigation determine to be appropriate permit to be present. All of these provisions, however, are qualified by the restriction that in no event shall any person (other than the witness) who has been or is reasonably likely to be examined in the investigation be present. This

last restriction is not limited to registered public accounting firms and associated persons of such firms but also includes any other person from whom the Board or the staff could seek to require testimony pursuant to a Commission subpoena (as described in Rule 5111).

Several commenters suggested that the rules should allow a witness and his or her counsel to be accompanied by a technical expert consultant during testimony as a matter of right. Commenters stated that allowing accounting consultants helps to ensure that a witness's rights are fully protected and helps to produce a better investigative record. Commenters also cited a district court opinion, S.E.C. v. Whitman, 613 F.Supp. 48 (D.D.C 1985) (requiring the Commission to permit an expert consultant to assist counsel during investigative testimony) as authority for the proposition that the Board should allow for the presence of such consultants.

We adopt the rule that we proposed, without modification. The rule provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony, and we expect the staff to allow that presence in appropriate circumstances and on appropriate terms, including, for example, that the consultant not be a partner or employee of the firm with which the witness is associated. We expect the staff to be accommodating, but we also expect the staff to be vigilant about not

permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel.[1/]

Commenters also stated that the rule should explicitly provide that the counsel representing a witness may also represent an accounting firm with which the witness is associated. One commenter went further, suggesting that even if a witness retains outside counsel, the firm's in-house counsel should also be permitted to attend the testimony.

The rule allows counsel to represent a witness and the witness's firm to the extent that such dual representation is consistent with counsel's ethical obligations generally. The rule does not allow for the presence of a firm's in-house counsel, or any other counsel, who does enter a notice of appearance affirmatively stating that he or she represents the witness. Counsel who represents both the firm and the witness, and who, during testimony, becomes aware of a conflict that would cause him or her to cease representing the witness, may not continue to be present.

Rule 5102(c)(4) is modeled on Rule 30(b)(6) of the Federal Rules of Civil Procedure. Rule 5102(c)(4) provides that a registered public accounting firm that is required to provide testimony shall designate one or more persons to testify on its

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[1/] Whatever binding precedential value Whitman may have in the context of a Commission investigation, it has none in the context of a Board investigation. The Whitman decision rests on the requirements of the Administrative Procedure Act, which is not applicable to Board proceedings.

behalf and may set forth, for each person designated, the matters on which the person will testify. Those persons are then required to testify as to matters known or reasonably available to the firm.

One commenter suggested that Rule 30(b)(6) does not provide an appropriate model for a corresponding procedure in a Board investigation because the Federal Rules of Civil Procedure govern a different type of proceeding. The commenter suggested that the scope of testimony that may be requested through this procedure should be more limited than under the Federal Rules. The commenter also noted that the proposed rules lack a procedure to allow the examinee to supplement examination answers at a later time.

We have not modified the rule in response to those comments. The Act provides the relevant scope of testimony that we may obtain from a registered firm. Rule 5102(c)(4) affords a firm flexibility with respect to the person or persons through whom it supplies that testimony. The rules do provide a procedure for reviewing and requesting changes to a transcript, as described below. The rules do not provide a procedure for otherwise supplementing testimony because any supplementation should be accomplished through additional examination under oath rather than through a supplemental written document. If a firm believes such supplementation is necessary, it

may contact the staff, and the staff may decide whether to resume the examination of a designated individual.

We have made technical changes to rule 5102(c)(4). Specifically, we have substituted the word "individual" for "person" where appropriate to avoid confusion that could flow from the fact that "person" is defined to include an entity.

Rule 5102(e) allows a witness a period of time, after being notified that the transcript or other recording of the examination is available for review, to describe any changes in form or substance that the witness would make and to supply the reasons for such changes. Under the rule, the transcript shall be accompanied by the reporter's certification that the witness was duly sworn and that the transcript is a true record of the testimony, and shall indicate whether the witness requested to review the transcript. The reporter shall also append to the transcript any changes to the testimony made by the witness during the review period described above.

Proposed Rule 5102(e) allowed a witness 10 days to request changes to the transcript. One commenter suggested that the period for requesting changes to a transcript should be 30 days. We have not adopted that suggestion, but we have modified the rule to provide for 15 days and to allow for an extension of the 15-day period with the approval of the Director of the Division of Enforcement and Investigations.

Rule 5103 – Demands for Production of Audit Workpapers and Other Documents in Investigations from Registered Public Accounting Firms and Associated Persons

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules requiring the production of audit workpapers and any other document or information in the possession of any registered public accounting firm or any associated person of such a firm, wherever domiciled, with respect to any matter that the Board considers relevant or material to an investigation. Rule 5103(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require production of such documents and information.

One commenter suggested that we change the caption of the rule to describe more precisely the subject of the rule. We have not adopted the specific caption suggested, but we have followed the suggestion generally by changing the caption from "Production of Audit Workpapers and Other Documents in Investigations" to the caption above.

One commenter suggested that these rules should define "audit workpapers." The commenter made suggestions about what the definition should include. We understand those comments to address document retention issues rather than rules on investigations. We will address audit documentation and document retention issues in the context of our establishment of auditing and related professional practice standards.

We emphasize, however, that the scope of our authority to demand documents goes well beyond documents that might be considered "audit workpapers," and includes any document that may be relevant or material to consideration of whether there have been violations of the Act, our rules, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards.

Another commenter stated that the standard was subjective in nature and suggested that the rule should include a "reasonableness" requirement. We decline to include that requirement in the rule. The scope of, and standard for, Board document demands is set out in the Act, and we intend for the rule to incorporate the full scope of our authority to demand documents.

A commenter also suggested that the rules should permit a firm to seek Board review of the scope of an accounting board demand issued by the staff. The commenter suggested that firms and associated persons should be able to ask that the Board quash an accounting board demand or issue a protective order limiting the scope of the demand. Finally, the commenter suggested that a firm or associated person should be able to seek review of a Board denial of such a request without having to risk a noncooperation proceeding and sanction.

We decline to adopt these suggested additions. In essence, the commenter argues that a firm or associated person should not face a noncooperation sanction unless the firm or associated person has first had a chance to obtain Commission (and perhaps, implicitly, court of appeals) review of the appropriateness of the accounting board demand, has failed to persuade the Commission or court of the inappropriateness of the demand, and then still fails to comply with the demand.

We first address the notion of providing by rule for review of Board decisions concerning the scope of accounting board demands. The Act provides for no such review and, under the Act, we see no mechanism for a firm or associated person to present that question to the Commission or a court other than through a petition for review of a disciplinary sanction for noncooperation.[2/]

Nor are we persuaded of any need to provide a special mechanism to petition for Board review of an accounting board demand issued by the staff. When the staff cannot resolve disputes about the scope of a demand, we expect that the staff, where appropriate, will recommend the institution of noncooperation proceedings.

That is not to say, however, that a person proceeding reasonably and in good faith can only obtain Board review through a process that necessarily ends in a sanction

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[2/] This discussion concerns general challenges to the scope of an accounting board demand. We separately address disputes related to privilege assertions in our discussion of Rule 5106, below.

if the Board sides with the staff. A noncooperation proceeding will normally include an opportunity for a person to submit a statement of position under Rule 5109(d), explaining why the Board should conclude that the demand exceeds the permissible statutory scope of documents, testimony, or information that the Board may demand. The Board will take that submission into account in determining whether to institute noncooperation proceedings.

If the submission does not persuade the Board, a noncooperation proceeding and sanction need not follow automatically. Some cases may involve a good faith assertion of a position that raises a genuine issue concerning the scope of the demand. In those cases, the Board might communicate its rejection of the person's position but also indicate that noncooperation proceedings will not be commenced if the person complies with the demand within a certain time. At that point, the person could comply or, at the risk of a sanction, could continue to contest the appropriateness of the demand in the hope of prevailing before a hearing officer, or on review by the Board, the Commission, or the court of appeals.

We should not be understood as suggesting that we will routinely afford an opportunity to cure noncompliance before authorizing noncooperation proceedings. We are not describing a process that effectively affords a no-risk mechanism for delaying compliance with every accounting board demand. We will, based on the circumstances

of each case, determine whether it is appropriate to afford an opportunity to cure before noncooperation proceedings are instituted, or whether a noncooperation proceeding is appropriate whether or not the noncompliance is cured. We may, for example, determine that the circumstances warrant a hearing on noncooperation and the possible imposition of a sanction even if the noncompliance is cured, while always holding out the possibility that curing the noncompliance may bear on the ultimate severity of any sanction.

Rule 5103(b) provides that an accounting board demand for documents or information shall set forth a reasonable time and place for such production. Rule 5103(b) does not impose any minimum notice requirement before production shall be due. The section-by-section analysis accompanying our proposing release stated that we anticipated that the staff would, as a general matter, provide at least five business days notice. Several commenters interpreted that as an indication that five days would be the norm, regardless of the nature and volume of documents demanded. Commenters suggested that the rule should prescribe a specific period of notice, much longer than five days. Suggestions included 14 days, 21 days, and 30 days. We decline to codify a particular period of notice, because there will be circumstances in which there is no compelling reason why 30, or even 14, days notice is necessary and there may be legitimate reasons for requiring the documents sooner. We also

anticipate, however, that it will not be unusual for the staff to provide two to three weeks notice. We reiterate our premise that Board staff will act fairly and reasonably, and we again emphasize that we expect firms and associated persons to cooperate with requirements that are reasonable under the circumstances. We will enforce that expectation through disciplinary proceedings for noncooperation where appropriate.

Proposed Rule 5103(b) provided that unless otherwise requested or permitted in the accounting board demand, the documents produced shall be the originals, and any document that exists in electronic form shall be produced in electronic form. Commenters stated that production of original documents, including workpapers, can be disruptive to ongoing audit engagements and suggested that the rule provide for production of copies rather than originals. To accommodate this concern, we have modified the rule to permit production of copies unless otherwise specified in the accounting board demand. The rule also requires, however, that the originals be maintained in a reasonably accessible manner, be readily available for inspection by the staff, and not be destroyed without the staff's consent. An original document that could otherwise be destroyed consistent with any applicable document retention requirements or other legal requirements may nevertheless not be destroyed without the staff's consent if it is responsive to an accounting board demand received by the firm.

We have made technical changes to rule 5102(c)(4). Specifically, we have substituted the word "individual" for "person" where appropriate to avoid confusion that could flow from the fact that "person" is defined to include an entity.

Rule 5104 – Examination of Books and Records in Aid of Investigations

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules allowing the Board to inspect the books and records of a registered public accounting firm or any associated person of such a firm, wherever domiciled, to verify the accuracy of any documents and information supplied by the firm or person in an investigation. Rule 5104 implements that authority by providing that the Board and the staff designated in an order of formal investigation may examine such books and records to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation. Any such examination would be separate and apart from any Board inspection pursuant to Section 104 of the Act and the Board's rules thereunder and would not be subject to the provisions of Section 104 or the Board's rules thereunder. Rule 5104 requires that the firm or person allow such examination upon demand, and does not provide for any minimum notice period.

One commenter suggested that a Rule 5104 examination should only occur with prior express Board approval. We have not adopted that specific suggestion, but we agree that a firm should not be subject to a Rule 5104 examination at the behest of

every staff member. We have modified the rule to provide that any such examination requires the prior approval of the Director of Enforcement and Investigations.

Commenters also expressed concern that the Rule 5104 procedure did not seem to allow a firm an opportunity to assert appropriate privileges as to the information to be examined. We expect the staff to apply the rule such that a firm that acts diligently will have an opportunity to make any valid privilege assertions before examination. Accordingly, we have revised Rule 5106, discussed below, to reflect the possibility of privilege assertions in the context of a Rule 5104 examination. We emphasize, however, that Rule 5104's "upon demand" language means that a firm should provide access at the time the staff requires access to be provided, and we do not expect the staff to suffer delays because of unsupported assertions that a privilege review cannot be completed quickly.

Rule 5105 – Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms

Section 105(b)(2)(C) of the Act authorizes the Board to promulgate rules to request that any person, including any client of a registered public accounting firm, provide any testimony and documents that the Board considers relevant or material to an investigation. The Act requires the Board and the staff to provide appropriate notice of such requests, subject to the needs of the investigation. Rule 5105 implements that authority by providing that the Board and the staff may make such requests to any

person. In this context, the rules use the term "accounting board request" to distinguish it from an "accounting board demand," which may be made only to registered public accounting firms and associated persons of such firms.

Rule 5105 provides that the Board or staff shall give appropriate notice when requesting testimony (Rule 5105(a)(1)) and specify a reasonable time and place when requesting document production (Rule 5105(b)). What notice is appropriate for testimony, and what is a reasonable time and place for production, may vary with the circumstances and the needs of the investigation. Rule 5105(a)(1) also provides that an accounting board request for testimony shall state the method by which the testimony shall be recorded. The rule further provides that if the person to be examined is an organized entity, rather than a natural person, the accounting board request shall provide a description with reasonable particularity of the matters on which examination is requested.

Rule 5105(a)(2) incorporates, in the context of testimony pursuant to an accounting board request, the procedural and transcript provisions of testimony pursuant to an accounting board demand, as discussed above with respect to Rules 5102(c)-(e).

Although the Board can only request, and not require, testimony or production of documents from persons other than registered public accounting firms and associated

persons of such firms, the Board does have the option of seeking a Commission subpoena to require testimony or document production from any person, as discussed below with respect to Rule 5111. The note to Rule 5105 serves as a reminder that this option is available to the Board. The note, however, does not in any way limit the Board's authority to seek a Commission subpoena at any time, even if the Board has not first sought the testimony or documents through an accounting board request. Neither the note, nor anything in the Board's rules, creates any right in any person to receive an accounting board request or any other form of notice from the Board before the Board seeks a Commission subpoena to be served on that person.

In response to comments, we have made technical changes to rule 5105(a)(2). Specifically, we have substituted the word "individual" for "person" where appropriate to avoid confusion that could flow from the fact that "person" is defined to include an entity.

Rule 5106 – Assertion of Claim of Privilege

Rule 5106 imposes requirements on any person who declines to provide testimony, documents, or information required by an accounting board demand, or a demand for examination under Rule 5104, on the ground of an assertion of privilege. The rule specifies the types of information that a person must supply related to the privilege assertion. The rule is adapted from Rule 6.2 of the local rules of the District

Court for the Southern District of New York. Failure to supply the required information is a violation of the rule, and may subject a person to a disciplinary proceeding for violation of a Board rule or for noncooperation with an investigation.

Some commenters suggested that the rule should provide more flexibility so that a firm or associated person need not face the prospect of a noncooperation hearing and sanction for failure to supply all of the details that the rule requires in a privilege log. We have declined to modify the rule in this respect for two reasons. First, as a general matter, the information required will necessarily be readily available to the person asserting the privilege. Second, we note again our premise that the staff will act reasonably. We see no need to try to articulate by rule the line between noncooperation that warrants a disciplinary sanction and insignificant, technical shortcomings that do not.

One commenter suggested that the rule should provide that failure to comply with the privilege log requirements could not result in a noncooperation proceeding absent a showing that the required information was both readily available and necessary in order to assess the good faith of the privilege claim. We decline to follow this suggestion as well. The privilege log requirements are based on the reasonable premise that the information is by its nature readily available to the person asserting the privilege, and we see no reason to allocate to the staff the burden of establishing that fact. Nor do we

see any sound basis for the suggestion that the staff should have to establish that the information is needed in order to assess the privilege claim.

Commenters also sought clarification on the nature and scope of privileges that may be asserted without being treated by the Board as noncooperation. We have not attempted to clarify the point in rule text. We note, however, that we do not intend to invade the province of any legitimately asserted privilege that would, under prevailing law, be treated as a valid basis for declining to provide documents or information in response to a Commission subpoena, including valid assertions of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. We fully intend, however, that assertions of the Fifth Amendment privilege may be used as evidence in Board disciplinary proceedings and will be the basis for evidentiary inferences against the person asserting the privilege. In addition, we may also report assertions of that privilege to other appropriate authorities consistent, with our authority under the Act to share information.

One commenter specifically indicated a need for clarification on whether a state law accountant-client privilege may be asserted in response to Board requests for testimony, documents, or information. The Board will not honor assertions of an accountant-client privilege. Failure to comply with an accounting board demand on the basis of an asserted accountant-client privilege will be grounds for a noncooperation

sanction. Likewise, any perceived state law nondisclosure requirements or other obstacles to compliance with an accounting board demand (other than a privilege that would be a valid basis for resisting a Commission subpoena) are, in our view, preempted by the Act, and a failure to comply on the basis of such requirements will be grounds for a noncooperation hearing and sanction.

Commenters also expressed concern that persons desiring in good faith to assert a privilege may have to choose between asserting the privilege or facing a noncooperation sanction if the staff and the Board view the assertion as not valid. That, however, is not necessarily the case.

As with disputes about the scope of an accounting board demand (discussed above), we expect that the staff, where appropriate, will recommend the institution of noncooperation proceedings when it cannot resolve privilege disputes. Again, however, this is not to say that a person proceeding reasonably and in good faith can only obtain Board review of the matter through a process that necessarily ends in a sanction if the Board sides with the staff. A noncooperation proceeding will normally include an opportunity for a person to submit a statement of position under Rule 5109(d). The Board will take that submission into account in determining whether to institute noncooperation proceedings.

If the submission does not persuade the Board, a noncooperation proceeding will not necessarily follow. Some matters may involve good faith disputes about genuinely uncertain questions regarding the application of a privilege in the context of a Board investigation, or the application of a privilege to particular documents or communications. In those cases, the Board might communicate its rejection of the person's position but also indicate that noncooperation proceedings will not be commenced if the person complies with the demand within a certain time. At that point, the person could comply or, at the risk of a sanction, could continue to assert the privilege in the hope of prevailing before a hearing officer, or on review by the Board, the Commission, or the court of appeals.

As in the context of disputes about the scope of an accounting board demand, we should not be understood as suggesting that we will routinely afford an opportunity to cure noncompliance before authorizing noncooperation proceedings. We are not describing a process that effectively affords a mechanism for automatically delaying compliance with every accounting board demand. We will, based on the circumstances of each case, determine whether it is appropriate to afford an opportunity to cure before noncooperation proceedings are instituted, or whether a noncooperation proceeding is appropriate whether or not the noncompliance is cured. We may determine that the circumstances warrant a hearing on noncooperation and the possible imposition of a

sanction even if the noncompliance is cured, while always holding out the possibility that curing the noncompliance may bear on the ultimate severity of any sanction.

Rule 5107 – Uniform Definitions in Demands and Requests for Information

Rule 5107 supplies certain definitions and rules of construction that shall be deemed to be incorporated by reference into all accounting board demands and accounting board requests for information. These definitions and rules of construction are modeled on those in use by the federal districts courts in the Southern District of New York. Rule 5107 does not preclude the Board or the staff, in any particular accounting board demand or accounting board request, from defining other terms, or from using abbreviations, or supplementing or using only part of a definition of a term defined in Rule 5107.

Rule 5108 – Confidentiality of Investigatory Records

Rule 5108 provides that unless otherwise ordered by the Board or the Commission, all documents, testimony, or other information prepared or received by or specifically for the Board or its staff in connection with an informal inquiry or a formal investigation shall be confidential in the hands of the Board, unless and until presented in connection with a public proceeding or released in accordance with Section 105(c) of the Act and the Board's rules thereunder. Consistent with Section 105(b)(5) of the Act, however, Rule 5108 provides that the Board may supply any such information to the

Commission and, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors, to certain other government entities, specifically: the Attorney General of the United States, an appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act) other than the Commission if the information pertains to an audit report for an institution subject to the jurisdiction of such regulator, state attorneys general in connection with any criminal investigation, and appropriate state regulatory authorities.

Commenters expressed several concerns and made several suggestions about proposed Rule 5108. We have made only one change to the rule in response to comments. Specifically, we have deleted the phrase "unless otherwise ordered by the Board or the Commission" from the beginning of the rule. Although the phrase was not intended to provide general discretionary authority to disclose confidential materials other than on the Act's own terms, we have instead adopted the rule with a new paragraph (b), which more precisely addresses the relevant point.

The new paragraph (b) provides that nothing in paragraph (a) "shall prohibit the Board or the staff of the Board from disclosing any documents, testimony, or other information to any other person as is reasonably necessary to carry out the Board's responsibility, under Section 105 of the Act, to conduct investigations according to fair procedures." The purpose of this provision is to provide notice that the Board does not

interpret Section 105(b)(5)(A) to prohibit the Board from doing such fundamental things as, for example, questioning a witness about a document supplied to the staff by someone other than that witness.

Read literally and in isolation, Section 105(b)(5)(A) could be understood to prohibit the staff not only from showing exhibits to witnesses, but even from transmitting to a firm a written accounting board demand for documents, since the demand would be a document encompassed by the language of Section 105(b)(5)(A) and would therefore be confidential. We read Section 105(b)(5)(A) in light of, rather than in isolation from, the rest of Section 105. Section 105 begins by authorizing the Board to conduct investigations and requiring the Board to do so according to fair procedures. An overly literal reading of Section 105(b)(5)(A) would negate any possibility of doing so.

Rule 5108(b) reflects our understanding that the Act authorizes the Board and its staff to disclose documents and information (even if otherwise covered by Section 105(b)(5)(A)) as reasonably necessary to execute the Board's authority and responsibility to conduct fair investigations. Rule 5108(b)'s application does not extend outside the sphere of a Board investigation. It is not authority for disclosing information other than to a person from whom the Board demands or requests information in connection with an investigation. Even as to those persons, the rule is not authority for

disclosing information other than as reasonably necessary to carry out legitimate investigative functions in a manner that is fair to the person.

Commenters also voiced other concerns about Rule 5108. For various reasons, however, we do not believe that any of these other concerns warrant changing the rule in the ways suggested by the commenters.

Commenters noted that the rule's confidentiality provision applies only to materials and information "in the hands of the Board," while Section 105(b)(5)(A) includes no such limiting phrase. Commenters suggested that the language of the Act contemplates that the protection of 105(b)(5)(A) extends much further, including to copies of documents that are prepared specifically for the Board, but that remain in the hands of the person who prepared them. One commenter suggested that the rule should expressly provide for confidentiality of documents in the hands of firms, associated persons, issuers whose audits are of concern in the investigation, and any witness who provides documents. The commenter also suggested that the rule should specify that the documents that are protected in the hands of such persons include originals and copies of transcripts, statements of position under Rule 5109(d), materials made available to a respondent under Rules 5422 and 5423, offers of settlement, and motions made during a disciplinary proceeding.

We decline to make any changes along those suggested lines. The phrasing of the rule, however, is not intended to narrow the effect or the reach of the Act. Indeed, to try to avert any such misunderstanding, the first note to Rule 5108 describes what is provided in Section 105(b)(5) of the Act, as distinct from what is provided by Rule 5108. Our reason for limiting the wording of Rule 5108 has nothing to do with limiting the reach of Section 105(b)(5)(A), but, rather, has to do with limiting our rules to their appropriate reach. By using the phrase "in the Board's hands," we do not mean to express a view on whether the Act reaches further than that.

Similarly, the rule omits the Act's reference to an evidentiary privilege because, as to materials and information in the Board's hands, any evidentiary privilege the Board would assert would necessarily be based on the Act. The statute does not require an implementing rule in order for the Board to assert the privilege.

In contrast, we see value in implementing through Rule 5108 certain aspects of Section 105(b)(5), principally for purposes of notice concerning how the Board will comply with the requirements of 105(b)(5) (e.g., by keeping the relevant documents confidential) and that the Board will make appropriate use of its authority to share confidential materials with certain other regulators.

One commenter also suggested that the rules should reflect that the Board may enter into agreements with firms pursuant to which a firm could provide the Board with

certain materials in which the firm may have a privilege, such as reports prepared by counsel concerning internal investigations, without waiving the privilege as to any third party.[3/] We decline to adopt this suggestion. We do not believe a rule is necessary in order to provide for the possibility of such protection in appropriate circumstances.

Commenters also suggested that the rule should do more to protect the confidentiality of documents that the Board provides to other agencies under Rule 5108(a)(1)-(2). Commenters suggested that the rule should make clear that the Act's provision requiring those agencies to maintain the materials as confidential and privileged preempts any state laws requiring open public access to records. Commenters also suggested that the rule should provide that the Board would only provide protected materials to an agency on the condition that the agency enter into a confidentiality agreement concerning the materials.

We do not doubt that Section 105(b) of the Act preempts state open records laws with respect to materials and information provided by the Board to an agency under

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[3/] The commenter noted that Commission staff has sometimes entered into such agreements, and that some courts have given effect to the agreements. See, e.g., Saito v. McKesson HBOC, Inc., 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) and McKesson HBOC, Inc. v. Adler, 562 S.E.2d 809 (Ga. App. 2002).

Section 105(b)(5)(B).[4/] Again, however, we do not see this as a point that has a place in the Board's rules. The Act speaks clearly for itself on this point.

For similar reasons, the rule does not seek to prohibit agencies from disclosing materials that the Act itself forbids them to disclose. Nor do we see a need to provide, by rule, for a confidentiality agreement in every case to reinforce the requirements of the Act. It is the Act, and not the Board's rules, that constrain the conduct of those agencies. In the event that we discover that any particular agency makes disclosures that we believe are inconsistent with Section 105(b)(5), both the Act and Rule 5108 allow us the flexibility to decline to supply certain information to that agency or to require appropriate assurances of confidentiality.

Finally, some commenters suggested that the rules should provide for some sort of notice to a firm or associated person when the Board provides documents or information to another agency. One commenter suggested that such notice be provided to the firm or person being investigated. The comment apparently means to suggest that such notice be provided to the firm or person being investigated, regardless of whether the documents being transmitted to an agency were supplied by the firm or

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[4/] Any otherwise applicable state or local law that would conflict with a requirement of the Act or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress is preempted. See, e.g., Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000); City of New York v. FCC, 486 U.S. 57, 64 (1988).

associated person being investigated. Other comments might also be understood to suggest that the notice be supplied to the firm or person who supplied the documents to the Board. Commenters suggested that such notice would be appropriate so that persons with an incentive to enforce the confidentiality provisions that restrict those agencies are in fact aware when the agencies obtain protected materials.

We have not included any notice requirement in the rule. We cannot identify any reasonable rationale for providing, as one commenter suggested, notice to a person who is not the person who supplied the Board with the documents that the Board is transmitting to an agency. The commenters' narrower suggestion that the rules should provide for notice to the person who actually supplied the documents or information to the Board raises a slightly different question, yet we still believe there are compelling reasons not to adopt such a notice requirement.

Most significantly, providing such notice might well undermine the legitimate investigative needs of the agency to whom the documents and information are supplied. With no clear indication in the Act that Congress intended or expected us to provide this type of notice, we are loathe to neglect the obvious interests of federal and state regulators and law enforcement agencies in maintaining the confidentiality of aspects of

their processes.[5/] In addition, the notion that any fairness considerations require this type of notice has effectively been rejected by the Supreme Court in the context of Commission investigations. In S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984), the Court held, among other things, that general policy considerations did not entitle a person whose conduct was at issue in a Commission investigation to receive notice of Commission subpoenas directed to other persons in the investigation. One argument that the Court rejected – that the person was entitled to an opportunity to protect his rights with respect to Commission requests for information from others[6/] – is similar to an argument advanced by commenters here -- that notice would ensure them of an opportunity to enforce the confidentiality restrictions against the receiving agency.

The second note to Rule 5108 points out that the Director of Enforcement and Investigations may engage in, and may authorize staff to engage in, discussions with persons identified in Rule 5108 concerning documents, testimony, and information described in the rule.

[5/] We also note that, in the context of Commission investigations, with very limited exceptions concerning certain of an individual's financial institution account records covered by the Right to Financial Privacy Act, 12 U.S.C. 3401, et seq., no notice is required or provided when the Commission shares documents or information with other regulatory or law enforcement agencies.

[6/] See 467 U.S. at 748-49.

Rule 5109 – Rights of Witnesses in Inquiries and Investigations

Rule 5109 sets out certain rights accorded to persons from whom the Board seeks documents, testimony, or information in an investigation. Under Rule 5109(a), any person compelled to testify or produce documents pursuant to a Commission subpoena issued pursuant to Rule 5111, and any person who testifies or produces documents pursuant to an accounting board demand, shall, upon request, be allowed to review the Board's order of formal investigation. No such person is entitled to obtain their own copy of the order of formal investigation, but the Director of Enforcement and Investigations may, in his or her discretion, allow a person to obtain a copy of the order. This rule is adapted from Rule 7(a) of the Commission's Rules Relating to Investigations.

One commenter suggested that a copy of the formal order of investigation should be provided as a matter of right, subject to a person's agreement to certain restrictions on the use of the document. We have added to the rule a provision that the Director of Enforcement and Investigations may, as a condition of granting a request for the formal order, impose limitations on its further dissemination. We intend for the Director to use this discretion as necessary to avoid undermining an investigation and to maintain, to the extent reasonably possible, the nonpublic nature of the formal order. We do not intend that this discretion routinely be used in a way that would inhibit legitimate uses of

the document by a person or counsel, such as sharing of the document subject to a joint defense agreement.

Under the rule we adopt, every person who receives an accounting board demand or an accounting board request has the right to review the formal order of investigation. We decline, however, to create for every such person a right to obtain a copy of the formal order. It is appropriate for the staff to exercise discretion not to provide the formal order, in light of legitimate investigative purposes and the general need to maintain the Board's investigative activity as confidential and nonpublic.

Rule 5109(b) allows any person who appears to testify in a formal investigation to be accompanied, represented, and advised by counsel. Rule 5109(b) grants this right on the condition that counsel affirmatively represents to the staff, either through a notice of appearance or a statement on the record at the beginning of the testimony, that he or she represents the witness. This rule is adapted from Rule 7(b) of the Commission's Rules Relating to Investigations. The right granted by Rule 5109(b) is also limited by Rule 5102(c)(3), which does not allow for the presence of any person, even counsel, who has been or is reasonably likely to be examined in the investigation.

Rule 5109(c) provides that a witness may inspect the transcript of his or her own testimony. A person who has testified or provided documents may also request a copy of his or her transcript or of the documents he or she produced. If the request is

granted, the transcript or documents may be obtained upon the payment of fees to cover the cost of reproduction. Any such request, however, may be denied by the Director of Enforcement and Investigations for good cause shown if the documents or testimony have not been presented in connection with a proceeding or released in accordance with Section 105(c) of the Act and the Board's rules thereunder. This rule is adapted in part from Rule 6 of the Commission's Rules Relating to Investigations.

One commenter suggested that the rule should provide a mechanism for the Director to make the determination whether "good cause" exists for denying copies to a witness, and that the rule should provide for review of the Director's decision. We decline to adopt these suggestions. The purpose of this aspect of the rule is to commit the matter to the Director's discretion. A person may always inspect the transcript of his or her own testimony, but the Director will have the discretion to preclude any witness from having his or her own copy of the transcript.

Rule 5109(d) provides that registered public accounting firms and persons associated with such firms may, on their own initiative at any time, submit a written statement to the Board setting forth their interests and positions in regard to the subject matter of any investigation in which they have become involved. The staff, either upon request or on its own initiative, may – but is not required to – advise any such person of the general nature of an investigation, including the indicated violations as they pertain

to that person, and may prescribe a fixed period of time that will be allowed for the person to submit a statement of position and interests before the staff makes any recommendation to the Board. Rule 5109(d) provides that any such statement that is submitted will be forwarded to the Board in conjunction with any staff recommendation pertaining to the person submitting the statement. This rule is adapted from Rule 7(a) of the Commission's Rules Relating to Investigations.

Commenters made several suggestions about the proposed Rule 5109(d) process. They suggested that the rule should require that this opportunity be afforded to a prospective respondent as a matter of right, that reasonable and sufficient time always be allowed for the preparation of a submission, and that the prospective respondent should have access to the investigative record in order to prepare a more meaningful submission. We have declined to change the rule in response to these suggestions.

The purpose of the Rule 5109(d) process is to assist the Board in its decision-making. It is not to protect or to create any supposed right to be heard at this stage of a matter. It is our expectation that the staff will routinely give a respondent a meaningful opportunity to make a Rule 5109(d) submission. We also expect, though, that the staff will exercise its discretion not to provide that opportunity when doing so would be contrary to the public interest or the interests of investors – such as when

circumstances call for expedited enforcement action, or when advance notice of particular charges to a respondent might undermine legitimate investigative objectives of the Board or of other regulatory or law enforcement agencies conducting parallel investigations. We therefore decline to create a right to make a Rule 5109(d) submission, or a right to have a certain amount of time in every case where the opportunity is afforded.

We also decline to require that a prospective respondent have access to any portion of the investigative record in connection with making a Rule 5109(d) submission. The Rule 5109(d) process, which is based on the Comission's so-called "Wells" process, provides a meaningful opportunity for a prospective respondent to focus the Board's attention on significant issues concerning the prospective respondent's characterization of its own conduct, and on legal and policy issues implicated by the staff's recommendation. The process usefully serves these purposes without becoming a miniature adjudication in which the prospective respondent provides its characterization of all of the evidence in the investigative record.

Rule 5110 – Noncooperation with an Investigation

Section 105(b)(3) of the Act authorizes the Board to impose sanctions, including revocation of registration and bar on association, against any registered public accounting firm or associated person who refuses to testify, produce documents, or

otherwise cooperate with the Board in connection with an investigation. Rule 5110 describes how the Board will implement that authority.

Under Rule 5110(a), the Board may institute a disciplinary proceeding, in accordance with Rule 5200(a)(3), for noncooperation with an investigation in certain circumstances. Under the rule as proposed, a noncooperation proceeding would have been warranted if it appeared to the Board that a registered public accounting firm or an associated person may have failed to comply with an accounting board demand, may have given testimony that is false or misleading or that omits material information, or may otherwise have failed to cooperate in connection with an investigation.

Commenters raised various concerns with this aspect of the proposal. First, commenters echoed other comments, discussed above, concerning a need to have some mechanism for review of staff positions (on such things as privilege disputes and the scope of document demands) without having to risk a noncooperation proceeding for noncompliance. We have effectively addressed the substance of those comments in our discussions of Rule 5103(a) and 5106.

Commenters also expressed concern about the prospect of a noncooperation proceeding for providing testimony that "omits material information." After consideration of the comments, we agree that the scope of the proposed rule should be revised on this point. We have therefore deleted the language concerning testimony that is false or

misleading or that omits material information. In its place, we have substituted the language of the federal perjury statute, 18 U.S.C. § 1623. The final rule provides for instituting a noncooperation proceeding where it appears to the Board that a person may have "knowingly made any false material declaration or made or used any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration."

One commenter also requested clarification on what would be considered noncooperation. We decline to attempt to set out every way in which a firm or associated person may fall short of its statutory obligation to cooperate with the Board in connection with an investigation. We believe it is appropriate to continue to include in the rule the general provision, echoing the Act, that noncooperation proceedings may be instituted where a firm or associated person "may otherwise have failed to cooperate." Depending upon the nature of the conduct, however, it may be appropriate in many circumstances for the staff to provide notice that it views certain conduct as noncooperation, and to afford an opportunity to cease or cure the conduct before recommending noncooperation proceedings.

In response to the request for clarification, we have added one additional point to the list of items that may warrant institution of noncooperation proceedings. Specifically, the rule we adopt states that we may authorize noncooperation

proceedings where it appears that a firm or associated person may have abused the Board's processes for the purpose of obstructing an investigation.

This new provision grew out of a comment made in connection with Rule 5402. The commenter suggested that the Board should impose fines for frivolous interlocutory appeals. We agree that abuse of the Board's processes is a form of failing to "otherwise cooperate," and we have added this provision to Rule 5110 to provide notice that the Board will impose sanctions for this form of noncooperation. In the interest of fairness, we have drafted the provision to include a scienter requirement: we will not treat as noncooperation every arguable abuse of the Board's processes, but only those that involve an intent to obstruct an investigation. We may, however, infer such an intent from circumstantial evidence, including, for example, circumstances indicating that a reasonable person would not have believed there was any genuine chance of prevailing on a particular petition for review of staff action or of a hearing officer ruling short of finding a violation.[7/]

A disciplinary proceeding for noncooperation shall proceed generally according to the hearing procedures set out in the Board's rules. Because of the nature of the conduct being sanctioned, however, a disciplinary proceeding for noncooperation will generally be a streamlined proceeding focused on a narrow issue. For that reason,

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[7/] In no circumstance will a party's petition for review of a hearing officer's iniitial decision finding a violation by that party be treated as noncooperation.

various of the procedural rules governing disciplinary proceedings include certain provisions that will apply only to disciplinary proceedings for noncooperation.

Some commenters expressed doubts about the appropriateness of a streamlined procedure for noncooperation proceedings. These commenters stated that noncooperation proceedings will present very complex factual and legal issues, and that the rules should not be based on a presupposition that these will be simple matters.

We recognize that some noncooperation proceedings may present complex legal issues. Some, such as those involving allegations of false testimony, may also involve significant factual evidence. The rules that we have proposed and adopted provide sufficient flexibility to deal with complex noncooperation issues in an appropriate time frame. But the rules are also designed to address, during the course of an investigation, ongoing recalcitrance even in the absence of any significant factual or legal issue. The rules afford a streamlined approach that will allow for swift dealing with that type of recalcitrance, but the streamlined option should not be understood as a signal that the Board intends to give short shrift to genuinely complex factual and legal issues that may arise in the noncooperation context.

One commenter requested clarification as to whether a firm might be held responsible for the noncooperation of one of its associated persons. Nothing in the rules creates vicarious noncooperation liability for a firm. Nevertheless, an associated

person's noncooperation has consequences for the firm. Pursuant to section 102(b)(3) of the Act and the Board's rules, every registered public accounting firm will have agreed, as a condition of the continuing effectiveness of its registration, (1) to secure from each of its associated persons a consent to cooperate in and comply with Board demands, and (2) to enforce those consents. While the firm would face no vicarious liability for the associated person's noncooperation, the firm's own registration status would be at risk if the firm failed either to secure the associated person's cooperation with the Board or to end its association with the person.

Rule 5111 – Requests for Issuance of Commission Subpoenas in Aid of an Investigation

Section 105(b)(2)(D) of the Act authorizes the Board to promulgate rules according to which the Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena on any person to require testimony and the production of documents that the Board considers relevant or material to an investigation. Rule 5111 implements that authority by providing that the Board shall seek issuance of such subpoenas, and in seeking such subpoenas shall supply the Commission with a completed form of subpoena and such other information as the Commission may require.

One commenter suggested that the rule should provide that any judicial action to enforce a Commission subpoena arising out of a Board investigation will be filed under

seal, to maintain the confidentiality of the matter. We decline to adopt this suggestion because it appears to be more about Commission processes than about Board processes.

Rule 5112 – Coordination and Referral of Investigations

Rule 5112(a) provides that the Board will notify the Commission of any pending investigation that involves a potential violation of the securities laws. The rule provides that the Board will do so as soon as practicable after entry of an order of formal investigation by sending a copy of the order to the Commission or appropriate Commission staff. Rule 5112(a) provides that the staff will then coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.

Rule 5112(b) provides that the Board may refer any investigation to the Commission and, in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), to that regulator.

Rule 5112(c) provides that, at the direction of the Commission, the Board may refer any investigation to the Attorney General of the United States, the attorney general of one or more states, and an appropriate state regulatory authority.

One commenter asked that the rule make clear that Board cooperation with other agencies does not extend to initiating investigations in aid of another agency's parallel proceedings. We decline to make this point in the rule. In this context, concepts like "in aid of" are too nebulous to be meaningful and serve only to fuel resource-consuming peripheral disputes. The Board will exercise all of its authority in a manner that it believes to be consistent with the Act. Disputes concerning whether the Board's reasons for initiating any particular investigation are appropriate may be addressed by reference to the Act.

Another commenter suggested that the rules should implement section 105(d)(1)(B) of the Act, which requires that the Board report any disciplinary sanction to the appropriate state regulatory authority or any foreign accountancy licensing board with which the disciplined firm or associated person is licensed or certified. In addition to state and foreign authorities, section 105(d)(1) also requires the Board to report sanctions to the Commission (section 105(d)(1)(A)) and, at the appropriate time, the public (section 105(d)(1)(C)). These provisions govern the Board, without providing for any discretion, and do not require an implementing rule.

Part 2 – Disciplinary Proceedings

Part 2 of the Board's Rules on Investigations and Adjudications consists of Rules 5200 through 5206. These rules address the commencement of disciplinary proceedings and the elements of those proceedings.

Rule 5200 – Commencement of Disciplinary Proceedings

Rule 5200 addresses the commencement of disciplinary proceedings and certain related matters. Rule 5200(a) identifies the three general categories of circumstances under which the Board may commence a disciplinary proceeding: when it appears to the Board that a hearing is warranted to determine whether (1) a registered public accounting firm or a person associated with such a firm has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, (2) such a firm, or its supervisory personnel, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of laws, rules, and standards, or (3) such a firm or a person associated with such a firm has failed to comply with an accounting

board demand, given false testimony, or otherwise failed to cooperate in connection with an investigation.

One commenter questioned whether "appears to the Board" is a sufficiently high standard and suggested that the rule require the Board to find a "reasonable basis" for concluding that a violation has occurred. We believe that "appears to the Board" is the appropriate standard. In the context of authorizing a disciplinary proceeding, the Board members' views on whether there is sufficient reason to believe that a violation occurred and is likely to be proven are sufficient. The use of an objective standard would have no practical effect on the outcome of the Board's deliberations and, if anything, would serve only as a peripheral litigation issue when the parties should instead be focused on the question of liability, rather than the question of whether the Board had sufficient reason to authorize the action.

Another commenter requested clarification on whether a violation based on a single negligent act is sufficient grounds to institute a disciplinary proceeding. The Act plainly contemplates that disciplinary proceedings can be instituted for a violation based on a single negligent act. Section 105(c)(5) of the Act provides that the Board may impose the more severe sanctions authorized by section 105(c)(4) only in cases that involve intentional or knowing conduct (including reckless conduct) or repeated instances of negligent conduct. Implicit in that provision is that a violation based on a

single instance of negligent conduct is sufficient to warrant a disciplinary proceeding to impose lesser sanctions.

Commenters also suggested that the Board should provide guidance concerning the term "supervisory personnel," and the concept of liability for a "failure to supervise." One commenter suggested that the Board should limit "supervisory personnel" to the partner in charge of an audit and an audit manager, and that the Board should spell out what constitutes a failure of reasonable supervision. Commenters made the point that supervisory structures of accounting firms are very different from supervisory structures at broker-dealers, and that therefore Commission precedent on failure to supervise can provide no guidance.

At this time, we are not providing specific guidance on the scope of supervisory liability under the Act. We will continue to consider whether additional guidance or rulemaking on this point would be appropriate. We see no reason, however, to limit the persons who may have supervisory liability to those occupying certain positions. A firm itself may have liability for failure to supervise, as may any associated person who plays a supervisory role. Moreover, even in the absence of additional, specific guidance, investigations may uncover circumstances in which it would be appropriate, under any reasonable reading of the Act, to commence disciplinary proceedings for failure to supervise.

Rule 5200(b) provides for an appointment of a hearing officer by the Board as soon as practicable after issuance of the order instituting proceedings or after a registration applicant has requested a hearing pursuant to Rule 5500(b). The rule is adapted from NASD Rule 9213(a). Under Rule 5200(b), the Board shall notify the parties of the hearing officer's assignment. The hearing officer shall have authority to do all things necessary and appropriate to discharge his or her duties, including, but not limited to, the matters specified in Rule 5200(b). The rule expressly subjects the hearing officer's authority to the limitations described in Rule 5402 (concerning hearing officer disqualification) and Rule 5403 (concerning *ex parte* communications). Though not part of the proposed rule, we have added the provision concerning registration hearings to conform this rule to the substance of the other provisions concerning hearings on disapproval of registration applications.

One commenter suggested that the rule should expressly provide the hearing officer with power to resolve disputes concerning document disclosure and the power to perform all other duties authorized elsewhere in the rules. We believe that the rule, as proposed and adopted, gives such authority to the hearing officer by virtue of the authority to rule on motions and to do all things necessary and appropriate to discharge duties.

Rule 5200(c) provides that the Board will observe certain separation of functions principles. The proposed rule provided that any Board employee or agent engaged in investigative or prosecutorial functions for the Board in a proceeding could not, in that same proceeding or a factually related proceeding, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding.

One commenter suggested that this rule should clearly exclude all enforcement personnel from participating in the adjudication of a disciplinary proceeding, whether or not they had an investigative or prosecutorial role in the matter. We are persuaded that this represents a good policy choice and we have revised the rule accordingly. The final rule provides that neither the staff of the Division of Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel. In addition, the rule provides, as proposed, that 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.

With respect to proceedings that involve a common question of law or fact, Rule 5200(d) provides that the Board or a hearing officer may, by order, consolidate the proceedings for hearing of any or all matters at issue in the proceedings. The rule is adapted from Rule 201 of the Commission's Rules of Practice. The rule provides that

consolidation shall not prejudice any rights that any party may have under the Board's Rules and shall not affect the right of any party to raise issues that could have been raised in the absence of consolidation.

Commenters suggested that the Board should recognize that consolidation may prejudice one or more parties and should allow parties an opportunity to object to joinder. One commenter stated that the rules should incorporate the standard for joinder under the federal rules, which the commenter characterized as allowing consolidation only when claims arise out of the same transaction or occurrence.

We have not changed the rule in response to the comments. The rule reflects an awareness of the possibility that consolidation could prejudice one or more parties. The rule specifically provides that matters may not be consolidated if doing so would prejudice a party's rights, and the rules afford the hearing officer an opportunity to hear any objections to consolidation. Where consolidation does not prejudice a party, then consolidation should not be objectionable, and may on occasion be appropriate and efficient, even when the commonality is limited to a question of law.

Rule 5201 – Notification of Commencement of Disciplinary Proceedings

Rule 5201(a) provides that when the Board issues an order instituting proceedings, the Secretary shall give each person or firm charged appropriate notice of the order within a time reasonable in light of the circumstances. As described in the

note to Rule 5201(a), in the case of emergency or expedited action, actual notice – by any means reasonably calculated to supply notice – may precede formal service of the order instituting proceedings.

One commenter suggested that the rule should be more specific on the timing of notice, or should at least provide that in no event would notice be provided later than 30 days after the issuance of the order. We have not adopted this suggestion. It is in the Board's interest to effect notice of the order as soon as possible after issuance. There is no strategic or other advantage to the Board in delaying notice, and the existence of the unserved order works no prejudice to, and imposes no obligations on, the respondent.

Another commenter suggested that the rule should specify the amount of notice that a respondent would have before a hearing would begin. This commenter suggested that the rule provide that a hearing could not begin sooner than 60 days or 90 days after notice of the order instituting the proceeding. A second commenter suggested that no hearing should commence sooner than 90 days after notice of the order instituting the proceeding.

We agree that the rule should include a provision concerning notice of the hearing date, though we decline to specify the suggested time frames. Rather, we have added a provision to rule 5201(a) providing that if the order instituting proceedings sets

a hearing date, each party shall be given notice of the hearing within a time reasonable, in light of the circumstances, in advance of the hearing. As a general matter, we expect that Board orders instituting proceedings will not specify a hearing date, unless the proceedings are for noncooperation. In those proceedings, we may find that reasonable notice of a hearing date is less than 90 days or 60 days, and we decline to provide by rule for a longer minimum time that would delay the process even when there is no genuine need for delay.

In matters where the Board's order does not set a hearing date, the hearing officer retains discretion to schedule a hearing date. We expect hearing officers to exercise that discretion prudently and fairly, consistent with avoiding unnecessary delays, but we decline to specify a minimum amount of notice that a party must have before a hearing may be held.

Rule 5201(b) describes the content of an order instituting proceedings. The precise requirements concerning the content of the order vary depending upon whether the proceeding is commenced under Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3). The proposed rule provided that, in each case, the order would specify in reasonable detail, with respect to each firm or person charged, the conduct alleged to form the basis for a disciplinary sanction.

Commenters suggested that the rule should require more in the way of notice. One commenter said that "reasonable detail" was insufficient, and that the rule should require a description of the time period, the alleged misconduct, and the alleged mental state with which the respondent acted. Another commenter suggested that the Board consider a heightened pleading requirement like that of Rule 9(b) of the Federal Rules of Civil Procedure.

We have modified the proposal to eliminate the phrase "reasonable detail." Instead, the rule requires a "short and plain statement of the matters of fact and law to be considered and determined," including of the conduct alleged to constitute a violation and the rule, statutory provision, or standard violated. Where a violation requires a particular state of mind, then a necessary component of alleging the conduct is alleging the existence of that state of mind. In requiring that the order include a description of the "conduct," the rule necessarily requires more than just a conclusory statement that the respondent engaged in conduct that violated a rule, statute, or standard. The rule requires that the order allege the conduct in sufficient factual detail to advise the respondent of what conduct is at issue.

Rule 5201(c) provides that, in the case of a hearing on a registration application commenced under Rule 5500, the notice of hearing shall state proposed grounds for disapproving the registration application.

Rule 5201(d) provides that either the Board or, on the motion of the interested division, a hearing officer, may amend an order instituting proceedings. The Board may do so at any time to include new matters of fact or law. A hearing officer may do so only prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for filing final briefs with the Board. A hearing officer may amend an order only to include new matters of fact or law that are within the scope of the original order instituting proceedings, but may not initiate new charges or expand the scope of matters set for hearing beyond the framework of the Board's order instituting proceedings. The rule is adapted from Rule 200(d) of the Commission's Rules of Practice.

Commenters suggested that the ability to amend an order should be limited to adding questions of law or fact germane to those already included, that the Board should provide notice that it is considering amending an order, and that the Board should not amend an order when doing so would unfairly prejudice a respondent. We decline to change the rule in response to these comments. Concerns about notice and prejudice are less appropriately directed to whether amendment is allowed, and more appropriately addressed to whether a respondent is given a fair opportunity to address new matters after amendment of an order. We expect that hearing officers will exercise appropriate discretion in assuring a fair opportunity to address new matters added by amendment. As to the commenters' concerns about the scope of the allowable

amendment, the rule already limits the hearing officer's amending authority to matters within the scope of the original order instituting proceedings. We decline to impose the same limitation on the Board's own authority to amend an order, though we reiterate that a respondent is entitled to a fair opportunity to address new matters added by amendment.

Rule 5202 – Record of Disciplinary Proceedings

Rule 5202(a) describes the material that shall make up the contents of the record in a disciplinary proceeding (Rule 5202(a)(1)) and the contents of the record on disapproval of an application for registration (Rule 5202(a)(2)). Under Rule 5202(b), any document offered as evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered part of the record but shall be maintained by the Secretary until all opportunities for Commission and judicial review have been exhausted or waived. Paragraphs (c)-(e) of Rule 5202 address the substitution of true copies for documents in the record, the preparation of the record and the certification of the record index, and the final transmittal of record items to the Secretary. The rule is adapted from Rules 350 and 351 of the Commission's Rules of Practice.

Rule 5203 – Public and Private Hearings

Section 105(c)(2) of the Act provides that any proceeding by the Board to determine whether to discipline a registered public accounting firm or an associated person thereof shall not be public unless otherwise ordered by the Board for good cause shown, with the consent of the parties to the hearing. Rule 5203 implements that requirement by providing that proceedings commenced pursuant to Rule 5200(a) shall not be public unless the Board so orders, for good cause shown, with the consent of the parties.

Rule 5203 also provides that all other Board hearings shall be nonpublic unless the Board otherwise orders. In practical effect, this provision applies only to a hearing on disapproval of a registration application, since that is the only type of hearing for which the rules provide other than the hearings expressly covered by Section 105(c)(2) of the Act. The rule essentially creates a presumption that a hearing on disapproval of a registration application will be non-public. A disapproval hearing will, by its nature, involve a firm that is not yet a registered firm and may well involve a record that includes confidential information submitted as part of the registration application. The rule reserves to the Board the flexibility to make the hearing public if warranted by unusual circumstances. In any event, if the Board decides, after a hearing, to disapprove the

application, that decision, along with the reasons for the decision, will be made public according to the provisions of Section 105(d) of the Act.

One commenter asked for clarification on whether the absence of one party's consent to a public proceeding would be sufficient to keep the proceeding nonpublic. Other than in hearings on disapproval of a registration application, it is correct that any one party's refusal to consent to a public proceeding is sufficient to keep the proceeding nonpublic. A hearing on disapproval of a registration application shall be nonpublic unless the Board, in its discretion, orders otherwise.

Rule 5204 – Determinations in Disciplinary Proceedings

One commenter expressed a concern that the proposed rules do not provide for the burdens of proof in a disciplinary proceeding. In response, we have added a new Rule 5204(a). Rule 5204(a) provides that in any disciplinary proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3), the interested division shall bear the burden of proving an alleged violation or failure to supervise by a preponderance of the evidence.

We have adopted the rest of Rule 5204 as proposed, except for renumbering the paragraphs in light of the addition of a new paragraph (a). Rule 5204(b) provides that, unless the Board orders otherwise, the hearing officer shall prepare an initial decision following a hearing. The rule provides that the initial decision shall include findings and

conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and such other information as the Board may require. The rule is adapted from Rule 360 of the Commission's Rules of Practice.

The note to Rule 5204(b) sets out the Board's general expectations about the time frame within which a hearing officer should complete an initial decision in various types of cases. These time frames are nothing more than the Board's general expectations and do not create any right in any person to have an initial decision prepared within any particular period of time.

Rule 5204(c) governs the hearing officer's filing of the initial decision with the Secretary and the Secretary's service of the initial decision on the parties.

Rule 5204(d) provides the circumstances in which an initial decision of a hearing officer becomes the final decision of the Board as to a party. The rule is adapted from Rule 360(d) of the Commission's Rules of Practice. Rule 5204(d)(1) provides that the initial decision becomes the Board's final decision as to a party upon issuance by the Secretary of a notice of finality. Rule 5204(d)(2) provides that the Secretary shall issue the notice of finality no later than twenty days after the lapsing of the time period for filing a petition for Board review (as described in Rule 5460), unless one of the two conditions described in Rule 5204(d)(3) has occurred. Rule 5204(d)(3) provides that

the Secretary shall not issue a notice of finality as to any party who has filed a timely petition for Board review or with respect to whom the Board, on its own motion, has ordered review of the initial decision pursuant to Rule 5460(b).

Rule 5205 – Settlement of Disciplinary Proceedings Without a Determination After Hearing

Rule 5205 governs certain matters related to possible settlement of disciplinary proceedings. The rule is adapted from Rule 240 of the Commission's Rules of Practice.

Rule 5205 provides that any person who is or is to be a party to a disciplinary proceeding may at any time propose in writing an offer of settlement. The rule imposes requirements for the content of the offer, and requires that it be signed by the person making the offer, not by counsel.

Rule 5205(c)(1) requires that the Director of Enforcement and Investigations present the offer to the Board along with a recommendation concerning the offer, except that, if the recommendation is unfavorable, the Director shall not present the offer to the Board unless the person making the offer so requests.

Rule 5205(c)(2)-(3) set out various matters that the person making the offer must waive before the Board will consider the offer, including waiver of rights to hearings, rights to proposed findings of fact and conclusions of law, rights to proceedings before and an initial decision by a hearing officer, rights to post-hearing procedures, rights to judicial review, rights to have Board and Board staff observe separation of functions

principles, and rights to claim bias or prejudgment by the Board based on consideration of or discussions concerning the settlement offer.

Rule 5205(c)(4) provides that if the Board rejects the offer, the offer will be deemed withdrawn and will not constitute a part of the record. Rule 5205(c)(4) further provides that rejection of the offer will not affect the continued validity of waivers of rights to claim bias or prejudgment on the basis of discussions concerning the settlement offer.

Rule 5205(c)(5) provides that Board acceptance of an offer will occur only upon the issuance of findings and an order by the Board.

A note to Rule 5205 points out that in hearings on disapproval of registration, settlement offers will be handled by the Director of Registration and Inspections, rather than the Director of Enforcement and Investigations, in accordance with Rule 5205.

One commenter suggested that the rule should allow for conditional settlements that do not require waiver of appeal rights – in other words, settlements that are conditional, depending upon the resolution of a legal point on appeal. We decline to revise the rule to provide for this specifically, because we believe that, to the extent such a settlement might ever be appropriate, the rule as drafted accommodates it. In effect, the Board retains the flexibility to waive, in settlement, any of the waiver requirements that Rule 5205 imposes on respondents

One commenter suggested deleting Rule 5205(c)(3)(i), because it allows the staff to advise the Board concerning a settlement offer without the respondent being able to address what the staff says. We do not adopt this suggestion.

Settlement offers may frequently arise even before the Board has authorized a disciplinary proceeding. In that circumstance, discussions between the staff and the Board are "deliberations of the Board and its employees . . . in connection with . . . an investigation" and are privileged and confidential under section 105(b)(5)(A) of the Act.

Even if a settlement offer arises after the institution of a disciplinary proceeding, established regulatory practice, even among federal agencies subject to the procedural constraints of the Administrative Procedure Act, recognizes that a regulatory body functioning both as ultimate adjudicator and as a party is entitled to the confidential recommendations of its staff on settlement discussions, so long as the respondent waives prejudgment issues. The rule we adopt is consistent with that established practice. A respondent who wishes for us to consider a settlement offer must allow us to confer confidentially with the staff about the matter, and that requires that the respondent waive any right to assert prejudgment arguments based on those communications.

Commenters also suggested that the rule should provide that settlement negotiations and offers are privileged and confidential and, if no settlement is reached,

may not be used as evidence in the proceeding itself. We fully expect that the content of settlement negotiations would not be introduced as evidence in Board proceedings, but we expect for that and any understandings about confidentiality to be accomplished in the same way it is in other contexts, such as Commission proceedings – by letter agreements and other agreements specific to the matter and the negotiation.

It is not clear, however, what the commenter means by suggesting that a Board rule should provide that settlement negotiations are "privileged." The Board intends to maintain the confidentiality of such negotiations, but whether such negotiations are privileged is not a matter for a Board rule.

Rule 5206 – Automatic Stay of Final Disciplinary Actions

Rule 5206 provides that no final disciplinary sanction of the Board shall be effective until either (a) the dissolution by the Commission of the stay provided by Section 105(e) of the Act or (b) the expiration of the period during which the Commission, on its own motion or upon application under Section 19(d)(2) of the Exchange Act, may institute review of the sanction.

Part 3 – Disciplinary Sanctions

Part 3 of the Board's Rules on Investigations and Adjudications consists of Rules 5300 through 5304. These rules describe the sanctions the Board may impose in

disciplinary proceedings and various matters related to the effect of, and the termination of, such sanctions.

Rule 5300 – Sanctions

Rule 5300 describes sanctions that the Board may impose in disciplinary proceedings. Rule 5300(a) describes sanctions that the Board may impose in disciplinary proceedings instituted other than for noncooperation in an investigation. Subparagraphs (1) – (6) of Rule 5300(a) incorporate the sanctions expressly provided by Section 105(c)(4) of the Act, including revocation of registration, bar from association, suspensions, limitations on activities, civil money penalties, censures, and a requirement of additional professional education or training. A Note to subparagraph (3) of Rule 5300(a) contains a non-exclusive list of types of limitations on activities the Board may impose. Subparagraphs (7) – (10) of Rule 5300(a) identify other sanctions, pursuant to the authority given to the Board in Section 105(c)(4)(G) of the Act, including requiring a party to engage an independent monitor, to engage counsel or other consultants to design policies to effectuate compliance with the Act, to adopt or implement policies or undertake action to improve audit quality or to effectuate compliance with the Act, or to obtain an independent review and report on one or more engagements.

Commenters suggested that the rules should provide guidance on when particular sanctions will be imposed. Commenters sought assurance that revocation and bar would be reserved for the most serious matters. Commenters sought some articulation of the standard that must be met for the imposition of lesser sanctions.

We have not revised the rule in response to these comments. The more serious the violation is, the more severe the appropriate penalty will be, and the Board retains discretion to assess the seriousness of the violation and the severity of the penalty. In addition, section 105(c)(5) of the Act requires scienter or repeated negligence for imposition of the most severe sanctions. The Act does not limit the standard that must be met for imposition of other sanctions.

Rule 5300(b) describes the sanctions that the Board may impose in disciplinary proceedings for noncooperation with an investigation. The sanctions include revocations, bars, and suspensions, as expressly provided by Section 105(b)(3)(A) of the Act. Rule 5300(b) also identifies other sanctions, pursuant to the authority given to the Board in Section 105(b)(3)(A)(iii), including civil money penalties, censures, limitations on activities, requiring a firm to engage a special master or independent monitor to monitor and report on the firm's compliance with accounting board demands, or authorizing the hearing officer to retain jurisdiction to monitor compliance with accounting board demands.

One commenter noted that the rules were unclear on whether money penalties might be assessed for noncooperation. The rule, as proposed and adopted, does provide for the possible imposition of money penalties for noncooperation.

Another commenter expressed doubt that the Act authorizes the imposition of money penalties for noncooperation. Section 105(b)(5) of the Act provides that noncooperation may be punished by revocation, bar, suspension, and "such other lesser sanctions as the Board considers appropriate." We believe that an appropriately calibrated money penalty is a "lesser sanction" than revocation of a firm's registration or a bar on association with a firm.

The commenter argued that "lesser sanctions" should be understood to mean only those sanctions, such as censure or additional training, for which section 105(c)(5) of the Act does not prescribe a scienter requirement. We see two significant flaws in this reasoning. First, the reasoning is premised on the notion that noncooperation, by its nature, does not involve scienter. This is not correct for all forms of noncooperation. Some instances of noncompliance will be evident on their face – for example, a failure to provide documents required by an accounting board demand – and are sanctionable as noncooperation without the need to establish any scienter. Other instances of noncooperation, such as knowingly providing false testimony or abusing Board processes to obstruct an investigation, necessarily involve a scienter element, and

would be punishable by a money penalty even if the Act limited money penalties to scienter-based offenses.

Second, the Act, in fact, does not limit money penalties to scienter-based offenses. Section 105(c)(5) distinguishes between money penalties that do require a finding of scienter (money penalties greater than $100,000 for a natural person or $2,000,000 for any other person) and money penalties that do not require a finding of scienter (all other money penalties). Accordingly, even under the commenter's own rationale – that "lesser sanctions" means only those sanctions available for non-scienter offenses – money penalties would be among those sanctions.

When the Board revokes a firm's registration or bars a person from association with a registered public accounting firm, the sanction is permanent and will not expire of its own accord. In contrast, a suspension of registration or a suspension from association shall be for a fixed time period at the expiration of which a suspended firm shall resume its status as registered and a suspended person shall be free to associate with a registered firm.

In the case of a revocation of registration or a bar on association, the Board may provide for a specified period after which the firm may reapply for registration, or the person may petition for termination of the bar. Modification or termination of sanctions is discussed below in connection with Rule 5302.

A note to Rule 5300 points out that the rule does not preclude the imposition, on consent in the context of a settlement, of any other sanction not identified in the rule.

Rule 5301 – Effect of Sanctions

Rule 5301 describes the effect of certain sanctions imposed by the Board. Rule 5301(a) applies to persons who have been suspended or barred from association with a registered public accounting firm or who have failed to comply with any other sanction imposed on them by the Board. Rule 5301 prohibits such persons from willfully becoming or remaining associated with any registered public accounting firm, unless they first obtain the consent of the Board, pursuant to Rule 5302, or of the Commission.

Rule 5301(b) applies to a registered public accounting firm. It prohibits a firm from permitting a person to become or remain associated with the firm if the firm knows, or in the exercise of reasonable care should have known, that the person is subject to a bar or suspension on such association, unless the firm first obtains the consent of the Board, pursuant to Rule 5302, or of the Commission.

With the proposed rules, the notes to Rule 5301(a) and Rule 5301(b) stated that the prohibition on association would prohibit the person from receiving, and the firm from paying or crediting, any salary, bonus, profit, or other remuneration that results directly or indirectly from any audit fees earned during the period of the suspension or

bar. Several commenters suggested that there were significant practical obstacles to drawing the proposed line on compensation.

In response to those concerns, we have eliminated from each note the sentence that read, "[t]his prohibition includes receiving any salary, or any bonus, profit or other remuneration that results directly or indirectly from any audit fees, that might have been earned during the period of the suspension or bar." The relevant remaining portion of each note is an explanation rooted directly in the language of section 2(a)(9) of the Act, (which defines "associated person"): a person who is suspended or barred from being associated with a registered public accounting firm may not, "in connection with the preparation or issuance of any audit report . . . share[ ] in the profits of, or receive[ ] compensation in any other form from," any registered public accounting firm.

This language means two fundamental things. First, a barred or suspended person may not receive a share of the firm's profits from audit work. To the extent that any compensation is calculated as a share of profits – whether a partner's draw, or any other employee's bonus or other special compensation -- the calculation must be adjusted so that the portion of the firm's profits that is derived from audit revenue is not counted in calculating that compensation.

Second, a person may not be compensated in any form for doing audit work. This does not mean that a salaried employee must suffer a salary cut that mirrors the

portion of the firm's profits that are from audit work, but it does reinforce the general prohibition on the person doing any audit work.

The language does not prohibit a barred partner from receiving from the firm a return of the partner's capital or a separation payment provided for in the partnership agreement. Nor does the language prohibit the payment of standard retirement benefits to which the person was entitled on the day the sanction took effect.

One commenter suggested that the rules prescribe at least one procedure which, if followed by a firm to determine whether a person is barred or suspended, would be "reasonable per se" and effectively provide a safe harbor for the firm from liability for associating with the person. The commenter suggested, as an example, that obtaining signed statements from individuals certifying that they are not suspended or barred could be a sufficient procedure for the firm to avoid liability.

We will continue to consider what, if any, sort of safe harbor procedure might be made available on this point. We reject the commenter's particular suggestion, however, simply because we see sufficient reason to be skeptical that persons who have committed transgressions serious enough to warrant bar or suspension will necessarily refrain from providing a false certification when seeking work. We would not consider mere reliance on such a certification reasonable. A bar or suspension, once it takes effect, will be a matter of public record, and the rule effectively requires that firms

make reasonable efforts to confirm, through public records, that an individual is not barred or suspended. The Board will consider ways to make information about bars and suspensions more readily accessible to firms.

Rule 5302 – Application for Relief from, or Modification of, Revocations and Bars

Rule 5302 provides mechanisms by which a firm or person subject to a Board sanction may apply to the Board for relief from, or modification of, that sanction. Under Rule 5302(a), a firm that has had its registration revoked pursuant to a Board determination that permitted the firm an opportunity to reapply for registration after a specified period of time may, after the expiration of the specified period, file an application for registration pursuant to Rule 2101. The revocation shall continue, however, unless and until the Board affirmatively approves such a registration application.

Under Rule 5302(b), a person subject to a bar on association that contains a provision allowing the person to seek termination of the bar after a specified period of time may, after the expiration of the specified period, file a petition to terminate the bar. Subparagraphs (2) – (5) of Rule 5302(b) govern the process related to such a petition.

Commenters questioned the appropriateness of Rule 5302(b)(2)(iii)(D), which requires an individual who seeks relief from a bar to provide the Board with, among other things, the names of other associated persons, at the firm with which the

individual seeks to associate, who have previously been barred by the Board or the Commission. Commenters stated that this information would not be readily available to the individual.

We have adopted the rule as we proposed it. While the requirements of the rule are framed with reference to the individual seeking relief from a bar, the burdens of the rule should not be viewed as falling solely on the individual. As a practical matter, the petition submitted by the individual should be a collaborative effort between the individual and the firm that wishes to associate with the individual. The firm should readily be able to supply the information necessary for the individual to satisfy the rule. The rule is based on Rule 193(b)(4)(iv) of the Commission's Rules of Practice, which imposes a similar requirement on barred individuals seeking to associate with a broker-dealer.

Rule 5302(c) governs modification of revocations and bars that do not expressly provide a time period after which the firm may reapply for registration or the person may petition to terminate the bar. Such firm or person may at any time request leave to reapply for registration or leave to file a petition to terminate a bar. They may not file a registration application or a petition to terminate the bar unless the Board grants such leave. The revocation and bar shall continue until the Board has both granted such leave and approved a subsequent application or petition.

Under Rule 5302(d), a firm or person subject to an ongoing sanction imposed for noncooperation with an investigation may file an application for termination of that sanction once the firm or person has remedied the noncooperation that formed the basis for the sanction. The sanction shall continue, however, unless and until the Board orders it terminated.

One commenter suggested that the rules should include provisions governing a hearing for a person who applies for termination of an ongoing sanction. We see no need for special provisions on this point. A continuing sanction generally will be a matter that effectively remains within the jurisdiction of the Board, or the hearing officer, as a piece of the proceeding from which the sanction resulted. Any necessary hearing on termination of the sanction can be provided in that context, without the need to institute a new proceeding.

Under Rule 5302(e), any firm or person subject to a sanction described in subparagraphs (3), (6), (7), (8), (9), or (10) of Rule 5300(a) may file an application for termination of the sanction at any time. The Board may, in its discretion, grant a hearing on the application. The sanction shall continue, however, unless and until the Board orders it terminated.

Rule 5303 – Use of Money Penalties

Rule 5303 provides that all money penalties collected by the Board shall be used to fund a merit scholarship program as required by, and described in, Section 109(c)(2) of the Act.

Rule 5304 – Summary Suspension for Failure to Pay Money Penalties

Under Rule 5304, the failure of a registered public accounting firm or an associated person to pay money penalties imposed by the Board may result in summary suspension, and effective revocation, of the firm's registration and summary suspension or bar from association. Under Rule 5304(a), if a firm fails to pay a money penalty after the exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the firm's registration.

The proposed Rule 5304(a) required only that the Board provide the firm with written notice at least seven days before any such suspension. One commenter understood the proposal to mean that a firm or associated person might have only seven days between the date the sanction becomes final and the date of summary suspension under the rule. The commenter suggested that the rule provide for at least 30 days between the sanction becoming final and the Board sending the seven-day notice.

The commenter's suggestion is consistent with what we intended by our proposal, and we have modified the rule to make that intent explicit. The rule that we adopt allows a thirty-day period for payment after a money penalty becomes final. If payment is not made in that thirty-day period, the Board may send a notice that failure to make payment within seven days will result in summary suspension.

Once such a suspension is imposed, it shall terminate upon payment of the penalty by the firm within 90 days of the onset of the suspension. If payment is not made within 90 days, the firm's registration will effectively be revoked, and the firm can re-register only by paying the penalty, plus interest, and filing an application for registration under Rule 2101 and obtaining Board approval of that application.

Under Rule 5304(b), if an associated person fails to pay a money penalty after exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the person from association with a registered firm. Rule 5304(b) requires the Board to provide written notice at least seven days before any such suspension. As with Rule 5304(a), we have added to the final rule a provision allowing a thirty-day period for payment after a money penalty becomes final and before the Board may send the seven-day notice. Once a suspension is imposed, it shall terminate upon payment of the penalty, plus interest, within 90 days of the onset of the

suspension. If payment is not made within 90 days, the Board may summarily bar the person from association with a registered firm.

Part 4 – Rules of Board Procedure

Part 4 of the Board's Rules on Investigations and Adjudications consists of Rules 5400 through 5469. These rules are further divided into general rules (5400 through 5411), prehearing rules (5420 through 5427), hearing rules (5440 through 5445), and appeals to the Board (5460 through 5469).

Rule 5400 – Hearings

Rule 5400 provides for hearings to be held only upon order of the Board and to be conducted in a fair, impartial, expeditious and orderly manner. The rule is adapted from Rule 200 of the Commission's Rules of Practice.

Rule 5401 – Appearance and Practice Before the Board

Rule 5401 provides that a person may appear on his own behalf before the Board or may be represented by counsel. Rule 5401 further provides that a member of a partnership may represent the partnership and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. Rule 5401(c) imposes certain procedural requirements related to representation and withdrawal.

Proposed Rule 5401(c)(4) provided that an individual's withdrawal from representation of a party would be permitted only with the approval of the Board or the

hearing officer. One commenter suggested that it would be helpful if the rules would enumerate grounds that would be adequate for withdrawal. Other commenters suggested that the rules should provide that permission to withdraw would not be unreasonably withheld. One commenter suggested that a party's request to replace counsel (as distinct from counsel's request to withdraw) should not require approval.

We are sensitive to the importance of counsel being free to withdraw in appropriate circumstances, and the importance of a party being free to change counsel in appropriate circumstances. We are also mindful of the ways in which an ostensible desire to withdraw or to change counsel can be used to delay or disrupt proceedings. To provide some assurance of the limited scope within which we intend for the Board or hearing officer to withhold permission to withdraw, we have adopted the suggestion of those commenters who urged that the rule provide that permission to withdraw would not be unreasonably withheld.

Rule 5402 – Hearing Officer Disqualification and Withdrawal

Rule 5402 allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402 also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233.

Commenters suggested that the rule should provide for a right of immediate interlocutory appeal to the Board from a hearing officer's denial of a recusal motion. One commenter stated that this was of particular importance given the possibility that Board staff, including enforcement staff, might be assigned to serve as hearing officers.

As discussed earlier, we have revised the definition of "hearing officer" to provide that neither a Board member nor any staff of the interested division will serve as a hearing officer. We decline to create a special right of interlocutory Board review in every case of a denied recusal motion. The interlocutory appeal process, governed by Rule 5461, allows a party to request that the hearing officer certify his or her recusal ruling for interlocutory review. The rule requires that the hearing officer should certify the ruling if immediate review of the order may materially advance the completion of the proceeding. Given that a reversible denial of a recusal motion could substantially delay completion of the proceeding by eventually requiring a complete re-hearing before a different hearing officer, we expect hearing officers to give careful attention to whether that standard for certification has been met with respect to any ruling denying a recusal motion.

One commenter suggested that the rule should provide that, if a hearing officer is replaced, the parties should have a right to move that certain testimony be reheard so that the new hearing officer may judge credibility. We believe that the rules as

proposed and adopted are flexible enough to accommodate such a motion and to leave the decision within the discretion of the new hearing officer.

Rule 5403 – *Ex Parte* Communications

Rule 5403 prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The proposed rule also prohibited a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules. Commenters suggested that the restriction should extend beyond the interested division to any Board staff that has had substantial involvement in a matter. We have revised Rule 5403(b) to impose the restriction not only on a party (including the interested division) but also on any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing,

The rule includes a specific exception allowing staff to discuss settlement offers with the Board when a party has provided the prejudgment waiver described in Rule 5205(c)(3). The rule is based in part on Rule 120 of the Commission's Rules of Practice.

Rule 5404 – Service of Papers by Parties

Rule 5404 requires service of papers on each party in a manner calculated to bring the paper to the attention of the party served. One commenter suggested that the rule be more specific, such as by requiring service by first class mail unless the hearing officer directs otherwise. We have adopted the rule as proposed. The rule is flexible enough to accommodate service by first class mail, or by other means, such as through electronic communication.

Rule 5405 – Filing of Papers With the Board: Procedure

Rule 5405 governs procedures for filing papers with the Board.

Rule 5406 – Filing of Papers: Form

Rule 5406 governs the form of papers to be filed with the Board.

Rule 5407 – Filing of Papers: Signature Requirement and Effect

Rule 5407 requires every paper filed to be signed either by the party, if the party represents himself or herself, or by counsel if the party is represented by counsel. Because the Board expects most papers to be filed electronically, a note to the rule states that the signature should be scanned into an electronic document where practicable, but that otherwise certain indicia of electronic signature will suffice.

Rule 5408 – Motions

Rule 5408 describes procedures and length limitations related to motions and supporting briefs. One commenter suggested that the time and page limits relating to motions are unduly restrictive. The commenter also suggested that the rules should give a hearing officer the authority to extend time periods, just as they give a hearing officer the authority to enlarge page limits. Rule 5408(b), as proposed and adopted, already provides the hearing officer with authority to extend time periods. In light of the flexibility given the Board and the hearing officer to adjust schedules and page limitations in appropriate circumstances, we decline to revise the rule to provide for longer time periods or larger page limitations generally.

Rule 5409 – Default and Motions to Set Aside Default

Rule 5409 describes the circumstances that shall constitute a default and the procedure for seeking to set aside a default. The rule is adapted from Rule 155 of the Commission's Rules of Practice.

Rule 5410 – Extra Time for Service by Mail

Proposed Rule 5410 included paragraph (a), concerning time computation, and paragraph (b), concerning additional time for service by mail. As noted above in connection with Rule 1002, we have adopted the substance of paragraph (a) but we have moved it to part I of the rules in order to give it broader application. We have

adopted the substance of proposed paragraph (b), providing an additional three days for service made by mail, as Rule 5410.

Rule 5411 – Modifications of Time, Postponements and Adjournments

Rule 5411 provides that the Board maintains discretion, except as otherwise provided by law, to adjust the time limits prescribed by the rules or to postpone or adjourn any hearing.

Rule 5420 – Leave to Participate to Request a Stay

Rule 5420 provides a procedure by which certain entities may seek a stay of a hearing. Under the proposed rule, the entities that may seek such a stay would have been the Commission, the United States Department of Justice or any United States Attorney's Office, and any criminal prosecutorial authority of a state or political subdivision of a state. One commenter suggested that the list should be expanded to include an appropriate state regulatory authority. We agree with that comment and have modified the rule accordingly.

Under Rule 5420, an authorized representative of any such entity may seek leave to participate on a limited basis to request a stay. Rule 5420 provides that a stay shall be granted upon a showing that a stay is necessary to protect an ongoing Commission investigation, and that a stay shall otherwise be favored upon a showing that it is in the public interest or for the protection of investors.

One commenter suggested that the rule should require that any person who appears in order to seek a stay must maintain the confidentiality of information in those proceedings. We have not adopted this suggestion. The entities that may participate under this rule are regulatory or criminal prosecutorial authorities. We do not believe the public interest is served by imposing any obstacle to or condition on their making a formal request that Board proceedings be stayed in the interest of ongoing regulatory or criminal investigative or other proceedings. Moreover, even before participating to seek a stay, some of them will already have received information from the Board pursuant to section 105(b)(5)(B) of the Act, subject to that section's confidentiality requirement, Appearing for the purpose of requesting a stay will not afford them access to information beyond what they may have received under section 105(b)(5)(B) unless a respondent, in opposing the stay request, chooses to provide more information. In any event, the request to participate, and the request for a stay, will also be nonpublic.

Rule 5421 – Answer to Allegations

Rule 5421 governs the filing of answers to orders instituting proceedings. A party may file an answer in any matter, but is not required to file an answer unless ordered to do so in the order instituting proceedings.

Commenters suggested that the rule should provide 21 days, rather than five days, for a respondent to file an answer in a noncooperation proceeding. We agree that

a strict five-day rule is not appropriate, given that some noncooperation proceedings may involve complex issues. We also believe that a general 21-day rule would be inappropriate in many uncomplicated matters of noncooperation. We have modified the rule to require an answer in a noncooperation proceeding within five days as a general matter, but to allow the hearing officer and the Board discretion to allow a longer period.

Rule 5422 – Availability of Documents for Inspection and Copying

Rule 5422 governs the obligations of Board staff to make documents available to a party for inspection and copying. Under the rule, the staff's obligation varies according to whether the proceeding is commenced under Rule 5200(a)(1)-(2) for violations or failures reasonably to supervise, Rule 5200(a)(3) for noncooperation, or Rule 5500 concerning disapproval of a registration application. In response to comments, we have made several changes to Rule 5422. In particular, we have revised the structure of the rule in response to commenters' suggestions that the rule should more closely track the Commission's approach with respect to so-called Brady material. We have added provisions to reinforce the principle that material exculpatory evidence will not be withheld even if the confidential informant privilege or other good cause would otherwise justify withholding it. We have also modified the rule to provide that documents made available in a noncooperation proceeding will include any documents that contain material exculpatory evidence on the issue of noncooperation.

Finally, we have revised the rule to require the Division to provide a privilege log with respect to a certain category of documents. We now turn to a description of the rule as we have adopted it.

Paragraphs (a) through (c) of Rule 5422 are the core provisions for determining what documents the staff must make available. Paragraph (a) describes generally the documents that the staff must make available to a respondent. Paragraph (b) limits paragraph (a) by describing categories of documents that the staff may withhold, subject to an overriding obligation not to withhold material exculpatory evidence. Paragraph (c) prescribes procedures the staff must follow when withholding certain categories of documents, and procedures for a hearing officer to determine whether withholding is appropriate.

Rule 5422(a)(1) applies to proceedings commenced under Rule 5200(a)(1) or Rule 5200(a)(2). The rule provides that in those proceedings, the Division of Enforcement and Investigations shall make available all documents in four specific categories: (1) accounting board requests, subpoenas, and accounting board demands for documents, testimony, or information issued in the investigation or in the informal inquiry, if any, that preceded the investigation, (2) responses to those accounting board requests, subpoenas, and accounting board demands, including any documents produced in response, (3) testimony transcripts and exhibits, and any other verbatim

records of witness statements, and (4) all other documents prepared or obtained by the Division of Enforcement and Investigations in connection with the investigation prior to the institution of proceedings.

Rule 5422(a)(2) applies to noncooperation proceedings commenced under Rule 5200(a)(3). Rule 5422(a)(2) requires that the Division of Enforcement and Investigations make available all documents on which the Division intends to rely in seeking a finding of noncooperation. The rule expressly provides that the Division shall not be required to make available any other documents in a proceeding based on noncooperation, subject only to the general requirement to make available material exculpatory evidence on the issue of noncooperation.

One commenter suggested that the rule should require disclosure of all documents "relevant" to the noncooperation proceeding, rather than just documents on which the staff intends to rely. As discussed below, we have added a requirement that the staff also provide any documents that contain material exculpatory evidence on the issue of noncooperation. We decline to expand the production obligation further. We anticipate that noncooperation proceedings will narrowly focus on such things as, for example, the demand with which there has been no compliance, or the testimony that is allegedly false. The only documents that would be relevant in those examples are the documents that the Division would use to prove noncooperation and any documents

that would tend to show that the person did comply with the demand, or that that person's testimony was not false. Under the rule that we adopt, all such documents must be made available to the respondent in a noncooperation proceeding.

We decline, however, to adopt a "relevance" standard and open the door to broader disputes about what documents might be "relevant." Liability for noncooperation is independent of whether the party has otherwise violated any law, rule, or standard enforceable by the Board. Noncooperation is not excusable on the basis of a conviction that the staff's investigation is misguided. We do not intend for noncooperation proceedings to become a forum for demonstrating, through broad access to the investigative record, that the investigation is flawed and that something less than full cooperation was therefore justified. A noncooperation proceeding focuses only on the obligation to cooperate, which is not a qualified obligation that varies depending upon one's view of the merits of the investigation.

Moreover, as we stated in proposing the rules, we intend that noncooperation proceedings will generally be commenced as soon as the grounds for such a proceeding appear, rather than waiting until the conclusion of an investigation.[8/] An

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[8/] The rules do not preclude the Board from commencing a proceeding for noncooperation after an investigation and prosecuting it separately from or consolidated with a proceeding for alleged violations of laws, rules, or standards enforceable by the Board. For example, the Board may, in its discretion, institute proceedings for violations of the Act and simultaneously institute proceedings for noncooperation in an

important objective of a noncooperation proceeding will be not only to impose a sanction if appropriate, but also to compel the cooperation at a time when it is still meaningful to the investigation. At that point in time, to require the staff to make available any portion of the investigative record other than that directly bearing on noncooperation could compromise the investigation, and might also compromise investigations by the Commission or other authorities. Indeed, to allow access to any portion of the investigative record in the course of a noncooperation proceeding would supply a counterproductive incentive that might cause some persons to fail to cooperate specifically for the purpose of obtaining access to that record.

Rule 5422(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500. Rule 5422(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the Division in connection with the registration application prior to the notice of hearing.

Rule 5422(a) includes specific exceptions for, and must be read in conjunction with, Rule 5422(b), which describes four categories of documents that the Division may withhold from a respondent even if Rule 5422(a) would otherwise require the Division to make the document available. Moreover, withholding documents may trigger the procedural requirements of Rule 5422(c). We therefore individually address each of the

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investigation against the same respondent for conduct (for example, false testimony) during the investigation.

four categories of documents that may be withheld under Rule 5422(b), and any Rule 5422(c) procedures related to withholding those documents.

Under Rule 5422(b)(1)(i), the Division need not make available any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration. Withholding such documents does not trigger any procedural requirements under Rule 5422(c). Commenters generally expressed two concerns about this category of documents. They suggested that the rules should require the staff to supply a log of the documents, and they suggested that a respondent should be entitled to review every document reviewed by a Board official who may ultimately participate in deciding the case.

We do not adopt the privilege log suggestion as to this category of documents. The privileged and confidential nature of the documents described in paragraph (b)(1)(i) would be clear enough even in the absence of section 105(b)(5)(A) of the Act, but section 105(b)(5)(A) eliminates any question about the Board's authority to maintain this category of documents in confidence even after commencing a proceeding. We decline to require the staff to create a log for these documents when there exists no reasonable basis on which a respondent might contest the decision to withhold.

Nor do we adopt the suggestion that a respondent should have the chance to review every document that the staff shows to the Board. Again, this is inconsistent with the confidentiality and privilege protection supplied by section 105(b)(5)(A). Moreover, although the commenters perceive some unfairness on this point, even federal agencies operating under the fairness constraints imposed by the Administrative Procedure Act routinely engage in the practice of receiving confidential advice from their staff, including investigative staff, up to the point in time when the agency authorizes an enforcement proceeding. It is only after that point that rules on ex parte communications constrain the agency's contact with its staff. We do not perceive similar line-drawing to be any less fair in the context of our proceedings than in the context of federal agency proceedings.

Under Rule 5422(b)(1)(ii), the Division need not make available any other document that, while not encompassed within the first category, is nevertheless protected by a privilege or by the attorney work product doctrine. This category would include, for example, documents that were privileged in the hands of the person who supplied them to the Board, but who supplied them pursuant to an understanding that doing so would not otherwise waive the privilege. As to this category of withheld documents, Rule 5422(c)(1) requires the Division to supply to the hearing officer and

each respondent a log providing all of the same information that Rule 5106 requires a person to submit when asserting a privilege against production to the Board.

Under Rule 5422(b)(1)(iii), the Division need not make available any document that would disclose the identity of a confidential source. We have declined to narrow this provision in response to commenters who suggested that its application should be limited to the same scope as the common law confidential informant privilege. We have, however, specifically provided that the staff may not withhold a document on this basis if doing so results in withholding material exculpatory evidence. Rule 5422(c)(2) requires the Division to provide the hearing officer with a list of any documents withheld to protect the identity of a confidential informant. The rule requires the Division to provide the same list to each respondent, although the staff may redact as much information as necessary from that list (including, in appropriate circumstances, all information) to protect the interests related to the Division's reason for withholding the document. The hearing officer, in his or her discretion, may review any such document in camera to assess the grounds for withholding it and to assess whether it includes material exculpatory evidence.

Under Rule 5422(b)(1)(iv), the Division need not make available any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or

otherwise for good cause shown. Commenters expressed concern that "good cause" was too indefinite a standard. We believe, however, that some general exception is necessary for categories of documents that the staff may occasionally have but may not intend to use as evidence. For example, the staff might have documents supplied by a foreign regulator under a confidentiality agreement. If the staff does not intend to use them, the "good cause" exception allows the staff to withhold them to honor the confidentiality agreement. Again, however, the good cause exception does not allow the staff to withhold a document that contains material exculpatory evidence. Rule 5422(c)'s procedures, described above with respect to confidential informant documents, apply in the same fashion to documents withheld as irrelevant or otherwise for good cause.

In addition to the procedural protections described above, Rule 5422(b)(2) provides an over-arching Brady-type restriction on what the Division may withhold. It provides that nothing in paragraph (b), and nothing in paragraph (a)(2)'s limitation on what the staff must make available in a noncooperation proceeding, authorizes the interested division to withhold documents that contain material exculpatory evidence.

Rule 5422(d) governs the time period in which the staff must make the documents available. Under the rule, the staff must make the documents available within seven days of the institution of a proceeding under Rule 5200(a)(3) for

noncooperation, and within 14 days of the institution of proceedings under Rules 5200(a)(1), 5200(a)(2), and 5500. In response to a comment, a technical correction to the rule makes clear that the prescribed time period indicates the deadline by which all documents must be available to the respondent.

Rule 5422(e) provides that the staff shall make the documents available at the Board's office where the documents are normally maintained, or at such other place as the parties agree upon in writing. Rule 5422(d) further provides that, except as subject to any specific contrary agreement with the staff, a party shall not have custody of the documents and shall not remove the documents from the Board's offices, though the party may make and retain copies of the documents. Rule 5422(f) provides that a party wishing to make copies of the documents must bear the cost of copying.

Rule 5422(g) addresses any failure by the interested division to make available any document that these rules required it to make available. The rule provides that, in that event, no person shall be entitled to a rehearing or redecision in a matter already heard or decided unless that person first establishes that the failure to make the document available did not constitute harmless error.

A note following Rule 5422 points out that the obligations of the interested division under this rule extend only to documents obtained by that division, and that this Rule does not require the interested division to make available documents located only

in the files of other divisions or offices. The proviso, however, is not intended to relieve the interested division of the obligation to make available any such document that the division knows of and intends to introduce as evidence. Any such document should be treated, for purposes of Rule 5422, just as if it were physically located in the division's files.

Rule 5423 – Production of Witness Statements

Rule 5423(a) provides that a respondent may move that the interested division produce any statement of a person, called or to be called as a witness by the division, that pertains or is expected to pertain to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the Board were a governmental entity. The hearing officer shall have authority to grant such a motion and require production of any such statement. Rule 5423(b) provides, however, that the interested division's failure to produce any such statement shall not be grounds for rehearing or redecision of a matter already heard or decided unless the respondent first establishes that the failure to produce the statement was not harmless error. The rule is based on Rule 231 of the Commission's Rules of Practice.

Rule 5424 – Accounting Board Demands and Commission Subpoenas

Rule 5424 provides for mechanisms by which any party may seek to secure testimony or evidence relevant to a proceeding. Rule 5424(a) describes procedures by

which any party may seek to have an accounting board demand served on any registered public accounting firm or associated person of such a firm, or seek to have an accounting board request served on any other person. Under the rule, the party must make a request to the hearing officer for issuance of the accounting board demand or accounting board request. In the event of the hearing officer's unavailability, the party may present its request, through the Secretary, to any member of the Board, or any other person designated by the Board to issue such demands and requests.

The application for an accounting board demand or accounting board request may be denied, or may be granted with modifications, if it is unreasonable, oppressive, excessive in scope, or unduly burdensome. The rule provides that a person whose application for an accounting board demand or accounting board request has been denied or modified may not make the same application to another person and may not apply to the Board for a Commission subpoena covering the same testimony, documents, or information as the denied application covered or as was excluded by modification in granting an application. Rule 5424(a) also provides that a party who applies for an accounting board demand or accounting board request to summon a witness shall pay the witness's reasonable expenses.

Rule 5424(b) provides that the Board, on its own initiative or on the application of any party, may seek issuance of a subpoena by the Commission to any person in order

to seek to secure testimony or evidence that the Board considers relevant or material to the proceeding. Unlike Rule 5424(a), which provides that an application for an accounting board demand or request shall be granted if certain criteria are satisfied, Rule 5424(b) leaves entirely to the discretion of the hearing officer or other Board designee whether to grant a party's request to seek a Commission subpoena. The rule does not create any entitlement, under any circumstances, to have the Board seek a Commission subpoena on behalf of a party. Moreover, if the Board does seek a Commission subpoena requested by a party, the rule does not, and should not be understood to, give rise to or justify any expectation about how or whether the Commission will respond to the request. Accordingly, the rule does not create any entitlement to have any Board proceedings stayed or delayed while any such request is pending.

Two commenters suggested that the rules should provide for a broader discovery process to address what they perceive to be an imbalance that works against the respondent. We are not persuaded that there is a meaningful imbalance. Virtually from the outset of the proceeding, the respondent has access to the evidentiary record compiled by the Division during the investigation. The respondent has access to all of the information in the documents and to the transcripts showing what testimony witnesses have provided in response to questions put to them. The Division and the

respondent are equally unenlightened as to what may exist in any other documents and as to what testimony witnesses would give in response to questions not yet put to them. The Division and the respondent have the same opportunity to seek board demands, board requests, or Commission subpoenas, and the same opportunity to interview prospective witnesses. The provisions of the rule are fair and are consistent with discovery provisions in administrative proceedings in other contexts.

In response to comments, we have made technical corrections to Rule 5424. We have used the word "party" in place of the less precise terms "person" and "applicant."

Rule 5425 – Depositions to Preserve Testimony for Hearing

Rule 5425 provides procedures by which a party may seek a deposition for the purpose of preserving for a hearing the testimony of a person who may be unavailable to appear at the hearing. Rule 5425 does not provide for depositions taken for the purpose of discovery. The rule is adapted from Rule 233 of the Commission's Rules of Practice.

Under Rule 5425(a), a party seeking to take a deposition to preserve testimony must make a written motion setting out the reasons why the deposition is necessary and specifically including the reasons that the party believes the witness will be unable to testify at the hearing. The motion must also identify the witness, the matters on which the party intends to question the witness, and the proposed time and place of the

deposition. Under Rule 5425(b), the hearing officer may grant the motion if the hearing officer finds that the witness will likely give testimony material to the proceeding, that it is likely the witness will be unable to appear at the hearing because of age, sickness, infirmity, imprisonment or other disability, or will otherwise be unavailable, and that the taking of the deposition will serve the interests of justice. Rules 5425(c)-(e) describe certain procedures governing any such deposition allowed by the hearing officer. In response to comments, we have made a techical correction eliminating references to the concept of a "deposition officer."

Rule 5426 – Prior Sworn Statements of Witnesses in Lieu of Live Testimony

Rule 5426 provides procedures by which a party may introduce into evidence a witness's prior sworn statement in lieu of live testimony by the witness. Rule 5426 is not a limitation on any party's ability to introduce a prior sworn statement with respect to a witness who appears in person and testifies (for purposes of impeachment, for example). But Rule 5426 does limit the circumstances in which a party may introduce a prior sworn statement in lieu of live testimony by the witness.

Rule 5426 identifies five circumstances in which the hearing officer may grant a motion to introduce a prior sworn statement in lieu of live testimony: (1) if the witness is dead, (2) if the witness is outside of the United States, unless it appears that the witness's absence from the country was procured by the party offering the prior sworn

statement, (3) if the witness is unable to attend because of age, sickness, infirmity, imprisonment or other disability, (4) if the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand, or (5) if, in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In granting a motion to introduce a prior sworn statement, a hearing officer has the discretion, under Rule 5426, to require that all relevant portions of the statement be included or to exclude portions of the statement not relevant to the proceeding.

Rule 5427 – Motion for Summary Disposition

Rule 5427 provides for any party to make a motion for summary disposition. Under Rule 5427(a), the interested division may make such a motion only after the party against whom the motion is directed has filed an answer and has had documents made available to it pursuant to Rule 5422. Under Rule 5427(b), a respondent may make such a motion at any time.

Rule 5427(c) requires that any party that would move for summary disposition must first request and attend a pre-motion conference with the hearing officer. Under the rule, the hearing officer would, at the conference, set a due date for the motion. The hearing officer has discretion either to set a due date for a response to the motion or to spare the opposing party the need to prepare a response until the hearing officer has

reviewed the motion. If the hearing officer chooses that approach, the hearing officer shall review the motion and then either deny the motion without any response being filed or shall give the opposing party an opportunity to file a response.

Rule 5427(d) provides that a hearing officer shall grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law. A hearing officer may also enter a summary disposition that is limited to the issue of liability even though there may be a genuine and contested issue as to the appropriate sanction. Rule 5427(d) also provides that the denial of a motion for summary disposition is not subject to interlocutory appeal. Rule 5427(e) governs page limitations on briefs related to motions for summary disposition.

Two commenters questioned whether summary dispostion could ever be appropriate for a disciplinary proceeding, particularly given what the commenters perceive to be inequitable discovery provisions. By the time of any summary disposition motion, however, a respondent would have access to the full evidentiary record available to the Division. The fact that one side was responsible for compiling that evidentiary record does not make it any more or less likely that the compiled evidence demonstrates the absence of any genuine issue as to any material fact. The standard

for summary disposition is high, and a motion is usually defeated by, for example, affidavit evidence that indicates conflicting factual evidence that might only be resolved by judging the credibility of witnesses subjected to cross-examination. We have adopted the rule as we proposed it.

Rule 5440 – Record of Hearings

Rule 5440 describes procedures related to the creation, correction, and availability of hearing transcripts.

Rule 5441 – Evidence: Admissibility

Rule 5441 provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. One commenter urged the Board to adopt greater structure for its evidentiary rules. The commenter noted that the rule appeared to leave out basic grounds for the exclusion of evidence recognized in the Federal Rules of Evidence, and argued that discretion in the hearing officer is inappropriate in proceedings that have the serious consequences of Board disciplinary proceedings.

After considering this comment, the Board has decided to adopt the rule as proposed. The standard in Rule 5441 is based on the Administrative Procedures Act.[9/]

[9/] 5 U.S.C. 556(c)(3) and (d).

In addition, the same standard is used in the SEC's Rules of Practice.[10/] By using this phrase in Rule 5441, the Board intends for evidentiary issues in PCAOB hearings to be addressed in a generally similar manner to SEC administrative hearings, and the administrative hearings of most other administrative agencies. Rule 5441 is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility.[11/] In particular, the three bases in the rule -- irrelevance, immateriality, and undue repetition -- are not the only permissible bases on which a hearing officer may exclude evidence under administrative practice. Nor does the standard in Rule 5441 preclude a hearing officer from referring to principles from the Federal Rules of Evidence or other authoritative sources in exercising his or her discretion to resolve evidentiary issues.[12/]

[10/] See SEC Rule of Practice 320, 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.")

[11/] See, e.g., Commission Opinion: Wheat, First Securities, Inc.; Rel. No. 34-48378, (August 20, 2003) (holding that hearsay is admissible in an SEC administrative hearing, but noting that the "record shows the probative and reliable nature of this evidence").

[12/] See id. (explaining that same result would have been reached had the administrative law judge applied the Federal Rules of Evidence).

Rule 5442 – Evidence: Objections and Offers of Proof

Rule 5442(a) provides that any objections must be made on the record and must be in short form, stating the grounds relied upon. Under Rule 5442(a) any exception to a hearing officer's ruling on an objection need not be noted at the time of the ruling but will be deemed waived on appeal to the Board unless the exception was raised (1) on interlocutory review under Rule 5461, (2) in a proposed finding or conclusion filed under Rule 5445, or (3) in a petition for Board review of an initial decision filed under Rule 5460. Rule 5442(b) provides that when evidence is excluded from the record, the party offering the evidence may make an offer of proof which shall be included in the record. The excluded material itself would be retained under Rule 5202(b).

Rule 5443 – Evidence: Presentation Under Oath or Affirmation

Rule 5443 provides that witnesses at a hearing shall testify under oath or affirmation.

Rule 5444 – Evidence: Rebuttal and Cross-Examination

Rule 5444 provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall determine the scope and form of evidence, rebuttal evidence, and cross-examination in

any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

Rule 5445 – Post-hearing Briefs and Other Submissions

Rule 5445 provides procedures relating to the submission of post-hearing briefs and other submissions.

Rule 5460 – Board Review of Determinations of Hearing Officers

Rule 5460 concerns Board review of initial decisions. Under Rule 5460, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 10 days of an initial decision in a proceeding commenced under Rule 5200(a)(3) for noncooperation, and within 30 days of an initial decision in other proceedings. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

Also under Rule 5460(a), if one party submits a timely petition for review, any other party then has an additional ten days to submit its own petition for review, even if its petition raises different issues than those raised by the first party to submit a petition. The purpose of this rule is to avoid the unnecessary expenditure of Board resources in cases where no party would appeal if it knew that the other party would not appeal, but

in which one or more parties nevertheless appeal because of a concern that failing to appeal will deprive it of the opportunity to raise its issues in any appeal lodged by another party. Under Rule 5460(a), no party need guess about the other party's intentions, and no party sacrifices anything by waiting to see whether another party files a timely petition for review.

Rule 5460(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460(c)-(e) set out procedural matters related to Board review.

Rule 5461 – Interlocutory Review

Rule 5461 concerns Board interlocutory review of hearing officer rulings. Under Rule 5461(a), the Board will not grant interlocutory review absent extraordinary circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members,

officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. § 1292(b).

Rule 5462 – Briefs Filed with the Board

Rule 5462 describes procedural requirements related to briefs and the filing of briefs. The rule is adapted from Rule 450 of the Commission's Rules of Practice.

Rule 5463 – Oral Argument Before the Board

Rule 5463 concerns oral argument before the Board. Under Rule 5463(a), the Board may order oral argument, with or without the motion of a party, on any matter. The rule provides that, in general, motions for oral argument will be granted unless exceptional circumstances make oral argument impractical or inadvisable. Rules 5463(b)-(c) provide for procedures relating to oral argument. Rule 5463(d) provides that a member of the Board who is not present for oral argument may nevertheless participate in the Board's decision as long as the Board member reviews a transcript of the argument before participating in the decision.

One commenter asked for clarification on whether the rule only permitted a request for oral argument to be made by the first party to submit a brief. The rule provides that any party may request oral argument, but the party must do so in its initial brief on the merits.

Rule 5464 – Additional Evidence

Rule 5464 provides that the Board may, upon its own motion or the motion of a party, allow the submission of additional evidence in connection with the Board's review of an initial decision. The rule is adapted from Rule 452 of the Commission's Rules of Practice.

Rule 5465 – Record Before the Board

Rule 5465 provides that the Board shall determine each matter on the basis of the record and provides certain requirements concerning the record. The rule is adapted from Rule 460 of the Commission's Rules of Practice.

Rule 5466 – Reconsideration

Rule 5466 provides procedures by which a party may seek reconsideration of a Board decision. The rule is adapted from Rule 470 of the Commission's Rules of Practice.

Rule 5467 – Receipt of Petitions for Commission or Judicial Review

Rule 5467 is intended to ensure that the Board has notice of any petitions filed by a party for review of a Board decision, or for review of a Commission order with respect to a Board decision. Rule 5467 is separate from, and in addition to, any notice or service requirements that the Commission imposes with respect to petitions for review filed with the Commission. Rule 5467, a registered public accounting firm must notify the Secretary, or any requirements of the Federal Rules of Appellate Procedure or any court within 10 days after the firm or any person associated with the firm files with the Commission a petition for review of a Board decision or files a petition for court review of a Commission order with respect to such a sanction. The rule is modeled in part on Rule 490 of the Commission's Rules of Practice.

One commenter suggested that, as to petitions filed by associated persons, the rule should put the burden on the associated person to report to the Board and should also require the associated person to notify the firm. We have not changed the rule in response to these comments.

A firm will generally have in place a mechanism for regular reporting to the Board, and the Board will have in place a mechanism for receiving reports from a firm. These things generally will not be true with respect to individuals who are associated persons. The rule imposes no unfair burden on the firm. An associated person who is

in the position of petitioning for review of a sanction is a person who, necessarily, has been sanctioned. That sanction, and whether it becomes final by virtue of an appeal period running without the person having petitioned for review, is something that the firm must necessarily monitor since it affects how the firm may or must interact with the associated person. Accordingly, we expect the firm as a matter of course to know whether and when its associated person has petitioned for review, and there is no unfair burden in requiring the firm to report that fact to the Board. We leave to the firm the creation and enforcement of internal procedures to ensure that its associated persons report the information to the firm.

We have, however, modified Rule 5467 to eliminate a possible ambiguity. The rule now expressly provides that a firm's obligation to report concerning an associated person does not extend to a person that is primarily associated with another registered public accounting firm.

Rule 5468 – Appeal of Actions Made Pursuant to Delegated Authority

As directed by Section 101(g)(2) of the Act, Rule 5468 provides procedures for seeking Board review of any action by someone other than the Board pursuant to authority delegated by the Board.

One commenter suggested that five days is too short a period within which to seek review of staff action pursuant to delegated authority. The proposed rule,

however, did not require a petition for review to be filed within five days. The proposed rule, and the rule we adopt, require a person to act within five days to provide notice to the Board that the person intends to seek review. The rule allows the person another five days beyond that notice in which to submit the petition for review.

We have tried to clarify this point by rephrasing the first sentence of Rule 5468(a) in terms of a "person intending to seek" review, rather than in terms of a "petition for" review. We have also added a provision to Rule 5468(a) designed to ensure that a person will not unfairly be denied an opportunity to petition for review if, through no fault of the person, service of notice of the staff action in question was delayed in reaching them.

Rule 5469 – Board Consideration of Actions Made Pursuant to Delegated Authority

Rule 5469 provides procedures relating to Board consideration of petitions for review of actions made pursuant to authority delegated by the Board. We have made two changes to Rule 5469 from the rule as proposed. First, we have made clear, in rule 5469(a), that the Board may act summarily on the basis of the petition, or on the basis of the petition and any staff response, or may require additional statements in support of or opposition to the petition. Second, we have eliminated the provision of Rule 5469(b) that provided that the effect of any staff action would be stayed pending any petition for

review of that action. We believe it is more appropriate that the effect of staff action not be stayed unless specifically ordered by the Board.

Part 5 – Hearings on Disapproval of Registration Applications

Part 5 of the Board's Rules on Investigations and Adjudications consists of Rules 5500 and 5501. These rules relate to adjudications on certain registration applications.

Rule 5500 – Commencement of Hearing on Disapproval of a Registration Application

Rule 5500 describes the procedure relating to the commencement of a Board adjudication proceeding to consider an application for registration. Under the Board's registration rules, if the Board is unable to make the determination necessary to approve a registration application, the Board will provide the applicant with notice of a hearing. Rule 5500 provides the procedures through which such a proceeding would be commenced.

Specifically, Rule 5500 provides that a proceeding would commence after the Board provides a notice of hearing under Rule 2106(b)(2)(ii) and the applicant timely files a request for a hearing date and notice of appearance, rather than opting to treat the Board's notice of hearing as a denial of the application. Under Rule 5500(b), a request for hearing must include a statement that the applicant has elected not to treat the notice of hearing as a disapproval of its application and a statement describing with

specificity why the applicant believes that the Board should not disapprove the application.

Rule 5501 – Procedures for a Hearing on Disapproval of a Registration Application

Rule 5501 provides that proceedings commenced pursuant to Rule 5500 are subject to the procedures set out in Parts 2 and 4 of Section 5 of the Board's rules.