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Board

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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

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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

^{2/} See Rule 5101(a).

^{3/} See Rule 5101(a)(2).

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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

^{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.

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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

^{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

^{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

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.

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

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(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 –

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- (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.

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 –

- application; (i) the application for registration, and any supplemented
- (ii) any additional information provided by the applicant;
- with the application; (iii) any other information obtained by the Board in connection
- Board; and (iv) the notice of a hearing and any written order issued by the
- Board. (v) any other document or item accepted into the record by the

(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 prejudice 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.

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.

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 rededecision 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 redetermination 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.

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 –

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

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(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.

**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.

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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

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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

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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

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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

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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

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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.

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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.

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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

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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

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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

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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.

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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.

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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

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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

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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

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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.

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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

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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.

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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

^{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)

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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 rededication 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 rededuction 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

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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

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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

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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.

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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

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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.

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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

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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

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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.