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Proposed Amendments to the Rules of Practice and Related Provisions; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201, and 240

[Release No. 34–48832; File No. S7–25–03]

RIN 3235–AI

Proposed Amendments to the Rules of Practice and Related Provisions

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing for public comment amendments to its Rules of Practice and related provisions in light of the Sarbanes-Oxley Act of 2002. The Sarbanes-Oxley Act, among other things, authorizes the Commission to review disciplinary actions of the Public Company Accounting Oversight Board (''Board'') and to create ''Fair Funds'' in Commission administrative proceedings. The Commission is also proposing for public comment amendments to other provisions of the Rules of Practice (''Rules'') as a result of its experience with those rules and to correct certain citations. The proposed amendments are intended to enhance the transparency and facilitate parties' understanding of the applicability of the review process to Board proceedings, and to make practice under the rules easier and more efficient.

DATES: Comments must be submitted on or before January 5, 2004.

ADDRESSES: To help us process and review your comments efficiently, comments should be sent by hard copy or e-mail, but not by both methods.

Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Alternatively, comments may be submitted electronically to the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–25–03. This file number should be included on the subject line if e-mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov).*[1]

FOR FURTHER INFORMATION CONTACT: Diane V. White, Office of the General Counsel, (202) 942–0950, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0208.

SUPPLEMENTARY INFORMATION: The Commission proposes to amend its Rules of Practice and related provisions. The amendments are being proposed in accordance with the provisions of the Sarbanes-Oxley Act of 2002 [2] and as a result of the Commission's experience with its existing rules. Additional amendments correct typographical errors and change certain citations to conform to the amended rules.[3]

I. Discussion

A. Proposed Amendments as a Result of the Sarbanes-Oxley Act

Section 107(c) of the Sarbanes-Oxley Act [4] authorizes the Commission to review disciplinary actions imposed by the Board and actions that result in the disapproval of registration of a public accounting firm.[5] Sections 105(d) and 107(c) of the Sarbanes-Oxley Act require the Board to give the Commission notice if it disapproves the registration of a public accounting firm or if it disciplines a registered public accounting firm or a person associated with a registered public accounting firm.

In creating its framework for Commission review of Board actions, section 107(c) of the Sarbanes-Oxley Act specifies that sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934,[6] which govern Commission review of self-regulatory organization disciplinary proceedings, shall govern Commission review of final disciplinary sanctions imposed by the Board ''as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1) * * *'' The effect of this statutory provision is to make Board actions subject to Commission review under those Exchange Act provisions on the same basis as actions by existing self-regulatory organizations, and to make relevant rules under those provisions applicable to that review. Thus, the administrative structure currently used by the Commission in reviewing self-regulatory disciplinary organization proceedings, including relevant provisions of the Rules, is applicable to persons seeking review of Board actions.

The Commission nonetheless has determined to propose amendments to certain of its rules in order to enhance the transparency and facilitate parties' understanding of the applicability of the review process to Board proceedings. Certain of those changes to its Rules will include specific references to Commission review of Board actions and, for example, identify the process by which the Board will provide notice to the Commission of its actions. The Commission asks for comment as to whether adjustments to the existing rules, in addition to those the Commission proposes, are warranted in order to permit the Commission more effectively to exercise its statutory review authority with respect to Board proceedings.

1. Disapproval of Registration

Proposed Rule 19d–4(a) would add definitions. Proposed Rule 19d–4(b) would require the Board to file with the Commission and serve on the public accounting firm a notice of disapproval of registration within 30 days of the Board's action.[7] The notice would include the firm's name and last known address (as reflected in the Board's records) the basis for the Board's disapproval, a copy of the Board's written notice of disapproval, and such other information as the Board deems relevant.

2. Review of Disciplinary Sanctions

Proposed Rule 19d–4(c) would require the Board to file and serve a notice of any disciplinary sanction, other than a disapproval of registration, within 30 days of the Board's action.[8] The notice would provide the name and last address (as reflected in the Board's records) of the associated person or registered public accounting firm

[1] The Commission does not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Interested persons submitting comments should submit only information that they wish to make publicly available.

[2] 15 U.S.C. 7201 *et seq.*

[3] Any necessary delegations will be adopted when the rules become final.

[4] 15 U.S.C. 7217(c).

[5] Under section 102(c) of the Sarbanes-Oxley Act, 15 U.S.C. 7212(c), the Board's written notice of disapproval of a complete application for registration as a registered public accounting firm is treated as a ''disciplinary sanction'' for purposes of sections 105(d) and 107(c) of that act, 15 U.S.C. 7215(d), 7217(c).

[6] 15 U.S.C. 78s(d)(2), 78s(e)(1).

[7] The thirty-day period for filing is consistent with the thirty days provided in section 19(d)(2) of the Exchange Act for the filing of an application for review by a person aggrieved by certain actions taken by a self-regulatory organization. The Commission requests comment as to whether this period is appropriate in the context of review of actions by the Board, or whether a longer or shorter period would be preferable.

[8] Comment is requested as to whether the thirty-day period is appropriate in this context, or whether a longer or shorter period would be preferable.

disciplined and a description of the acts or omissions upon which the sanction is based. The notice would also specify the sanction imposed, give the effective date of the sanction, and include a statement of the reasons for the sanction or a copy of the Board's statement justifying the sanction, as well as such other information as the Board deems relevant.

Proposed Rule 440(a) would permit any person aggrieved by a final disciplinary sanction (including disapproval of a completed application for registration of a public accounting firm) imposed by the Board to file an application for review with the Commission. Proposed Rule 440(b) would require that any application be filed within 30 days after the Board's notice under proposed Rule 19d–4 is received by the aggrieved person.[9] The application would identify the determination complained of and would contain a brief statement of the alleged errors in the determination. The application would be accompanied by a notice of appearance by counsel, if any, filed in accordance with Rule 102(d). Under proposed Rule 440(d), the Board would have fourteen days after receipt of the application to certify the record to the Commission and serve one copy of the record index on each party.

3. Stay of Board Action

In accordance with section 105(e)(1) of the Sarbanes-Oxley Act, [10] proposed Rule 440(c) would provide that filing of an application for review acts as a stay of the Board's action unless the Commission otherwise orders. Proposed Rule 401(e)(1) would permit any person aggrieved by the automatic stay to ask the Commission to lift the stay. The Commission may, in any event, lift the stay on its own motion. The Commission requests comment as to whether other persons should be permitted to request that the stay be lifted.

4. Summary Action; Expedition

As permitted under section 105(e)(1) of the Sarbanes-Oxley Act, proposed Rule 401(e)(2) would provide that the Commission may act summarily, without notice and opportunity for hearing. The Commission may also expedite consideration of a motion to lift a stay of Board action to the extent expedition is consistent with the Commission's other responsibilities. If the consideration of a motion to lift is expedited, proposed Rule 401(e)(3) would provide that persons opposing the lifting of the stay may file an opposition within two days of service of the motion to lift unless the Commission orders a different period. [11]

5. Review on Motion of the Commission

Proposed Rule 441(a) would permit the Commission to review a Board disciplinary sanction on its own motion. The Commission proposes that it would determine whether to take review of a Board disciplinary sanction within 40 days after the Board files its notice of the action. [12] Proposed Rule 441(b) permits the Commission to give notice to the parties that it wishes to raise any material matter, whether or not the parties previously raised that matter. The Commission may provide an opportunity for supplemental briefing if the Commission believes that such briefing would significantly aid its decisional process.

6. Amendments to Existing Rules

The Commission is also proposing amendments to the following Rules of Practice with respect to the review proceedings created by the Sarbanes-Oxley Act:

- The definition of ''proceeding'' in Rule 101(a)(9) (Definitions) would be amended to include review of Board disciplinary sanctions under proposed Rule 440.
- The Commission would amend Rule 202(a) (Specification of procedures by parties in certain proceedings) and Rule 210 (Parties, limited participants and amici curiae), which permits intervention and leave to participate on a limited basis, to exclude review of Board disciplinary sanctions under proposed Rule 440. These Rules currently do not apply to Commission enforcement or disciplinary proceedings or review of determinations by self-regulatory organizations. The Commission asks for comment as to whether proposed Rules 440 and 441 would provide sufficient procedures for review of Board disciplinary sanctions, or whether intervention or limited participation would be appropriate in Commission review of Board disciplinary sanctions.
- Rule 450(a)(2) (Briefs filed with the Commission) would be amended to provide for briefs to be filed in the Commission's review of final disciplinary sanctions imposed by the Board. Under the proposed Rule, the Commission would issue a briefing schedule order within 21 days (or such longer time as provided by the Commission) following its receipt of the Board's index of the record of the Board's determination.
- The Commission would define the contents of the record before it in its review of Board action to include the record certified to the Commission by the Board, any application for review, and any submissions made to the Commission, by adding Rule 460(a)(3) (Record before the Commission).

The Commission would also revise its *ex parte* rule, 17 CFR 200.111 (Prohibitions; application, definitions), to provide that, in proceedings to review Board action, the prohibitions against *ex parte* communications would commence when a copy of the application for review of the Board's action is served on the Secretary to the Commission.

B. Fair Funds and Disgorgement

Section 308(a) of the Sarbanes-Oxley Act [13] provides that, in a Commission administrative proceeding where the Commission or a hearing officer enters an order requiring disgorgement from a respondent for a violation of the securities laws, or the respondent agrees in settlement to payment of such disgorgement, any civil penalty also ordered against that respondent may be added to the disgorgement funds to create a ''Fair Fund'' to be disbursed by the Commission for the benefit of the victims of such violation. Section 308(b) of the Sarbanes-Oxley Act [14] authorizes the Commission to accept gifts or bequests to the United States of real and personal property for deposit in a Fair Fund.

Administration of, and distribution to investors under, Fair Funds and disgorgement plans, occurs after the conclusion of the principal action against a respondent. The functions involved are administrative, and are not subject to provisions such as Rule 120 of the Rules of Practice, the *ex parte* communication rule in subpart D of the Rules of Practice. Recognizing this, the Commission proposes to remove from subpart D of the Rules of Practice Rules 610 through 620, which relate to the

[9] Comment is requested as to whether the thirty-day period is appropriate in this context, or whether a longer or shorter period would be preferable.

[10] 15 U.S.C. 7215(c)(1).

[11] The two-day period is modeled after current Rule 401(d)(3), which permits persons opposing a motion to the Commission for a stay to file a statement in opposition within two days of service of the motion. Comment is requested as to whether this period is appropriate, or whether a longer or shorter period would be preferable.

[12] Rule 421(a) permits the Commission to order review of certain determinations by self-regulatory organization within 40 days after notice thereof is filed with the Commission. The Commission requests comment as to whether this period is appropriate, or whether a longer or shorter period would be preferable.

[13] 15 U.S.C. 7246(a).

[14] 15 U.S.C. 7246(b).

development, submission, approval, and administration of orders of disgorgement, and to the right to challenge orders of disgorgement, and to include them in a new subpart F.

Proposed Rule 1100 would state that the Commission is authorized to create a Fair Fund in any administrative proceeding in which a final order is entered against a respondent requiring disgorgement and payment of a civil money penalty. The Commission may also create a Fair Fund if it approves a settlement of an administrative proceeding that provides for a respondent's payment of disgorgement and a civil money penalty. The proposed Rule would also explain that the Commission may add to the Fair Fund any property received in accordance with section 308(b) of the Sarbanes-Oxley Act.[15]

Certain requirements for Fair Funds would suggest that the Commission's Rules should make some distinctions between Fair Funds and disgorgement funds. For example, Fair Funds must be disbursed to the investors harmed by the securities law violations at issue. The purpose of disgorgement is to require a wrong-doer to pay back the ill-gotten gains that the wrong-doer obtained by virtue of his or her violation. Thus, the Commission can order a wrong-doer to disgorge ill-gotten gains whether or not investors suffered any damages as a result of the violation.[16] Where there are no identifiable victims of a violation, the Commission proposes to permit that the disgorgement and civil money penalty amounts be paid to the United States Treasury. The Commission asks for comment on this proposal.

In other respects, the Commission believes that the requirements for Fair Funds and disgorgement funds should be similar. In some cases, the Commission may conclude that it is in the public interest to impose a civil money penalty and order disgorgement even though the relative value of the ill-gotten gains and the number of potential claimants would result in high administrative costs and *de minimis* distributions to individual investors. Under such circumstances, the Commission would continue its practice of ordering that the disgorgement and civil penalty amount be paid directly to the United States Treasury.

Current Rule 611(b) provides that the Commission may authorize payment of disgorgement funds to any court registry or court-appointed receiver in any case that alleges the same or similar facts against the respondent. The Commission proposes to continue this authority with respect to disgorgement funds and Fair Funds in proposed Rule 1102(a).

The proposed Rules would permit either the Commission or the hearing officer, as appropriate, to oversee the administration of both disgorgement funds and Fair Funds.

Proposed Rule 1101(a) would continue the practice under current Rule 610 of allowing the Commission or the hearing officer at any time to order a party to submit a plan for the administration of either a Fair Fund or a disgorgement fund. Unless ordered otherwise, the Division of Enforcement would be required to submit such a plan within 60 days after the respondent has tendered the funds or other assets pursuant to the Commission's order to pay disgorgement and, if applicable, a civil money penalty.

Proposed Rule 1101(b) would extend the requirements of current Rule 611(a) to require that both Fair Fund or disgorgement fund plans provide for: receiving and holding additional funds, including funds received under section 308(b) of the Sarbanes-Oxley Act; identifying categories of persons who are potentially eligible to receive funds; providing notice to potentially eligible persons of the fund's existence and their potential eligibility; handling claims; termination of the fund and disposition of any remaining assets; administration of the fund; and such other provisions as the Commission or hearing officer deem appropriate.

As discussed above, proposed Rule 1102(b) would continue to permit the Commission or the hearing officer to order that funds be paid directly to the United States Treasury if the cost of administering the fund and the relative value of the disgorgement fund, together with any civil money penalty, and the number of potential claimants would not justify distribution of the funds.

Proposed Rule 1103 would amend and renumber current Rule 612 to require that notice of either a proposed disgorgement plan or a proposed Fair Fund plan be published in the *SEC News Digest*, the *SEC Docket*, and such other publications as the Commission or the hearing officer directs. The notice would specify how to obtain copies of the proposed plan and inform those desiring to comment to submit their written views to the Commission. The Commission also proposes posting notice of a proposed plan on its website. The Commission seeks comment as to how website posting can be done most effectively.

Proposed Rule 1104 would replace and renumber current Rule 613 to provide that, at any time after 30 days following publication of the notice of a proposed disgorgement plan or a proposed Fair Fund plan, the Commission or the hearing officer may approve, modify, or disapprove the proposed plan. The Commission or the hearing officer may order publication of a substantially modified plan prior to adoption.

Proposed Rule 1105 would replace and amend current Rule 614 to provide for administration of Fair Funds, as well as disgorgement funds. The proposed Rule would continue to permit the Commission or hearing officer to appoint any person, including a Commission employee, as fund administrator. Either the Commission or the hearing officer would be able to remove an administrator.

An administrator who is not a Commission employee must post a bond in an amount approved by the Commission. An administrator who is not a Commission employee may receive a fee for reasonable services, subject to approval by the Commission or the hearing officer. Commission employees may not receive such fees. Fees and expenses from fund administration would be paid first from interest and then, if the interest were insufficient, from corpus. The administrator would give periodic accountings, as ordered, and submit a final accounting prior to his or her discharge and cancellation of any bond.

Current Rule 614(a) would be renumbered Rule 1105(b). The Rule currently provides that a respondent may be required or permitted to administer a plan of disgorgement, subject to terms the Commission or the hearing officer deems appropriate. At this time, the Commission does not propose to extend this provision to Fair Funds although it invites comment on this issue. A Fair Fund would include a civil penalty and might include funds conveyed to the United States pursuant to section 308(b) of the Sarbanes-Oxley Act.

Proposed Rule 1106 would renumber Rule 620 to make clear that no person would be granted the right to intervene or appear in a proceeding to challenge an order of disgorgement, an order creating a Fair Fund, an order approving, modifying, or disapproving a disgorgement plan or a Fair Fund plan,

[15] Section 308(b) of the Sarbanes-Oxley Act provides that the Commission may accept, hold, and utilize gifts of property for a Fair Fund. Gifts of property received pursuant to this section may be deposited only in a Fair Fund.

[16] *See e.g., SEC* v. *First City Financial Corp.,* 890 F. 2d 1215, 1230 (D.C. Cir. 1989) (defendant who violated Exchange Act section 13 required to disgorge although harm was to the market as a whole, not to particular persons).

or any determination relating to a plan based solely upon the person's eligibility or potential eligibility to participate in a fund or based on a private right of action. Under the proposed Rule, as is the case under the existing disgorgement Rule, such person's participation would be limited to submitting comments in accordance with proposed Rule 1103.

C. Other Proposed Amendments

In 1995, the Commission substantially amended its Rules of Practice. After several years of experience with these Rules, the Commission believes that certain changes to the Rules would make practice under those Rules easier and more efficient. The Commission invites comments with respect to these proposed modifications.

1. The existing Rules do not make explicit the Commission's authority to order a variation from the rules governing proceedings before it. The Commission is proposing to include in Rule 100 a new paragraph (c) that would specify that the Commission may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary, upon its determination that to do so would serve the interests of justice and not result in prejudice to any party to the proceeding.

2. Under section 11A of the Exchange Act and the rules thereunder, the Commission is authorized to adjudicate certain disputes involving registered securities information processors, national market system plans, or transaction reporting plans.[17] In addition to the inclusion of review of Board disciplinary sanctions discussed above, the Commission proposes to amend Rule 101(a)(9) to expand the definition of ''proceedings'' to make clear that the Rules of Practice are applicable to such adjudications.[18]

3. The Commission currently requires counsel to file a motion to withdraw as counsel. Many agencies instead permit counsel to file a notice of withdrawal, which does not require agency action but informs the agency and parties of counsel's withdrawal. The Commission believes that a notice would preserve the intended benefits of the existing requirement by providing timely notice to both the Commission and the parties of the withdrawal. It would also eliminate the need for the Commission or the hearing officer to rule on a motion for withdrawal.

The proposed amendment of Rule 102(d)(4) would require any person seeking to withdraw his or her appearance in a representative capacity to file a notice of withdrawal with the Commission or the hearing officer, stating the name, address, and telephone number of the withdrawing representative; the name, address, and telephone number of the person for whom the appearance was made; and the effective date of the withdrawal. If the person seeking to withdraw knows the name, address, and telephone number of the new representative, or knows that the person for whom the appearance was made intends to represent him- or herself, that information would also have to be included in the notice. The amended Rule would require that notice be served on the parties in accordance with Rule 150, and that the notice be filed at least five days before the proposed effective date of the withdrawal.

4. The Commission is considering a proposed amendment that would specifically recognize the authority of hearing officers to correct manifest errors of fact in initial decisions. The Commission has found that some appeals to it could be streamlined if certain issues were addressed first to the hearing officer. The proposed amendment would add to the enumeration of powers of hearing officers in Rule 111 the authority to consider and rule upon a motion to correct a manifest error of fact, provided that such a motion is filed within ten days of the initial decision.

5. Currently, Rule 141(a)(3) requires the Secretary to ''place in the record of the proceeding a certificate of service'' of orders instituting proceedings. The proposed amendment of the Rule would delete this requirement, substituting a requirement that the Secretary ''maintain a record of service on parties.'' The amendment would allow the Secretary to maintain computerized rather than hard copy records of service.

6. Current Rule 141(a)(3) also requires that, if service is effected by mail, the certificate ''shall be accompanied by a confirmation of receipt or of attempted delivery,'' which is also to be maintained in the record of the proceeding. The proposed amendment of Rule 141(a)(3) would delete the requirement that such documents be retained in the record of the proceeding, allowing the Secretary to retain all the confirmation or records of attempted delivery in a single file. The Commission believes that this form of recordkeeping will permit easier retrieval of these documents.

7. Current Rule 141(b) provides for the service of written orders or decisions by the Commission or a hearing officer, other than an order instituting proceedings, to be served by any method of service authorized under Rule 141(a) or Rule 150(c). The proposed amendment of Rule 150(c) discussed below would, among other things, eliminate the requirement that parties seeking to serve each other by facsimile transmission agree to do so in writing. The Commission proposes to retain the requirement of a written agreement as a precondition to service of orders and decisions by facsimile. The proposed amendment of Rule 141(b) would replace the reference to Rule 150(c) with a reference to Rules 150(c)(1)–(3).

8. Consistent with Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure, existing Rule 150(c)(4), which governs service of documents on parties by facsimile transmission, requires parties who choose to serve each other by facsimile to agree to do so in a signed writing. The existing Rule also requires that receipt of each document served by facsimile be confirmed by a manually signed receipt. The proposed amendment would delete both of these requirements. It would, however, allow a party to decline to receive service by facsimile. Such a declination would have to be made in writing and served in accordance with Rule 150. The proposed Rule would also require that facsimile transmissions be made at a time that results in their receipt during the Commission's business hours as defined in Rule 104.

The Commission's experience shows that in many instances parties are serving one another by facsimile but are not entering into the agreements or confirming by manually signed receipt. Under the new Rule, parties who choose service by facsimile would be required to provide the Commission and the parties with notice of the facsimile machine telephone number to be used and the hours of facsimile machine operation.

[17] *See* Exchange Act section 11A(b)(5) (requiring Commission to review prohibitions or limitations of access to services offered by registered securities information processors); Exchange Act Rule 11Aa3–2(e) (giving Commission discretion to entertain appeals from actions under national market system plans); Exchange Act Rule 11Aa3–1(f) (giving Commission discretion to entertain appeals in connection with implementation or operation of transaction reporting plans).

[18] Because the current Rules of Practice do not specify a particular procedure for proceedings under Exchange Act section 11A, the Commission has been required to specify by order the procedural rules that are to be employed in section 11A review proceedings. *See, e.g., The Cincinnati Stock Exchange,* Exchange Act Rel. No. 43316 (Sept. 21, 2000), 73 SEC Docket 1006 (Order Accepting Jurisdiction, Establishing Procedures, and Ordering Briefs).

Proposed Rule 101(a)(12) would also define the term ''Board'' to refer to the Public Company Accounting Oversight Board.

The Commission solicits views about what might constitute sufficient evidence of completion of facsimile service. *See* current Rule 150(d). The Commission also seeks comment as to whether parties making service by facsimile, or the Commission serving orders and decisions by facsimile, should be required to transmit a non-facsimile original contemporaneously with service by facsimile. The current Rule allows parties to specify in the written agreement providing for service by facsimile whether a non-facsimile document is to be provided.

9. Rule 151 currently does not permit filing of documents with the Commission by facsimile transmission. The proposed amendment would allow such filing. The proposed amendment makes clear, however, that one who seeks to file by facsimile assumes the risk that the transmission will not be completed in a timely or legible fashion. As proposed, Rule 151 would require that parties filing by facsimile should be required to transmit a non-facsimile original contemporaneously. At present, the Commission receives a hard copy of filings to satisfy Rule 153(a), which requires that filings be signed by at least one counsel of record, or if a party is acting as his or her own counsel, by the party. The Commission requests comments as to how the signature requirement should be implemented if filings are by facsimile and if no hard copy original is required to be filed.

In addition, the Commission requests comments as to whether filing by e-mail should be permitted. If such filing is permitted, the Commission requests comments as to whether the requirements applicable to filing by facsimile transmission would also be appropriate in that context.

Current Rule 151 requires that papers required to be served on a party shall be filed with the Commission ''at the time of service or promptly thereafter.'' To conform with other Rules, the proposed amendment would require filing with the Commission ''contemporaneously'' with service on a party.

10. Rule 152(a)(2) currently allows the use of either 10-point or 12-point type in papers filed in Commission proceedings. To enhance the legibility of filings, the proposed amendment would require the use of 12-point or larger type.

11. Current Rule 154 limits a brief in support of or in opposition to a motion to 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The Commission has received filings by parties who attempt to circumvent this page limitation by filing 10-page briefs and extremely lengthy motions. The proposed amendment seeks to establish a combined page limit of 15 pages for the motion and brief.

12. Current Rule 151 provides that persons must file papers with the Commission within the time limit for filing. Rule 160 gives an additional three days for service by mail. Questions have been raised about whether a person receives three additional days to respond if service is made by mail when the Commission's or hearing officer's order specifies a date certain for filing a response. The proposed amendment to Rule 160 would make clear that the person does not receive additional time. If a party requires a short extension, the Commission believes that the party could request that extension under Rule 161.

13. Rule 201 currently provides for the consolidation of proceedings. The proposed amendment would permit the Commission also to order any proceeding severed with respect to some or all of the parties. The proposed amendment would provide that motions to sever must be addressed to the Commission and represent that a settlement offer has been submitted to the Secretary for Commission consideration, or otherwise show good cause. The Commission asks for comment as to whether the law judges should have the power to sever parties from a proceeding.

14. Current Rule 230(a)(1)(vi) requires the Division of Enforcement to make available for inspection and copying by any party any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management that have been obtained by the Division of Enforcement prior to the institution of the proceedings, in connection with the investigation leading to the Division of Enforcement's recommendation to institute proceedings. The proposed amendment would state that such reports must be produced only if the Division intends either to introduce them into evidence, or to use them to refresh the recollection of any witness.

Examined parties receive notice of examination findings in the examination process, and do not require notice through the Rules of Practice. Therefore, in order to protect the confidentiality of examination reports, the proposed amendment would limit production of examination and inspection reports to circumstances where the Division intends to introduce the report into evidence, either in reliance on the report to prove its case, or to refresh the recollection of any witness.

The proposed amendment would not alter the requirement that the Division produce documents that contain material exculpatory evidence as required by *Brady* v. *Maryland*.[19]

Current Rule 230(c) permits the hearing officer to require the Division of Enforcement to submit for review a list of withheld documents. The proposed amendment would provide that when similar documents are withheld, those documents may be identified by category instead of individual document. Under the proposed amendment, the hearing officer would retain discretion to determine when an identification by category is insufficient. The proposed amendment would also correct typographical errors in the cross-reference to paragraphs pursuant to which documents may be withheld.

15. Current Rule 231(a), relating to production of witness statements, refers to ''any statement * * * that would be required to be produced by the Jencks Act, 18 U.S.C. 3500.'' There has been some question as to what constitutes a ''statement'' under this provision. The proposed change would make clear that the Commission will rely on the definition of ''statement'' contained in the Jencks Act [20] in applying this Rule.

16. Current Rule 232(e)(1) allows only the person to whom a subpoena is directed or a person who is an owner, creator, or the subject of the documents to be produced pursuant to a subpoena, to oppose the subpoena. The proposed amendment would add that any party may also oppose a subpoena.

Subpoenas directed at third party witnesses can be overly broad. Some recipients of such subpoenas may lack the sophistication or resources to dispute the scope of the subpoenas, and it would be unfair to require them to make filings in opposition. The proposed amendment would allow the Division of Enforcement, or any other party, to present arguments about whether subpoenas to any witnesses are unreasonable, oppressive, or unduly burdensome.

17. Current Rule 235(a) provides that a hearing officer may grant a motion to introduce a prior sworn statement of a witness who 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. Current Rule 233, however, which sets forth the basis for ordering a deposition, does not permit the taking of a deposition when it is anticipated that a

[19] 373 U.S. 83, 87 (1963).

[20] 18 U.S.C. 3500(e).

witness will be absent from the United States. Since depositions can be used only to preserve testimony of a witness who is unlikely to attend the hearing, the proposed revision of Rule 233 would allow the taking of a deposition of a witness currently within the United States who is expected to be outside the United States so long as the deposition will serve the interests of justice and it appears that the party requesting the deposition did not procure the witness's absence.

18. Rule 350(b) currently requires the Secretary to retain documents that are marked for identification but not offered into evidence. There does not seem to be any reason to keep documents that the party did not seek to introduce, and the proposed amendment would delete that requirement. The Secretary would continue to retain documents offered into evidence but excluded from the record so that, in the event of an objection, the Commission could consider any arguments that the documents should be admitted.

19. Proposed Rule 351(a) deletes a reference to a practice abandoned several years ago whereby the interested division took custody of the exhibits after a hearing and was responsible for having them sent to the Secretary. Currently the court reporter takes custody of exhibits.

20. Current Rule 360(d)(1) provides that an initial decision of a hearing officer becomes the final decision of the Commission unless a party or aggrieved person entitled to review files a petition for review, or the Commission orders review on its own initiative. Current Rule 360(e) further provides that, if an initial decision becomes the final decision of the Commission as to a party, the Commission shall issue an order that the decision has become final as to that party. The interplay of these Rules appears to have engendered confusion as to when a decision is final and enforceable. The proposed amendments would renumber paragraph 360(d)(2) as (d)(1) and combine paragraphs (d)(1) and (e) as (d)(2), clarifying that a decision becomes final upon the issuance of a finality order by the Commission.

21. Current Rule 400 provides for the Commission to grant interlocutory review only in ''extraordinary circumstances.'' The proposed amendment would instruct the parties that petitions for interlocutory review are ''disfavored,'' making clear that such petitions rarely would be granted. The proposed amendment would recognize, however, that the Commission retains discretion to undertake such review on its own motion at any time.

22. A proposed amendment to Rules 400 and 430 would provide that certain matters are subject to interlocutory review under Rule 400, not Rule 430. Rule 430 permits review of matters delegated to the staff. Under 17 CFR 200.30–9 and 30–10, certain functions are delegated to the administrative law judges and the chief administrative law judge. As the Rules are currently drafted, such determinations arguably might be reviewable under Rule 430 although the determination would not merit interlocutory review under Rule 400. The amendment would make clear that Rule 400 is the sole route for interlocutory review of determinations by a hearing officer.

23. Current Rule 401(d)(1) provides that any person aggrieved by an action by a self-regulatory organization for which the Commission is the appropriate review agency, for which action review may be sought pursuant to Rule 420, may seek a stay of that action. The proposed amendment would clarify that a stay can be sought only at the time an application for review is filed or thereafter. Filing an application for review brings the action before the Commission. Since the proposed amendment of Rule 420(c) reduces the content requirements for an application for review, the requirement that an application be filed when or before a stay is sought would not impose a significant delay.

24. The Commission requests comment on the proposed amendment of Rule 410(b), which would permit an opposing party to file a cross-petition for review within ten days from the filing of a petition for review, making it unnecessary for parties to file protective defensive petitions for review.

Another proposed amendment would delete Rule 410(d), thus abolishing the opposition to the petition for review. The Commission requests comment on the proposal to abolish the petition for review. In the Commission's experience, the utility of such oppositions has been quite limited, given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision. Moreover, the Commission believes that a motion for summary affirmance would permit the Commission to dispose of matters suited to more abbreviated review.

25. The proposed amendment of Rule 411(e) would provide a 21-day time limit for filing a motion for summary affirmance. The proposed amendment would also set forth standards both for granting and for denying summary affirmance. Summary affirmance would be granted if the Commission finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. Summary affirmance would be denied upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

26. Section 19(d) of the Exchange Act requires a person who appeals from self-regulatory organization disciplinary action to do so within 30 days ''or within such longer period as'' the Commission ''may determine.'' The proposed amendment to Rule 420(b) would make clear that an appeal from self-regulatory organization action must be filed within 30 days, absent a showing of extraordinary circumstances, and will not be extended by the Commission under Rule 161. This standard is consistent with prior Commission precedent.[21]

Current Rule 420 contains language that might suggest that the applicant's address be used to serve only the record index. The proposed amendment would provide that the applicant identify where he or she may be served for all purposes.

27. Rule 450(c), which sets limits on the page length of briefs, would be amended to limit instead the number of words in briefs. The proposed word limits—14,000 for principal briefs and 7,000 for any reply brief—are based on Rule 32 of the Federal Rules of Appellate Procedure. The proposed amendment would also state that motions to file oversized briefs are disfavored. In exceptional cases, however, where more pages may be needed to address the issues—for example, where the Division of Enforcement must address arguments by multiple respondents—the Commission may, upon motion, allow longer filings.

Except when a principal brief does not exceed 30 pages in length, or a reply brief does not exceed 15 pages in length, the proposed amendment would require the attorney filing the brief (or an unrepresented party) to certify that the brief complies with the length limitation and to state the number of words in the brief. The proposed amendment would permit the party certifying the length of the brief to rely on the word count of the word processing system used to prepare the brief.

[21] *See, e.g., Lance E. Van Alstyne,* 53 S.E.C. 1093, 1099 (1998) (Commission will not authorize late filing of appeals by self-regulatory organizations absent extraordinary circumstances).

The Commission has received briefs which sought to incorporate by reference briefs filed before the hearing officer in the proceeding on appeal. Such incorporation by reference, if allowed, would erode the page-limit requirements of Rule 450(c). The proposed amendment provides that pleadings incorporated by reference will be included in determining the word count of briefs. The amendment is intended to promote adherence to the length limitations of Rule 450(c) and to encourage parties to exercise judgment in selecting the arguments that best advance their positions rather than simply repeating previously formulated contentions.

28. The current Rules make no provision for the use of visual aids at oral argument. The proposed amendment of Rule 451(b) would prohibit the use of visual aids unless copies are provided to the Commission and all parties at least five business days before the argument is to be held.[22] The Commission requests comment as to whether five business days provides sufficient time for the parties to prepare adequate responses to proposed visual aids.

29. Current Rule 360(a)(2) directs the hearing officer to issue an initial decision within the time period specified in the order instituting proceedings. To address the hearing officer's inability to comply with this directive where a proceeding is stayed by order of the hearing officer or the Commission under Rule 210(c)(3) because a criminal investigation or prosecution is pending, the proposed amendment of Rule 360(a)(2) would specify that, if a proceeding is stayed under the authority of Rule 210(c)(3), the specified time period for issuance of the initial decision, as well as any other time limits established in orders issued by the hearing officer under Rule 360(a)(2), will be automatically tolled during the period in which the stay is in effect.

30. Rule 360(d)(2) provides that the initial decision shall not become final as to a party or person if a timely petition for review is filed by that party or person. The proposed amendment would add the timely filing, by a party or an aggrieved person entitled to review, of a motion to correct an initial decision to the hearing officer as an event that prevents the initial decision from becoming the final decision of the Commission as to that party or person until the hearing officer has decided the motion. The proposed amendment would also make conforming changes to Rule 360(b), which specifies that an initial decision shall include a statement reflecting the provisions of Rule 360(d).

A proposed amendment of Rule 410(b) would provide that the time to file a petition for review is stayed until 21 days after resolution of any motion to correct an initial decision filed before the hearing officer so that, while a motion to correct is pending, a party need not file a petition for review to preserve its appeal rights.

Current Rule 470 specifies a 15-page limit for a motion for reconsideration, rather than the ten pages permitted for other motions. There does not seem to be any reason for treating motions for reconsideration differently from other motions. The amendment proposes to limit the party seeking reconsideration to the same number of pages and the same format used for other motions under the Rules of Practice. The Commission requests comment as to whether motions for reconsideration should be subject to different requirements from other motions, and if so, what differences would be appropriate.

31. The proposed amendment of Rule 601 would codify existing practice for payment of disgorgement, interest, and penalties. The proposal standardizes the language currently used by hearing officers in initial decisions and the Commission in its orders, as follows:

(c) *Method of making payment.* Payment shall be made by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission. The payment shall be mailed or delivered to the Office of Financial Management of the Commission. Payment shall be accompanied by a letter that identifies the name and number of the case and the name of the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement.

II. Request for Public Comments

We request and encourage any interested person to submit comments regarding: (1) The proposed changes that are the subject of this release, (2) additional or different changes, or (3) other matters that may have an effect on the proposals contained in this release.

III. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with section 533(b)(3)(A) of the Administrative Procedure Act, [23] that this revision relates solely to agency organization, procedure, or practice. It is therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act [24] therefore does not apply. Similarly, because these rules relate to ''agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties,'' the Commission is not soliciting comment for purposes of the Small Business Regulatory Enforcement Fairness Act. [25] Nonetheless, the Commission has determined that it would be useful to publish these proposed rules for notice and comment, before adoption. [26]

These rules do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended. [27]

IV. Costs and Benefits of the Proposed Rules and Amendments

The Sarbanes-Oxley Act of 2002 authorizes the Commission to review disciplinary actions by the Public Company Accounting Oversight Board as well as actions resulting in disapproval of registration of public accounting firms. In response, the Commission proposes to revise certain of its rules in order to enhance the transparency and facilitate parties' understanding of the applicability of the review process to Board proceedings. The Sarbanes-Oxley Act also provides that where the Commission or a hearing officer in a Commission administrative proceeding enters an order requiring disgorgement and a civil money penalty, the Commission may create a ''Fair Fund'' combining the disgorgement and the civil money penalty to be disbursed for the benefit of the victims of the securities law violations at issue in the proceeding. In response, the Commission proposes regulatory provisions for the submission and administration of Fair Fund plans and disgorgement plans. The Commission also proposes to take this opportunity to amend other provisions of the rules.

Taken as a whole, the Commission's Rules of Practice (''Rules'') create governmental review and remedial processes. That is, they are procedural and administrative in nature. The benefits to the parties are the familiar benefits of due process: notice,

[22] A further proposed amendment would conform the language of Rule 451(b) to reflect Commission practice not to issue the order setting oral argument in a Commission administrative proceeding until the date for argument is set.

[23] 5 U.S.C. 553(b)(3)(A).

[24] 5 U.S.C. 601 *et seq.*

[25] 5 U.S.C. 804(3)(C).

[26] *See* 5 U.S.C. 603.

[27] 44 U.S.C. 3501 *et seq.*

opportunity to be heard, efficiency and fairness. The cost of these processes, on the other hand, falls largely on the oversight bodies.

For purposes of cost/benefit analysis, the processes created by the regulatory provisions proposed in this release, given their procedural nature, might best be viewed as a whole. Nonetheless, to the extent possible, specific benefits and costs that can be more narrowly associated with separate provisions are identified below. However, because there are so many provisions, and because the costs tend to be primarily governmental, we do not provide separate sections for our respective cost and benefit analyses. Rather, we simply identify each provision proposed and discuss any benefits and costs that may be associated with it beyond the more general points summarized above.

Proposed Rule 19d–4(b) requires the Board to file with the Commission and serve on the public accounting firm a notice of disapproval of registration within 30 days of the Board's action. Proposed Rule 19d–4(c) imposes on the Board a similar filing and service requirement for notices of any disciplinary sanction other than a disapproval of registration. Timely notice is a fundamental aspect of due process. It benefits those who receive notice by allowing them to plan and take action in light of the Board's findings. Timely filing with the Commission lets the Commission know of the conclusion of Board proceedings so that it can exert oversight over the quality and fairness of those proceedings, which benefits parties to the proceedings as well as the general public. These rules would impose a small administrative cost on the Board.

Proposed Rules 440 and 441 provide for Commission review of Board actions. Proposed Rule 440 allows review upon application of a person aggrieved by a final Board disciplinary sanction, including disapproval of a completed application for registration of a public accounting firm, and proposed Rule 441 permits Commission review of Board disciplinary sanctions upon the Commission's own motion. The Rules pertain to the review mechanism required by the Sarbanes-Oxley Act, informing those upon whom Board sanctions are imposed of the option of Commission review and instructing them about procedures involved in initiating the review process.

Commission review of Board findings benefits parties to Board proceedings (and, to a lesser extent, the general public) by protecting against arbitrary, capricious, or otherwise unlawful treatment. Review also allows the Commission to exercise a check on, and protect the public interest in, the quality and consistency of Board findings.

Parties involved in review proceedings will incur legal and other costs. Review upon application by a person aggrieved, under proposed Rule 440, is optional. Thus, a party would only incur these costs if it expected a net benefit from the review process. In the case of review upon the Commission's own motion under proposed Rule 441, however, the parties involved might otherwise have chosen to avoid incurring the costs.

In accordance with section 105(e)(1) of the Sarbanes-Oxley Act, proposed Rule 440(c) provides that filing an application for review with the Commission acts as a stay of the Board's action unless the Commission orders otherwise. Proposed Rule 401(e) allows (1) persons aggrieved by such an automatic stay to ask the Commission to lift the stay; (2) the Commission to lift such a stay summarily, without notice and opportunity for a hearing; and (3) persons opposing the lifting of such a stay to file an opposition.

Rule 440(c) benefits the party upon whom Board sanctions have been imposed by allowing that party an opportunity to be heard in the review process before the Board's sanctions take effect. The automatic stay imposes a cost upon third parties who would benefit if the sanctions went into place immediately.

Allowing a person aggrieved by the automatic stay to ask to have the stay lifted benefits the aggrieved person by offering the option of a possible earlier termination of the stay. Those availing themselves of this option will incur legal and other costs, though since the procedure is optional, they will presumably do so only if they conclude that doing so yields an expected net benefit. Similarly, allowing opposition to a motion to lift allows those opposing the motion an opportunity to be heard. Although opposing a motion could involve legal and other expenses, since opposition is optional, parties would only incur those costs if they expected a net benefit from opposing.

Allowing the Commission to lift a stay summarily could benefit persons aggrieved by the stay by providing prompt and inexpensive relief. At the same time, those who might oppose the lifting of the stay would be denied notice and an opportunity to be heard in connection with the lifting of the stay.

Section 308(a) of the Sarbanes-Oxley Act provides that, in a Commission administrative proceeding where the Commission or a hearing officer enters an order requiring disgorgement and a civil money penalty, the Commission may create a ''Fair Fund'' by including the civil penalty with the disgorgement amount. The Commission is required to disburse money from a Fair Fund for the benefit of the victims of the securities law violations at issue in the proceeding.

Proposed Rule 1101 would authorize the Commission to create a Fair Fund in any administrative proceeding in which a final order is entered imposing disgorgement and a civil money penalty, and would permit the Commission to add to the Fair Fund any property received in accordance with section 308(b) of the Sarbanes-Oxley Act. The Commission would also be allowed to create a Fair Fund if it approves a settlement of an administrative proceeding that provides for payment of disgorgement and a civil money penalty. Where the relative value of the ill-gotten gains and the number of potential claimants would result in high administrative costs and *de minimis* distributions to investors, the proposed rules would allow the Commission not to create a Fair Fund, and the disgorgement and civil penalty amounts would be paid directly to the United States Treasury.

Creating and administering Fair Funds benefits victims of securities law violations, who would be more likely to be made whole. Allowing monies that would otherwise go into a Fair Fund to be paid to the Treasury where investors would receive only *de minimis* distributions would prevent those monies from being consumed by administrative costs, though at a cost to victims who might otherwise have received a minimal payment from a Fair Fund.

The proposed amendment of Rule 102(d)(4) would allow a person seeking to withdraw his or her appearance before the Commission in a representative capacity to file a notice of withdrawal rather than the motion to withdraw that is currently required. Filing a notice would preserve the benefits of the existing requirement by giving the Commission and the parties timely notice of withdrawal. Preparing and filing a notice may be less expensive than preparing and filing a motion. Additionally, the proposed amendment would increase efficiency by eliminating the need for the Commission or a hearing officer to rule on a motion for withdrawal.

The proposed amendment of Rule 150(c)(4) would eliminate the requirements that parties who choose to serve each other by facsimile transmission (1) agree to do so in a

signed writing, and (2) confirm receipt of each document by a manually signed receipt. Eliminating these requirements would result in lower costs to the serving parties. However, eliminating the requirement of a signed receipt could make it more difficult to prove that a transmission was received.

The proposed amendment of Rule 151 would allow parties to file documents with the Commission by facsimile transmission. This amendment provides parties an additional option for transmitting documents to the Commission. Facsimile filing would allow the Commission to receive, and be able to address, documents in as timely a fashion as possible. Costs of transmission by facsimile are likely to be lower than overnight or courier fees. The proposal would not impose any new costs, since the existing methods for filing with the Commission remain available.

The proposed amendment to Rule 154 establishes a combined page limit of 15 pages for a motion and a brief in support of the motion. The 15-page limit would also apply to a brief in opposition to a motion and to any reply brief. The proposed amendment to Rule 450(c) provides that pleadings incorporated by reference will be included in determining the page count of briefs.

Reducing page limits may result in lower legal costs to the parties. Limiting the number of pages submitted also keeps proceedings efficient.

The proposed amendment of Rule 233 would allow the taking of a deposition of a witness then within the United States, who is expected to be outside the United States at the time of an administrative hearing, so long as the deposition will serve the interests of justice and it appears that the party requesting the deposition did not procure the witness's absence. The proposal serves the interests of justice by making available a statement that otherwise might not have been made part of the record. If use of such a deposition results in the absence from a hearing of a witness who otherwise would have appeared, there would be a loss in that the hearing officer would have no opportunity to assess demeanor. However, since the Rule allows a deposition only where it appears that the party requesting the deposition did not procure the witness's absence, such a series of events should rarely occur.

The remaining proposals variously clarify existing practice, relate to internal agency management, increase the efficiency of proceedings, or promote due process.

The Commission requests data to quantify the costs and the value of the benefits identified. The Commission also seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of the proposed rules.

V. Effect on Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act of 1933,[28] section 3(f) of the Exchange Act,[29] section 2(c) of the Investment Company Act of 1940,[30] and section 202(c) of the Investment Advisers Act of 1940 [31] require us, when engaging in rulemaking that requires us to consider or determine whether an act is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [32] prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rules are intended to enhance the transparency and facilitate parties' understanding of the applicability of the Commission review process to Board proceedings. The proposed rules and amendments also include regulatory provisions for the submission and administration of Fair Funds plans and disgorgement plans, and the proposed amendments are intended to clarify existing practice and increase the efficiency of Commission enforcement and self-regulatory organization disciplinary review proceedings. The proposed rules and amendments would apply to all persons involved in administrative proceedings before the Commission and therefore the Commission does not expect the proposed rules and amendments to have an anti-competitive effect. To the extent the proposed rules and amendments would foster making whole victims of securities laws violations and would increase the transparency of the Commission's administrative practice and the efficiency of the Commission's proceedings, there might be an increase in investor confidence in market fairness and efficiency. However, the magnitude of the effect of the proposed amendments in this regard is difficult to quantify. We request comment on the possible effects of our rule proposals on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

[28] 15 U.S.C. 77b(b).

[29] 15 U.S.C. 78c(f).

[30] 15 U.S.C. 80a–2(c).

[31] 15 U.S.C. 80b–2(c).

[32] 15 U.S.C. 78w(a)(2).

VI. Statutory Basis and Text of Proposed Amendments

These amendments to the Rules of Practice and related provisions are being adopted pursuant to statutory authority granted to the Commission, including section 3 of the Sarbanes-Oxley Act, 15 U.S.C. 7202; section 19 of the Securities Act, 15 U.S.C. 77s; sections 19 and 23 of the Securities Exchange Act, 15 U.S.C. 78s and 78w; section 20 of the Public Utility Holding Company Act, 15 U.S.C. 79t; section 319 of the Trust Indenture Act, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a-37 and 80a-39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b-11.

List of Subjects

17 CFR Parts 200 and 201

Administrative practice and procedure.

17 CFR Part 240

Reporting and Recordkeeping Requirements; Securities.

Text of the Amendment

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The general authority citation for part 200, subpart A is revised to read as follows:

Subpart A—Organization and Program Management

Authority: 15 U.S.C. 77s, 77sss, 78d–1, 78d–2, 78w, 78*ll*(d), 78mmm, 79t, 80a–37, 80b–11, and 7202, unless otherwise noted.

* * * * * ′

2. In § 200.21, paragraph (b), remove the words ''Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter)'' and, in their place, add the words ''Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter)''.

Subpart B—Disposition of Commission Business

3. The authority citation for subpart B continues to read as follows:

Authority: 5 U.S.C. 552b; 15 U.S.C. 78d–1 and 78w.

4. In § 200.43, paragraph (c)(3), remove the words ''Rule 26 of the Commission's rules of practice, 17 CFR 201.26'' and, in their place, add the words ''Rules 430 and 431 of the Commission's Rules of Practice, §§ 201.430 and 201.431 of this chapter''.

5. The authority citation for part 200, subpart F, is revised to read as follows:

Subpart F—Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees

Authority: 15 U.S.C. 77s, 77sss, 78w, 79t, 80a–37, 80b–11, and 7202; and 5 U.S.C. 557.

6. Section 200.111 is amended by:

a. Redesignating paragraph (c)(1)(iii) as paragraph (c)(1)(iv); and

b. Adding new paragraph (c)(1)(iii).

The addition reads as follows:

§ 200.111 Prohibitions; application; definitions.

* * * * *

(c) *Period during which prohibitions apply.* (1) * * *

(iii) That, in proceedings under Title I of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7211–7219, these prohibitions shall commence at the time that a copy of an application for review has been filed with the Commission and served on the Public Company Accounting Oversight Board; and

* * * * *

PART 201—RULES OF PRACTICE

Subpart D—Rules of Practice

7. The authority citation for part 201, subpart D, is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77sss, 77ttt, 77u, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78*o*(d), 78*o*–3, 78s, 78u–2, 78u–3, 78v, 78w, 79c, 79s, 79t, 79z–5a, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

8. Section 201.100 is amended by adding paragraph (c) to read as follows:

§ 201.100 Scope of the rules of practice.

* * * * *

(c) The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary.

9. Section 201.101 is amended by:

a. Revising paragraph (a)(9); and

b. Adding paragraph (a)(12).

The revision and addition read as follows:

§ 201.101 Definitions.

(a) * * *

(9) *Proceeding* means any agency process initiated:

(i) By an order instituting proceedings; or

(ii) By the filing, pursuant to § 201.410, of a petition for review of an initial decision by a hearing officer; or

(iii) By the filing, pursuant to § 201.420, of an application for review of a self-regulatory organization determination; or

(iv) By the filing, pursuant to § 201.430, of a notice of intention to file a petition for review of a determination made pursuant to delegated authority; or

(v) By the filing, pursuant to § 201.440, of an application for review of a determination by the Public Company Accounting Oversight Board; or

(vi) By the filing, pursuant to § 240.11Aa3–1(f) of this chapter, of an application for review of an action or failure to act in connection with the implementation or operation of any effective transaction reporting plan; or

(vii) By the filing, pursuant to § 240.11Aa3–2(e) of this chapter, of an application for review of an action taken or failure to act in connection with the implementation or operation of any effective national market system plan.

* * * * *

(12) *Board* means the Public Company Accounting Oversight Board.

* * * * *

10. Section 201.102 is amended by revising paragraph (d)(4) to read as follows:

§ 201.102 Appearance and practice before the Commission.

* * * * *

(d) *Designation of address for service; notice of appearance; power of attorney; withdrawal.* * * *

(4) *Withdrawal.* Any person seeking to withdraw his or her appearance in a representative capacity shall file a notice of withdrawal with the Commission or the hearing officer. The notice shall state the name, address, and telephone number of the withdrawing representative; the name, address, and telephone number of the person for whom the appearance was made; and the effective date of the withdrawal. If the person seeking to withdraw knows the name, address, and telephone number of the new representative, or knows that the person for whom the appearance was made intends to represent him- or herself, that information shall be included in the notice. The notice must be served on the parties in accordance with § 201.150. The notice shall be filed at least five days before the proposed effective date of the withdrawal.

* * * * *

11. Section 201.111 is amended by revising paragraph (h) to read as follows:

§ 201.111 Hearing officer: Authority.

* * * * *

(h) Subject to any limitations set forth elsewhere in these Rules of Practice, considering and ruling upon all procedural and other motions, including a motion to correct a manifest error of fact in the initial decision, provided that such a motion to correct is filed within ten days of the initial decision;

* * * * *

12. Section 201.141 is amended by:

a. Revising the section heading; and

b. Revising paragraphs (a)(3) and (b) to read as follows:

The revisions read as follows:

§ 201.141 Orders and decisions: Service of orders instituting proceedings and other orders and decisions.

(a) *Service of an order instituting proceedings.*

* * * * *

(3) *Record of service.* The Secretary shall maintain a record of service on parties, identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if available, the name of the individual to whom the order was given. If service is made by U.S. Postal Service certified or Express Mail, the Secretary shall maintain the confirmation of receipt or of attempted delivery. If service is made to an agent authorized by appointment to receive service, the certificate of service shall be accompanied by evidence of the appointment.

* * * * *

(b) *Service of orders or decisions other than an order instituting proceedings.* Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this section or § 201.150(c)(1)–(3). Such orders or decisions may also be served by facsimile transmission if the party to be served has agreed to accept such service in a writing, signed by the party, and has provided the Commission with information concerning the facsimile machine telephone number and hours of

facsimile machine operation. Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be made by the Secretary or the hearing officer.

13. Section 201.150 is amended by revising paragraph (c)(4) to read as follows:

§ 201.150 Service of papers by parties.

* * * * *

(c) *How made.* * * *

(4) Transmitting the papers by facsimile transmission where the following conditions are met:

(i) The persons so serving each other have provided the Commission and the parties with notice of the facsimile machine telephone number to be used and the hours of facsimile machine operation;

(ii) The transmission is made at such a time that it is received during the Commission's business hours as defined in § 201.104; and

(iii) The sender of the transmission has not been served in accordance with § 201.150 with a written notice from the recipient of the transmission declining service by facsimile transmission.

* * * * *

14. Section 201.151 is amended by revising paragraph (a) to read as follows:

§ 201.151 Filing of papers with the Commission: Procedure.

(a) *When to file.* All papers required to be served by a party upon any person shall be filed contemporaneously with the Commission. Papers required to be filed with the Commission must be received within the time limit, if any, for such filing. Filing with the Commission may be made by facsimile transmission if the party also contemporaneously transmits to the Commission a non-facsimile original with a manual signature. However, any person filing with the Commission by facsimile transmission will be responsible for assuring that the Commission receives a complete and legible filing within the time limit set for such filing.

* * * * *

15. Section 201.152 is amended by revising paragraph (a)(2) to read as follows:

§ 201.152 Filing of papers: Form.

(a) *Specifications.* * * *

(2) Be typewritten or printed in 12-point or larger typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;

* * * * *

16. Section 201.154 is amended by revising paragraph (c) to read as follows:

§ 201.154 Motions.

* * * * *

(c) *Length limitation.* A motion, together with the brief in support of the motion; the brief in opposition to the motion; or any reply brief, shall not exceed 15 pages, exclusive of pages containing any table of contents or table of authorities. The page limit shall not apply to any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or relevant exhibits. Requests for leave to file motions and briefs in excess of 15 pages are disfavored.

17. Section 201.160 is amended by revising paragraph (b) to read as follows:

§ 201.160 Time computation.

* * * * *

(b) *Additional time for service by mail.* If service is made by mail, three days shall be added to the prescribed period for response unless an order of the Commission or the hearing officer specifies a date certain for filing. In the event that an order of the Commission or the hearing officer specifies a date certain for filing, no time shall be added for service by mail.

18. Section 201.201 is amended by:

a. Revising the section heading;

b. Designating the current text as paragraph (a) and adding a paragraph heading; and

c. Adding paragraph (b).

The revision and additions read as follows:

§ 201.201 Consolidation and severance of proceedings.

(a) *Consolidation.** * *

(b) *Severance.* By order of the Commission, any proceeding may be severed with respect to some or all parties. Any motion to sever must be made solely to the Commission and must include a representation that a settlement offer is pending before the Commission or otherwise show good cause.

19. Section 201.202 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding, a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, or a proceeding to review a determination of the Board pursuant to §§ 201.440 and 201.441, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding with particular reference to:

* * * * *

20. Section 201.210 is amended by revising paragraph (a)(1) and the introductory text to paragraphs (b)(1) and (c) to read as follows:

§ 201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding, a proceeding to review a self-regulatory organization determination, or a proceeding to review a Board determination*—

(1) *Generally.* No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding, a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, or a proceeding to review a determination by the Board pursuant to §§ 201.440 and 201.441, except as authorized by paragraph (c) of this section.

* * * * *

(b) *Intervention as a party.*—(1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, or a proceeding to review a Board determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding:

* * * * *

(c) *Leave to participate on a limited basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, or a proceeding to review a Board determination, any person may seek leave to participate on a limited basis as a non-party participant as to any matter affecting the person's interests:

* * * * *

21. Section 201.230 is amended by revising paragraphs (a)(1)(vi) and (c) to read as follows:

§ 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.

* * * * *

(a) *Documents to be available for inspection and copying.* (1) * * *

(vi) Any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market

Regulation, or the Division of Investment Management, if the Division of Enforcement intends either to introduce any such report into evidence or to use any such report to refresh the recollection of any witness.

* * * * *

(c) *Withheld document list.* The hearing officer may require the Division of Enforcement to submit for review a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (b)(1)(iv) of this section or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (b)(1)(iv) of this section, those documents may be identified by category instead of by individual document. The hearing officer retains discretion to determine when an identification by category is insufficient.

* * * * *

22. Section 201.231 is amended by revising paragraph (a) to read as follows:

§ 201.231 Enforcement and disciplinary proceedings: Production of witness statements.

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Division of Enforcement 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. For purposes of this section, *statement* shall have the meaning set forth in 18 U.S.C. 3500(e). 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.

* * * * *

23. Section 201.232 is amended by revising paragraph (e)(1) to read as follows:

201.232 Subpoenas.

* * * * *

(e) *Application to quash or modify.* (1) Any person to whom a subpoena is directed, or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than 15 days after the date of service of such subpoena, request that the subpoena be quashed or modified. Such request shall be made by application filed with the Secretary and served on all parties pursuant to § 201.150. The party on whose behalf the subpoena was issued may, within five days of service of the application, file an opposition to the application. If a hearing officer has been assigned to the proceeding, the application to quash shall be directed to that hearing officer for consideration, even if the subpoena was issued by another person.

* * * * *

24. Section 201.233 is amended by revising paragraph (b) to read as follows:

§ 201.233 Deposition upon oral examination.

* * * * *

(b) *Required finding when ordering a deposition.* In the discretion of the Commission or the hearing officer, an order for a 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, who is then within the United States, will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment, other disability, or absence from the United States, unless it appears that the absence of the witness was procured by the party requesting the deposition; and that the taking of a deposition will serve the interests of justice.

* * * * *

25. Section 201.350 is amended by revising paragraph (b) to read as follows:

§ 201.350 Record in proceedings before hearing officer; retention of documents; copies.

* * * * *

(b) *Retention of documents not admitted.* Any document offered into evidence but excluded shall not be considered a part of the record. The Secretary shall retain any such document until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

* * * * *

26. Section 201.351 is amended by revising paragraph (a) to read as follows:

§ 201.351 Transmittal of documents to Secretary; record index; certification.

(a) *Transmittal from hearing officer to Secretary of partial record index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with a list of such documents.

* * * * *

27. Section 201.360 is amended by:

a. Adding a sentence at the end of paragraph (a)(2);

b. Revising paragraphs (b)(1), (b)(2) and (d); and

c. Removing paragraph (e).

The addition and revisions read as follows:

§ 201.360 Initial decision of hearing officer.

(a)(1) * * *

(2) *Time period for filing initial decision.* * * * If a stay is granted pursuant to § 201.210(c)(3), the time period specified in the order instituting proceedings in which the hearing officer's initial decision must be filed with the Secretary, as well as any other time limits established in orders issued by the hearing officer in the proceeding, shall be automatically tolled during the period while the stay is in effect.

(b) *Content.* * * *

(1) The Commission will enter an order of finality as to each party unless a party or an aggrieved person entitled to review timely files a petition for review of the initial decision or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or the Commission determines on its own initiative to review the initial decision; and

(2) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or if the Commission takes action to review as to a party or an aggrieved person entitled to review, the initial decision shall not become final as to that party or person.

* * * * *

(d) *Finality.* (1) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision, or if the Commission on its own initiative orders review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(2) If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error of fact in the initial decision, and if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final as to that party. The decision becomes final upon issuance of

the order. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC News Digest* and the *SEC Docket,* and on the SEC Web site.

28. Section 201.400 is amended by revising paragraph (a) to read as follows:

§ 201.400 Interlocutory review.

(a) *Availability.* The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review. Petitions by parties for interlocutory review are disfavored, and the Commission ordinarily will grant a petition to review a hearing officer ruling prior to its consideration of an initial decision only in extraordinary circumstances. The Commission may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this section or the petition of a party who has been denied certification if it determines that interlocutory review is not warranted or appropriate under the circumstances. This section is the exclusive remedy for review of a hearing officer's ruling prior to Commission consideration of the entire proceeding and is the sole mechanism for appeal of actions delegated pursuant to 17 CFR 200.30–9 and 200.30–10.

* * * * *

29. Section 201.401 is amended by:

a. Revising the section heading and paragraph (d)(1); and

b. Adding paragraph (e).

The revisions and addition read as follows:

§ 201.401 Consideration of stays.

* * * * *

(d) *Stay of an action by a self-regulatory organization.*

(1) *Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to § 201.420, may be made by any person aggrieved thereby at the time an application for review is filed in accordance with § 201.420 or thereafter.

* * * * *

(e) *Lifting of stay of action by the Public Company Accounting Oversight Board.* (1) *Availability.* Any person aggrieved by the stay of action by the Board entered in accordance with 15 U.S.C. 7215(e) for which review has been sought pursuant to § 201.440 or which the Commission has taken up on its motion pursuant to § 201.441 may make a motion to lift the stay. The Commission may, at any time, on its own motion determine whether to lift the automatic stay.

(2) *Summary action.* The Commission may lift a stay summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* The Commission may expedite consideration of a motion to lift a stay of Board action, consistent with the Commission's other responsibilities. Where consideration is expedited, persons opposing the lifting of the stay may file a statement in opposition within two days of service of the motion requesting lifting of the stay unless the Commission, by written order, shall specify a different period.

30. Section 201.410 is amended by:

a. Revising paragraph (b); and

b. Removing and reserving paragraph (d).

The revision reads as follows:

§ 201.410 Appeal of initial decisions by hearing officers.

* * * * *

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to § 201.360(b) unless a party has filed a motion to correct an initial decision with the hearing officer. If such correction has been sought, a party shall have 21 days from the date of the hearing officer's order resolving the motion for to correct to file a petition for review. The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to § 201.340 may, at the discretion of the Commission, be deemed to have been waived by the petitioner. In the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within the original time allowed for seeking review or within ten days from the date that the petition for review was filed, whichever is later.

* * * * *

31. Section 201.411 is amended by revising paragraph (e) as follows:

§ 201.411 Commission consideration of decisions by hearing officers.

* * * * *

(e) *Summary affirmance.* (1) At any time within 21 days after the filing of a petition for review pursuant to § 201.410(b), any party may file a motion in accordance with § 201.154 asking that the Commission summarily affirm an initial decision. Any party may file an opposition and reply to such motion in accordance with § 201.154. Pending determination of the motion for summary affirmance, the Commission, in its discretion, may delay issuance of a briefing schedule order pursuant to § 201.450.

(2) Upon consideration of the motion and any opposition or upon its own initiative, the Commission may summarily affirm an initial decision. The Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. The Commission will decline to grant summary affirmance upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

* * * * *

32. Section 201.420 is amended by:

a. Revising paragraph (b);

b. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e); and

c. Adding new paragraph (c).

The revision and addition read as follows:

§ 201.420 Appeal of determinations by self-regulatory organizations.

* * * * *

(b) *Procedure.* As required by section 19(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d)(1), an applicant must file an application for review with the Commission within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review. The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances. This section is the exclusive remedy for seeking an extension of the 30-day period.

(c) *Application.* The application shall be filed with the Commission pursuant to § 201.151. The applicant shall serve the application on the self-regulatory organization. The application shall identify the determination complained of and set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons therefor. The application shall state an address where the applicant can be served. The application should not exceed two pages in length. The application shall be accompanied by the notice of appearance required by § 201.102(d).

* * * * *

33. Section 201.430 is amended by revising paragraph (a) to read as follows:

§ 201.430 Appeal of actions made pursuant to delegated authority.

(a) *Scope of rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30–1 through 200.30–8 or §§ 200.30–11 through 200.30–18 of this chapter may seek review of the action pursuant to paragraph (b) of this section.

* * * * *

34. Sections 201.440 and 201.441 are added to read as follows:

§ 201.440 Appeal of determinations by the Public Company Accounting Oversight Board.

(a) *Application for review; when available.* Any person who is aggrieved by a determination of the Board with respect to any final disciplinary sanction, including disapproval of a completed application for registration of a public accounting firm, may file an application for review.

(b) *Procedure.* An aggrieved person may file an application for review with the Commission pursuant to § 201.151 within 30 days after the notice filed by the Board of its determination with the Commission pursuant to § 240.19d–4 of this chapter is received by the aggrieved person applying for review. The applicant shall serve the application on the Board at the same time. The application shall identify the determination complained of, set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor, and state an address where the applicant can be served. The notice of appearance required by § 201.102(d) shall accompany the application.

(c) *Stay of determination.* Filing an application for review with the Commission pursuant to paragraph (b) of this section operates as a stay of the Board's determination unless the Commission otherwise orders either pursuant to a motion filed in accordance with § 201.401(e) or upon its own motion.

(d) *Certification of the record; service of the index.* Within fourteen days after receipt of an application for review, the Board shall certify and file with the Commission one copy of the record upon which it took the complained-of action. The Board shall file with the Commission three copies of an index of such record, and shall serve one copy of the index on each party.

§ 201.441 Commission consideration of Board determinations.

(a) *Commission review other than pursuant to an application for review.* The Commission may, on its own initiative, order review of any final disciplinary sanction, including disapproval of a completed application for registration of a public accounting firm, imposed by the Board that could be the subject to an application for review pursuant to § 201.440(a) within 40 days after the Board filed notice thereof pursuant to § 240.19d–4 of this chapter.

(b) *Supplemental briefing.* The Commission may at any time prior to the issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. The Commission will give notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties where the Commission believes that such briefing could significantly aid the decisional process.

35. Section 201.450 is amended by:

a. Redesignating paragraphs (a)(2)(iii) and (a)(2)(iv) as paragraphs (a)(2)(iv) and (a)(2)(v);

b. Adding new paragraph (a)(2)(iii);

c. Revising paragraph (c); and

d. Adding paragraph (d).

The additions and revision read as follows:

§ 201.450 Briefs filed with the Commission.

(a) *Briefing schedule order.* * * *

(2) * * *

(iii) Receipt by the Commission of an index to the record of a determination by the Board filed pursuant to § 201.440(d);

* * * * *

(c) *Length limitation.* Except with leave of the Commission, opening and opposition briefs shall not exceed 14,000 words and reply briefs shall not exceed 7,000 words, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits. The number of words shall include pleadings incorporated by reference. Motions to file briefs in excess of these limitations are disfavored.

(d) *Certificate of compliance.* An opening or opposition brief that does not exceed 30 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, but inclusive of pleadings incorporated by reference, is presumptively considered to contain no more than 14,000 words. A reply brief that does not exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, but inclusive of pleadings incorporated by reference, is presumptively considered to contain no more than 7,000 words. Any brief that exceeds these page limits must include a certificate by the attorney, or an unrepresented party, stating that the brief complies with the length limitation set forth in § 201.450(c) and stating the number of words in the brief. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief.

36. Section 201.451 is amended by revising paragraph (b) to read as follows:

§ 201.451 Oral argument before the Commission.

* * * * *

(b) *Procedure.* Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such changes. No visual aids may be used at oral argument unless copies have been provided to the Commission and all parties at least five business days before the argument is to be held.

* * * * *

37. Section 201.460 is amended by adding paragraph (a)(3) to read as follows:

§ 201.460 Record before the Commission.

* * * * *

(a) *Contents of the record.* * * *

(3) In a proceeding for final decision before the Commission reviewing a determination of the Board, the record shall consist of:

(i) The record certified pursuant to § 201.440(d) by the Board;

(ii) Any application for review; and

(iii) Any submissions, moving papers and briefs filed on appeal or review.

* * * * *

38. Section 201.470 is amended by revising paragraph (b) to read as follows:

§ 201.470 Reconsideration.

* * * * *

(b) *Procedure.* A motion for reconsideration shall be filed within 10 days after service of the order complained of, or within such time as

the Commission may prescribe upon motion for extension of time filed by the person seeking reconsideration, if the motion is 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. A motion for reconsideration shall conform to the requirements, including page length, provided in § 201.154. No response to a motion for reconsideration shall be filed unless requested by the Commission. Any response so requested shall comply with § 201.154.

39. Section 201.601 is amended by adding paragraph (c) to read as follows:

§ 201.601 Prompt payment of disgorgement, interest and penalties.

* * * * *

(c) *Method of making payment.* Payment shall be made by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission. The payment shall be mailed or delivered to the Office of Financial Management of the Commission. Payment shall be accompanied by a letter that identifies the name and number of the case and the name of the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement.

40. Sections 201.610 through 201.614 and § 201.620 are removed and reserved.

41. Sections 201.1100 through 201.1106, Subpart F—Fair Fund and Disgorgement Plans—are added to read as follows:

Subpart F—Fair Fund and Disgorgement Plans

Sec.
201.1100 Creation of Fair Fund.
201.1101 Submission of plan of distribution; contents of plan.
201.1102 Provisions for payment.
201.1103 Notice of proposed plan and opportunity for comment by non-parties.
201.1104 Order approving, modifying, or disapproving proposed plan.
201.1105 Administration of plan.
201.1106 Right to challenge.

Authority: 15 U.S.C. 77h–1, 77s, 77u, 78c(b), 78d–1, 78d–2, 78u–2, 78u–3, 78v, 78w, 80a–9, 80a–37, 80a–39, 80a–40, 80b–3, 80b–11, 80b–12, and 7246.

§ 201.1100 Creation of Fair Fund.

In any agency process initiated by an order instituting proceedings in which the Commission issues an order requiring the payment of disgorgement by a respondent and also assessing a civil money penalty against that respondent, the Commission may order that the amount of the disgorgement and of the civil money penalty, together with any funds received by the Commission pursuant to 15 U.S.C. 7246(b), be used to create a fund for the benefit of investors who were harmed by the violation.

§ 201.1101 Submission of plan of distribution; contents of plan.

(a) *Submission.* The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of funds in a Fair Fund or disgorgement funds. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after the respondent has turned over the funds or other assets pursuant to the Commission's order imposing disgorgement and, if applicable, a civil money penalty and any appeals of the Commission's order have been waived or completed, or appeal is no longer available.

(b) *Contents of plan.* Unless otherwise ordered, a plan for the administration of a Fair Fund or a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of any account where funds will be held, the instruments in which the funds may be invested; and, in the case of a Fair Fund, the receipt of any funds pursuant to 15 U.S.C. 7246(b), if applicable;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation, and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns, and, subject to the approval of the Commission, make distributions from the fund to investors who were harmed by the violation; and

(7) Such other provisions as the Commission or the hearing officer may require.

§ 201.1102 Provisions for payment.

(a) *Payment to registry of the court or court-appointed receiver.* Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan for the administration of a Fair Fund or a disgorgement fund may provide for payment of funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(b) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the disgorgement funds and any civil penalty shall be paid directly to the general fund of the United States Treasury.

§ 201.1103 Notice of proposed plan and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement or a proposed Fair Fund plan shall be published in the *SEC News Digest* and the *SEC* Docket, on the SEC website, and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

§ 201.1104 Order approving, modifying, or disapproving proposed plan.

At any time after 30 days following publication of notice of a proposed plan of disgorgement or of a proposed Fair Fund plan, the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission, a proposed plan that is substantially modified prior to adoption may be republished for an additional comment period pursuant to § 201.1103. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

§ 201.1105 Administration of plan.

(a) *Appointment and removal of administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement or a Fair Fund plan and to delegate to that person responsibility for administering the plan. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Assistance by respondent.* A respondent may be required or permitted to administer or assist in administering a plan of disgorgement subject to such terms and conditions as the Commission or hearing officer deem appropriate to ensure the proper distribution of the funds.

(c) *Administrator to post bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed in 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(d) *Administrator's fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, the administrator may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(e) *Source of funds.* Unless otherwise ordered, fees and other expenses of administering the plan shall be paid first from the interest earned on the funds, and if the interest is not sufficient, then from the corpus.

(f) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(g) *Amendment.* A plan may be amended upon motion by any party or by the plan administrator or upon the Commission's or the hearing officer's own motion.

§ 201.1106 Right to challenge.

Other than in connection with the opportunity to submit comments as provided in § 201.1103, no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge an order of disgorgement or of creation of a Fair Fund; or an order approving, approving with modifications, or disapproving a plan of disgorgement or a Fair Fund plan; or any determination relating to a plan based solely upon that person's eligibility or potential eligibility to participate in a fund or based upon any private right of action such person may have against any person who is also a respondent in the proceeding.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

42. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

43. Section 240.19d–4 is added to read as follows:

§ 240.19d–4 Notice by the Public Company Accounting Oversight Board of disapproval of registration or of disciplinary action.

(a) *Definitions.*

(1) *Board* means the Public Company Accounting Oversight Board.

(2) *Public accounting firm* shall have the meaning set forth in 15 U.S.C. 7201(a)(11).

(3) *Registered public accounting firm* shall have the meaning set forth in 15 U.S.C. 7201(a)(12).

(4) *Associated person* shall mean a person associated with a registered public accounting firm as defined in 15 U.S.C. 7201(a)(9).

(b)(1) *Notice of disapproval of registration.* If the Board disapproves a completed application for registration by a public accounting firm, the Board shall file a notice of its disapproval with the Commission within 30 days and serve a copy on the public accounting firm.

(2) *Contents of the notice.* The notice required by paragraph (b)(1) of this section shall provide the following information:

(i) The name of the public accounting firm and the public accounting firm's last known address as reflected in the Board's records;

(ii) The basis for the Board's disapproval, and a copy of the Board's written notice of disapproval; and

(iii) Such other information as the Board may deem relevant.

(c)(1) *Notice of disciplinary action.* If the Board imposes any final disciplinary sanction on any registered public accounting firm or any associated person of a registered public accounting firm under 15 U.S.C. 7215(b)(3) or 7215(c), the Board shall file a notice of the disciplinary sanction with the Commission within 30 days and serve a copy on the person sanctioned.

(2) *Contents of the notice.* The notice required by paragraph (c)(1) of this section shall provide the following information:

(i) The name of the registered public accounting firm or the associated person, together with the firm's or the person's last known address as reflected in the Board's records;

(ii) A description of the acts or practices, or omissions to act, upon which the sanction is based;

(iii) A statement of the sanction imposed, the reasons therefor, or a copy of the Board's statement justifying the sanction, and the effective date of such sanction; and

(iv) Such other information as the Board may deem relevant.

By the Commission.

Dated: November 23, 2003.

Margaret H. McFarland,

Deputy Secretary.

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