Summary of Proposal(s)

(1) *Collection title:* Request for Internet Services.
(2) *Form(s) submitted:* (N/A).
(3) *OMB Number:* 3220–0198.
(4) *Expiration date of current OMB clearance:* 05/31/2004.
(5) *Type of request:* Revision.
(6) *Respondents:* Individuals or households.
(7) *Estimated annual number of respondents:* 11,760.
(8) *Total annual responses:* 23,520.
(9) *Total annual reporting hours:* 1,274.
(10) *Collection description:* The Railroad Retirement Board collects information needed to provide customers with the ability to request a Password Request Code and subsequently, to establish an individual PIN/Password, the initial steps in providing the option of conducting transactions with the RRB on a routine basis through the Internet.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained by contacting Charles Mierzwa, the agency clearance officer, at (312) 751–3363 or *Charles.Mierzwa@RRB.GOV*.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or *Ronald.Hodapp@RRB.GOV* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 04–6663 Filed 3–24–04; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of GE Global Insurance Holding Corporation to Withdraw Its 7% Notes (due 2026) From Listing and Registration on the New York Stock Exchange, Inc. File No. 1–14178

March 19, 2004.

GE Global Insurance Holding Corporation, a Delaware corporation (''Issuer''), has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its 7% Notes (due 2026) (''Security''), from listing and registration on the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'').

The Issuer stated in its application that it has met the requirements of the NYSE rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Board of Directors (''Board'') of the Issuer approved a resolution on March 10, 2004 to withdraw the Issuer's Security from listing on the NYSE. The Board stated that following reasons factored into its decision to withdraw the Issuer's Security from the Exchange: (i) The limited number of holders of the Security (as of March 2, 2004, there were approximately 88 beneficial holders of the Security); (ii) the Issuer's Security trades infrequently on the NYSE and based on information provided in pricing history reports, there has been minimal trading of the Security during the three-month period prior to the date of this application; (iii) the Issuer believes that delisting the Security should not have a material impact on the holders of the Security; and (iv) the Issuer is not obligated under the indenture under which the Security was issued or any other documents to maintain a listing of the Security on the NYSE or any other exchange.

The Issuer's application relates solely to the Security's withdrawal from listing on the NYSE and from registration under section 12(b) of the Act[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before April 12, 2004, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the NYSE and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters should refer to File No. 1–14178. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–6659 Filed 3–24–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49454; File No. PCAOB–2003–07]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating to Investigations and Adjudications

March 19, 2004.

Pursuant to section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on October 10, 2003, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rules described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

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

On September 29, 2003, the Board adopted rules related to investigations and adjudications. The proposal includes 64 rules on investigations and adjudications (PCAOB Rules 5000 through 5501), a general rule on time computation (PCAOB Rule 1002) and 14 definitions that would appear in PCAOB Rule 1001. The text of the proposed rules is available for inspection at the Commission's Public Reference Room and on the PCOAB's Internet Web site, at *http://www.pcaobus.org.*

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules; Board's Statements on Burden on Competition and on Comments on the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed the burden on competition and any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in subsections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78*l*(d).
[2] 17 CFR 240.12d2–2(d).
[3] 15 U.S.C. 78*l*(b).
[4] 15 U.S.C. 78*l*(g).
[5] 17 CFR 200.30–3(a)(1).

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

(a) Purpose

Section 105 of the Act grants the Board broad investigative and disciplinary authority over registered public accounting firms and persons associated with such firms. Specifically, the Act authorizes the Board to conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. The Act also authorizes the Board to conduct hearings to determine whether a registered firm or associated person should be disciplined for any such violation. To implement this authority, Section 105(a) directs the Board to establish, by rule, fair procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms. The Board has adopted the proposed rules and definitions to establish fair procedures for Board investigations, fair procedures for Board disciplinary proceedings, and fair sanctions for violations. Each of the rules and definitions is discussed below.

Rule 1001—Definitions of Terms Employed in Rules

Rule 1001 contains definitions of terms used in the Board's rules. The rules relating to investigations and adjudications employ certain terms that the Board is adding to the terms defined in Rule 1001.

Accounting Board Demand

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

Accounting Board Request

Rule 1001(a)(x) defines ''accounting board request'' as a request to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term to distinguish the Board's efforts to obtain documents and testimony from persons other than registered public accounting firms and their associated persons.

Bar

Rule 1001(b)(ii) defines ''bar'' as a permanent disciplinary sanction prohibiting a person from being associated with a registered public accounting firm. The rules distinguish between the concepts of ''bar'' and ''suspension.'' Both sanctions, when applied to an associated person, prohibit the person from being an associated person of a registered public accounting firm. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the person may resume being an associated person without any other action by the person or the Board. In contrast, a bar is a permanent sanction that does not expire unless the person petitions the Board for termination of the bar, pursuant to the provisions of the rules, and the Board grants the petition. In some cases, the Board may impose a bar that expressly provides that a person may petition for termination of the bar after a fixed period. In other cases, the Board may impose a bar with no such provision.

Counsel

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

Disciplinary Proceeding

Rule 1001(d)(i) defines ''disciplinary proceeding'' as a proceeding initiated by an order instituting proceedings, held for the purpose of determining (1) whether a registered public accounting firm, or any person associated with a registered public accounting firm has (a) engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards; or (b) failed reasonably to supervise an associated person in connection with any such violation by that person; or (c) failed to cooperate with the Board in connection with an investigation; and (2) whether to impose a sanction pursuant to Rule 5300.

Document

Rule 1001(d)(ii) defines ''document'' as synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term. In no event shall the term ''document'' be construed to be limited to audit work papers.

Hearing Officer

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

Interested Division

Rule 1001(i)(iv) defines ''interested division'' as a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding. As a general matter, the interested division in a disciplinary proceeding will be the Division of Enforcement and Investigations, and the interested division in a hearing on disapproval of a registration application will be the Division of Registration and Inspections. The definition is adapted from Rule 101(a)(6) of the Commission's Rules of Practice.

Order Instituting Proceedings

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

Party

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

Person

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

Revocation

Rule 1001(r)(iii) defines ''revocation'' as a permanent disciplinary sanction terminating a firm's registration. The rules distinguish between the concepts of ''revocation'' and ''suspension.'' Both sanctions, when applied to a firm,

prohibit the firm from preparing or issuing, or participating in the preparation or issuance of, audit reports. A suspension, however, as defined below, is a time-limited sanction that expires at a fixed time after which the firm may resume such work without any other action by the firm or the Board. In contrast, revocation is a permanent sanction that does not expire unless the firm, with the Board's permission, reapplies for registration pursuant to the provisions of the rules, and the Board approves the application. In some cases, the Board may impose a revocation that expressly provides that a firm may reapply for registration after a fixed period. In other cases, the Board may impose a revocation with no such provision.

Secretary

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

Suspension

Rule 1001(s)(iv) defines ''suspension'' as a temporary disciplinary sanction which lapses by its own terms and prohibits (1) a registered public accounting firm from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer; or (2) a person from being associated with a registered public accounting firm. A suspension is distinct from a bar (as to an associated person) and a revocation (as to a firm) in that a suspension is a sanction that expires by its own terms at a fixed time, with no further action required of the associated person, the firm, or the Board.

Rule 1002—Time Computation

Rule 1002 describes the method by which the Board shall compute time for purposes of complying with deadlines in the Board's rules.

Rule 5000—General

Rule 5000 requires that registered public accounting firms and any associated persons of such firms comply with all Board orders to which they are subject. The Act authorizes the Board to take certain action with respect to, or require certain things of, registered public accounting firms and their associated persons. For example, the Act authorizes the Board to require such firms and persons to produce documents or to provide testimony, and the Act authorizes the Board to impose significant disciplinary sanctions on such firms and persons for various violations and for non-cooperation with Board investigations. In exercising its authority, the Board will frequently act through the vehicle of a Board order. A requirement of compliance with such orders is implicit in the authority to take the action, and Rule 5000 makes that requirement explicit.

Part 1—Inquiries and Investigations

Part 1 of the Board's Rules on Investigations and Adjudications consists of Rules 5100 through 5112. These rules address procedural matters concerning the conduct of informal inquiries by Board staff and formal Board investigations.

Rule 5100—Informal Inquiries

The Board contemplates that the staff of the Division of Enforcement and Investigations will sometimes conduct informal inquiries to determine whether to recommend that the Board open a formal investigation on a matter. Rule 5100 describes generally the circumstances in which the staff may conduct an informal inquiry (Rule 5100(a)) and the scope of the activity in which the staff may engage in an informal inquiry (Rule 5100(b)).

Under Rule 5100(a), the staff may undertake an informal inquiry where it appears to the staff that an act or practice, or an omission to act, by a registered public accounting firm or an associated person may violate the Act, the Board's rules, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Under Rule 5100(b), the staff may pursue an informal inquiry by requesting documents, information, or testimony from any person. The staff may not, in an informal inquiry, issue accounting board demands.

Rule 5101—Commencement and Closure of Investigations

Rule 5101 describes generally the processes by which the Board will commence and close formal investigations. The Board may commence a formal investigation when it appears that an act or practice, or omission to act, by a registered public accounting firm or any person associated with such a firm may violate any provision of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards. Rule 5101(a)(1) provides that the way the Board will commence an investigation is by issuing an order of formal investigation. Rule 5101(a)(2) provides that the Board may, in the formal order, designate Board staff members, or groups of staff members (such as a particular division or office) authorized to issue accounting board demands and otherwise require or request the cooperation of any person in connection with the investigation. Rule 5101(b) provides that the Board may issue an order suspending a formal investigation for a specified period of time or terminating a formal investigation.

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

Section 105(b)(2)(A) of the Act authorizes the Board to promulgate rules requiring the testimony of any registered public accounting firm or any associated person of such a firm with respect to any matter that the Board considers relevant or material to an investigation. Rule 5102(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require such testimony. Paragraphs (b) through (e) of Rule 5102 describe procedures related to obtaining and recording that testimony.

Rule 5102(b) provides that the Board or staff shall require testimony by serving an accounting board demand. Under the rule, the demand must give reasonable notice of the time and place for taking testimony, must describe the methods by which the testimony will be recorded, and, if the demand is directed to a firm rather than to a natural person, must supply a description with reasonable particularity of the matters on which examination is requested.

The rule does not impose any minimum period of notice for testimony, but does require reasonable notice. We anticipate that it will not be unusual for the staff to provide two to three weeks notice. We decline to codify a particular period of notice, however, because there will be circumstances in which there is no compelling reason why 21, or even 14, days notice is necessary, and there may be legitimate reasons for requiring the testimony sooner.

Rule 5102(c) describes procedures related to the actual conduct of the examination. Rule 5102(c)(1) provides that each witness shall be required to declare that the witness will testify truthfully, by oath or affirmation. The oath or affirmation provision of the rule is adapted from Federal Rule of

Evidence 603. The authority to administer and obtain such an oath or affirmation is implicit in the Board's authority to require testimony.

Rule 5102(c)(2) provides that examinations shall be conducted before a reporter designated by the Board's staff to record the examination. Rule 5102(c)(3) imposes restrictions on who may be present during the examination. Persons who may be present are limited to the witness, the witness's counsel (subject to Rule 5109(b), discussed below), any member of the Board or the Board's staff, the reporter, and any other person whom the Board or the staff designated in the order of formal investigation determine to be appropriate permit to be present. All of these provisions, however, are qualified by the restriction that in no event shall any person (other than the witness) who has been or is reasonably likely to be examined in the investigation be present. This last restriction is not limited to registered public accounting firms and associated persons of such firms but also includes any other person from whom the Board or the staff could seek to require testimony pursuant to a Commission subpoena (as described in Rule 5111).

The rule allows counsel to represent a witness and the witness's firm to the extent that such dual representation is consistent with counsel's ethical obligations generally. The rule does not allow for the presence of a firm's in-house counsel, or any other counsel, who does not enter a notice of appearance affirmatively stating that he or she represents the witness. Counsel who represents both the firm and the witness, and who, during testimony, becomes aware of a conflict that would cause him or her to cease representing the witness, may not continue to be present.

Rule 5102(c)(4) is modeled on Rule 30(b)(6) of the Federal Rules of Civil Procedure. Rule 5102(c)(4) provides that a registered public accounting firm that is required to provide testimony shall designate one or more persons to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. Those persons are then required to testify as to matters known or reasonably available to the firm.

Rule 5102(e) allows a witness a period of time, after being notified that the transcript or other recording of the examination is available for review, to describe any changes in form or substance that the witness would make and to supply the reasons for such changes. Under the rule, the transcript shall be accompanied by the reporter's certification that the witness was duly sworn and that the transcript is a true record of the testimony, and shall indicate whether the witness requested to review the transcript. The reporter shall also append to the transcript any changes to the testimony made by the witness during the review period described above.

Rule 5102(e) allow a witness 15 days to request changes to the transcript, and allows for an extension of the 15-day period with the approval of the Director of the Division of Enforcement and Investigations.

Rule 5103—Demands for Production of Audit Workpapers and Other Documents in Investigations From Registered Public Accounting Firms and Associated Persons

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules requiring the production of audit workpapers and any other document or information in the possession of any registered public accounting firm or any associated person of such a firm, wherever domiciled, with respect to any matter that the Board considers relevant or material to an investigation. Rule 5103(a) implements that authority by providing that the Board and the staff of the Board designated in the order of formal investigation may require production of such documents and information.

Rule 5103(b) provides that an accounting board demand for documents or information shall set forth a reasonable time and place for such production. Rule 5103(b) does not impose any minimum notice requirement before production shall be due. We anticipate that it will not be unusual for the staff to provide two to three weeks notice. The rule does not codify a particular period of notice, however, because there will be circumstances in which there is no compelling reason why 21, or even 14, days notice is necessary and there may be legitimate reasons for requiring the documents sooner.

Rule 5103(b) provides that the documents produced may be photocopies unless otherwise specified in the accounting board demand. The rule also requires, however, that the originals be maintained in a reasonably accessible manner, be readily available for inspection by the staff, and not be destroyed without the staff's consent. An original document that could otherwise be destroyed consistent with any applicable document retention requirements or other legal requirements may nevertheless not be destroyed without the staff's consent if it is responsive to an accounting board demand received by the firm.

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

Section 105(b)(2)(B) of the Act authorizes the Board to promulgate rules allowing the Board to inspect the books and records of a registered public accounting firm or any associated person of such a firm, wherever domiciled, to verify the accuracy of any documents and information supplied by the firm or person in an investigation. Rule 5104 implements that authority by providing that the Board and the staff designated in an order of formal investigation may examine such books and records to verify the accuracy of any documents or information supplied in the course of an informal inquiry or formal investigation. Any such examination would be separate and apart from any Board inspection pursuant to Section 104 of the Act and the Board's rules thereunder and would not be subject to the provisions of Section 104 or the Board's rules thereunder. Rule 5104 requires that the firm or person allow such examination upon demand, and does not provide for any minimum notice period.

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

Section 105(b)(2)(C) of the Act authorizes the Board to promulgate rules to request that any person, including any client of a registered public accounting firm, provide any testimony and documents that the Board considers relevant or material to an investigation. The Act requires the Board and the staff to provide appropriate notice of such requests, subject to the needs of the investigation. Rule 5105 implements that authority by providing that the Board and the staff may make such requests to any person. In this context, the rules use the term ''accounting board request'' to distinguish it from an ''accounting board demand,'' which may be made only to registered public accounting firms and associated persons of such firms.

Rule 5105 provides that the Board or staff shall give appropriate notice when requesting testimony (Rule 5105(a)(1)) and specify a reasonable time and place when requesting document production (Rule 5105(b)). What notice is appropriate for testimony, and what is a reasonable time and place for production, may vary with the circumstances and the needs of the investigation. Rule 5105(a)(1) also

provides that an accounting board request for testimony shall state the method by which the testimony shall be recorded. The rule further provides that if the person to be examined is an organized entity, rather than a natural person, the accounting board request shall provide a description with reasonable particularity of the matters on which examination is requested.

Rule 5105(a)(2) incorporates, in the context of testimony pursuant to an accounting board request, the procedural and transcript provisions of testimony pursuant to an accounting board demand, as discussed above with respect to Rules 5102(c)–(e).

Although the Board can only request, and not require, testimony or production of documents from persons other than registered public accounting firms and associated persons of such firms, the Board does have the option of seeking a Commission subpoena to require testimony or document production from any person, as discussed below with respect to Rule 5111. The note to Rule 5105 serves as a reminder that this option is available to the Board. The note, however, does not in any way limit the Board's authority to seek a Commission subpoena at any time, even if the Board has not first sought the testimony or documents through an accounting board request. Neither the note, nor anything in the Board's rules, creates any right in any person to receive an accounting board request or any other form of notice from the Board before the Board seeks a Commission subpoena to be served on that person.

Rule 5106—Assertion of Claim of Privilege

Rule 5106 imposes requirements on any person who declines to provide testimony, documents, or information required by an accounting board demand, or a demand for examination under Rule 5104, on the ground of an assertion of privilege. The rule specifies the types of information that a person must supply related to the privilege assertion. The rule is adapted from Rule 6.2 of the local rules of the District Court for the Southern District of New York. Failure to supply the required information is a violation of the rule, and may subject a person to a disciplinary proceeding for violation of a Board rule or for non-cooperation with an investigation.

Although not expressly reflected in the rule text, the Board does not intend to invade the province of any legitimately asserted privilege that would, under prevailing law, be treated as a valid basis for declining to provide documents or information in response to a Commission subpoena, including valid assertions of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The Board fully intends, however, that assertions of the Fifth Amendment privilege may be used as evidence in Board disciplinary proceedings and will be the basis for evidentiary inferences against the person asserting the privilege. In addition, the Board may also report assertions of that privilege to other appropriate authorities consistent with our authority under the Act to share information.

Rule 5107—Uniform Definitions in Demands and Requests for Information

Rule 5107 supplies certain definitions and rules of construction that shall be deemed to be incorporated by reference into all accounting board demands and accounting board requests for information. These definitions and rules of construction are modeled on those in use by the federal districts courts in the Southern District of New York. Rule 5107 does not preclude the Board or the staff, in any particular accounting board demand or accounting board request, from defining other terms, or from using abbreviations, or supplementing or using only part of a definition of a term defined in Rule 5107.

Rule 5108—Confidentiality of Investigatory Records

Rule 5108(a) provides that unless otherwise ordered by the Board or the Commission, all documents, testimony or other information prepared or received by or specifically for the Board or its staff in connection with an informal inquiry or a formal investigation shall be confidential in the hands of the Board, unless and until presented in connection with a public proceeding or released in accordance with Section 105(c) of the Act and the Board's rules thereunder. Consistent with Section 105(b)(5) of the Act, however, Rule 5108 provides that the Board may supply any such information to the Commission and, when determined by the Board to be necessary to accomplish the purposes of the Act or to protect investors, to certain other government entities, specifically: the Attorney General of the United States, an appropriate Federal functional regulator (as defined in Section 509 of the Gramm-Leach-Bliley Act) other than the Commission if the information pertains to an audit report for an institution subject to the jurisdiction of such regulator, state attorneys general in connection with any criminal investigation, and appropriate state regulatory authorities.

Rule 5108(b) provides that nothing in paragraph (a) ''shall prohibit the Board or the staff of the Board from disclosing any documents, testimony, or other information to any other person as is reasonably necessary to carry out the Board's responsibility, under Section 105 of the Act, to conduct investigations according to fair procedures.'' The purpose of this provision is to provide notice that the Board does not interpret Section 105(b)(5)(A) to prohibit the Board from doing such fundamental things as, for example, questioning a witness about a document supplied to the staff by someone other than that witness.

Read literally and in isolation, Section 105(b)(5)(A) could be understood to prohibit the staff not only from showing exhibits to witnesses, but even from transmitting to a firm a written accounting board demand for documents, since the demand would be a document encompassed by the language of Section 105(b)(5)(A) and would therefore be confidential. We read Section 105(b)(5)(A) in light of, rather than in isolation from, the rest of Section 105. Section 105 begins by authorizing the Board to conduct investigations and requiring the Board to do so according to fair procedures. An overly literal reading of Section 105(b)(5)(A) would negate any possibility of doing so.

Rule 5108(b) reflects our understanding that the Act authorizes the Board and its staff to disclose documents and information (even if otherwise covered by Section 105(b)(5)(A)) as reasonably necessary to execute the Board's authority and responsibility to conduct fair investigations. Rule 5108(b)'s application does not extend outside the sphere of a Board investigation. It is not authority for disclosing information other than to a person from whom the Board demands or requests information in connection with an investigation. Even as to those persons, the rule is not authority for disclosing information other than as reasonably necessary to carry out legitimate investigative functions in a manner that is fair to the person.

We note that Section 105(b) of the Act appears to preempt state open records laws with respect to materials and information provided by the Board to an agency under Section 105(b)(5)(B).[1] We

[1] Any otherwise applicable state or local law that would conflict with a requirement of the Act or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of

do not, however, see this as a point that has a place in the Board's rules. The Act speaks clearly for itself on this point.

For similar reasons, the rule does not seek to prohibit agencies from disclosing materials that the Act itself forbids them to disclose. Nor do we see a need to provide, by rule, for a confidentiality agreement in every case to reinforce the requirements of the Act. It is the Act, and not the Board's rules, that constrain the conduct of those agencies. In the event that we discover that any particular agency makes disclosures that we believe are inconsistent with Section 105(b)(5), both the Act and Rule 5108 allow us the flexibility to decline to supply certain information to that agency or to require appropriate assurances of confidentiality.

The second note to Rule 5108 points out that the Director of Enforcement and Investigations may engage in, and may authorize staff to engage in, discussions with persons identified in Rule 5108 concerning documents, testimony, and information described in the rule.

Rule 5109—Rights of Witnesses in Inquiries and Investigations

Rule 5109 sets out certain rights accorded to persons from whom the Board seeks documents, testimony, or information in an investigation. Under Rule 5109(a), any person compelled to testify or produce documents pursuant to a Commission subpoena issued pursuant to Rule 5111, and any person who testifies or produces documents pursuant to an accounting board demand, shall, upon request, be allowed to review the Board's order of formal investigation. No such person is entitled to obtain their own copy of the order of formal investigation, but the Director of Enforcement and Investigations may, in his or her discretion, allow a person to obtain a copy of the order. The Director of Enforcement and Investigations may, as a condition of granting a request for the formal order, impose limitations on its further dissemination. We intend for the Director to use this discretion as necessary to avoid undermining an investigation and to maintain, to the extent reasonably possible, the nonpublic nature of the formal order. We do not intend that this discretion routinely be used in a way that would inhibit legitimate uses of the document by a person or counsel, such as sharing of the document subject to a joint defense agreement.

Rule 5109(b) allows any person who appears to testify in a formal investigation to be accompanied, represented, and advised by counsel. Rule 5109(b) grants this right on the condition that counsel affirmatively represents to the staff, either through a notice of appearance or a statement on the record at the beginning of the testimony, that he or she represents the witness. This rule is adapted from Rule 7(b) of the Commission's Rules Relating to Investigations. The right granted by Rule 5109(b) is also limited by Rule 5102(c)(3), which does not allow for the presence of any person, even counsel, who has been or is reasonably likely to be examined in the investigation.

Rule 5109(c) provides that a witness may inspect the transcript of his or her own testimony. A person who has testified or provided documents may also request a copy of his or her transcript or of the documents he or she produced. If the request is granted, the transcript or documents may be obtained upon the payment of fees to cover the cost of reproduction. Any such request, however, may be denied by the Director of Enforcement and Investigations for good cause shown if the documents or testimony have not been presented in connection with a proceeding or released in accordance with Section 105(c) of the Act and the Board's rules thereunder. This rule is adapted in part from Rule 6 of the Commission's Rules Relating to Investigations.

Rule 5109(d) provides that registered public accounting firms and persons associated with such firms may, on their own initiative at any time, submit a written statement to the Board setting forth their interests and positions in regard to the subject matter of any investigation in which they have become involved. The staff, either upon request or on its own initiative, may—but is not required to—advise any such person of the general nature of an investigation, including the indicated violations as they pertain to that person, and may prescribe a fixed period of time that will be allowed for the person to submit a statement of position and interests before the staff makes any recommendation to the Board. Rule 5109(d) provides that any such statement that is submitted will be forwarded to the Board in conjunction with any staff recommendation pertaining to the person submitting the statement. This rule is adapted from Rule 7(a) of the Commission's Rules Relating to Investigations.

The purpose of the Rule 5109(d) process is to assist the Board in its decision-making. It is our expectation that the staff will routinely give a respondent a meaningful opportunity to make a Rule 5109(d) submission. We also expect, though, that the staff will exercise its discretion not to provide that opportunity when doing so would be contrary to the public interest or the interests of investors—such as when circumstances call for expedited enforcement action, or when advance notice of particular charges to a respondent might undermine legitimate investigative objectives of the Board or of other regulatory or law enforcement agencies conducting parallel investigations. We therefore decline to create a right to make a Rule 5109(d) submission, or a right to have a certain amount of time in every case where the opportunity is afforded.

Rule 5110—Non-Cooperation With an Investigation

Section 105(b)(3) of the Act authorizes the Board to impose sanctions, including revocation of registration and bar on association, against any registered public accounting firm or associated person who refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation. Rule 5110 describes how the Board will implement that authority.

Under Rule 5110(a), the Board may institute a disciplinary proceeding, in accordance with Rule 5200(a)(3), for non-cooperation with an investigation in certain circumstances. Under the rule as proposed, a non-cooperation proceeding would have been warranted if it appeared to the Board that a registered public accounting firm or an associated person may have failed to comply with an accounting board demand; may have knowingly made any false material declaration or made or used any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration; may have abused the Board's processes for the purpose of obstructing an investigation; or may otherwise have failed to cooperate in connection with an investigation.

We believe it is appropriate to include in the rule the general provision, echoing the Act, that non-cooperation proceedings may be instituted where a firm or associated person ''may otherwise have failed to cooperate.'' Depending upon the nature of the conduct, however, it may be appropriate in many circumstances for the staff to provide notice that it views certain conduct as non-cooperation, and to afford an opportunity to cease or cure

Congress is preempted. *See, e.g., Crosby* v. *National Foreign Trade Council,* 530 U.S. 363, 372–73 (2000); *City of New York* v. *FCC,* 486 U.S. 57, 64 (1988).

the conduct before recommending non-cooperation proceedings.

The provision concern abuse of the Board's processes to obstruct an investigation includes a scienter requirement: We will not treat as non-cooperation every arguable abuse of the Board's processes, but only those that involve an intent to obstruct an investigation. We may, however, infer such an intent from circumstantial evidence, including, for example, circumstances indicating that a reasonable person would not have believed there was any genuine chance of prevailing on a particular petition for review of staff action or of a hearing officer ruling short of finding a violation.

A disciplinary proceeding for non-cooperation shall proceed generally according to the hearing procedures set out in the Board's rules. Because of the nature of the conduct being sanctioned, however, a disciplinary proceeding for non-cooperation will generally be a streamlined proceeding focused on a narrow issue. For that reason, various of the procedural rules governing disciplinary proceedings include certain provisions that will apply only to disciplinary proceedings for non-cooperation.

We recognize that some non-cooperation proceedings may present complex legal issues. Some, such as those involving allegations of false testimony, may also involve significant factual evidence. The rules provide sufficient flexibility to deal with complex non-cooperation issues in an appropriate time frame. But the rules are also designed to address, during the course of an investigation, ongoing recalcitrance even in the absence of any significant factual or legal issue. The rules afford a streamlined approach that will allow for swift dealing with that type of recalcitrance, but the streamlined option should not be understood as a signal that the Board intends to give short shrift to genuinely complex factual and legal issues that may arise in the non-cooperation context.

Nothing in the rules creates vicarious non-cooperation liability for a firm. Nevertheless, an associated person's non-cooperation has consequences for the firm. Pursuant to Section 102(b)(3) of the Act and the Board's rules, every registered public accounting firm will have agreed, as a condition of the continuing effectiveness of its registration, (1) to secure from each of its associated persons a consent to cooperate in and comply with Board demands, and (2) to enforce those consents. While the firm would face no vicarious liability for the associated person's non-cooperation, the firm's own registration status would be at risk if the firm failed either to secure the associated person's cooperation with the Board or to end its association with the person.

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

Section 105(b)(2)(D) of the Act authorizes the Board to promulgate rules according to which the Board may seek issuance by the Commission, in a manner established by the Commission, of a subpoena on any person to require testimony and the production of documents that the Board considers relevant or material to an investigation. Rule 5111 implements that authority by providing that the Board shall seek issuance of such subpoenas, and in seeking such subpoenas shall supply the Commission with a completed form of subpoena and such other information as the Commission may require.

Rule 5112—Coordination and Referral of Investigations

Rule 5112(a) provides that the Board will notify the Commission of any pending investigation that involves a potential violation of the securities laws. The rule provides that the Board will do so as soon as practicable after entry of an order of formal investigation by sending a copy of the order to the Commission or appropriate Commission staff. Rule 5112(a) provides that the staff will then coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.

Rule 5112(b) provides that the Board may refer any investigation to the Commission and, in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), to that regulator.

Rule 5112(c) provides that, at the direction of the Commission, the Board may refer any investigation to the Attorney General of the United States, the attorney general of one or more states, and an appropriate state regulatory authority.

Part 2—Disciplinary Proceedings

Part 2 of the Board's Rules on Investigations and Adjudications consists of Rules 5200 through 5206. These rules address the commencement of disciplinary proceedings and the elements of those proceedings.

Rule 5200—Commencement of Disciplinary Proceedings

Rule 5200 addresses the commencement of disciplinary proceedings and certain related matters. Rule 5200(a) identifies the three general categories of circumstances under which the Board may commence a disciplinary proceeding: when it appears to the Board that a hearing is warranted to determine whether (1) a registered public accounting firm or a person associated with such a firm has engaged in any act or practice, or omitted to act, in violation of the Act, the Rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, (2) such a firm, or its supervisory personnel, has failed reasonably to supervise an associated person, either as required by the Rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of laws, rules, and standards, or (3) such a firm or a person associated with such a firm has failed to comply with an accounting board demand, given false testimony, or otherwise failed to cooperate in connection with an investigation.

The Act plainly contemplates that disciplinary proceedings can be instituted for a violation based on a single negligent act. Section 105(c)(5) of the Act provides that the Board may impose the more severe sanctions authorized by Section 105(c)(4) only in cases that involve intentional or knowing conduct (including reckless conduct) or repeated instances of negligent conduct. Implicit in that provision is that a violation based on a single instance of negligent conduct is sufficient to warrant a disciplinary proceeding to impose lesser sanctions. The rule is intended to implement the full scope of that authority.

At this time, we are not providing specific guidance on the scope of supervisory liability under the Act. We will continue to consider whether additional guidance or rulemaking on this point would be appropriate. We see no reason, however, to limit the persons who may have supervisory liability to those occupying certain positions. A firm itself may have liability for failure to supervise, as may any associated person who plays a supervisory role. Moreover, even in the absence of additional, specific guidance, investigations may uncover

circumstances in which it would be appropriate, under any reasonable reading of the Act, to commence disciplinary proceedings for failure to supervise.

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

Rule 5200(c) provides that the Board will observe certain separation of functions principles. The rule provides that neither the staff of the Division of Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel. In addition, the rule provides that a hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

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

Rule 5201—Notification of Commencement of Disciplinary Proceedings

Rule 5201(a) provides that when the Board issues an order instituting proceedings, the Secretary shall give each person or firm charged appropriate notice of the order within a time reasonable in light of the circumstances. As described in the note to Rule 5201(a), in the case of emergency or expedited action, actual notice—by any means reasonably calculated to supply notice—may precede formal service of the order instituting proceedings. The rule also provides that if the order instituting proceedings sets a hearing date, each party shall be given notice of the hearing within a time reasonable, in light of the circumstances, in advance of the hearing. As a general matter, we expect that Board orders instituting proceedings will not specify a hearing date, unless the proceedings are for non-cooperation. In those proceedings, we may find that reasonable notice of a hearing date is less than 90 days or 60 days, and we decline to provide by rule for a longer minimum time that would delay the process even when there is no genuine need for delay.

In matters where the Board's order does not set a hearing date, the hearing officer retains discretion to schedule a hearing date. We expect hearing officers to exercise that discretion prudently and fairly, consistent with avoiding unnecessary delays, but we decline to specify a minimum amount of notice that a party must have before a hearing may be held.

Rule 5201(b) describes the content of an order instituting proceedings. The precise requirements concerning the content of the order vary depending upon whether the proceeding is commenced under Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3). The rule provides that, in each case, the order must include a ''short and plain statement of the matters of fact and law to be considered and determined,'' including of the conduct alleged to constitute a violation and the rule, statutory provision, or standard violated. Where a violation requires a particular state of mind, then a necessary component of alleging the conduct is alleging the existence of that state of mind. In requiring that the order include a description of the ''conduct,'' the rule necessarily requires more than just a conclusory statement that the respondent engaged in conduct that violated a rule, statute, or standard. The rule requires that the order allege the conduct in sufficient factual detail to advise the respondent of what conduct is at issue.

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

Rule 5201(d) provides that either the Board or, on the motion of the interested division, a hearing officer, may amend an order instituting proceedings. The Board may do so at any time to include new matters of fact or law. A hearing officer may do so only prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for filing final briefs with the Board. A hearing officer may amend an order only to include new matters of fact or law that are within the scope of the original order instituting proceedings, but may not initiate new charges or expand the scope of matters set for hearing beyond the framework of the Board's order instituting proceedings. The rule is adapted from Rule 200(d) of the Commission's Rules of Practice.

Rule 5202—Record of Disciplinary Proceedings

Rule 5202(a) describes the material that shall make up the contents of the record in a disciplinary proceeding (Rule 5202(a)(1)) and the contents of the record on disapproval of an application for registration (Rule 5202(a)(2)). Under Rule 5202(b), any document offered as evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered part of the record but shall be maintained by the Secretary until all opportunities for Commission and judicial review have been exhausted or waived. Paragraphs (c)–(e) of Rule 5202 address the substitution of true copies for documents in the record, the preparation of the record and the certification of the record index, and the final transmittal of record items to the Secretary. The rule is adapted from Rules 350 and 351 of the Commission's Rules of Practice.

Rule 5203—Public and Private Hearings

Section 105(c)(2) of the Act provides that any proceeding by the Board to determine whether to discipline a registered public accounting firm or an associated person thereof shall not be public unless otherwise ordered by the Board for good cause shown, with the consent of the parties to the hearing. Rule 5203 implements that requirement by providing that proceedings commenced pursuant to Rule 5200(a) shall not be public unless the Board so orders, for good cause shown, with the consent of the parties.

Rule 5203 also provides that all other Board hearings shall be nonpublic unless the Board otherwise orders. In practical effect, this provision applies only to a hearing on disapproval of a registration application, since that is the only type of hearing for which the rules provide other than the hearings expressly covered by Section 105(c)(2)

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

Rule 5204—Determinations in Disciplinary Proceedings

Rule 5204(a) provides that in any disciplinary proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3), the interested division shall bear the burden of proving an alleged violation or failure to supervise by a preponderance of the evidence.

Rule 5204(b) provides that, unless the Board orders otherwise, the hearing officer shall prepare an initial decision following a hearing. The rule provides that the initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and such other information as the Board may require. The rule is adapted from Rule 360 of the Commission's Rules of Practice.

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

Rule 5204(c) governs the hearing officer's filing of the initial decision with the Secretary and the Secretary's service of the initial decision on the parties.

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

Rule 5205—Settlement of Disciplinary Proceedings Without a Determination After Hearing

Rule 5205 governs certain matters related to possible settlement of disciplinary proceedings. The rule is adapted from Rule 240 of the Commission's Rules of Practice.

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

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

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

Rule 5205(c)(4) provides that if the Board rejects the offer, the offer will be deemed withdrawn and will not constitute a part of the record. Rule 5205(c)(4) further provides that rejection of the offer will not affect the continued validity of waivers of rights to claim bias or prejudgment on the basis of discussions concerning the settlement offer.

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

A note to Rule 5205 points out that in hearings on disapproval of registration, settlement offers will be handled by the Director of Registration and Inspections, rather than the Director of Enforcement and Investigations, in accordance with Rule 5205.

Rule 5206—Automatic Stay of Final Disciplinary Actions

Rule 5206 provides that no final disciplinary sanction of the Board shall be effective until either (a) the dissolution by the Commission of the stay provided by Section 105(e) of the Act or (b) the expiration of the period during which the Commission, on its own motion or upon application under Section 19(d)(2) of the Exchange Act, may institute review of the sanction.

Part 3—Disciplinary Sanctions

Part 3 of the Board's Rules on Investigations and Adjudications consists of Rules 5300 through 5304. These rules describe the sanctions the Board may impose in disciplinary proceedings and various matters related to the effect of, and the termination of, such sanctions.

Rule 5300—Sanctions

Rule 5300 describes sanctions that the Board may impose in disciplinary proceedings. Rule 5300(a) describes sanctions that the Board may impose in disciplinary proceedings instituted other than for non-cooperation in an investigation. Subparagraphs (1) through (6) of Rule 5300(a) incorporate the sanctions expressly provided by Section 105(c)(4) of the Act, including revocation of registration, bar from association, suspensions, limitations on activities, civil money penalties, censures, and a requirement of additional professional education or training. A note to subparagraph (3) of Rule 5300(a) contains a non-exclusive list of types of limitations on activities the Board may impose. Subparagraphs (7) through (10) of Rule 5300(a) identify other sanctions, pursuant to the authority given to the Board in Section 105(c)(4)(G) of the Act, including requiring a party to engage an independent monitor, to engage counsel or other consultants to design policies to effectuate compliance with the Act, to adopt or implement policies or undertake action to improve audit quality or to effectuate compliance with the Act, or to obtain an independent review and report on one or more engagements.

The more serious the violation is, the more severe the appropriate penalty will be, and the Board retains discretion to assess the seriousness of the violation

and the severity of the penalty. Section 105(c)(5) of the Act requires scienter or repeated negligence for imposition of the most severe sanctions. The Act does not limit the standard that must be met for imposition of other sanctions.

Rule 5300(b) describes the sanctions that the Board may impose in disciplinary proceedings for non-cooperation with an investigation. The sanctions include revocations, bars, and suspensions, as expressly provided by Section 105(b)(3)(A) of the Act. Rule 5300(b) also identifies other sanctions, pursuant to the authority given to the Board in Section 105(b)(3)(A)(iii), including civil money penalties, censures, limitations on activities, requiring a firm to engage a special master or independent monitor to monitor and report on the firm's compliance with accounting board demands, or authorizing the hearing officer to retain jurisdiction to monitor compliance with accounting board demands.

When the Board revokes a firm's registration or bars a person from association with a registered public accounting firm, the sanction is permanent and will not expire of its own accord. In contrast, a suspension of registration or a suspension from association shall be for a fixed time period at the expiration of which a suspended firm shall resume its status as registered and a suspended person shall be free to associate with a registered firm.

In the case of a revocation of registration or a bar on association, the Board may provide for a specified period after which the firm may reapply for registration, or the person may petition for termination of the bar. Modification or termination of sanctions is discussed below in connection with Rule 5302.

A note to Rule 5300 points out that the rule does not preclude the imposition, on consent in the context of a settlement, of any other sanction not identified in the rule.

Rule 5301—Effect of Sanctions

Rule 5301 describes the effect of certain sanctions imposed by the Board. Rule 5301(a) applies to persons who have been suspended or barred from association with a registered public accounting firm or who have failed to comply with any other sanction imposed on them by the Board. Rule 5301 prohibits such persons from willfully becoming or remaining associated with any registered public accounting firm, unless they first obtain the consent of the Board, pursuant to Rule 5302, or of the Commission.

Rule 5301(b) applies to a registered public accounting firm. It prohibits a firm from permitting a person to become or remain associated with the firm if the firm knows, or in the exercise of reasonable care should have known, that the person is subject to a bar or suspension on such association, unless the firm first obtains the consent of the Board, pursuant to Rule 5302, or of the Commission.

Both Rule 5301(a) and Rule 5301(b) are followed by notes that make two fundamental points about the effect of sanctions. First, a barred or suspended person may not receive a share of the firm's profits from audit work. To the extent that any compensation is calculated as a share of profits—whether a partner's draw, or any other employee's bonus or other special compensation—the calculation must be adjusted so that the portion of the firm's profits that is derived from audit revenue is not counted in calculating that compensation.

Second, a person may not be compensated in any form for doing audit work. This does not mean that a salaried employee must suffer a salary cut that mirrors the portion of the firm's profits that are from audit work, but it does reinforce the general prohibition on the person doing any audit work.

The language does not prohibit a barred partner from receiving from the firm a return of the partner's capital or a separation payment provided for in the partnership agreement. Nor does the language prohibit the payment of standard retirement benefits to which the person was entitled on the day the sanction took effect.

One commenter suggested that the rules prescribe at least one procedure which, if followed by a firm to determine whether a person is barred or suspended, would be ''reasonable per se'' and effectively provide a safe harbor for the firm from liability for associating with the person. The commenter suggested, as an example, that obtaining signed statements from individuals certifying that they are not suspended or barred could be a sufficient procedure for the firm to avoid liability.

We will continue to consider what, if any, sort of safe harbor procedure might be made available with respect to a firm's obligations to make efforts to know whether an associated person has been barred or is serving a suspension. A bar or suspension, once it takes effect, will be a matter of public record, and the rule effectively requires that firms make reasonable efforts to confirm, through public records, that an individual is not barred or suspended. The Board will consider ways to make information about bars and suspensions more readily accessible to firms.

Rule 5302—Application for Relief From, or Modification of, Revocations and Bars

Rule 5302 provides mechanisms by which a firm or person subject to a Board sanction may apply to the Board for relief from, or modification of, that sanction. Under Rule 5302(a), a firm that has had its registration revoked pursuant to a Board determination that permitted the firm an opportunity to reapply for registration after a specified period of time may, after the expiration of the specified period, file an application for registration pursuant to Rule 2101. The revocation shall continue, however, unless and until the Board affirmatively approves such a registration application.

Under Rule 5302(b), a person subject to a bar on association that contains a provision allowing the person to seek termination of the bar after a specified period of time may, after the expiration of the specified period, file a petition to terminate the bar. Subparagraphs (2) through (5) of Rule 5302(b) govern the process related to such a petition.

The burdens of the rule should not be viewed as falling solely on the individual. As a practical matter, the petition submitted by the individual should be a collaborative effort between the individual and the firm that wishes to associate with the individual. The firm should readily be able to supply some of the information necessary for the individual to satisfy the rule. The rule is based on Rule 193(b)(4)(iv) of the Commission's Rules of Practice, which imposes similar requirements on barred individuals seeking to associate with a broker-dealer.

Rule 5302(c) governs modification of revocations and bars that do not expressly provide a time period after which the firm may reapply for registration or the person may petition to terminate the bar. Such firm or person may at any time request leave to reapply for registration or leave to file a petition to terminate a bar. They may not file a registration application or a petition to terminate the bar unless the Board grants such leave. The revocation and bar shall continue until the Board has both granted such leave and approved a subsequent application or petition.

Under Rule 5302(d), a firm or person subject to an ongoing sanction imposed for non-cooperation with an investigation may file an application for termination of that sanction once the firm or person has remedied the non-cooperation that formed the basis for the

sanction. The sanction shall continue, however, unless and until the Board orders it terminated.

Under Rule 5302(e), any firm or person subject to a sanction described in subparagraphs (3), (6), (7), (8), (9), or (10) of Rule 5300(a) may file an application for termination of the sanction at any time. The Board may, in its discretion, grant a hearing on the application. The sanction shall continue, however, unless and until the Board orders it terminated.

Rule 5303—Use of Money Penalties

Rule 5303 provides that all money penalties collected by the Board shall be used to fund a merit scholarship program as required by, and described in, Section 109(c)(2) of the Act.

Rule 5304—Summary Suspension for Failure To Pay Money Penalties

Under Rule 5304, the failure of a registered public accounting firm or an associated person to pay money penalties imposed by the Board may result in summary suspension, and effective revocation, of the firm's registration and summary suspension or bar from association. Under Rule 5304(a), if a firm fails to pay a money penalty after the exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the firm's registration.

The rule allows a thirty-day period for payment after a money penalty becomes final. If payment is not made in that 30-day period, the Board may send a notice that failure to make payment within seven days will result in summary suspension.

Once such a suspension is imposed, it shall terminate upon payment of the penalty by the firm within 90 days of the onset of the suspension. If payment is not made within 90 days, the firm's registration will effectively be revoked, and the firm can re-register only by paying the penalty, plus interest, and filing an application for registration under Rule 2101 and obtaining Board approval of that application.

Under Rule 5304(b), if an associated person fails to pay a money penalty after exhaustion of all reviews and appeals and the termination of any stay, the Board may summarily suspend the person from association with a registered firm. Rule 5304(b) allows a thirty-day period for payment after a money penalty becomes final, after which the Board may send a notice that failure to pay within seven days will result in summary suspension. Once a suspension is imposed, it shall terminate upon payment of the penalty, plus interest, within 90 days of the onset of the suspension. If payment is not made within 90 days, the Board may summarily bar the person from association with a registered firm.

Part 4—Rules of Board Procedure

Part 4 of the Board's Rules on Investigations and Adjudications consists of Rules 5400 through 5469. These rules are further divided into general rules (5400 through 5411), prehearing rules (5420 through 5427), hearing rules (5440 through 5445), and appeals to the Board (5460 through 5469).

Rule 5400—Hearings

Rule 5400 provides for hearings to be held only upon order of the Board and to be conducted in a fair, impartial, expeditious and orderly manner. The rule is adapted from Rule 200 of the Commission's Rules of Practice.

Rule 5401—Appearance and Practice Before the Board

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

Rule 5402—Hearing Officer Disqualification and Withdrawal

Rule 5402 allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402 also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233.

Rule 5403—*Ex Parte* Communications

Rule 5403 prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The rule also prohibits any party (including the interested division) and any Board staff that has had substantial involvement in a matter from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules.

The rule includes a specific exception allowing staff to discuss settlement offers with the Board when a party has provided the prejudgment waiver described in Rule 5205(c)(3). The rule is based in part on Rule 120 of the Commission's Rules of Practice.

Rule 5404—Service of Papers by Parties

Rule 5404 requires service of papers on each party in a manner calculated to bring the paper to the attention of the party served. The rule is flexible enough to accommodate service by first class mail, or by other means, such as through electronic communication.

Rule 5405—Filing of Papers With the Board: Procedure

Rule 5405 governs procedures for filing papers with the Board.

Rule 5406—Filing of Papers: Form

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

Rule 5407—Filing of Papers: Signature Requirement and Effect

Rule 5407 requires every paper filed to be signed either by the party, if the party represents himself or herself, or by counsel if the party is represented by counsel. Because the Board expects most papers to be filed electronically, a note to the rule states that the signature should be scanned into an electronic document where practicable, but that otherwise certain indicia of electronic signature will suffice.

Rule 5408—Motions

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

Rule 5409—Default and Motions to Set Aside Default

Rule 5409 describes the circumstances that shall constitute a default and the procedure for seeking to set aside a default. The rule is adapted from Rule 155 of the Commission's Rules of Practice.

Rule 5410—Extra Time for Service by Mail

Rule 5410 provides an additional three days for service made by mail.

Rule 5411—Modifications of Time, Postponements and Adjournments

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

Rule 5420—Leave To Participate To Request a Stay

Rule 5420 provides a procedure by which certain entities may seek a stay of a hearing. The entities that may seek

such a stay are the Commission, the United States Department of Justice or any United States Attorney's Office, any criminal prosecutorial authority of a state or political subdivision of a state, and an appropriate state regulatory authority.

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

Rule 5421—Answer to Allegations

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

Rule 5422—Availability of Documents for Inspection and Copying

Rule 5422 governs the obligations of Board staff to make documents available to a party for inspection and copying. Under the rule, the staff's obligation varies according to whether the proceeding is commenced under Rule 5200(a)(1)–(2) for violations or failures reasonably to supervise, Rule 5200(a)(3) for non-cooperation, or Rule 5500 concerning disapproval of a registration application.

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

Rule 5422(a)(1) applies to proceedings commenced under Rule 5200(a)(1) or Rule 5200(a)(2). The rule provides that in those proceedings, the Division of Enforcement and Investigations shall make available all documents in four specific categories: (1) Accounting board requests, subpoenas, and accounting board demands for documents, testimony, or information issued in the investigation or in the informal inquiry, if any, that preceded the investigation, (2) responses to those accounting board requests, subpoenas, and accounting board demands, including any documents produced in response, (3) testimony transcripts and exhibits, and any other verbatim records of witness statements, and (4) all other documents prepared or obtained by the Division of Enforcement and Investigations in connection with the investigation prior to the institution of proceedings.

Rule 5422(a)(2) applies to non-cooperation proceedings commenced under Rule 5200(a)(3). Rule 5422(a)(2) requires that the Division of Enforcement and Investigations make available all documents on which the Division intends to rely in seeking a finding of non-cooperation. The rule expressly provides that the Division shall not be required to make available any other documents in a proceeding based on non-cooperation, subject only to the general requirement to make available material exculpatory evidence on the issue of non-cooperation.

We anticipate that non-cooperation proceedings will narrowly focus on such things as, for example, the demand with which there has been no compliance, or the testimony that is allegedly false. The only documents that would be relevant in those examples are the documents that the Division would use to prove non-cooperation and any documents that would tend to show that the person did comply with the demand, or that that person's testimony was not false. Under the rule, all such documents must be made available to the respondent in a non-cooperation proceeding.

We have declined, however, to adopt a ''relevance'' standard and open the door to broader disputes about what documents might be ''relevant.'' Liability for non-cooperation is independent of whether the party has otherwise violated any law, rule, or standard enforceable by the Board. Non-cooperation is not excusable on the basis of a conviction that the staff's investigation is misguided. We do not intend for non-cooperation proceedings to become a forum for demonstrating, through broad access to the investigative record, that the investigation is flawed and that something less than full cooperation was therefore justified. A non-cooperation proceeding focuses only on the obligation to cooperate, which is not a qualified obligation that varies depending upon one's view of the merits of the investigation.

Moreover, we intend that non-cooperation proceedings will generally be commenced as soon as the grounds for such a proceeding appear, rather than waiting until the conclusion of an investigation.[2] An important objective of a non-cooperation proceeding will be not only to impose a sanction if appropriate, but also to compel the cooperation at a time when it is still meaningful to the investigation. At that point in time, to require the staff to make available any portion of the investigative record other than that directly bearing on non-cooperation could compromise the investigation, and might also compromise investigations by the Commission or other authorities. Indeed, to allow access to any portion of the investigative record in the course of a non-cooperation proceeding would supply a counterproductive incentive that might cause some persons to fail to cooperate specifically for the purpose of obtaining access to that record.

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

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

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

[2] The rules do not preclude the Board from commencing a proceeding for non-cooperation after an investigation and prosecuting it separately from or consolidated with a proceeding for alleged violations of laws, rules, or standards enforceable by the Board. For example, the Board may, in its discretion, institute proceedings for violations of the Act and simultaneously institute proceedings for non-cooperation in an investigation against the same respondent for conduct (for example, false testimony) during the investigation.

procedural requirements under Rule 5422(c).

Under Rule 5422(b)(1)(ii), the Division need not make available any other document that, while not encompassed within the first category, is nevertheless protected by a privilege or by the attorney work product doctrine. This category would include, for example, documents that were privileged in the hands of the person who supplied them to the Board, but who supplied them pursuant to an understanding that doing so would not otherwise waive the privilege. As to this category of withheld documents, Rule 5422(c)(1) requires the Division to supply to the hearing officer and each respondent a log providing all of the same information that Rule 5106 requires a person to submit when asserting a privilege against production to the Board.

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

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

In addition to the procedural protections described above, Rule 5422(b)(2) provides an over-arching restriction on what the Division may withhold. It provides that nothing in paragraph (b), and nothing in paragraph (a)(2)'s limitation on what the staff must make available in a non-cooperation proceeding, authorizes the interested division to withhold documents that contain material exculpatory evidence.

Rule 5422(d) governs the time period in which the staff must make the documents available. Under the rule, the staff must make the documents available within seven days of the institution of a proceeding under Rule 5200(a)(3) for non-cooperation, and within 14 days of the institution of proceedings under Rules 5200(a)(1), 5200(a)(2), and 5500.

Rule 5422(e) provides that the staff shall make the documents available at the Board's office where the documents are normally maintained, or at such other place as the parties agree upon in writing. Rule 5422(d) further provides that, except as subject to any specific contrary agreement with the staff, a party shall not have custody of the documents and shall not remove the documents from the Board's offices, though the party may make and retain copies of the documents. Rule 5422(f) provides that a party wishing to make copies of the documents must bear the cost of copying.

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

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

Rule 5423—Production of Witness Statements

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

Rule 5424—Accounting Board Demands and Commission Subpoenas

Rule 5424 provides for mechanisms by which any party may seek to secure testimony or evidence relevant to a proceeding. Rule 5424(a) describes procedures by which any party may seek to have an accounting board demand served on any registered public accounting firm or associated person of such a firm, or seek to have an accounting board request served on any other person. Under the rule, the party must make a request to the hearing officer for issuance of the accounting board demand or accounting board request. In the event of the hearing officer's unavailability, the party may present its request, through the Secretary, to any member of the Board, or any other person designated by the Board to issue such demands and requests.

The application for an accounting board demand or accounting board request may be denied, or may be granted with modifications, if it is unreasonable, oppressive, excessive in scope, or unduly burdensome. The rule provides that a person whose application for an accounting board demand or accounting board request has been denied or modified may not make the same application to another person and may not apply to the Board for a Commission subpoena covering the same testimony, documents, or information as the denied application covered or as was excluded by modification in granting an application.

Rule 5424(a) also provides that a party who applies for an accounting board demand or accounting board request to summon a witness shall pay the witness's reasonable expenses.

Rule 5424(b) provides that the Board, on its own initiative or on the application of any party, may seek issuance of a subpoena by the Commission to any person in order to seek to secure testimony or evidence that the Board considers relevant or material to the proceeding. Unlike Rule 5424(a), which provides that an application for an accounting board demand or request shall be granted if certain criteria are satisfied, Rule 5424(b) leaves entirely to the discretion of the hearing officer or other Board designee whether to grant a party's request to seek a Commission subpoena. The rule does not create any entitlement, under any circumstances, to have the Board seek a Commission subpoena on behalf of a party. Moreover, if the Board does seek a Commission subpoena requested by a party, the rule does not, and should not be understood to, give rise to or justify any expectation about how or whether the Commission will respond to the request. Accordingly, the rule does not create any entitlement to have any Board proceedings stayed or delayed while any such request is pending.

Rule 5425—Depositions To Preserve Testimony for Hearing

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

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

Rule 5426—Prior Sworn Statements of Witnesses in Lieu of Live Testimony

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

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

Rule 5427—Motion for Summary Disposition

Rule 5427 provides for any party to make a motion for summary disposition. Under Rule 5427(a), the interested division may make such a motion only after the party against whom the motion is directed has filed an answer and has had documents made available to it pursuant to Rule 5422. Under Rule 5427(b), a respondent may make such a motion at any time.

Rule 5427(c) requires that any party that would move for summary disposition must first request and attend a pre-motion conference with the hearing officer. Under the rule, the hearing officer would, at the conference, set a due date for the motion. The hearing officer has discretion either to set a due date for a response to the motion or to spare the opposing party the need to prepare a response until the hearing officer has reviewed the motion. If the hearing officer chooses that approach, the hearing officer shall review the motion and then either deny the motion without any response being filed or shall give the opposing party an opportunity to file a response.

Rule 5427(d) provides that a hearing officer shall grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law. A hearing officer may also enter a summary disposition that is limited to the issue of liability even though there may be a genuine and contested issue as to the appropriate sanction. Rule 5427(d) also provides that the denial of a motion for summary disposition is not subject to interlocutory appeal. Rule 5427(e) governs page limitations on briefs related to motions for summary disposition.

Rule 5440—Record of Hearings

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

Rule 5441—Evidence: Admissibility

Rule 5441 provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. The standard in Rule 5441 is based on the Administrative Procedure Act.[3] In addition, the same standard is used in the Commission's Rules of Practice.[4] By using this phrase in Rule 5441, the Board intends for evidentiary issues in PCAOB hearings to be addressed in a generally similar manner to Commission administrative hearings, and the administrative hearings of most other administrative agencies. Rule 5441 is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility.[5] In particular, the

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

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

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

three bases in the rule—irrelevance, immateriality, and undue repetition—are not the only permissible bases on which a hearing officer may exclude evidence under administrative practice. Nor does the standard in Rule 5441 preclude a hearing officer from referring to principles from the Federal Rules of Evidence or other authoritative sources in exercising his or her discretion to resolve evidentiary issues.[6]

Rule 5442—Evidence: Objections and Offers of Proof

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

Rule 5443—Evidence: Presentation Under Oath or Affirmation

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

Rule 5444—Evidence: Rebuttal and Cross-Examination

Rule 5444 provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall determine the scope and form of evidence, rebuttal evidence, and cross-examination in any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

Rule 5445—Post-Hearing Briefs and Other Submissions

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

Rule 5460—Board Review of Determinations of Hearing Officers

Rule 5460 concerns Board review of initial decisions. Under Rule 5460, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 10 days of an initial decision in a proceeding commenced under Rule 5200(a)(3) for non-cooperation, and within 30 days of an initial decision in other proceedings. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

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

Rule 5460(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460(c) through (e) set out procedural matters related to Board review.

Rule 5461—Interlocutory Review

Rule 5461 concerns Board interlocutory review of hearing officer rulings. Under Rule 5461(a), the Board will not grant interlocutory review absent extraordinary circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. 1292(b).

Rule 5462—Briefs Filed With the Board

Rule 5462 describes procedural requirements related to briefs and the filing of briefs. The rule is adapted from Rule 450 of the Commission's Rules of Practice.

Rule 5463—Oral Argument Before the Board

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

Rule 5464—Additional Evidence

Rule 5464 provides that the Board may, upon its own motion or the motion of a party, allow the submission of additional evidence in connection with the Board's review of an initial decision. The rule is adapted from Rule 452 of the Commission's Rules of Practice.

Rule 5465—Record Before the Board

Rule 5465 provides that the Board shall determine each matter on the basis of the record and provides certain requirements concerning the record. The rule is adapted from Rule 460 of the Commission's Rules of Practice.

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

Rule 5466—Reconsideration

Rule 5466 provides procedures by which a party may seek reconsideration of a Board decision. The rule is adapted from Rule 470 of the Commission's Rules of Practice.

Rule 5467—Receipt of Petitions for Commission or Judicial Review

Rule 5467 is intended to ensure that the Board has notice of any petitions filed by a party for review of a Board decision, or for review of a Commission order with respect to a Board decision. Rule 5467 is separate from, and in addition to, any notice or service requirements that the Commission imposes with respect to petitions for review filed with the Commission. Rule 5467, a registered public accounting firm must notify the Secretary, or any requirements of the Federal Rules of Appellate Procedure or any court within 10 days after the firm or any person associated with the firm files with the Commission a petition for review of a Board decision or files a petition for court review of a Commission order with respect to such a sanction. The rule is modeled in part on Rule 490 of the Commission's Rules of Practice.

A firm will generally have in place a mechanism for regular reporting to the Board, and the Board will have in place a mechanism for receiving reports from a firm. These things generally will not be true with respect to individuals who are associated persons. An associated person who is in the position of petitioning for review of a sanction is a person who, necessarily, has been sanctioned. That sanction—and whether it becomes final by virtue of an appeal period running without the person having petitioned for review—is something that the firm must necessarily monitor since it affects how the firm may or must interact with the associated person. Accordingly, we expect the firm as a matter of course to know whether and when its associated person has petitioned for review. The rule leaves to the firm the creation and enforcement of internal procedures to ensure that its associated persons report the information to the firm.

Rule 5468—Appeal of Actions Made Pursuant to Delegated Authority

As directed by Section 101(g)(2) of the Act, Rule 5468 provides procedures for seeking Board review of any action by someone other than the Board pursuant to authority delegated by the Board. The rule requires a person to act within five days to provide notice to the Board that the person intends to seek review. The rule allows the person another five days beyond that notice in which to submit the petition for review. The rule also includes a provision designed to ensure that a person will not unfairly be denied an opportunity to petition for review if, through no fault of the person, service of notice of the staff action in question was delayed in reaching them.

Rule 5469—Board Consideration of Actions Made Pursuant to Delegated Authority

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

Part 5—Hearings on Disapproval of Registration Applications

Part 5 of the Board's Rules on Investigations and Adjudications consists of Rules 5500 and 5501. These rules relate to adjudications on certain registration applications.

Rule 5500—Commencement of Hearing on Disapproval of a Registration Application

Rule 5500 describes the procedure relating to the commencement of a Board adjudication proceeding to consider an application for registration. Under the Board's registration rules, if the Board is unable to make the determination necessary to approve a registration application, the Board will provide the applicant with notice of a hearing. Rule 5500 provides the procedures through which such a proceeding would be commenced.

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

Rule 5501—Procedures for a Hearing on Disapproval of a Registration Application

Rule 5501 provides that proceedings commenced pursuant to Rule 5500 are subject to the procedures set out in Parts 2 and 4 of Section 5 of the Board's rules.

(b) Statutory Basis

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

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules provide procedures by which the Board will carry out its authority and responsibility to conduct investigations and disciplinary proceedings. The proposed rules will provide for procedural fairness and for uniformity of procedures governing investigations and disciplinary proceedings with respect to all persons subject to obligations imposed by the Board in those investigations and proceedings. The proposed rules implement the Act's provisions on investigations and discipline without imposing any burden on competition.

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

The Board released the proposed rules for public comment in PCAOB Release No. 2003–012 (July 28, 2003). A copy of PCAOB Release No. 2003–012 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at *pcaobus.org.* The Board received 17 written comments. The Board has clarified and modified certain aspects of the proposed rules in response to comments it received, as discussed below.

One commenter suggested that the Board add a good standing requirement to the definition of ''counsel.'' The Board incorporated that suggestion in the final rule.

The Board proposed a definition of ''hearing officer'' that included a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing. Several commenters expressed the view that neither Board members nor staff of the interested division should ever serve as hearing officers. After considering those comments, the Board adopted a final rule that excludes the possibility of any Board member or

staff of the interested division serving as a hearing officer.

Proposed Rule 5103(b) would have required that unless otherwise requested or permitted, the documents produced in response to an accounting board demand be the originals. Commenters stated that production of original documents, including workpapers, can be disruptive to ongoing audit engagements and suggested that the rule provide for production of copies rather than originals. To accommodate this concern, the Board modified the rule to permit production of copies unless otherwise specified in the accounting board demand.

In response to a comment on proposed Rule 5108, concerning the confidentiality of materials obtained by the Board, the Board deleted the phrase ''unless otherwise ordered by the Board or the Commission'' from the beginning of the rule. This change makes clear that the rule is not intended to suggest any Board authority to make materials public other than in a manner consistent with the Act.

With respect to proposed Rule 5110, commenters expressed concern about the prospect of a non-cooperation proceeding for providing testimony that ''omits material information.'' After consideration of the comments, the Board revised the scope of the rule on this point. The Board deleted the language concerning testimony that is false or misleading or that omits material information. In its place, the rule now uses the language of the federal perjury statute, 18 U.S.C. § 1623. The final rule provides for instituting a non-cooperation proceeding where it appears to the Board that a person may have ''knowingly made any false material declaration or made or used any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration.''

Moreover, in response to a request for clarification, the Board added an additional point to the list of items that may warrant institution of non-cooperation proceedings. Specifically, the final rule states that the Board may authorize non-cooperation proceedings where it appears that a firm or associated person may have abused the Board's processes for the purpose of obstructing an investigation.

This new provision grew out of a comment made in connection with Rule 5402. The commenter suggested that the Board should impose fines for frivolous interlocutory appeals. The Board agreed that abuse of the Board's processes is a form of failing to ''otherwise cooperate'' and added this provision to Rule 5110 to provide notice that the Board will impose sanctions for this form of non-cooperation.

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

One commenter expressed a concern that the proposed rules do not provide for the burdens of proof in a disciplinary proceeding. In response, the Board added a new Rule 5204(a). Rule 5204(a) provides that in any disciplinary proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5200(a)(3), the interested division shall bear the burden of proving an alleged violation or failure to supervise by a preponderance of the evidence.

Rule 5304 concerns the imposition of summary suspensions for registered firms or associated persons that fail to pay a money penalty imposed by the Board. Rule 5304(a), as proposed, required only that the Board provide written notice at least seven days before any such suspension. One commenter understood the proposal to mean that a firm or associated person might have only seven days between the date the sanction becomes final and the date of summary suspension under the rule. The commenter suggested that the rule provide for at least 30 days between the sanction becoming final and the Board sending the seven-day notice.

The commenter's suggestion was consistent with what was intended by the proposal, and the Board modified the rule to make that intent explicit. The final rule allows a 30-day period for payment after a money penalty becomes final. If payment is not made in that 30-day period, the Board may send a notice that failure to make payment within seven days will result in summary suspension.

Proposed Rule 5401(c)(4) provided that an individual's withdrawal from representation of a party would be permitted only with the approval of the Board or the hearing officer. Commenters suggested that the rules should provide that permission to withdraw would not be unreasonably withheld.

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

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

Rule 5420 provides that certain entities may seek leave to request a stay of a Board disciplinary proceeding. Under the proposed rule, the entities that could seek such a stay would have been the Commission, the United States Department of Justice or any United States Attorney's Office, and any criminal prosecutorial authority of a state or political subdivision of a state.

One commenter suggested that the list should be expanded to include an appropriate state regulatory authority. The Board agreed with that comment and modified the rule accordingly.

Rule 5422 governs the obligations of Board staff to make documents available to a party for inspection and copying. Under the rule, the staff's obligation varies according to whether the proceeding is commenced under Rule 5200(a)(1)–(2) for violations or failures reasonably to supervise, Rule 5200(a)(3) for non-cooperation, or Rule 5500 concerning disapproval of a registration application. In response to comments, the Board made several changes to Rule 5422. In particular, the Board revised the structure of the rule in response to suggestions that the rule should more closely track the Commission's approach with respect to so-called *Brady* material. The Board added provisions to reinforce the principle that material exculpatory evidence will not be withheld even if the confidential informant privilege or other good cause would otherwise justify withholding it. The Board also modified the rule to provide that documents made available in a non-cooperation proceeding will include any documents that contain material exculpatory evidence on the issue of non-cooperation. Finally, the Board revised the rule to require the Division to provide a privilege log with respect to a certain category of documents.

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

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

(A) By order approve the proposed rules; or

(B) Institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent with the Act.[7] Comments may be submitted electronically or by paper. Electronic comments may be submitted by: (1) Electronic form on the SEC Web site (*http://www.sec.gov*) or (2) e-mail to *rule-comments@sec.gov.* Mail paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File No. PCAOB–2003–07; this file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. We do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All comments should be submitted on or before April 15, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

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[7] The Commission notes, in connection with proposed Rule 5424(b), that the issuance of Commission subpoenas in connection with PCAOB disciplinary proceedings would be a novel and potentially complex arrangement, and the Commission staff has discussed with the PCAOB staff the need to develop and implement additional rules and procedures regarding the handling of subpoena requests. These additional rules and procedures would address, among other things, the steps that the parties to PCAOB proceedings would need to follow prior to applying for Commission subpoenas as well as the Commission's processes for handling such requests once they are received. We have discussed with the PCAOB staff the fact that Rule 5424(b) will not be available for use in PCAOB proceedings until such additional rules and procedures have been developed and implemented to the satisfaction of the Commission. Comments are specifically solicited on Rule 5424(b) in light of applicable statutory, due process and other legal considerations, including any relevant distinctions between the functions of the PCAOB and those of self-regulatory organizations.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49449; File No. SR–Amex–2004–04]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto by the American Stock Exchange LLC Relating to Auto-Ex for Exchange Traded Funds and Nasdaq Securities Traded on an Unlisted Basis

March 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 20, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Amex. On March 4, 2004, the Amex amended the proposed rule change.[3] On March 11, 2004, the Amex amended the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex seeks to revise its Auto-Ex procedures for Portfolio Depository Receipts, Index Fund Shares, Trust Issued Receipts (collectively referred to as ''Exchange Traded Funds'' or ''ETFs''), and Nasdaq securities admitted to trading on an unlisted basis. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Trading in Nasdaq National Market Securities

Rule 118 (a) through (k) no change

(l) & (m) (proposed in unapproved Amex rule filings)

(n) An institutional order is a limit order for a Nasdaq National Market Security of 10,000 shares or more transmitted to the order book electronically which is to be executed automatically in full at one price. If it is not executed automatically in full at one price, it is to be routed to the specialist for execution and may be partially executed. Unlike an all or none order, an institutional order has standing on the limit order book. An institutional order may not be entered for the proprietary account of a broker-dealer.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Office of Market Supervision (''OMS''), Commission, dated March 3, 2004 (''Amendment No. 1''). In Amendment No. 1, the Amex restated the proposed rule change in its entirety.

[4] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, OMS, Commission, dated March 11, 2004 (''Amendment No. 2''). In Amendment No. 2, the Amex restated the proposed rule change in its entirety.