

and withdrawal. The proposed rule provided that an individual's withdrawal from representation of a party would be permitted only with the approval of the Board or the hearing officer. One commenter suggested that it would be helpful if the rules would enumerate grounds that would be adequate for withdrawal. Other commenters suggested that the rules should provide that permission to withdraw would not be unreasonably withheld. One commenter suggested that a party's request to replace counsel (as distinct from counsel's request to withdraw) should not require approval.

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

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

As discussed earlier, we have revised the definition of "hearing officer" to provide that neither a Board member nor any staff of the interested division will serve as a hearing officer. We decline to create a special right of interlocutory Board review in every case of a denied recusal motion. The interlocutory appeal process, governed by Rule 5461T, allows a party to request that the hearing officer certify his or her recusal ruling for interlocutory review. The rule requires that the hearing officer should certify the ruling if immediate review of the order may materially advance the completion of the

proceeding. Given that a reversible denial of a recusal motion could substantially delay completion of the proceeding by eventually requiring a complete re-hearing before a different hearing officer, we expect hearing officers to give careful attention to whether that standard for certification has been met with respect to any ruling denying a recusal motion.

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

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

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

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rules

The Board has asked the Commission to approve the proposed temporary rules prior to the thirtieth day after the date of publication of notice of the filing to ensure the efficient implementation of the registration process under section 102 of the Act.

Under section 102 of the Act, Congress required accounting firms to register with the Board by October 22, 2003, the 180th day from the Commission's section 101(d) determination that the Board is organized and has the capacity to carry out the requirements of, and enforce compliance with, the Act. The Board began accepting registration forms on August 7, 2003. Under section 102(c)(i) of the Act, the Board is required to issue a notice of disapproval or seek additional information within 45 days of receiving a registration form. Furthermore, section 105(c) of the Act requires that the Board, among other things, establish fair disciplinary procedures. Under rules previously adopted by the Board and approved by the Commission, the Board may not disapprove an application without first giving the applicant an opportunity for a hearing. On July 28, 2003, the Board proposed procedural rules for disapproving a registration application, as part of its Rules on Investigations and Adjudications. The Board sought and received comments on the proposals. After considering the comments, the Board adopted temporary rules relating to registration disapproval procedures on September 29, 2003.

Pursuant to section 107(b) of the Act, the Commission shall approve proposed rules upon a finding that such rules are consistent with the Act and with the securities laws or are necessary or appropriate in the public interest or for the protection of investors. Although the Commission will later consider permanent rules, the proposed temporary rules will facilitate the process of making determinations on new and pending registration applications. On the basis of the foregoing, the Commission finds that the temporary rules are consistent with the requirements of sections 102, 105(c) and 107(b) of the Act and the securities laws⁶ and are necessary and appropriate in the public interest and for the protection of investors.

Because accounting firms already have begun submitting registration

⁶ The Commission has considered whether the action will promote efficiency, competition and capital formation.