

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

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

### 3. Stay of Board Action

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

### 4. Summary Action; Expedition

As permitted under section 105(e)(1) of the Sarbanes-Oxley Act, proposed Rule 401(e)(2) would provide that the Commission may act summarily, without notice and opportunity for hearing. The Commission may also expedite consideration of a motion to lift a stay of Board action to the extent expedition is consistent with the Commission's other responsibilities. If the consideration of a motion to lift is

expedited, proposed Rule 401(e)(3) would provide that persons opposing the lifting of the stay may file an opposition within two days of service of the motion to lift unless the Commission orders a different period.<sup>11</sup>

### 5. Review on Motion of the Commission

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

### 6. Amendments to Existing Rules

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

- The definition of "proceeding" in Rule 101(a)(9) (Definitions) would be amended to include review of Board disciplinary sanctions under proposed Rule 440.

- The Commission would amend Rule 202(a) (Specification of procedures by parties in certain proceedings) and Rule 210 (Parties, limited participants and amici curiae), which permits intervention and leave to participate on a limited basis, to exclude review of Board disciplinary sanctions under proposed Rule 440. These Rules currently do not apply to Commission enforcement or disciplinary proceedings or review of determinations by self-regulatory organizations. The Commission asks for comment as to whether proposed Rules 440 and 441 would provide sufficient procedures for review of Board disciplinary sanctions, or whether intervention or limited participation would be appropriate in

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

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

Commission review of Board disciplinary sanctions.

- Rule 450(a)(2) (Briefs filed with the Commission) would be amended to provide for briefs to be filed in the Commission's review of final disciplinary sanctions imposed by the Board. Under the proposed Rule, the Commission would issue a briefing schedule order within 21 days (or such longer time as provided by the Commission) following its receipt of the Board's index of the record of the Board's determination.

- The Commission would define the contents of the record before it in its review of Board action to include the record certified to the Commission by the Board, any application for review, and any submissions made to the Commission, by adding Rule 460(a)(3) (Record before the Commission).

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

### B. Fair Funds and Disgorgement

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

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

<sup>13</sup> 15 U.S.C. 7246(a).

<sup>14</sup> 15 U.S.C. 7246(b).

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

<sup>10</sup> 15 U.S.C. 7215(c)(1).