

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

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

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

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

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

Commission to exercise a check on, and protect the public interest in, the quality and consistency of Board findings.

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

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

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

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

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

Section 308(a) of the Sarbanes-Oxley Act provides that, in a Commission administrative proceeding where the Commission or a hearing officer enters

an order requiring disgorgement and a civil money penalty, the Commission may create a "Fair Fund" by including the civil penalty with the disgorgement amount. The Commission is required to disburse money from a Fair Fund for the benefit of the victims of the securities law violations at issue in the proceeding.

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

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

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

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