

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 201**

**Release No. 34-75976; File No. S7-18-15**

**RIN 3235-AL87**

**Amendments to the Commission's Rules of Practice**

**AGENCY: Securities and Exchange Commission.**

**ACTION: Proposed rule.**

**SUMMARY:** The Securities and Exchange Commission ("Commission") is proposing for public comment amendments to update its Rules of Practice to, among other things, adjust the timing of hearings in administrative proceedings; allow for discovery depositions; clarify the rules for admitting hearsay and assertion of affirmative defenses; and make certain related amendments.

**DATES:** Comments should be received on or before [insert date 60 days after publication in the Federal Register].

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-18-15 on the subject line; or

- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

*Paper Comments*

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-18-15. 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 of submission. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information in submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Adela Choi, Senior Counsel, and Laura Jarsulic, Associate General Counsel, Office of the General Counsel, (202) 551-5150, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549

**SUPPLEMENTARY INFORMATION:** The Commission proposes to amend its Rules of Practice. The amendments are being proposed to update its existing rules.

## I. Introduction

As it has done from time to time, the Commission proposes to amend its Rules of Practice.<sup>1</sup> The Commission proposes amendments to update the Rules of Practice to adjust the timing of hearings and other deadlines in administrative proceedings and to provide parties in administrative proceedings with the ability to use depositions and other discovery tools. The Commission proposes additional amendments to implement the newly available discovery tools. These proposed Rules are intended to introduce additional flexibility into administrative proceedings, while still providing for the timely and efficient disposition of proceedings. The Commission also proposes amendments to clarify certain other Rules, including the assertion of affirmative defenses in answers and the admissibility of hearsay.

## II. Discussion of Proposed Amendments

The proposed amendments are as follows:

### A. Proposed Amendments to Rule 360

Rule 360<sup>2</sup> sets forth timing for certain stages of an administrative proceeding. These stages include a prehearing period, a hearing, a period during which parties review hearing transcripts and submit briefs, and then a deadline by which the hearing officer must file an initial decision with the Office of the Secretary. Under current Rule 360, the deadlines for these stages are calculated from the date of service of an order instituting proceedings. Initial decisions must

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<sup>1</sup> See, e.g., *Rules of Practice*, Exchange Act Release No. 35833, 60 FR 32738 (June 9, 1995); *Rules of Practice*, Exchange Act Release No. 40636, 63 FR 63404 (Nov. 4, 1998); *Rules of Practice*, Exchange Act Release No. 48018, 68 FR 35787 (June 11, 2003); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 69 FR 13166 (Mar. 12, 2004); *Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission*, Exchange Act Release No. 52846, 70 FR 72566 (Dec. 5, 2005); *Rules of Practice*, Exchange Act Release No. 63723, 76 FR 4066 (Jan. 24, 2011).

<sup>2</sup> 17 CFR 201.360.

be filed within the number of days prescribed in the order instituting proceedings – 120, 210, or 300 days from the date of service of the order instituting proceedings. Broadly speaking, administrative proceedings instituted pursuant to Section 12(j) of the Exchange Act<sup>3</sup> are designated as 120-day cases, administrative proceedings seeking sanctions as a result of an injunction or conviction<sup>4</sup> are designated as 210-day cases, and administrative proceedings alleging violations of the securities laws are designated as 300-day cases. Because deadlines are calculated from the date of service of the order instituting proceedings, if there are delays early on in the proceeding, the hearing occurs later and the hearing officer then has less time to prepare an initial decision in advance of the Rule 360 deadline.

The amount of time for parties to prepare during the prehearing period may vary from case to case with the number of factual and legal allegations, the complexity of the claims and defenses, and the size of the record. Parties in 300-day cases, for example, have increasingly requested extensions of time to review investigative records and prepare for hearing, citing the volume and time it takes to load and then review electronic productions. Parties in such cases frequently file motions before the hearing officer or the Commission to resolve complicated issues prior to the hearing. In addition, the Chief Administrative Law Judge has sought several extensions of time for hearing officers to file initial decisions in more complicated 300-day cases.<sup>5</sup>

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<sup>3</sup> 15 U.S.C. 78l(j).

<sup>4</sup> *See, e.g.*, 15 U.S.C. 78o(b)(6); 15 U.S.C. 80b-3(f).

<sup>5</sup> *See, e.g.*, *Natural Blue Resources, Inc., et al.*, Exchange Act Release No. 74891 (May 6, 2015) (order granting extension); *Lawrence M. Labine*, Exchange Act Release No. 74883 (May 6, 2015) (same); *Total Wealth Management, Inc., et al.*, Exchange Act Release No. 74353 (Feb. 23, 2015) (same); *Donald J. Anthony, Jr., et al.*, Exchange Act Release No. 74139 (Jan. 26, 2015) (order granting second motion for extension).

As amended, Rule 360 would include three modifications to address the timing of a proceeding. First, the deadline for filing the initial decision would run from the time that the post-hearing briefing or briefing of dispositive motions or defaults has been completed, rather than the date of service of the order instituting proceedings. This modification would divorce the deadline for the completion of an initial decision from other stages of the proceeding. Under the proposed amendment, the deadlines for initial decisions that would be designated in orders instituting proceedings would be 30, 75, and 120 days from the completion of post-hearing or dispositive briefing. The proposed length of time afforded for the preparation of an initial decision in each type of proceeding would be the same as the amount of time hearing officers are afforded under current Rule 360, if a proceeding actually progresses according to the timeline set out in the current rule.

Second, amended Rule 360 would provide a range of time during which the hearing must begin. For example, in 300-day cases, current Rule 360 states that a hearing should occur within approximately four months. The amended rule would provide that the hearing must be scheduled to begin approximately four months after service of the order instituting proceedings, but not later than eight months after service of the order.<sup>6</sup> Significantly, the amendment doubles the maximum length of the current rule's prehearing period. This is intended to provide additional flexibility during the prehearing phase of a proceeding and afford parties sufficient time to conduct deposition discovery pursuant to new proposed rules, while retaining an outer time limit to ensure the timely and efficient resolution of the proceeding. It also would allow

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<sup>6</sup> As amended, Rule 360 would retain the same amount of time as current Rule 360 for parties to obtain the transcript of the hearing and submit post-hearing briefs – approximately two months.

respondents more time to review electronic documents in cases involving an electronic production from the Division.

Third, amended Rule 360 would create a procedure for extending the initial decision deadline by up to thirty days. This extension is intended to complement the Chief Law Judge's ability under current Rule 360 to request extensions of time from the Commission. Under amended Rule 360, the hearing officer may certify to the Commission in writing the need to extend the initial decision deadline by up to thirty days for case management purposes. This certification would need to be issued at least thirty days before the expiration of the initial decision deadline and the proposed extension would take effect if the Commission does not issue an order to the contrary within fourteen days after receiving the certification.

This procedure for extending the initial decision deadline by a thirty-day period is intended to promote effective case management by the hearing officers. For example, for a hearing officer faced with several initial decision deadlines in the same week, a thirty-day extension would provide flexibility to stagger the deadlines. The amended rule would retain the provision allowing the Chief Law Judge to request an extension of any length from the Commission, without regard to whether a hearing officer has already sought to extend the deadline.

We seek comments about the amount of time proposed for each phase of the proceeding, including the eight-month cap on the prehearing period for cases with the longest initial decision deadlines, the time allotted for post-hearing briefing, and the time provided for the hearing officer to prepare an initial decision.

## B. Proposed Amendments to Rule 233

Rule 233<sup>7</sup> currently permits parties to take depositions by oral examination only if a witness will be unable to attend or testify at a hearing. The proposed amendment would allow respondents and the Division to file notices to take depositions. If a proceeding involves a single respondent, the proposed amendment would allow the respondent and the Division to each file notices to depose three persons (i.e., a maximum of three depositions per side) in proceedings designated in the proposal as 120-day cases (known as 300-day cases under current Rule 360). If a proceeding involves multiple respondents, the proposed amendment would allow respondents to collectively file notices to depose five persons and the Division to file notices to depose five persons in proceedings designated in the proposal as 120-day cases (i.e., a maximum of five depositions per side).<sup>8</sup> Under the amendment, parties also could request that the hearing officer issue a subpoena for documents in conjunction with the deposition.

The proposed amendment is intended to provide parties with an opportunity to develop arguments and defenses through deposition discovery, which may narrow the facts and issues to be explored during the hearing. Allowing depositions should facilitate the development of the case during the prehearing stage, which may ultimately result in more focused prehearing preparations, with issues distilled for the hearing and post-hearing briefing.

We recognize that additional time during the prehearing stage of the proceeding would facilitate the effective use of depositions for discovery. As a result, we have proposed amendments to Rule 360, discussed above, that provide additional flexibility over deadlines

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<sup>7</sup> 17 CFR 201.233.

<sup>8</sup> The provision in current Rule 233 that allows for depositions when a witness is unable to attend or testify at a hearing has been preserved under the amended rule as Rule 233(b). Depositions requested under new Rule 233(b) would not count against the per-side limit on discovery depositions under new Rule 233(a).

during the prehearing discovery period of a proceeding, permitting the hearing to begin up to eight months after service of the order instituting proceedings. We anticipate that four to eight months would be a sufficient amount of time for parties to prepare for the hearing, review documents, and take up to three depositions per side in a single-respondent proceeding, and up to five depositions per side in a multiple-respondent proceeding. In selecting this increased amount of time and number of depositions permitted, we intend to provide parties with the potential benefits of this discovery tool, without sacrificing the public interest in resolving administrative proceedings promptly and efficiently.

We propose additional amendments to Rule 233 to guide the use of depositions for discovery purposes. The amendments would allow the issuance of subpoenas to order a witness to attend a deposition noticed by a party pursuant to Rule 233, and would not preclude the deposition of a witness if the witness testified during an investigation. Notices of depositions also would be served on each party pursuant to Rule 150 and would need to be consistent with the prehearing conference and the hearing officer's scheduling order.

Other proposed amendments to Rule 233 would outline procedures for deposition practice that are consistent with the Federal Rules of Civil Procedure.<sup>9</sup> For example, the amendments would be consistent with federal rules on the location of the depositions; the method of recording; the deposition officer's duties; examination and cross-examination of the witness; forms of objections and waiver of objections; motions to terminate or limit depositions; review of the transcript or recording by the witness; certification and delivery of the deposition;

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<sup>9</sup> See generally Federal Rules of Civil Procedure 45(c), 30(b), (d), (e), and (f); *but see* Federal Rule of Civil Procedure 30(c) (limiting depositions to seven hours instead of the six hours proposed in the amendment to Rule 233). While the Federal Rules of Civil Procedure are tailored for use in the federal court system, they represent a well-settled body of procedural rules familiar to practitioners. We have borrowed from those rules, but we have also made changes or declined to follow the Federal Rules of Civil Procedure where appropriate to tailor those rules to our own administrative forum.



attachment of documents and tangible things; and copies of the transcript or recording. We would retain current Rule 233's explicit statement that a witness being deposed may have counsel during the deposition.

We seek comments about the proposed structure of the amendments that provide for depositions, including the number of depositions allowed in single-respondent and multiple-respondent proceedings.

### C. Proposed Amendments to Support Amended Rule 233

We also propose amendments to Rules 180,<sup>10</sup> 221,<sup>11</sup> 232,<sup>12</sup> and 234<sup>13</sup> to support the purpose and intent of the proposed amendments to Rule 233. These amendments are based on the expectation that depositions would play an increased role in the prehearing stage of administrative proceedings, and adjust other rules accordingly.

Rule 180 allows the Commission or a hearing officer to exclude a person from a hearing or conference, or summarily suspend a person from representing others in a proceeding, if the person engages in contemptuous conduct before either the Commission or a hearing officer. The exclusion or summary suspension can last for the duration or any portion of a proceeding, and the person may seek review of the exclusion or suspension by filing a motion to vacate with the Commission. We propose to amend Rule 180 to allow the Commission or a hearing officer to exclude or summarily suspend a person for any portion of a deposition, as well as the proceeding, a conference, or a hearing for contemptuous conduct. The person would have the

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<sup>10</sup> 17 CFR 201.180.

<sup>11</sup> 17 CFR 201.221.

<sup>12</sup> 17 CFR 201.232.

<sup>13</sup> 17 CFR 201.234.

same right to review of the exclusion or suspension by filing a motion to vacate with the Commission.

Rule 221 sets forth the purposes of a prehearing conference and includes a list of the subjects to be discussed. We propose amendments to Rule 221 to add depositions and expert witness disclosures or reports to the list of subjects to be discussed at the prehearing conference. Under the current rule, the list of subjects for discussion at the prehearing conference covers most other significant aspects of the prehearing period. By adding depositions and the timing of expert witness disclosure to that list, the proposed amendment recognizes the impact that depositions and other discovery tools may have on the development of a schedule that makes efficient use of time during the prehearing period and the proceeding more broadly. It also conforms to the proposed amendment to Rule 233, which would require notices of depositions to be consistent with the prehearing conference and the hearing officer's scheduling order.

Rule 232 sets forth standards for the issuance of subpoenas and motions to quash. With the proposed amendments, Rule 232(a) would make clear that parties may request the issuance of a subpoena in connection with a deposition permitted under Rule 233, and Rule 233(e) would allow any person to whom a notice of deposition is directed to request that the notice of deposition be quashed. This proposed amendment is intended to promote efficiency in the discovery process because it would allow persons who are noticed for depositions to move to quash at the notice stage, rather than waiting for a party to request the issuance of a subpoena to order attendance.

We also propose to amend the standards governing applications to quash or modify subpoenas. Rule 232(e)(2) provides that the hearing officer or the Commission shall quash or modify a subpoena, or order return upon specified conditions, if compliance with the subpoena

would be unreasonable, oppressive or unduly burdensome. As amended, Rule 232(e)(2) would provide that the hearing officer or Commission shall quash or modify a subpoena or notice of deposition, or order return upon specified conditions, if compliance with the subpoena would be unreasonable, oppressive, unduly burdensome, or would unduly delay the hearing. This amendment would require the hearing officer or Commission to consider the delaying effect of compliance with a subpoena or notice of deposition as part of the motion to quash standard and is intended to promote the efficient use of time for discovery during the prehearing period.

Finally, we propose to amend Rule 232(e) to add a new provision that specifies an additional standard governing motions to quash depositions noticed or subpoenaed pursuant to Rule 233(a), as amended. Under new Rule 232(e)(3), the hearing officer or Commission would quash or modify a deposition notice or subpoena filed or issued under Rule 233(a) unless the requesting party demonstrates that the deposition notice or subpoena satisfies the requirements under Rule 233(a). This is intended to ensure that parties notice the correct number of depositions pursuant to Rule 233(a) and follow other requirements of that rule.

Rule 232(e)(3) also would require the party requesting the deposition to demonstrate that the proposed deponent is a fact witness,<sup>14</sup> a designated expert witness under Rule 222(b), or a document custodian.<sup>15</sup> This provision is intended to foster use of depositions where appropriate and encourage meaningful discovery, within the limits of the number of depositions provided per side pursuant to Rule 233(a). This provision should encourage parties to focus any requested

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<sup>14</sup> Under proposed Rule 232(e)(3), this type of proposed deponent must have witnessed or participated in “any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Division, or any defense asserted by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of relevant facts about claims or defenses of any party arises from the Division’s investigation or litigation).”

<sup>15</sup> This excludes Division of Enforcement or other Commission officers or personnel who have custody of documents or data that was produced from the Division to the respondent. In that circumstance, the Division or Commission officers or personnel were not the original custodian of the documents.

depositions on those persons who are most likely to yield relevant information and thereby make efficient use of time during the prehearing stage of the proceeding.

Rule 232(f) provides for the payment of witness fees and mileage. We propose to add a provision to Rule 232(f) stating that each party is responsible for paying any fees and expenses incurred as a result of deposition or testimony by the expert witness whom that party has designated under Rule 222(b).

Rule 234 contains procedures for taking depositions through the use of written questions. Under Rule 234, a party may make a motion to take a deposition on written questions by filing the questions with the motion. We propose to amend the rule to provide that the moving party may take a deposition on written questions either by stipulation of the parties or by filing a motion demonstrating good cause. This proposed amendment is intended to provide a clear standard under which the hearing officer or Commission would review such a motion, and is consistent with standards for other types of motions articulated under other Rules of Practice.<sup>16</sup> The amendment would replace the standard under the current rule, which references current Rule 233(b)'s limit on depositions to witnesses unable to appear or testify at a hearing.

We seek comments about the proposed amendments to the standards for motions to quash subpoenas and notices for depositions, including the consideration of whether compliance with the subpoena would unduly delay the hearing and the requirement that a proposed deponent must be a fact witness, expert witness under Rule 222(b), or document custodian.

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<sup>16</sup> *See, e.g.*, 17 CFR 201.155(b) (good cause showing to set aside a default); 17 CFR 201.161 (good cause showing for extending or shortening time limits for filings); 17 CFR 201.201(b) (good cause showing for severing a proceeding).

D. Proposed Amendment to Rule 222

Rule 222<sup>17</sup> provides that a party who intends to call an expert witness shall submit a variety of information. The proposed amendment to the rule provides for two exceptions: (1) drafts of any material that is otherwise required to be submitted in final form; and (2) communications between a party's attorney and the party's expert witness who would be required to submit a report under the rules, except under limited circumstances.

The proposed amendment also would require disclosure of a written report for a witness retained or specially employed to provide expert testimony in the case, or an employee of a party whose duties regularly involve giving expert testimony. The proposed amendment would outline the elements that must be contained in that written report, including a complete statement of all opinions the witness will express and the basis and reasons for them, the facts or data considered by the witness in forming them, any exhibits that will be used to summarize or support them, and a statement of the compensation to be paid for the expert's study and testimony in the case. These proposed amendments are consistent with the requirements for expert witness disclosures and expert reports in the Federal Rules of Civil Procedure and we believe they would promote efficiency in both prehearing discovery and the hearing.<sup>18</sup> Moreover, the administrative law judges already have required such expert reports in proceedings before them.<sup>19</sup>

We propose amendments to current Rule 222(b)'s requirement that parties submit a list of other proceedings in which their expert witness has given expert testimony and a list of

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<sup>17</sup> 17 CFR 201.222.

<sup>18</sup> See Federal Rule of Civil Procedure 26(b)(4), (a)(2), respectively.

<sup>19</sup> See, e.g., *ZPR Investment Management, Inc.*, Admin Proc. Ruling Rel. No. 775 (Aug. 6, 2013), available at <http://www.sec.gov/alj/aljorders/2013/ap-775.pdf>. (general prehearing order stating that "expert reports should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26").

publications authored or co-authored by their expert witness. As amended, Rule 222(b) would limit the list of proceedings to the previous four years, and would limit the list of publications to the previous ten years.

E. Proposed Amendment to Rule 141

Rule 141(a)(2)(iv)<sup>20</sup> specifies the requirements for serving an order instituting proceedings on a person in a foreign country. The proposed amendment would incorporate additional methods of service. The current rule allows for service of an order instituting proceedings on persons in foreign countries by any method specified in the rule, or “by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.”

We propose to amend this rule to state that service reasonably calculated to give notice includes any method authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; methods prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; or as the foreign authority directs in response to a letter rogatory or letter of request. In addition, under the proposed rules, unless prohibited by the foreign country's law, service may be made by delivering a copy of the order instituting proceedings to the individual personally, or using any form of mail that the Secretary or the interested division addresses and sends to the individual and that requires a signed receipt.

The proposed rule would also allow service by any other means not prohibited by international agreement, as the Commission or hearing officer orders. Like the similar provision in the Federal Rules of Civil Procedure, this provision would cover situations where existing

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<sup>20</sup> 17 CFR 201.141(a)(2)(iv).

agreements do not apply, or efforts to serve under such agreements are or would not be successful.

In addition to providing clarification that proper service on persons in foreign countries may be made by any of the above methods, the amended rule would provide some certainty regarding whether service of an order instituting proceedings has been effected properly and would allow the Commission to rely on international agreements in which foreign countries have agreed to accept certain forms of service as valid.

We also propose to amend Rule 141(a)(3),<sup>21</sup> which requires the Secretary to maintain a record of service on parties. In instances where a division of the Commission, rather than the Secretary, serves an order instituting proceedings, the Secretary does not always receive a copy of the service. The proposed amendment would make it clear that a division that serves an order instituting proceedings must file with the Secretary either an acknowledgement of service by the person served or proof of service.

#### F. Proposed Amendment to Rule 161

Rule 161<sup>22</sup> governs extensions of time, postponements, and adjournments requested by parties. Under the current Rule 161(c)(2), a hearing officer may stay a proceeding pending the Commission's consideration of offers of settlement under certain limited circumstances, but that stay does not affect any of the deadlines in Rule 360. We propose to amend Rule 161(c)(2) to allow a stay pending Commission consideration of settlement offers to also stay the timelines set

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<sup>21</sup> 17 CFR 201.141(a)(3).

<sup>22</sup> 17 CFR 201.161.

forth in Rule 360.<sup>23</sup> All the other requirements for granting a stay that are in the current rule would remain unchanged. This proposed amendment recognizes the important role of settlement in administrative proceedings.

G. Proposed Amendment to Rule 230

Rule 230(a)<sup>24</sup> requires the Division to make available to respondents certain documents obtained by the Division in connection with an investigation prior to the institution of proceedings. Rule 230(b)<sup>25</sup> provides a list of documents that may be withheld from this production. We propose amending Rule 230(b) to provide that the Division may redact certain sensitive personal information from documents that will be made available to respondents, unless the information concerns the person to whom the documents are being produced. Under the amendment, the Division would be able to redact an individual's social-security number, an individual's birth date, the name of an individual known to be a minor, or a financial account number, taxpayer-identification number, credit card or debit card number, passport number, driver's license number, or state-issued identification number other than the last four digits of the number. This proposed amendment is intended to enhance the protection afforded to sensitive personal information.

We also propose to amend Rule 230(b) to clarify that the Division may withhold or redact documents that reflect settlement negotiations with persons or entities who are not respondents in the proceeding at issue. This proposed amendment is intended to preserve the

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<sup>23</sup> We also propose a conforming amendment to Rule 360(a)(2)(iii) to include a cross-reference to amended Rule 161(c)(2).

<sup>24</sup> 17 CFR 201.230(a).

<sup>25</sup> 17 CFR 201.230(b).



confidentiality of settlement discussions and safeguard the privacy of potential respondents with whom the Division has negotiated and is consistent with case law that favors the important public policy interest in candid settlement negotiations.<sup>26</sup>

H. Proposed Clarifying Amendments to Rules 220, 235, and 320

Rule 220<sup>27</sup> sets forth the requirements for filing answers to allegations in an order instituting proceedings. Currently, Rule 220 states that a defense of res judicata, statute of limitations, or any other matter constituting an affirmative defense shall be asserted in the answer. We propose amendments to Rule 220 to emphasize that a respondent must affirmatively state in an answer whether the respondent is asserting any avoidance or affirmative defense, including but not limited to res judicata, statute of limitations, or reliance. This proposed amendment would not change the substantive requirement under the current rule to include affirmative defenses in the answer. Instead, it is intended to clarify that any theories for avoidance of liability or remedies, even if not technically considered affirmative defenses, must be stated in the answer as well.<sup>28</sup> Timely assertion of affirmative defenses or theories of avoidance would focus the use of prehearing discovery, foster early identification of key issues and, as a result, make the discovery process more effective and efficient.

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<sup>26</sup> See, e.g., *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980-81 (6th Cir. 2003) (“The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery.”).

<sup>27</sup> 17 CFR 201.220.

<sup>28</sup> For example, some might argue that “reliance on counsel” is not a formal affirmative defense, but a basis for negating liability.

Rule 235<sup>29</sup> provides the standard for granting a motion to introduce a prior sworn statement of a witness who is not a party. Although current Rule 235(a) states that the standard applies to “a witness, not a party,” we propose adding new Rule 235(b) to make clear that sworn statements or declarations of a party or agent may be used by an adverse party for any purpose. Further, new Rule 235(b) would clarify that “sworn statements” include a deposition taken pursuant to Rules 233 or 234 or investigative testimony, and allows for the use of declarations pursuant to 28 U.S.C. Section 1746.

Rule 320<sup>30</sup> provides the standard for admissibility of evidence. Under the current rule, the Commission or hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, or unduly repetitious. We propose to amend the rule to add “unreliable” to the list of evidence that shall be excluded. This amended admissibility standard is consistent with the Administrative Procedure Act.<sup>31</sup> We also propose to add new Rule 320(b) to clarify that hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Admitting hearsay evidence if it meets a threshold showing of relevance, materiality, and reliability also is consistent with the Administrative Procedure Act.<sup>32</sup>

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<sup>29</sup> 17 CFR 201.235.

<sup>30</sup> 17 CFR 201.320.

<sup>31</sup> 5 U.S.C. 556(c)(3) (allowing hearing officers to receive relevant evidence); 5 U.S.C. 556(d) (stating that a sanction may not be imposed or rule or order issued except on consideration of the whole record or of those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence).

<sup>32</sup> See 5 U.S.C. 556(d) (stating that any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence); see, e.g., *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (hearsay admissible in administrative proceedings if “reliable and credible”); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (hearsay admissible if “it bear[s] satisfactory indicia of reliability” and is “probative and its use fundamentally fair”). Courts also have held that hearsay can constitute substantial evidence that satisfies the APA requirement. See, e.g., *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (hearsay evidence is admissible in administrative proceedings if it “bear[s] satisfactory indicia of reliability” and “can constitute substantial evidence if it is reliable and trustworthy”); see generally *Richardson v. Perales*, 402 U.S. 389, 407-08 (1971) (holding that a medical report, though hearsay,

I. Proposed Amendments to Appellate Procedure in Rules 410, 411, 420, 440, and 450

We propose amendments to certain procedures that govern appeals to the Commission. Rule 410(b)<sup>33</sup> outlines the procedure for filing a petition for review of an initial decision and directs a party to set forth in the petition the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Rule 410(b) also states that an exception may be deemed to have been waived by the petitioner if the petitioner does not include the exception in the petition for review or a previously filed proposed finding made pursuant to Rule 340.

We propose to amend Rule 410(b) to eliminate both the requirement that a petitioner set forth all the specific findings and conclusions of the initial decision to which exception is taken, and the provision stating that if an exception is not stated, it may be deemed to have been waived by the petitioner. Instead, under amended Rule 410(b), a petitioner would be required to set forth only a summary statement of the issues presented for review. We also propose to add new Rule 410(c) to limit the length of petitions for review to three pages. Incorporation of pleadings or filings by reference would not be permitted.

This proposed amendment is intended to address timing issues and potential inequities in the number of briefs each party is permitted to submit to the Commission. The timing issues arise out of the requirement under Rule 410 that a party must file its petition for review within 21 days after service of the initial decision or 21 days from the date of the hearing officer's order resolving a motion to correct manifest error in an initial decision. This means that during the

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could constitute substantial evidence in social security disability claim hearing); *cf.* Federal Rule of Evidence 403 (stating that relevant, material, and reliable evidence shall be admitted).

<sup>33</sup> 17 CFR 201.410(b).

three-week period immediately following the issuance of the initial decision, a party must decide whether to file a motion to correct manifest error and, if not, whether to appeal. If the party decides to file a petition to appeal, then the petitioner is required under the current rule to quickly determine every exception the petitioner takes with the findings and conclusions in the initial decision, along with supporting reasons. Requiring the petitioner to submit a petition that includes all exceptions and supporting reasons, which may be deemed waived if not raised in the petition, encourages petitioners to file lengthy petitions that provide lists of exceptions with little refinement of the arguments or narrowing of issues to those most significant to the Commission's review. As a result, petitions for review often have exceeded the length of opening briefs later filed in support of a petition for review. In addition, petitions often list exceptions that are later abandoned or unsupported in the opening brief.

The proposed amendment would address these issues by allowing a party to file a petition for review that provides only a brief summary of the issues presented for review under Rule 411(b), which refers to prejudicial errors, findings or conclusions of material fact that are clearly erroneous, conclusions of law that are erroneous, or exercises of discretion or decisions of law or policy that the Commission should review.<sup>34</sup> After filing a petition for review that gives the Commission summary notice of the issues presented by the case, the petitioner would then be able to focus on the brief that develops the reasoned arguments in support of the petition. This practice is consistent with the Commission's routine grant of appeals, without allowing parties to

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<sup>34</sup> This is consistent with the Commission's current rules governing appeals to the Commission from determinations by self-regulatory organizations pursuant to Rule 420. Under Rule 420, an application for review of a determination of a self-regulatory organization must set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons, and must not exceed two pages. Rule 420 does not contain a waiver provision.

file oppositions to petitions.<sup>35</sup> Providing for a summary petition would also be consistent with the Federal Rules of Appellate Procedure, which requires only notice filing if a petitioner may appeal as of right.<sup>36</sup>

Allowing parties to file only a summary statement of the issues on appeal also would address potential briefing inequities in the current rule. As described above, a petitioner often files a lengthy petition for review that is followed, in the typical case, by an opening brief limited to 14,000 words. Essentially, petitioners are afforded two opportunities under the current rule to brief the issues in the case, while under current Rule 450, the opposing party typically may submit only a brief in opposition that is limited to 14,000 words. As a practical matter, that brief in opposition must address not only the arguments explained in the petitioner's opening brief, but also each exception listed in the petition for review. This has the potential to place opposing parties at a disadvantage. The proposed amendment to Rule 410(b) would correct this apparent inequity by requiring a petitioner to make arguments in its opening brief rather than in the petition for review. This also has the benefit of encouraging a petitioner to narrow the issues and

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<sup>35</sup> *Proposed Amendments to the Rules of Practice and Related Provisions*, Exchange Act Release No. 48832, 68 FR 68185, 68191 (Dec. 5, 2003) ("In the Commission's experience, the utility of such oppositions has been quite limited, given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision."); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 69 FR 13166, 13167 (Mar. 12, 2004) (deleting the provision for oppositions to petitions for review). The Commission issues a scheduling order within approximately three weeks of granting a petition for review. Pursuant to Rule 450, the scheduling order generally provides the petitioner with thirty days to submit a brief in support of the petition of no more than 14,000 words.

<sup>36</sup> Federal Rule of Appellate Procedure 3(c) (stating that a notice of appeal when there is an appeal as of right must specify the parties taking appeal, designate the judgment, order, or part thereof being appeals, and name the court to which the appeal is taken); *cf.* Federal Rule of Appellate Procedure 5 (stating that a petition for appeal when an appeal is within the court's discretion must include the facts necessary to understand the question presented, the question itself, the relief sought, the reasons why the appeal should be allowed and is authorized by statute or rule, and a copy of the order, decree, or judgment complained of and any related opinion or memorandum, and any order stating the district court's permission to appeal or finding that the necessary conditions are met).

explain supporting arguments, while allowing opposing parties to address only those arguments asserted in the petitioner's opening brief.

We propose an amendment to Rule 411(d)<sup>37</sup> to effect the amendments to Rule 410(b). Rule 411(b) states that Commission review of an initial decision is limited to the issues specified in the petition for review and any issues specified in the order scheduling briefs.<sup>38</sup> We propose to amend Rule 411(b) to state that Commission review of an initial decision is limited to the issues specified in an opening brief and that any exception to an initial decision not supported in an opening brief may be deemed to have been waived by the petitioner.

We propose amendments to Rule 450<sup>39</sup> to provide additional support for a structure in which opening briefs are the primary vehicles for arguments on appeal. Rule 450(b) states that reply briefs are confined to matters in opposition briefs of other parties. We propose amendments to Rule 450(b) to make clear that any argument raised for the first time in a reply brief shall be deemed to have been waived by the petitioner.

We also propose amendments to Rule 450(c) to prohibit parties from incorporating pleadings or filings by reference. Under current Rule 450(c), parties are permitted to incorporate pleadings or filings by reference, although the number of words in documents incorporated by reference count against Rule 450(c)'s word limit for briefs. As a practical matter, it is difficult to enforce a word count that allows for incorporation by reference, and the rule has encouraged parties to rely on pleadings or filings from the hearing below, which already are in the record,

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<sup>37</sup> 17 CFR 201.411(d).

<sup>38</sup> Rule 411(d) also states that on notice to all parties, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

<sup>39</sup> 17 CFR 201.450.

rather than addressing the relevant evidence or developing the arguments central to the appeal before the Commission. Prohibiting incorporation by reference is intended to sharpen the arguments and require parties to provide specific support for each assertion, rather than non-specific support through incorporation of other briefs or filings.

We propose amendments to Rule 450(d) to conform to the proposed amendments to Rule 450(c). Rule 450(d) requires parties to certify compliance with the length limitations set forth in Rule 450(c). As amended, Rule 450(d) would no longer refer to pleadings incorporated by reference, and would require parties to certify compliance with the requirements set forth in Rule 450(c), instead of certifying only compliance with the length limitations in Rule 450(c).

Finally, we propose amendments to Rules 420(c)<sup>40</sup> and 440(b)<sup>41</sup> to make them consistent with the proposed amendments to Rules 410(b) and 450(b). Rule 420 governs appeals of determinations by self-regulatory organizations and Rule 440 governs appeals of determinations by the Public Company Accounting Oversight Board. Current Rule 420(c) is similar to proposed amended Rule 410(b) in that it limits the length of an application for review and requires that applicants set forth in summary form only a brief statement of alleged errors in the determination and supporting reasons. We propose to amend Rule 420(c) to include a provision stating that any exception to a determination that is not supported in an opening brief may be deemed to have been waived by the applicant. Likewise, current Rule 440(b) is similar to proposed amendments to Rule 410(b) because it requires that an applicant set forth in summary form only a brief statement of alleged errors in the determination and supporting reasons. We propose to amend Rule 440(b) to include a page limit for the application (two pages, which is consistent

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<sup>40</sup> 17 CFR 201.420(c).

<sup>41</sup> 17 CFR 201.440(b).

with current Rule 420(c)) and a provision stating that any exception to a determination that is not supported in an opening brief may be deemed to have been waived by the applicant. These proposed amendments would align appeals from determinations by the Public Company Accounting Oversight Board with appeals from determinations by self-regulatory organizations and appeals from initial decisions issued by hearing officers.

#### J. Proposed Amendments to Rule 900 Guidelines

We propose amendments to Rule 900,<sup>42</sup> which sets forth guidelines for the timely completion of proceedings, provides for confidential status reports to the Commission on pending cases, and directs the publication of summary information concerning the pending case docket. Rule 900(a) states that the guidelines will be examined periodically and, if necessary, readjusted in light of changes in the pending caseload and the available level of staff resources. Consistent with that provision, we propose to amend Rule 900(a) to state that a decision by the Commission with respect to an appeal from the initial decision of a hearing officer, a review of a determination by a self-regulatory organization or the Public Company Accounting Oversight Board, or a remand of a prior Commission decision by a court of appeals ordinarily will be issued within eight months from the completion of briefing on the petition for review, application for review, or remand order, and, if the Commission determines that the complexity of the issues presented in an appeal warrant additional time, the decision of the Commission may be issued within ten months of the completion of briefing. We also propose to amend Rule 900(a) to provide that if the Commission determines that a decision by the Commission cannot be issued within the eight or ten-month periods, the Commission may extend that period by

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<sup>42</sup> 17 CFR 201.900.



orders as it deems appropriate in its discretion. Finally, we propose to amend Rule 900(c) to include additional information in the published report concerning the pending case docket. Specifically, we propose to amend the rule to include, in addition to what is already included, the median number of days from the completion of briefing of an appeal to the time of the Commission's decision for the cases completed in the given time period.

#### K. Effective Date and Transition

We are proposing that the amended Rules govern any proceeding commenced after the effective date of the amended Rules. We seek comments about whether the amended Rules should be applied, in whole or in part, to proceedings that are pending or have been docketed before or on the effective date, and, if so, the standard for applying any amended Rules to such pending proceedings.

### **III. Request for Public Comment**

We request and encourage any interested person to submit comments regarding: (1) the time periods for each stage of the proceeding under proposed amendments to Rule 360, (2) the structure and number of depositions provided under proposed amendments to Rule 233, (3) the standards governing an application to quash deposition notices or subpoenas under proposed amendments to Rule 232, (4) the standards governing the admission of evidence, including hearsay, under Rule 320, (5) the assertion of affirmative defenses under Rule 220, (6) the effective date and whether and how any amended rules should apply to proceedings pending on the effective date, (7) the other proposed changes that are the subject of this release, (8) additional or different changes, or (9) other matters that may have an effect on the proposals contained in this release.

#### **IV. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act**

The Commission finds, in accordance with Section 553(b)(3)(A) of the Administrative Procedure Act,<sup>43</sup> that these revisions relate solely to agency organization, procedure, or practice. They are therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act<sup>44</sup> therefore does not apply.<sup>45</sup> Nonetheless, we have determined that it would be useful to publish these proposed rules for notice and comment before adoption. Because these rules relate to "agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties," they are not subject to the Small Business Regulatory Enforcement Fairness Act.<sup>46</sup> To the extent these rules relate to agency information collections during the conduct of administrative proceedings, they are exempt from review under the Paperwork Reduction Act.<sup>47</sup>

#### **V. Economic Analysis**

We are mindful of the costs and benefits of our rules. In proposing these amendments, we seek to enhance flexibility in the conduct of administrative proceedings while maintaining the facility to efficiently resolve individual matters.

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<sup>43</sup> 5 U.S.C. 553(b)(3)(A).

<sup>44</sup> 5 U.S.C. 601- 612.

<sup>45</sup> *See* 5 U.S.C. 603.

<sup>46</sup> 5 U.S.C. 804(3)(C).

<sup>47</sup> *See* 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4 (exempting collections during the conduct of administrative proceedings or investigations).

The current rules governing administrative proceedings serve as the baseline against which we assess the economic impacts of these proposed amendments. At present, Commission rules set the prehearing period of a proceeding at approximately four months for a 300-day proceeding and do not permit parties to take depositions solely for the purpose of discovery. Rules governing the testimony of expert witnesses have not been formalized, but the administrative law judges already have required expert reports in proceedings before them.

The scope of the benefits and costs of the proposed rules depends on the expected volume of administrative proceedings. In fiscal year 2014, 230 new administrative proceedings were initiated and not settled immediately. New proceedings initiated and not immediately settled in fiscal years 2013 and 2012 totaled 202 and 207 respectively.<sup>48</sup>

The amendments to Rule 233 and Rule 360, as well as the supporting amendments, may benefit respondents and the Division of Enforcement by providing them with additional time and tools to discover relevant facts and information. The proposed amendment to Rule 233 and supporting amendments would permit respondents and the Division of Enforcement to take depositions by oral examination, permitting a more efficient discovery period. We preliminarily believe that the proposed amendments regarding depositions will provide parties with an opportunity to further develop arguments and defenses, which may narrow the facts and issues to be explored during the hearing. The proposed amendments to Rule 360 would alter the timeline to allow for expanded discovery. We anticipate that the potential for a longer discovery period would allow respondents additional time to review investigative records and to load and then

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<sup>48</sup> The total number of administrative proceedings initiated and not immediately settled each fiscal year encompasses a variety of types of proceedings, including proceedings instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 seeking to determine whether it is necessary and appropriate for the protection of investors to suspend or revoke the registration of an issuer's securities and proceedings instituted under Section 15(b) of the Exchange Act or Section 203(f) of the Investment Advisers Act of 1940 seeking to determine what, if any, remedial action is appropriate in the public interest.

review electronic productions. Together, allowing depositions and providing time for additional discovery should facilitate the information acquisition during the prehearing stage, and may ultimately result in more focused hearings. Furthermore, we preliminarily believe that more information acquisition at the prehearing stage may lead to cost savings to respondents and the Division of Enforcement stemming from the earlier resolution of cases through settlement or shorter, more focused, hearings. We are unable to quantify these benefits, however, as the potential savings would depend on multiple factors, including the complexity of actions brought to administrative proceedings and the impact that the change to discovery may have on settlement terms, which are unknown.

We preliminarily believe that the costs of the proposed amendments will be borne by the Commission as well as respondents in administrative proceedings and witnesses who provide deposition testimony. These costs will primarily stem from the cost of depositions and the additional length of administrative proceedings.

Costs stemming from depositions depend on whether respondents and the Division of Enforcement take depositions for the purpose of discovery and how they choose to participate in these depositions. Costs of depositions include the expenses of travel, attorney's fees, and reporter and transcription expenses. Based on staff experience, we preliminarily estimate the cost to a respondent of conducting one deposition could be approximately \$36,840.<sup>49</sup> However,

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<sup>49</sup> This estimate is comprised of the following expenses: (i) travel expenses: \$4,000; (ii) reporter/videographer: \$7,000; and (iii) professional costs for two attorneys (including reasonable preparation for the deposition): 34 hours x \$460/hr and 34 hours x \$300/hr = \$25,840. The hourly rates for the attorneys are based on the 2014-2015 Laffey Matrix. The Laffey Matrix is a matrix of hourly rates for attorneys of varying experience levels that is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia. See Laffey Matrix – 2014-2015, available at [http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix\\_2014-2015.pdf](http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf) (last visited Sept. 10, 2015) (the "Laffey Matrix"); see *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc); *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995). We have applied different estimates of the outside legal costs in connection with public company reporting, but believe that the Laffey Matrix is an appropriate

we recognize that respondents and the Division of Enforcement play a large role in managing their own costs by determining whether to take or attend depositions, managing attorney costs, including the number of attorneys attending each deposition, contracting with a competitively-priced reporter, arranging for less expensive travel, and choosing the location of depositions. We note that determinations regarding the approach to depositions will likely reflect parties' beliefs regarding the potential benefits they expect to realize from participation in depositions. However we recognize that although respondents and the Division of Enforcement can choose the extent and manner in which they request depositions, the costs of depositions are borne not only by the party choosing to conduct a deposition, but also by other parties who choose to attend the deposition, the witness, and other entities in time, travel, preparation, and attorney costs.<sup>50</sup>

The longer potential discovery period permitted by the proposed amendment to Rule 360, while intended to provide sufficient time for parties to engage in discovery, may impose costs on respondents and the Commission. We preliminarily estimate that potentially lengthening the overall administrative proceedings timeline by up to four months to allow more time for discovery may result in additional costs to respondents in a single matter of up to \$462,400.<sup>51</sup>

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measure for calculating reasonable attorneys fees in litigation. *Compare Pay Ratio Disclosure*, Exchange Act Release No. 75610, 80 FR 50103 (Aug. 5, 2015) (applying a \$400 per hour estimate of professional costs for Paperwork Reduction Act calculations).

<sup>50</sup> Some witnesses who are deposed might bear little if any out-of-pocket cost if, for example, the deposition is conducted in the city in which they live or work, and they choose not to be represented by counsel at the deposition. Moreover, the party seeking the deposition might under the rules reimburse the witness for mileage or other travel costs. On the other hand, if the witness is required to pay for his or own travel to the deposition, and chooses to retain counsel to represent him or her at the deposition, we preliminary estimate that the deposition cost to the witness could be approximately \$19,640 (\$4000 in travel expenses for the witness and an attorney, and attorney time of 34 hours (preparation and attendance at the deposition) x \$460 per hour). The hourly rate for the attorney is based on the Laffey Matrix.

<sup>51</sup> This estimate is comprised of the following expenses: (i) 1 senior attorney x 40 hours per week x 16 weeks x \$460/hr = \$294,400; (ii) 1 mid-level attorney x 20 hours per week x 16 weeks x \$300/hr = \$96,000; (iii) 1 paralegal x 30 hours per week x 16 weeks x \$150/hr = \$72,000. The hourly rates for the attorneys and paralegal are based on the Laffey Matrix.

Again, however, we recognize that while parties are likely to incur these costs only to the extent that they expect to receive benefits from engaging in depositions and additional discovery, the costs imposed by the additional time for discovery may be incurred by all parties, not just the party advocating for additional time for discovery. Further, to the extent that the proposed rules may result in the earlier resolution of cases through settlement or shorter, more focused, hearings, some of these costs may potentially be offset.

The proposed amendments related to discovery may also affect efficiency in certain cases. To the extent that the proposed amendments facilitate the discovery of relevant facts and information through depositions and extending the time for discovery, they may lead to more expeditious resolution of administrative proceedings, which could enhance the overall efficiency of the Commission's processes. For example, for complex cases that may benefit significantly from the additional information there could be efficiency gains from the proposed rules if the costs associated with the use of depositions are smaller than the value of the information gained from depositions. However, we note that because parties may not take into account the costs that depositions may impose on other entities, a potential consequence of the proposed amendments to Rule 233 and Rule 360 is that parties may engage in more discovery than is efficient. For example, for simple cases which may not benefit significantly from the additional information gained from a deposition, requesting depositions may result in inefficiency by imposing costs on all parties and witnesses involved without any significant informational benefit. However, we preliminarily believe that the supporting proposed amendments to Rule 232 and 233 may mitigate the risk of this efficiency loss by setting forth standards for the issuance of subpoenas and motions to quash depositions and setting a limit on the maximum number of depositions each side may request.

As an alternative to the proposed rules, we could continue to permit depositions only when a witness is unable to testify at a hearing, or propose other limited discovery tools, such as the use of interrogatories or requests for admissions in lieu of depositions. Although alternatives such as interrogatories or admissions may reduce some of the costs of the discovery process (i.e., the cost of depositions), they might increase other costs (resulting from the time attorneys and parties need to prepare responses) and also may yield less useful information for the administrative proceeding given the limited nature of questioning these forms permit. Relative to these alternatives, we believe that the proposed amendments would achieve the benefits of discovery in a cost-efficient manner.

The proposed amendments to Rule 222 specify the requirements for parties requesting to call expert witnesses. To the extent that the requirements specified in Rule 222 are identical to the current practices of administrative law judges, we do not anticipate any significant economic effects. However, the proposed amendments to Rule 222 may impose costs on parties involved in proceedings before administrative law judges whose current practices differ in any way from the requirements specified in Rule 222.

We preliminarily do not expect any significant economic consequences to stem from proposed amendments to Rules 141, 161, 220, 230, 235, 320, 410, 411, 420, 440, 450, and 900. For Rule 233 and its supporting amendments and Rule 360, we expect that these proposed amendments will have an impact on the efficiency of administrative proceedings but do not expect them to significantly affect the efficiency, competition, or capital formation of securities

markets. We also do not expect the proposed amendments to impose a significant burden on competition.<sup>52</sup>

We request comment on all aspects of the economic effects of the proposal, including any anticipated impacts that are not mentioned here. We are particularly interested in comments regarding the expected benefits and costs of the proposed rules, including the specific benefits and costs parties expect to result from the proposed amendments. We are also interested in comments regarding how the amendments may affect the overall length and outcomes of administrative proceedings, and how parties approach administrative proceedings. Additionally, we request quantitative estimates of the benefits and costs on respondents in administrative proceedings and witnesses who provide deposition testimony, in general or for particular types of proceedings. We also request comment on reasonable alternatives to the proposed rules and on any effect the proposed rules may have on efficiency, competition, and capital formation.

## **VI. Statutory Basis and Text of Proposed Amendments**

These amendments to the Rules of Practice are being proposed pursuant to statutory authority granted to the Commission, including section 3 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7202; section 19 of the Securities Act, 15 U.S.C. 77s; sections 4A, 19, and 23 of the Exchange Act, 15 U.S.C. 78d-1, 78s, and 78w; section 319 of the Trust Indenture Act of 1939, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a-37 and 80a-39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b-11.

### **List of Subjects**

#### **17 CFR Part 201**

Administrative practice and procedure.

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<sup>52</sup> See 15 U.S.C. 78w(a)(2).



## Text of the Amendments

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

### PART 201 – RULES OF PRACTICE

1. The authority citation for part 201, subpart D, continues to read as follows:

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

2. § 201.141 is amended by revising paragraphs (a)(2)(iv), (a)(2)(v), and (a)(3) to read as follows:

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

(a) \* \* \*

(2) \* \* \*

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any of the following methods:

(A) Any method specified in paragraph (a)(2) of this section that is not prohibited by the law of the foreign country; or

(B) By any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(C) Any method that is reasonably calculated to give notice

(1) As prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; or

(2) As the foreign authority directs in response to a letter rogatory or letter of request; or

(3) Unless prohibited by the foreign country's law, by delivering a copy of the order instituting proceedings to the individual personally, or using any form of mail that the Secretary or the interested division addresses and sends to the individual and that requires a signed receipt; or

(D) By any other means not prohibited by international agreement, as the Commission or hearing officer orders.

(v) *In stop order proceedings.* Notwithstanding any other provision of paragraph (a)(2) of this section, in proceedings pursuant to Sections 8 or 10 of the Securities Act of 1933, 15 U.S.C. 77h or 77j, or Sections 305 or 307 of the Trust Indenture Act of 1939, 15 U.S.C. 77eee or 77ggg, notice of the institution of proceedings shall be made by personal service or confirmed telegraphic notice, or a waiver obtained pursuant to paragraph (a)(4) of this section.

\* \* \* \* \*

(3) *Record of service.* The Secretary shall maintain a record of service on parties (in hard copy or computerized format), identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If a division serves a copy of an order instituting proceedings, the division shall file with the Secretary either an acknowledgement of service by the person served or proof of service consisting of a statement by the person who made service certifying the date and manner of service; the names of the persons served; and their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service. If service is made in person, the certificate of service shall state, if available, the name of the individual to whom the order was given. If service is made by U.S. Postal Service certified or

Express Mail, the Secretary shall maintain the confirmation of receipt or of attempted delivery, and tracking number. If service is made to an agent authorized by appointment to receive service, the certificate of service shall be accompanied by evidence of the appointment.

\* \* \* \* \*

3. § 201.161 is amended by revising paragraph (c)(2)(iii) to read as follows:

**§201.161 Extensions of time, postponements and adjournments.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) The granting of any stay pursuant to this paragraph (c) shall stay the timeline pursuant to §201.360(a).

4. § 210.180 is amended by revising paragraphs (a)(1), (a)(1)(i), and (a)(2).

The revisions read as follows:

**§201.180 Sanctions.**

(a) \* \* \*(1) *Subject to exclusion or suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including at or in connection with any conference, deposition or hearing, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such deposition, hearing or conference, or any portion thereof; and/or

\* \* \* \* \*

(2) *Review procedure.* A person excluded from a deposition, hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in §201.500.

\* \* \* \* \*

5. Revise section 201.220 to read as follows:

**§201.220 Answer to allegations.**

(a) *When required.* In its order instituting proceedings, the Commission may require any respondent to file an answer to each of the allegations contained therein. Even if not so ordered, any respondent in any proceeding may elect to file an answer. Any other person granted leave by the Commission or the hearing officer to participate on a limited basis in such proceedings pursuant to §201.210(c) may be required to file an answer.

(b) *When to file.* Except where a different period is provided by rule or by order, a respondent shall do so within 20 days after service upon the respondent of the order instituting proceedings. Persons granted leave to participate on a limited basis in the proceeding pursuant to §201.210(c) may file an answer within a reasonable time, as determined by the Commission or the hearing officer. If the order instituting proceedings is amended, the Commission or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) *Contents; effect of failure to deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have,

and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A respondent must affirmatively state in the answer any avoidance or affirmative defense, including but not limited to res judicata, statute of limitations or reliance. Any allegation not denied shall be deemed admitted.

(d) *Motion for more definite statement.* A respondent may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

(e) *Amendments.* A respondent may amend its answer at any time by written consent of each adverse party or with leave of the Commission or the hearing officer. Leave shall be freely granted when justice so requires.

(f) *Failure to file answer: default.* If a respondent fails to file an answer required by this section within the time provided, such respondent may be deemed in default pursuant to § 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

6. § 201.221 is amended by revising paragraph (c) to read as follows.

**§201.221 Prehearing conference.**

\* \* \* \* \*

(c) *Subjects to be discussed.* At a prehearing conference consideration may be given and action taken with respect to any and all of the following:

- (1) Simplification and clarification of the issues;
- (2) Exchange of witness and exhibit lists and copies of exhibits;
- (3) Timing of disclosure of expert witness disclosures and reports, if any;
- (4) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;
- (5) Matters of which official notice may be taken;
- (6) The schedule for exchanging prehearing motions or briefs, if any;
- (7) The method of service for papers other than Commission orders;
- (8) Summary disposition of any or all issues;
- (9) Settlement of any or all issues;
- (10) Determination of hearing dates;
- (11) Amendments to the order instituting proceedings or answers thereto;
- (12) Production of documents as set forth in § 201.230, and prehearing production of documents in response to subpoenas duces tecum as set forth in § 201.232;
- (13) Specification of procedures as set forth in § 201.202;
- (14) Depositions to be conducted, if any, and date by which depositions shall be completed; and
- (15) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

\* \* \* \* \*

7. § 201.222 is amended by:

- a. revising the heading; and
- b. revising paragraph (b).

The revisions read as follows:

**§201.222 Prehearing submissions and disclosures.**

\* \* \* \* \*

(b) *Expert witnesses.*--

(1) *Information to be supplied; reports.* Each party who intends to call an expert witness shall submit, in addition to the information required by paragraph (a)(4) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony during the previous 4 years, and a list of publications authored or co-authored by the expert in the previous 10 years. Additionally, if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, then the party must include in the disclosure a written report—prepared and signed by the witness. The report must contain:

- (i) A complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) The facts or data considered by the witness in forming them;
- (iii) Any exhibits that will be used to summarize or support them; and
- (iv) A statement of the compensation to be paid for the study and testimony in the case.

(2) *Drafts and communications protected.*--

- (i) Drafts of any report or other disclosure required under this section need not be furnished regardless of the form in which the draft is recorded.
- (ii) Communications between a party's attorney and the party's expert witness who is identified under this section need not be furnished regardless of the form of the communications, except if the communications relate to compensation for the expert's study or testimony, identify facts or data that the party's attorney provided and that the expert considered in forming the

opinions to be expressed, or identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

8. § 201.230 is amended by:

- a. Revising paragraph (b) introductory text;
- b. Redesignating paragraph (b)(1)(iv) as paragraph (b)(1)(v) and adding new paragraph (b)(1)(iv);
- c. Redesignating paragraph (b)(2) as paragraph (b)(3) and adding new paragraph (b)(2);  
and
- d. In paragraph (c), removing the term "(b)(1)(iv)" and adding in its place "(b)(1)(v)"  
wherever it occurs.

The revision and additions read as follows:

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

\* \* \* \* \*

(b) *Documents that may be withheld or redacted.* \* \* \*

(iv) The document reflects only settlement negotiations between the Division of Enforcement and a person or entity who is not a respondent in the proceeding; or

\* \* \* \* \*

(2) Unless the hearing officer orders otherwise upon motion, the Division of Enforcement may redact information from a document if:

(i) The information is among the categories set forth in paragraphs (b)(1)(i) through (v) of this section; or

(ii) The information consists of the following with regard to a person other than the respondent to whom the information is being produced:



- (A) An individual's social-security number;
- (B) An individual's birth date;
- (C) The name of an individual known to be a minor; or
- (D) A financial account number, taxpayer-identification number, credit card or debit card number, passport number, driver's license number, or state-issued identification number other than the last four digits of the number.

\* \* \* \* \*

9. § 201.232 is amended by revising paragraphs (a), (c), (d), (e), and (f) to read as follows:

**§201.232 Subpoenas.**

(a) *Availability; procedure.* In connection with any hearing ordered by the Commission or any deposition permitted under §201.233, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at such depositions or at the designated time and place of hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing and served on each party pursuant to §201.150. A person whose request for a subpoena has been denied or modified may not request that any other person issue the subpoena.

\* \* \* \* \*

(c) *Service.* Service shall be made pursuant to the provisions of §201.150 (b) through (d). The provisions of this paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations, as required by 17 CFR 203.8, as well as depositions and hearings.

(d) *Tender of fees required.* When a subpoena ordering the attendance of a person at a hearing or deposition is issued at the instance of anyone other than an officer or agency of the

United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by paragraph (f) of this section.

\* \* \* \* \*

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

(2) *Standards governing application to quash or modify.* If compliance with the subpoena or notice of deposition would be unreasonable, oppressive, unduly burdensome or would unduly delay the hearing, the hearing officer or the Commission shall quash or modify the subpoena or notice, or may order a response to the subpoena, or appearance at a deposition, only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(3) *Additional standards governing application to quash deposition notices or subpoenas filed pursuant to § 201.233(a).* The hearing officer or the Commission shall quash or modify a

deposition notice or subpoena filed or issued pursuant to §201.233(a) unless the requesting party demonstrates that the deposition notice or subpoena satisfies the requirements of §201.233(a), and:

(i) The proposed deponent was a witness of or participant in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Division of Enforcement, or any defense asserted by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of relevant facts about claims or defenses of any party arises from the Division of Enforcement's investigation or the proceeding);

(ii) The proposed deponent is a designated as an "expert witness" under §201.222(b); provided, however, that the deposition of an expert who is required to submit a written report under §201.222(b) may only occur after such report is served; or

(iii) The proposed deponent has custody of documents or electronic data relevant to the claims or defenses of any party (this excludes Division of Enforcement or other Commission officers or personnel who have custody of documents or data that was produced by the Division to the respondent).

\* \* \* \* \*

(f) *Witness fees and mileage.* Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear. Except for such witness fees and mileage, each party is responsible for paying any fees and expenses of the

expert witnesses whom that party designates under § 201.222(b), for appearance at any deposition or hearing.

10. § 201.233 is revised to read as follows:

**§201.233 Depositions upon oral examination.**

(a) *Depositions upon written notice.* In any proceeding under the 120-day timeframe under §201.360(a)(2), except as otherwise set forth in these rules, and consistent with the prehearing conference and hearing officer's scheduling order:

(1) If the proceeding involves a single respondent, the respondent may file written notices to depose no more than three persons, and the Division of Enforcement may file written notices to depose no more than three persons. No other depositions shall be permitted, except as provided in paragraph (b) of this section;

(2) If the proceeding involves multiple respondents, the respondents collectively may file joint written notices to depose no more than five persons, and the Division of Enforcement may file written notices to depose no more than five persons. The depositions taken under this paragraph (a)(2) shall not exceed a total of five depositions for the Division of Enforcement, and five depositions for all respondents collectively. No other depositions shall be permitted except as provided in paragraph (b) of this section;

(3) A deponent's attendance may be ordered by subpoena issued pursuant to the procedures in §201.232; and

(4) The Commission or hearing officer may rule on a motion by a party that a deposition shall not be taken upon a determination under §201.232(e). The fact that a witness testified during an investigation does not preclude the deposition of that witness.

(b) *Depositions when witness is unavailable.* In addition to depositions permitted under paragraph (a) of this section, the Commission or the hearing officer may grant a party's request to file a written notice of deposition if the requesting party shows that the prospective witness will likely give testimony material to the proceeding; that it is likely the prospective witness, who is then within the United States, will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment, other disability, or absence from the United States, unless it appears that the absence of the witness was procured by the party requesting the deposition; and that the taking of a deposition will serve the interests of justice.

(c) *Service and contents of notice.* Notice of any deposition pursuant to this section shall be made in writing and served on each party pursuant to §201.150, and shall be consistent with the prehearing conference and hearing officer's scheduling order. A notice of deposition shall designate by name a deposition officer. The deposition officer may be any person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. A notice of deposition also shall state:

- (1) The name and address of the witness whose deposition is to be taken;
- (2) The scope of the testimony to be taken;
- (3) The time and place of the deposition; provided that a subpoena for a deposition may command a person to attend a deposition only as follows:
  - (A) Within 100 miles of where the person resides, is employed, or regularly transacts business in person;
  - (B) Within the state where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party's officer;
  - (C) At such other location that the parties and proposed deponent stipulate; or

(D) At such other location that the hearing officer or the Commission determines is appropriate; and

(4) The manner of recording and preserving the deposition.

(d) *Producing documents.* In connection with any deposition pursuant to §201.233(a), a party may request the issuance of a subpoena duces tecum under §201.232. The party conducting the deposition shall serve upon the deponent any subpoena duces tecum so issued. The materials designated for production, as set out in the subpoena, must be listed in the notice of deposition or in an attachment.

(e) *Method of recording.*

(1) *Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the hearing officer or Commission orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(2) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the hearing officer or the Commission orders otherwise.

(f) *By remote means.* The parties may stipulate—or the hearing officer or Commission may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(g) *Deposition officer's duties.*

(1) *Before the deposition.* The deposition officer designated pursuant to paragraph (c) of this section must begin the deposition with an on-the-record statement that includes:

- (i) The deposition officer's name and business address;
- (ii) The date, time, and place of the deposition;
- (iii) The deponent's name;
- (iv) The deposition officer's administration of the oath or affirmation to the deponent; and
- (v) The identity of all persons present.

(2) *Conducting the deposition; Avoiding distortion.* If the deposition is recorded non-stenographically, the deposition officer must repeat the items in paragraphs (g)(1)(i) through (iii) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(3) *After the deposition.* At the end of a deposition, the deposition officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(h) *Order and record of the examination.*

(1) *Order of examination.* The examination and cross-examination of a deponent proceed as they would at the hearing. After putting the deponent under oath or affirmation, the deposition officer must record the testimony by the method designated under paragraph (e) of this section. The testimony must be recorded by the deposition officer personally or by a person acting in the presence and under the direction of the deposition officer. The witness being deposed may have counsel present during the deposition.

(2) *Form of objections stated during the deposition.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the deposition officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—

must be noted on the record, but the examination still proceeds and the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the hearing officer or the Commission, or to present a motion to the hearing officer or the Commission for a limitation on the questioning in the deposition.

(i) *Waiver of objections.*

(1) *To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the deposition officer's qualification.* An objection based on disqualification of the deposition officer before whom a deposition is to be taken is waived if not made:

(i) Before the deposition begins; or

(ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition.*

(i) *Objection to competence, relevance, or materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:



(A) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(B) It is not timely made during the deposition.

(4) *To completing and returning the deposition.* An objection to how the deposition officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(j) *Duration; cross-examination; motion to terminate or limit.*

(1) *Duration.* Unless otherwise stipulated or ordered by the hearing officer or the Commission, a deposition is limited to one day of 6 hours, including cross-examination as provided in this subsection. In a deposition conducted by or for a respondent, the Division of Enforcement shall be allowed a reasonable amount of time for cross-examination of the deponent. In a deposition conducted by the Division, the respondents collectively shall be allowed a reasonable amount of time for cross-examination of the deponent. The hearing officer or the Commission may allow additional time if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Motion to terminate or limit.*

(i) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent

or party so demands, the deposition must be suspended for the time necessary to present the motion to the hearing officer or the Commission.

(ii) *Order.* The hearing officer or the Commission may order that the deposition be terminated or may limit its scope. If terminated, the deposition may be resumed only by order of the hearing officer or the Commission.

(k) *Review by the witness; changes.* (1) *Review; statement of changes.* On request by the deponent or a party before the deposition is completed, and unless otherwise ordered by the hearing officer or the Commission, the deponent must be allowed 14 days after being notified by the deposition officer that the transcript or recording is available, unless a longer time is agreed to by the parties or permitted by the hearing officer, in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes indicated in the deposition officer's certificate.* The deposition officer must note in the certificate prescribed by paragraph (l)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 14-day period.

(l) *Certification and delivery; exhibits; copies of the transcript or recording.*

(1) *Certification and delivery.* The deposition officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the hearing officer orders otherwise, the deposition officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the

attorney or party who arranged for the transcript or recording. The attorney or party must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things.*

(i) *Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(ii) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the hearing officer or Commission, the deposition officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the deposition officer must furnish a copy of the transcript or recording to any party or the deponent.

11. § 201.234 is amended by revising paragraphs (a) and (c) to read as follows:

**§201.234 Depositions upon written questions.**

(a) *Availability.* Any deposition permitted under §201.232 may be taken and submitted on written questions upon motion of any party, for good cause shown, or as stipulated by the parties.

\* \* \* \* \*

(c) *Additional requirements.* The order for deposition, filing of the deposition, form of the deposition and use of the deposition in the record shall be governed by paragraphs (c) through (l) of §201.233, except that no cross-examination shall be made.

12. § 201.235 is amended by:

- a. Revising the heading;
- b. Revising paragraphs (a), (a)(2), and (a)(5); and
- c. Adding paragraph (b).

The revisions and addition read as follows:

**§201.235 Introducing prior sworn statements or declarations.**

(a) At a hearing, any person wishing to introduce a prior, sworn deposition taken pursuant to §201.233 or §201.234, investigative testimony, or other sworn statement or a declaration pursuant to 28 U.S.C. 1746, of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor. If only part of a statement or declaration is offered in evidence, the hearing officer may require that all relevant portions of the statement or declaration be introduced. If all of a statement or declaration is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement or declaration may be granted if:

\* \* \* \* \*

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement or declaration;

\* \* \* \* \*

(5) In the discretion of the Commission or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement or declaration to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement or declaration in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

(b) *Sworn statement or declaration of party or agent.* An adverse party may use for any purpose a deposition taken pursuant to §201.233 or §201.234, investigative testimony, or other sworn statement or a declaration pursuant to 28 U.S.C. 1746, of a party or anyone who, when giving the sworn statement or declaration, was the party's officer, director, or managing agent.

13. § 201.320 is revised to read as follows:

**§201.320 Evidence: Admissibility.**

(a) Except as otherwise provided in this section, the Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable.

(b) Subject to §201.235, evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.

14. § 201.360 is amended by revising paragraphs (a)(2), (a)(3), and (b) to read as follows:

**§201.360 Initial decision of hearing officer.**

(a) \* \* \*

(2) *Time period for filing initial decision and for hearing.*

(i) *Initial decision.* In the order instituting proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary. In the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors, this time period will be either 30, 75, or 120 days from the completion of post-hearing briefing, or if there is no in-person hearing, the completion of briefing on a dispositive motion (including but not limited to a motion for summary disposition or default) or the occurrence of a default under §201.155(a).

(ii) *Hearing.* Under the 120-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately 4 months (but no more than 8 months) from the date of service of the order instituting the proceeding, allowing parties approximately 2 months from the conclusion of the hearing to obtain the transcript and submit post-hearing briefs, and no more than 120 days after the completion of post-hearing or dispositive motion briefing for the hearing officer to file an initial decision. Under the 75-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately 2-1/2 months (but no more than 6 months) from the date of service of the order instituting the proceeding, allowing parties approximately 2 months from the conclusion of the hearing to obtain the transcript and submit post-hearing briefs, and no more than 75 days after the completion of post-hearing or dispositive

motion briefing for the hearing officer to file an initial decision. Under the 30-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately 1 month (but no more than 4 months) from the date of service of the order instituting the proceeding, allowing parties approximately 2 months from the conclusion of the hearing to obtain the transcript and submit post-hearing briefs, and no more than 30 days after the completion of post-hearing or dispositive motion briefing for the hearing officer to file an initial decision. These deadlines confer no substantive rights on respondents. If a stay is granted pursuant to §201.161(c)(2)(i) or §201.210(c)(3), the time period specified in the order instituting proceedings in which the hearing officer's initial decision must be filed with the Secretary, as well as any other time limits established in orders issued by the hearing officer in the proceeding, shall be automatically tolled during the period while the stay is in effect.

(3) *Certification of extension; motion for extension.* (i) In the event that the hearing officer presiding over the proceeding determines that it will not be possible to file the initial decision within the specified period of time, the hearing officer may certify to the Commission in writing the need to extend the initial decision deadline by up to 30 days for case management purposes. The certification must be issued no later than 30 days prior to the expiration of the time specified for the issuance of an initial decision and be served on the Commission and all parties in the proceeding. If the Commission has not issued an order to the contrary within fourteen days after receiving the certification, the extension set forth in the hearing officer's certification shall take effect.

(ii) Either in addition to a certification of extension, or instead of a certification of extension, the Chief Administrative Law Judge may submit a motion to the Commission requesting an extension of the time period for filing the initial decision. First, the hearing officer

presiding over the proceeding must consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. This motion may request an extension of any length but must be filed no later than 15 days prior to the expiration of the time specified in the certification of extension, or if there is no certification of extension, 30 days prior to the expiration of the time specified in the order instituting proceedings. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

(iii) The provisions of this paragraph (a)(3) confer no rights on respondents.

(b) *Content.* An initial decision shall include findings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall also include a statement that, as provided in paragraph (d) of this section:

\* \* \* \* \*

15. § 201.410 is amended by:

- a. Revising paragraph (b);
- b. Redesignating paragraph (c) as paragraph (d); and
- c. Adding new paragraph (c).

The revision and addition read as follows:



**§201.410 Appeal of initial decisions by hearing officers.**

\* \* \* \* \*

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to §201.360(b) unless a party has filed a motion to correct an initial decision with the hearing officer. If such correction has been sought, a party shall have 21 days from the date of the hearing officer's order resolving the motion to correct to file a petition for review. The petition shall set forth a statement of the issues presented for review under §201.411(b). In the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within the original time allowed for seeking review or within ten days from the date that the petition for review was filed, whichever is later.

(c) *Length limitation.* Except with leave of the Commission, the petition for review shall not exceed three pages in length. Incorporation of pleadings or filings by reference is not permitted. Motions to file petitions in excess of those limitations are disfavored.

\* \* \* \* \*

16. § 201.411 is amended by revising paragraph (d) to read as follows:

**§201.411 Commission consideration of initial decisions by hearing officers.**

\* \* \* \* \*

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in an opening brief that complies with §201.450(b), or the issues, if any, specified in the briefing schedule order issued pursuant to §201.450(a). Any exception to an initial decision not supported in an opening brief that complies with §201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the petitioner. On notice to all parties, however, the Commission may, at any time prior to issuance of its decision,

raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

\* \* \* \* \*

17. § 201.420 is amended by adding a new last sentence to paragraph (c) to read as follows:

**§201.420 Appeal of determinations by self-regulatory organizations.**

\* \* \* \* \*

(c) *Application.* \* \* \* Any exception to a determination not supported in an opening brief that complies with §201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant.

\* \* \* \* \*

18. § 201.440 is amended by revising paragraph (b) to read as follows:

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

\* \* \* \* \*

(b) *Procedure.* An aggrieved person may file an application for review with the Commission pursuant to §201.151 within 30 days after the notice filed by the Board of its determination with the Commission pursuant to 17 CFR 240.19d-4 is received by the aggrieved person applying for review. The applicant shall serve the application on the Board at the same time. The application shall identify the determination complained of, set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor, and state an address where the applicant can be served. The application should not exceed two pages in length. The notice of appearance required by §201.102(d) shall accompany the application. Any exception to a determination not supported in an opening brief that complies with §201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant.

\* \* \* \* \*

19. § 201.450 is amended by revising paragraphs (b), (c) and (d) to read as follows.

**§201.450 Briefs filed with the Commission.**

\* \* \* \* \*

(b) *Contents of briefs.* Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties; except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived.

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

(d) *Certificate of compliance.* An opening or opposition brief that does not exceed 30 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, is presumptively considered to contain no more than 14,000 words. A reply brief that does not exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases,

pertinent legislative provisions, or rules and exhibits is presumptively considered to contain no more than 7,000 words. Any brief that exceeds these page limits must include a certificate by the party's representative, or an unrepresented party, stating that the brief complies with the requirements set forth in §201.450(c) and stating the number of words in the brief. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief.

20. § 201.900 is revised to read as follows:

**§ 201.900 Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings.**

(a) *Guidelines for the timely completion of proceedings.* (1) Timely resolution of adjudicatory proceedings is one factor in assessing the effectiveness of the adjudicatory program in protecting investors, promoting public confidence in the securities markets and assuring respondents a fair hearing. Establishment of guidelines for the timely completion of key phases of contested administrative proceedings provides a standard for both the Commission and the public to gauge the Commission's adjudicatory program on this criterion. The Commission has directed that:

(i) To the extent possible, a decision by the Commission on review of an interlocutory matter should be completed within 45 days of the date set for filing the final brief on the matter submitted for review.

(ii) To the extent possible, a decision by the Commission on a motion to stay a decision that has already taken effect or that will take effect within five days of the filing of the motion, should be issued within five days of the date set for filing of the opposition to the motion for a stay. If the decision complained of has not taken effect, the Commission's decision should be issued within 45 days of the date set for filing of the opposition to the motion for a stay.

(iii) Ordinarily, a decision by the Commission with respect to an appeal from the initial decision of a hearing officer, a review of a determination by a self-regulatory organization or the Public Company Accounting Oversight Board, or a remand of a prior Commission decision by a court of appeals will be issued within eight months from the completion of briefing on the petition for review, application for review, or remand order. If the Commission determines that the complexity of the issues presented in a petition for review, application for review, or remand order warrants additional time, the decision of the Commission in that matter may be issued within 10 months of the completion of briefing.

(iv) If the Commission determines that a decision by the Commission cannot be issued within the period specified in paragraph (a)(1)(iii), the Commission may extend that period by orders as it deems appropriate in its discretion. The guidelines in this paragraph (a) confer no rights or entitlements on parties or other persons.

(2) The guidelines in this paragraph (a) do not create a requirement that each portion of a proceeding or the entire proceeding be completed within the periods described. Among other reasons, Commission review may require additional time because a matter is unusually complex or because the record is exceptionally long. In addition, fairness is enhanced if the Commission's deliberative process is not constrained by an inflexible schedule. In some proceedings, deliberation may be delayed by the need to consider more urgent matters, to permit the preparation of dissenting opinions, or for other good cause. The guidelines will be used by the Commission as one of several criteria in monitoring and evaluating its adjudicatory program. The guidelines will be examined periodically, and, if necessary, readjusted in light of changes in the pending caseload and the available level of staff resources.

(b) *Reports to the Commission on pending cases.* The administrative law judges, the Secretary and the General Counsel have each been delegated authority to issue certain orders or adjudicate certain proceedings. See 17 CFR 200.30-1 et seq. Proceedings are also assigned to the General Counsel for the preparation of a proposed order or opinion which will then be recommended to the Commission for consideration. In order to improve accountability by and to the Commission for management of the docket, the Commission has directed that confidential status reports with respect to all filed adjudicatory proceedings shall be made periodically to the Commission. These reports will be made through the Secretary, with a minimum frequency established by the Commission. In connection with these periodic reports, if a proceeding pending before the Commission has not been concluded within 30 days of the guidelines established in paragraph (a) of this section, the General Counsel shall specifically apprise the Commission of that fact, and shall describe the procedural posture of the case, project an estimated date for conclusion of the proceeding, and provide such other information as is necessary to enable the Commission to make a determination under paragraph (a)(1)(iv) of this section or to determine whether additional steps are necessary to reach a fair and timely resolution of the matter.

(c) *Publication of information concerning the pending case docket.* Ongoing disclosure of information about the adjudication program caseload increases awareness of the importance of the program, facilitates oversight of the program and promotes confidence in the efficiency and fairness of the program by investors, securities industry participants, self-regulatory organizations and other members of the public. The Commission has directed the Secretary to publish in the first and seventh months of each fiscal year summary statistical information about the status of pending adjudicatory proceedings and changes in the Commission's caseload over

the prior six months. The report will include the number of cases pending before the administrative law judges and the Commission at the beginning and end of the six-month period. The report will also show increases in the caseload arising from new cases being instituted, appealed or remanded to the Commission and decreases in the caseload arising from the disposition of proceedings by issuance of initial decisions, issuance of final decisions issued on appeal of initial decisions, other dispositions of appeals of initial decisions, final decisions on review of self-regulatory organization determinations, other dispositions on review of self-regulatory organization determinations, and decisions with respect to stays or interlocutory motions. For each category of decision, the report shall also show the median age of the cases at the time of the decision, the number of cases decided within the guidelines for the timely completion of adjudicatory proceedings, and, with respect to appeals from initial decisions, reviews of determinations by self-regulatory organizations or the Public Company Accounting Oversight Board, and remands of prior Commission decisions, the median days from the completion of briefing to the time of the Commission's decision.

By the Commission.

Dated: September 24, 2015

Brent J. Fields  
Secretary