SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

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RIN 3235-AL87

Amendments to the Commission's Rules of Practice

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to its Rules of Practice. These changes concern, among other things, the timing of hearings in administrative proceedings, depositions, summary disposition, and the contents of an answer.

DATES:

Effective Date: The final rules are effective September 27, 2016.

Applicability Dates: The applicability dates for proceedings pending as of July 13, 2016, are discussed in Section Q of this release.

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SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rules 141, 154, 161, 180, 220, 221, 222, 230, 232, 233, 234, 235, 250, 320, 360, 410, 411, 420, 440, 450 and 900 of its Rules of Practice [17 CFR 201.141, 201.154, 201.161, 201.180, 201.220, 201.221, 201.222, 201.230, 201.232, 201.233, 201.234, 201.235, 201.250, 201.320, 201.360, 201.410, 201.411, 201.420, 201.440, 201.450 and 201.900].

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I. Introduction

On September 24, 2015, the Commission proposed for comment amendments to its Rules of Practice. Among other things, we proposed to update the Rules of Practice, adjust the timing of hearings and other deadlines in administrative proceedings, and provide parties in administrative proceedings with the ability to take depositions.[1] We also proposed to clarify and amend certain other rules, including the admissibility of hearsay and the requirements for the contents of an answer. In addition, we proposed amendments to certain procedures that govern appeals to the Commission. The proposed amendments were intended to update the Rules of Practice and introduce additional flexibility into administrative proceedings, while continuing to provide for the timely and efficient disposition of proceedings.[2]

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[1] *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 75976 (Sept. 24, 2015), 80 FR 60091 (Oct. 5, 2015), available at https://www.gpo.gov/fdsys/pkg/FR-2015-10-05/pdf/2015-24707.pdf (last visited July 8, 2016).

[2] Promoting timeliness and efficiency in administrative proceedings has been a longstanding goal of the Commission. *See Rules of Practice*, Exchange Act Release No. 48018 (June 11, 2003), 68 FR 35787 (June 17, 2003), available at https://www.gpo.gov/fdsys/pkg/FR-2003-06-17/pdf/03-15262.pdf (last visited July 8, 2016) ("*2003 Release*") (amending Rules of Practice "to improve the timeliness of [the Commission's] administrative proceedings"); *Rules of Practice*, Exchange Act Release No. 35833 (June 9, 1995), 60 FR 32738 (June 23, 1995), available at https://www.gpo.gov/fdsys/pkg/FR-1995-06-23/pdf/95-14750.pdf ("*1995 Release*") (last visited July 8, 2016) (amending Rules of Practice to "better facilitate full, fair and efficient proceedings…"); *see also id.*, 60 FR at 32753, Comment to Rule 161 ("Extensions of Time, Postponements and Adjournments") ("The rule requires the hearing officer to consider explicitly the efficient and timely administration of justice when determining whether to grant a postponement, adjournment or extension of time for filing of papers. The need for delay must be balanced against the need to bring each case to a timely conclusion, consistent with the public interest.").

We received 13 comment letters in response to the proposal.[3] Commenters generally supported the Commission's efforts to update the rules, expand the discovery process and enlarge the timetables in administrative proceedings, and in some instances suggested additional changes. Some commenters argued that the proposed amendments were too incremental.[4] Others focused on the legitimacy of the Commission's administrative forum, and in so doing offered suggestions that went beyond the scope of the proposed amendments.[5] After carefully considering the comments, we are adopting amendments to our Rules of Practice as described below.

II. Description of the Final Rules

As with the proposing release, we begin with a discussion of the amendments to Rule 360, which sets forth the framework and timing for the stages of an administrative proceeding. Next, we discuss Rule 233 governing depositions, followed by Rule 232, which prescribes

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[3] The comment letters are located at http://www.sec.gov/comments/s7-18-15/s71815.shtml (last visited July 8, 2016).

[4] *See, e.g.*, David M. Zornow, Christopher J. Gunther and Chad E. Silverman letter dated December 4, 2015 ("Zornow/Gunther/Silverman").

[5] These comments generally expressed opposition to the administrative forum. *See, e.g.*, Joseph A. Grundfest letter dated December 4, 2015 ("Grundfest") (recommending the adoption of a mechanism to allow respondents in certain cases to remove a proceeding filed administratively to federal court); *id*. (arguing that the ability to proceed in an administrative forum creates the possibility that the Commission will choose to shield controversial cases from the full scrutiny of federal district and appellate courts); Zornow/Gunther/Silverman (asserting that conflicts of interest preclude the Commission from being perceived as a neutral arbiter). Because these comments are outside the scope of the proposed amendments, we have not addressed them in the adopting release.

standards for the issuance of subpoenas and motions to quash. The remaining rule amendments are discussed in numerical order.

A. Rule 360 (Initial Decision of Hearing Officer and Timing of Hearing)

1. Proposed Rule

Rule 360[6] governs the time period for the filing of an initial decision by the hearing officer and establishes the timing for the stages of an administrative proceeding, which include a prehearing period, a hearing, a period for reviewing hearing transcripts and submitting post-hearing briefs, and a deadline for the hearing officer to file an initial decision with the Office of the Secretary of the Commission (the "Secretary"). Rule 360(a)(2) currently designates the timeframes for each of these stages based on the date of service of an order instituting proceedings ("OIP"). Initial decisions must be filed within the number of days prescribed by the Commission in the OIP: 120, 210, or 300 days from the date of service of the OIP. The prehearing period, start date of the hearing, and period for review of the transcript and post-hearing briefing are, in turn, determined by the date of the OIP and time periods corresponding to the applicable initial decision deadline. Should the hearing officer determine that it is not possible to issue the initial decision within the period specified in the OIP, the Chief Administrative Law Judge is authorized, under current Rule 360(a)(3), to request an extension of time from the Commission.

We proposed to modify three aspects of the timing of a proceeding under Rule 360. First, the proposal modifies the calculation of the initial decision deadline by changing the trigger date for the time to file an initial decision from the OIP service date to the date of completion of post-

[6] 17 CFR 201.360.

hearing or dispositive motion briefing or a finding of a default. This modification divorces the deadline for the completion of an initial decision from other stages of the proceeding, and is reflected in an amendment separating current Rule 360(a)(2) into two paragraphs, proposed Rule 360(a)(2)(i) covering the initial decision deadline and proposed Rule 360(a)(2)(ii) covering the prehearing period. Under proposed Rule 360(a)(2)(i), the OIP designates the time period for preparation of the initial decision as 30, 75 or 120 days from the completion of post-hearing or dispositive motion briefing or a finding of a default.

Second, proposed Rule 360(a)(2)(ii) provides a range of time during which the hearing must begin. For proceedings with an initial decision deadline of 120 days, the proposal doubles the maximum length of the prehearing period from the current approximately four months to no more than eight months after service of the OIP. Pursuant to the proposal, under the 75-day timeline, the hearing would begin approximately two and one-half months (but not more than six months) from the date of service of the OIP, and for 30-day proceedings, the hearing would begin approximately one month (but no more than four months) from the date of service of the OIP. Consistent with current practice, the hearing officer would issue an order setting the hearing dates following a prehearing conference with the parties pursuant to Rule 221. The proposed extensions of time were designed to accommodate deposition discovery in 120-day cases and generally allow for additional time for prehearing preparation and review of documents, while retaining an outer time limit to promote timely and efficient resolution of the proceedings.

Proposed Rule 360(a)(2)(ii), like current Rule 360(a)(2), contemplated an initial schedule allowing approximately two months for review of transcripts and submission of post-hearing briefs.

Third, the proposal adds a procedure for the hearing officer to extend the initial decision deadline. Under proposed Rule 360(a)(3)(ii), the hearing officer is permitted to certify to the Commission the need to extend the initial decision deadline by up to 30 days for case management purposes. This certification must be issued at least 30 days before the expiration of the initial decision deadline, and the proposed extension would take effect absent a Commission order to the contrary issued within 14 days after it receives the certification.

2. Comments Received

Commenters generally supported extensions of the prehearing period under Rule 360, but some suggested that longer or more flexible periods be adopted. Several commenters advocated longer prehearing periods of, for instance, twelve months or eighteen months,[7] and one commenter argued against any "pre-determined limit[s]" on the timing of proceedings.[8] A number of commenters argued that hearing officers should be given the discretion to set the prehearing period or to authorize extensions of the period on a case-by-case basis.[9] Several commenters suggested alternative methods for calculating the prehearing period, for instance,

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[7] *See, e.g.*, Financial Services Roundtable letter dated December 4, 2015 ("FSR"); New Jersey State Bar Association letter dated December 1, 2015 ("NJSBA").

[8] *See* Zornow/Gunther/Silverman.

[9] *See, e.g.*, Susan E. Brune letter dated November 24, 2015 ("Brune"); Grundfest; Calfee, Halter & Griswold, LLP letter dated November 30, 2015 ("Calfee"); Gibson, Dunn & Crutcher LLP letter dated December 4, 2015 ("Gibson").

based on the length of the Division of Enforcement (the "Division") investigation[10] or the date the Division completes production of the investigative file.[11]

In urging longer prehearing periods, commenters argued that respondents need longer discovery periods to review and address evidence gathered by the Division during the investigation that precedes the institution of proceedings. These commenters generally cited the size of the Division's investigative files (including electronic document productions) to be reviewed by respondents during the period, the time required for respondents to receive the complete investigative file during the prehearing period, and the need to counter lengthy and extensive Division investigations.[12] Commenters also offered comparisons to the length of discovery and flexible scheduling procedures in federal courts and in the administrative proceedings of some other agencies.[13]

Most commenters who addressed this proposed rule focused on the maximum prehearing period for proceedings designated as 120-day matters. But one commenter urged further extensions to the prehearing period for all administrative proceedings and to other time periods designated under Rule 360(a)(2)(ii).[14] This commenter supported the proposal to divorce the deadline for the initial decision from the other stages of the proceeding but argued that the

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[10] *See* Stephen E. Hudson letter dated December 3, 2015 ("Hudson I").

[11] *See* Gibson; Calfee.

[12] *See, e.g.*, Navistar International Corporation letter dated December 3, 2015 ("Navistar").

[13] *See* Brune; Gibson; Navistar.

[14] NJSBA.

Commission should extend the period for post-hearing briefing to three months, rather than the two months allocated under both the current and proposed rules. The commenter also suggested modifying the certification process for 30-day extensions under Rule 360 to require the hearing officer's certification to be issued 45 or 60 days before the deadline, and an order from the Commission expressly granting or rejecting the proposed extension.[15]

3. Final Rule

We are adopting Rule 360(a)(2)(i) substantially as proposed, with non-substantive modifications intended to clarify that multiple events (*i.e.*, completion of post-hearing briefing where a hearing has been completed, completion of briefing on a dispositive motion where there is no hearing, or the determination of a default) may trigger the running of the 30, 75 or 120-day deadline for the initial decision.[16]

In addition, we believe it is appropriate, consistent with the view of commenters suggesting a longer prehearing period under the 120-day timeline, to modify the proposed amendments to Rule 360(a)(2)(ii) to extend by an additional two months the maximum prehearing period for proceedings in this category. As adopted, Rule 360(a)(2)(ii) provides that under the 120-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately four months (but no more than ten months, instead of the proposed eight)

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[15] *Id.*

[16] We emphasize that, as provided for in current Rule 360(a)(1), unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to Rule 202.

from the date of service of the OIP.[17] The longer prehearing period is intended to provide parties, in appropriate cases, additional time to review the investigative record, conduct depositions under amended Rule 233, and prepare for a hearing.[18]

While we recognize that some might view the maximum ten-month prehearing period as not long enough, the Commission believes that the final rule strikes the appropriate balance between the time needed to conduct discovery and prepare for a hearing and the Commission's goal of timely and efficiently resolving administrative proceedings.

In response to commenters urging open-ended prehearing periods as determined by hearing officers, we note that the Commission amended Rule 360 in 2003 to impose mandatory deadlines for completion of initial decisions because of concerns about adherence to the Rule's then-existing non-binding goals.[19] We continue to believe that timely completion of proceedings can be achieved more successfully with express deadlines for completion of the various steps in

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[17] The prehearing periods in this rule do not affect the statutory hearing requirements in cease-and-desist proceedings. In such proceedings, the Commission is required to set a hearing date not earlier than 30 days nor later than 60 days after service of the OIP, unless an earlier or later date is set by the Commission with the consent of any respondent so served. *See, e.g.*, Securities Exchange Act of 1934 ("Exchange Act") Section 21C(b), 15 U.S.C. 78u–3(b).

[18] By lengthening the prehearing period, the Commission does not suggest that every 120-day matter will qualify for the maximum ten-month period. Proceedings designated for the 120-day timeline will range from routine matters involving a single violation of the securities laws to matters involving, for example, multiple and distinct alleged violations, a particularly voluminous investigative record, or a complex set of factual allegations. In setting the hearing date, the hearing officer should assess whether the proceeding at issue warrants the maximum prehearing period or whether a shorter prehearing period would provide the parties with adequate preparation time. In keeping with the goal of resolving administrative proceedings in an expeditious manner, the maximum prehearing period should be the exception rather than the norm.

[19] *See 2003 Release*, 68 FR at 35787.

the administrative proceeding. In designating timeframes for proceedings in the OIP, the Commission considers "the nature, complexity, and urgency of the subject matter," with due regard for the public interest and the protection of investors.[20]

We are amending Rule 360(a)(2)(ii) in one additional respect to resolve an apparent discrepancy with existing Rule 340, which governs the timeframes for filing post-hearing briefs. Specifically, we are amending Rule 360(a)(2)(ii) to remove the approximately two-month timeframe for obtaining transcripts and submitting post-hearing briefs. The Commission included these internal timeframes when it amended Rule 360 in 2003 to address concerns that setting only an outside deadline for the issuance of an initial decision by the hearing officer could incentivize the hearing officer to curtail the parties' prehearing preparation time and post-hearing briefing time while reserving the majority of the overall time period for the hearing officer to draft the initial decision.[21] This should not be a concern under amended Rule 360, because under the amended rule the deadline for filing the initial decision is triggered not by the date of service of the OIP, but by the completion of post-hearing briefing (or, if there is no hearing, the completion of briefing on a dispositive motion or the determination of a default). The "approximately 2-month" language contained in current and proposed Rule 360 for submission of post-hearing briefs also may create unnecessary ambiguity in the post-hearing briefing requirements set forth in Rule 340, which provides that the hearing officer shall by order set the

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[20] 17 CFR 201.360(a)(2)(i).

[21] *See 2003 Release*, 68 FR at 35787.

deadlines for post-hearing briefing for a period that shall not exceed 90 days after the close of the hearing, unless the hearing officer, for good cause shown, permits a different period.[22]

We are adopting Rule 360(a)(2)(ii) as proposed with respect to the scheduling of hearings in 75-day and 30-day proceedings, with a conforming change to remove the approximate timeframes set forth in the rule for obtaining a transcript and submitting post-hearing briefs, for the reasons discussed above. The final amendment provides for an outer limit of six months for the hearing to commence under the 75-day timeline, and an outer limit of four months for the hearing to commence in 30-day proceedings. Proceedings in the 75-day category typically involve "follow-on" proceedings following certain injunctions or criminal convictions.[23] The 30-day designation typically is reserved for proceedings under Section 12(j) of the Exchange Act.[24] We continue to believe that the proposed prehearing periods for these cases is appropriate since they are by their nature more routine than 120-day proceedings, and are sometimes uncontested. We therefore believe that the prehearing periods for these cases, which we are adopting as

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[22] We did not propose, and are not now amending, Rule 340. However, given that one of the overall purposes of these amendments is to promote efficiency in the adjudication of administrative proceedings, the "good cause" standard for granting extensions beyond the 90-day timeframe set forth in Rule 340 should continue to be rarely granted, limited to truly unusual circumstances, and not introduce undue delay in the resolution of proceedings.

[23] The Commission is authorized to institute administrative proceedings following certain injunctions or convictions of persons associated with or seeking to associate in the securities industry. *See, e.g.*, Exchange Act Section 15(b), 15 U.S.C. 78o(b); Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(f).

[24] Section 12(j) of the Exchange Act authorizes the Commission, among other things, to revoke the registration of a security if the issuer fails to comply with the federal securities laws. *See* 15 U.S.C. 78l(j).

proposed, will provide adequate preparation time for the parties while balancing the need for efficient resolution of administrative proceedings.

We are adopting Rule 360(a)(3) as proposed. The final rule permits the hearing officer presiding over the proceeding to certify to the Commission a need to extend the initial decision deadline by up to 30 days for case management purposes. This certification must be issued no later than 30 days prior to the expiration of the initial decision deadline. One commenter supported the proposed certification procedure but suggested requiring the certification to be issued 45 or 60 days prior to the expiration of the initial decision deadline. The Commission continues to believe that a 30-day period provides sufficient notice to the parties of the hearing officer's certification. In response to the comment suggesting the Commission issue an order expressly granting or rejecting the hearing officer's proposed extension, we do not believe this added procedure is necessary. As adopted, the rule provides that if the Commission has not issued an order to the contrary within 14 days after receiving the certification, the extension sought in the hearing officer's certification shall take effect. In the Commission's view, the final rule provides sufficient clarity on whether the proposed extension has been granted.

B. Rule 233 (Depositions Upon Oral Examination)

1. Proposed Rule

Current Rule 233 permits any party to move for permission to take the deposition of a witness who likely will be unavailable to attend or testify at the hearing. We proposed to amend Rule 233 to permit a limited number of additional depositions. As proposed, amended Rule 233 permits the respondent and the Division in a single-respondent proceeding designated as a 120-day proceeding each to notice the depositions of three persons. In a multi-respondent 120-day proceeding, the Division is permitted to notice five depositions, and the respondents collectively

can also notice five depositions. Under the proposal, the parties could also request that the hearing officer issue a subpoena for documents in conjunction with the deposition. Proposed Rule 233 also sets forth procedures for deposition practice, including a six-hour time limit for depositions, contents of the notice of deposition, and other matters.

2. Comments Received

Most commenters urged that the final rule provide respondents the ability to conduct more depositions than the Commission proposed. Commenters appeared to be animated by two principal concerns. First, commenters believed that the Commission's proposal to limit parties to a fixed number of depositions did not accommodate respondents' potential need for additional depositions depending on the facts and circumstances of the individual case, particularly in complex or multi-party proceedings.[25] Second, commenters argued that the Division's investigation before the Commission initiates proceedings creates an information imbalance that warrants providing respondents with additional opportunities to conduct depositions.[26]

Commenters suggested a variety of possible parameters for additional depositions. Most commenters urged that hearing officers be granted discretion to approve requests for additional depositions, similar to the practice under Rule 30 of the Federal Rules of Civil Procedure.[27]

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[25] Center for Capital Market Competitiveness, U.S. Chamber of Commerce letter dated December 4, 2015 ("CCMC"); Calfee; NJSBA; Navistar; Hudson I; Zornow/Gunther/Silverman; FSR; Gibson; Grundfest.

[26] Aegis J. Frumento and Stephanie Korenman letter dated December 4, 2015 ("Frumento/Korenman"); Brune; Navistar; Hudson I; Zornow/Gunther/Silverman; FSR; CCMC.

[27] Brune; Calfee; NJSBA; Navistar; Hudson I; Gibson; Frumento/Korenman; CCMC. One of these commenters further pointed out that the adjudication rules of the Federal Trade Commission do not limit the number of discovery depositions. Gibson (citing 16 CFR 3.31(a)).

Commenters criticized the "one size fits all" approach of the proposed rule,[28] and argued that hearing officer discretion in the matter of depositions is necessary because each case presents unique facts and circumstances. Three commenters suggested guidelines for exercising such discretion based on limitations found in Rule 26 of the Federal Rules of Civil Procedure.[29]

Commenters differed on the number of depositions they believed the rule should permit as a matter of right (*i.e.*, before a party would be required to seek leave from the hearing officer to notice the deposition). A number of commenters pointed the Commission to Rule 30(a)(2) of the Federal Rules of Civil Procedure as an appropriate model.[30] Rule 30(a)(2) requires leave of court for a deposition if the deposition would result in plaintiffs as a group or defendants as a group taking more than ten depositions.[31] Two of these commenters further urged that ten depositions be permitted to each party[32] or each respondent,[33] rather than to each side. One commenter suggested five depositions for each respondent in either a single-respondent or multi-

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However, one commenter believed that a limit of ten depositions per party would be reasonable. FSR.

[28] Stephen E. Hudson letter dated December 4, 2015 ("Hudson II", incorporating anonymous blog); Zornow/Gunther/Silverman.

[29] NJSBA (citing Fed.R.Civ.P. 26(b)(2)(C)); Hudson I (same); Gibson (citing Fed.R.Civ.P. 26(b)(1)).

[30] Brune; Navistar; Hudson I; FSR; CCMC.

[31] Fed.R.Civ.P. 30(a)(2)(A)(i).

[32] FSR.

[33] CCMC.

respondent proceeding as an appropriate starting point, coupled with hearing officer discretion to enlarge the number.[34]

Three commenters supported the Commission's proposal of three depositions in a single-respondent proceeding and five depositions in a multi-respondent proceeding, subject, again, to hearing officer discretion to enlarge the number, and with certain other caveats.[35] One of these commenters suggested that the three- and five-deposition limits proposed by the Commission should be limited to fact witnesses, and not include experts.[36] A second commenter proposed that hearing officers be required to grant a party in a single-respondent proceeding leave to take more than three depositions, and a party in a multi-respondent proceeding leave to take more than five depositions.[37] Another of these commenters added that that the Division should not be permitted to notice any depositions at all.[38] Two commenters urged that the rule not set any predetermined limits, but rather that the number of depositions be left entirely to the discretion of the hearing officer.[39]

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[34] Gibson.

[35] Calfee; NJSBA; Frumento/Korenman.

[36] Calfee; *see also* CCMC (proposing ten depositions of right for each respondent, not including expert depositions, which would be separately authorized by the hearing officer).

[37] NJSBA.

[38] Frumento/Korenman.

[39] Zornow/Gunther/Silverman; Grundfest.

A number of commenters took issue with the Commission's proposal that the respondents in a multi-respondent proceeding share a fixed number of depositions.[40] These commenters generally argued that, because respondents may have divergent interests, each respondent should be entitled to take the same number of depositions.[41] In addition, several commenters – citing the ability of the Division to develop an extensive investigative record before the initiation of the proceeding – argued that the Division should not be permitted to take any depositions, or that its right to do so should be limited in various ways.[42]

Finally, two commenters urged that the Commission permit seven hours for each deposition, consistent with the practice in federal courts, rather than the proposed six hours.[43]

3. Final Rule

We are adopting the proposed amendments to Rule 233 with certain modifications. The proposed amendments to Rule 233, in conjunction with increasing the maximum prehearing time period under Rule 360, were intended to provide parties with the potential benefits of deposition discovery without sacrificing the public interest or the Commission's goal of resolving

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[40] Calfee; Hudson II (incorporating anonymous blog); FSR; Gibson; CCMC.

[41] FSR; CCMC.

[42] Brune (Division should be permitted to depose only respondents' experts, or fact witnesses with leave); Hudson I (same); FSR (Division should not be able to depose witnesses whose testimony was taken during the investigation); Frumento/Korenman (no depositions at all for Division); CCMC (Division should only be permitted to take depositions based upon proffer to hearing officer explaining why the staff were unable to take testimony during the investigation, or that the deposition is needed because of new information obtained after the completion of the investigation).

[43] Calfee; FSR; *see* Fed.R.Civ.P. 30(c).

administrative proceedings promptly and efficiently. We have weighed commenters' concerns against the need to maintain this balance.

There are sound justifications for limiting the availability of depositions in Commission administrative proceedings as compared with litigation under the Federal Rules of Civil Procedure. Typically, in a federal civil action a complaint is filed, and, because neither party can compel testimony prior to the filing of the complaint, oral depositions thereafter play a critical role in gathering preliminary and background discovery, in addition to gathering evidence for use at trial. However, in a Commission enforcement action, the complaint (in a federal court action) or the OIP (in an administrative proceeding) is premised on an evidentiary record developed through the staff's pre-filing investigation. The Division produces to respondents various materials from the investigative file—*i.e.*, non-privileged documents gathered by the Division, transcripts of investigative testimony, and disclosure of material, exculpatory facts (*Brady* material)—that provide significant guidance to respondents in determining the most important witnesses to depose.[44] Thus, as some commenters appeared to acknowledge, a principal goal of oral depositions in our administrative proceedings would be to supplement the record, not create it.[45] Given these different starting points, the fact that rules that govern discovery in federal court

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[44] Rule 230 requires early production by the Division of non-privileged documents and transcripts of testimony obtained during the investigation. Under Rule 230, which incorporates certain criminal process rights derived from criminal cases and statutes, respondents receive documents that contain material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). No analogous provision is present in the Federal Rules of Civil Procedure.

[45] *See* Brune (transcripts of investigative testimony "can reflect no meaningful exploration of important areas…."); Hudson I (same); FSR ("[R]espondents did not have an opportunity to ask [investigative] witnesses questions or to choose which witnesses to examine.").

also apply to Commission federal court enforcement actions does not provide a compelling reason for incorporating the same deposition discovery rules into our administrative practice, in particular given the Commission's strong interest in establishing a timely and efficient administrative forum.[46] Accordingly, we do not agree with commenters who advocated further expanding the proposed oral deposition rights in our administrative proceedings commensurate with Rule 30 of the Federal Rules of Civil Procedure, including ten depositions per side (or per party) as of right.

At the same time we recognize, as many commenters noted, that some cases may present unique issues or challenges that warrant affording the parties additional opportunities to conduct prehearing depositions. While the Commission's expectation is that such circumstances will rarely be present, we agree that our rules should be flexible enough to accommodate reasonable requests for a limited number of additional depositions. For this reason, the final rule includes a new provision, Rule 233(a)(3), that permits either side to move the hearing officer for leave to notice up to two additional depositions.

Paragraphs (a)(1) and (2) of amended Rule 233 retain the proposed rule's limitations on depositions as a matter of right. They provide that, in a single-respondent proceeding under the 120-day timeframe set forth in Rule 360, the respondent and the Division may each file written notices to depose up to three persons; and, in a multi-respondent 120-day proceeding, the

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[46] *See supra* note 2. In response to the commenter who also pointed us to the adjudication rules of the FTC, we note that agency practice is varied on this issue. *See* Gibson. A number of agencies do not permit prehearing discovery depositions except with respect to witnesses who will be unavailable at the hearing. *See, e.g.*,12 CFR 1081.209 and 77 FR 39057, 39073 (June 29, 2012) (Consumer Financial Protection Bureau); 17 CFR 10.44 and 41 FR 2508, 2509 (Jan. 16, 1976) (Commodity Futures Trading Commission); 12 CFR 308.27 (Federal Deposit Insurance Corporation).

respondents collectively may file joint written notices to depose up to five persons and the Division may file written notices to depose up to five persons.[47] However, because we are persuaded that a seven-hour limit to depositions, rather than the six-hour limit we proposed, balances the Commission's goal of timely and efficient administrative proceedings and the benefits of allowing parties more time to depose witnesses, we have revised paragraph (j)(1) of Rule 233 to provide for a seven-hour limit to depositions.[48] Amended paragraph (a)(5) further makes clear that the fact that a witness testified during an investigation does not preclude the deposition of that witness.[49]

The final rule limits depositions to 120-day proceedings as proposed. Thus, parties will not be permitted to notice depositions in proceedings where the initial decision is placed on either the 30- or 75-day timeline under amended Rule 360. As adopted, Rule 360 provides for the hearing in proceedings placed on the 120-day timeline to commence between four and ten months from the date of service of the OIP. We anticipate that this extended period will provide sufficient time for parties to take the allotted number of depositions, along with any additional depositions that may be permitted under new paragraph (a)(3) of the Rule (discussed below), and to complete their other prehearing preparation. Further, as discussed below, and as reflected in amended Rule 221, we expect that the depositions each party plans to notice, including the

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[47] Federal Rule of Civil Procedure 30(a)(2)(A) similarly sets a deposition limit per side, not per party. *See* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* section 2104 (3d ed.).

[48] This is consistent with the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 30(d)(1).

[49] This provision has been renumbered from the proposed rule, where it was numbered paragraph (a)(4).

identities of the proposed deponents, will be one of the topics discussed at any initial prehearing conference.[50]

We disagree with commenters who urged that the Division not be permitted to notice depositions (or have its deposition rights limited) in view of the Division's ability to take investigative testimony before the proceedings are instituted. Investigative testimony generally is directed at ascertaining facts in order for the staff to determine whether to recommend that the Commission authorize an action for violations of the federal securities laws. Once the investigative record has been sifted through and the Commission has instituted an administrative proceeding, issues relevant to a claim or defense may become clarified and warrant new or additional focus in discovery.[51] Thus, the prehearing discovery context is sufficiently different from the investigation such that the Division should be entitled to the same discovery rights as respondents in order to prepare its case for the hearing.[52] Moreover, information gathered from depositions taken by the respondents might reveal the need for the Division to depose other persons. Also, in some instances, witnesses decline to answer questions in investigative testimony based upon assertion of attorney-client privilege or the Fifth Amendment, but those

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[50] *See infra* discussion at section H.

[51] As just one example, the Commission's experience has been that issues relating to possible reliance on professionals are not always clarified during the investigation. Today the Commission is also amending Rule 220 to require that respondents state in an answer whether they relied on professionals. This early statement will enable the Division to consider this issue in formulating its deposition plan.

[52] *See SEC v. Saul,* 133 F.R.D. 115 (N.D. Ill. 1990); *SEC v. Espuelas*, 699 F. Supp. 2d 655 (S.D.N.Y. 2010). "There is no authority which suggests that it is appropriate to limit the SEC's right to take discovery based upon the extent of its previous investigation into the facts underlying the case." *SEC v. Sargent,* 229 F.3d 68, 80 (1st Cir. 2000) *(*relying on *Saul*).

protections might no longer apply by the time of depositions in an administrative proceeding. Thus, many reasons support the need for the Division to have the same rights as respondents to conduct depositions.

New paragraph (a)(3) of amended Rule 233 permits the hearing officer in a 120-day proceeding to grant either side leave to take up to two additional depositions beyond those permitted under paragraphs (a)(1) and (2). This means that, in proceedings involving a single respondent, the hearing officer may permit up to a maximum of five depositions for the respondent and five depositions for the Division. In proceedings involving multiple respondents, the hearing officer may permit up to a maximum of seven depositions for all respondents, collectively, and seven depositions for the Division.

Paragraph (a)(3) is intended to permit a limited number of additional depositions in compelling circumstances without significantly increasing the burdens for all the parties or undermining the goal of providing a prompt and efficient administrative forum. As discussed above, we have increased the prehearing period in 120-day proceedings to a maximum of ten months. As amended, Rule 233 will now permit parties to notice up to seven depositions of witnesses from among the categories set forth in amended Rule 232(e), compared with no depositions permitted under the current rule (except for witnesses likely to be unavailable at the hearing). We believe that these new deposition opportunities will afford respondents and the Division additional opportunities to develop the record without compromising the hearing schedule.

A motion for additional depositions under paragraph (a)(3) must be filed no later than 90 days prior to the hearing date. We anticipate that this deadline will give the parties sufficient time at the outset of a proceeding to identify additional witnesses they wish to depose, and to

confer with other parties to determine whether they intend also to file a motion and, in a multi-respondent proceeding, whether there are any common putative deponents, before moving the hearing officer for leave. This deadline should also enable any motions to be resolved and additional depositions to be taken in a timely manner, consistent with the needs of the parties to prepare for the hearing.

To support a prompt determination on a motion for additional depositions, paragraph (a)(3)(i) establishes a simplified motion practice leading to an expedited decision from the hearing officer. Any party opposing the motion must file its opposition, if any, within five days; the motion and any oppositions are each limited to seven pages; and neither separate points and authorities nor replies are permitted.[53] The proceeding will not automatically be stayed during the pendency of a motion. Further, under paragraph (a)(3)(iii), if the moving party proposes to take the additional depositions upon written questions, as provided for in Rule 234, the motion must state that fact, and the written questions must be submitted with the motion for additional depositions.

Paragraph (a)(3)(ii) establishes two requirements for a grant of additional depositions. First, the additional depositions must satisfy the requirements of Rule 232(e). Amended Rule 232(e), among other things, requires the hearing officer, upon application, to quash or modify a deposition if the deposition would be unreasonable, oppressive, unduly burdensome, would unduly delay the hearing, or if the proposed deponent does not fall within one of the three

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[53] We have made separate conforming amendments to Rule 154 (Motions), whereby the requirements of that rule do not apply where another rule expressly applies to a particular motion.

categories of witnesses authorized for depositions under Rule 232(e)(3). By requiring that any additional depositions satisfy the requirements of Rule 232(e), we intend to incorporate the standards under that Rule into the motion practice under paragraph (a)(3); opposing parties do not need to file a separate application to quash.[54] However, for any depositions a party may take as a matter of right, the Commission or a hearing officer may quash such a deposition notice following the filing of a motion made pursuant to Rule 232(e).

If the requested additional depositions satisfy the threshold requirements of Rule 232(e), the moving side must also demonstrate that it has a compelling need to take the additional depositions. To make this showing the moving side must, in its motion, identify each witness that it intends to depose as of right and the additional witnesses that it seeks to depose; describe the role of each witness and each proposed additional witness; describe the matters concerning which each witness and each proposed additional witness is expected to be questioned and why each deposition is necessary to the side's arguments, claims, or defenses; and show that the additional depositions requested will not be cumulative or duplicative.

Paragraph (b) of amended Rule 233 retains the existing procedure whereby a party may seek leave of the hearing officer to take the deposition of a witness who will likely be unavailable to attend or testify at the hearing. A deposition granted under paragraph (b) does not count against the moving side's permissible number of depositions by right or additional depositions under paragraph (a). Nothing in the rules as amended changes the current practices or standards for obtaining leave to depose individuals under paragraph (b). As before, a

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[54] This does not preclude proposed deponents or other persons described in Rule 232(e)(1) from filing an application under that rule to quash or modify a notice of deposition or a subpoena.

deposition under Rule 233(b) is available only upon a showing that the prospective witness will likely give testimony that is material to the hearing; that it is likely the prospective witness 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 absence of the witness was procured by the moving party); and that the taking of the deposition will serve the interests of justice. These standards should prevent this provision from being used as a means to circumvent the number of depositions allowed under Rule 233(a).

We received no comments on the remaining proposed amendments to Rule 233, with the exception, as noted above, of the six-hour length of depositions. The final rule changes this to seven hours.[55]

C. Amendments to Rule 232 (Subpoenas)

1. Proposed Rule

Current Rule 232 addresses the availability of, and standards for issuing, subpoenas requiring the attendance of witnesses at hearings and the production of documents. We proposed amendments to Rule 232 to correspond with the new provisions on depositions in Rule 233. As proposed, amended Rule 232(e)(1) permits a person who is subject to a deposition notice, or a party, to move to quash or modify the notice. This proposed amendment is intended to promote efficiency in the discovery process by allowing persons to move at the notice stage, rather than

[55] We note that we have made certain other minor changes to this rule from the proposed rule, including: (1) deleting the requirement that a notice of deposition describe the scope of the testimony to be taken; (2) requiring that each party bear its own transcription costs; (3) clarifying that the deposition officer must furnish a copy of the transcript to any party or the deponent, as directed by the party or person paying the charges; and (4) providing that any party may seek relief from the hearing officer with respect to disputes over the conduct of a deposition. These changes are generally intended to simplify the rule text or to clarify minor procedural matters.

waiting for a party to request the issuance of a subpoena to compel attendance. Proposed paragraphs (e)(2) and (3) of the rule establish additional standards governing the hearing officer's decision on an application to quash or modify a notice of deposition or subpoena. Proposed paragraph (e)(2) adds undue delay of the hearing as a ground for quashing or modifying a deposition notice or subpoena (to the existing grounds that compliance would be unreasonable, oppressive, or unduly burdensome). This amendment requires the hearing officer or the Commission to consider the delaying effect of compliance with a subpoena or notice of deposition, and is intended to promote the efficient use of time for discovery during the prehearing period.

Proposed paragraph (e)(3) requires that the hearing officer or the Commission quash or modify the subpoena unless the requesting party demonstrates that the proposed deponent is a fact witness (except that those witnesses whose only knowledge of relevant facts arose from the Division's investigation or the proceeding may not be deposed), an expert witness designated pursuant to Rule 222(b), or a document custodian (except those Division or Commission personnel who have custody of documents or data that were produced by the Division to the respondent), and that the notice or subpoena otherwise satisfies the requirements of Rule 233(a). This provision is intended to foster use of depositions where appropriate and promote meaningful discovery, within the limits of the number of depositions provided per side pursuant to proposed Rule 233(a).

Proposed Rule 232(f) requires each party to pay the fees and expenses of its own expert witnesses.

2. Comments Received

One commenter submitted for our consideration several links to a securities blog that criticized many of the proposed changes to our Rules of Practice.[56] With respect to Rule 232, the author of the blog made two principal comments. The author took issue with the requirement of Rule 232 that a subpoena be issued by the hearing officer, as compared with Rule 45 of the Federal Rules of Civil Procedure, which permits parties to issue subpoenas without the judge acting as a "gatekeeper." The author asserted that hearing officers, "at the prodding of" the Division, permit only limited discovery in administrative proceedings, and criticized the proposed changes to Rule 232 for not addressing this situation. The author also objected to the requirement of proposed Rule 232(e)(3) that a subpoena be quashed or modified unless the requesting party demonstrates that the proposed deponent is a fact witness, an expert witness, or a document custodian. The author argued that, instead, respondents should be permitted to use their allotted number of depositions to notice persons they deem important to their defense irrespective of such limitations.

3. Final Rule

We are adopting amended Rule 232 substantially as proposed, with one change to correspond to changes we have made to Rule 220 ("Answer to Allegations"). As is discussed below, we have adopted an amendment to Rule 220 that requires respondents to state in the answer whether they relied on professionals. In conjunction with this change, we have amended Rule 232(e)(3)(i) to clarify that a proposed deponent may include a fact witness relative to any claim

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[56] Hudson II.

of the Division, any defense, or anything else required to be included in an answer pursuant to Rule 220(c).

With regard to the one comment referenced above, we note, first, that Rule 232 is based on Section 555(d) of the Administrative Procedure Act ("APA"),[57] which does not contemplate that parties to agency proceedings would themselves issue subpoenas.[58] The grounds for a hearing officer denying a request to issue a subpoena under Rule 232 – that it is "unreasonable, oppressive, excessive in scope, or unduly burdensome" – are also consistent with well-established judicial standards,[59] and we have no evidence that hearing officers are not acting diligently and in good faith in their consideration of current requests for subpoenas, or that they would not do so in implementing the standards for quashing or modifying deposition subpoenas set forth under the amended rule.

Second, depositions impose costs and burdens not just on the party taking the deposition but on all other parties to the proceeding and upon the deponent. The proposed rule was based on the Commission's experience that fact witnesses, expert witnesses, and document custodians are

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[57] *1995 Release*, 60 FR at 32764.

[58] 5 U.S.C. 555(d); *Attorney General's Manual on the Administrative Procedure Act*, section 6(c) (1947) ("*Attorney General's Manual*").

[59] *Attorney General's Manual*, section 6(c) ("[A]gencies may refuse to issue to private parties subpoenas which appear to be so irrelevant or unreasonable that a court would refuse to enforce them."); *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 2004) (under Federal Rule of Civil Procedure 45, a court has the power to quash or modify a subpoena if it is unreasonable and oppressive, and subjects a party to undue burden).

the individuals most likely to have information relevant to the issues to be decided.[60] We are not aware of, nor did any commenter suggest, any other categories of witnesses whose deposition would be necessary in administrative proceedings. If there are instances in which a party requires the testimony of a witness who does not fit within the three categories to testify, the party may seek to call that witness at the hearing, either by voluntary appearance or by subpoena of the witness, if otherwise permitted under the Rules.

D. Rule 141 (Orders and Decisions; Service of Orders Instituting Proceedings and Other Orders and Decisions)

1. Proposed Rule

Rule 141(a)(2)(iv)[61] contains the requirements for serving an OIP on a person in a foreign country. The current rule allows for service of an OIP 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 proposed to amend this rule so 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 rule, unless prohibited by the foreign country's law, service can be made by delivering a copy of the OIP to

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[60] In contrast to Federal Rule of Civil Procedure 30(b)(6), neither current Rule 232(e)(3) nor Rule 233 permits depositions of a public or private corporation, partnership, association, governmental agency, or other entity. Such depositions are not permitted under the amended Rules of Practice.

[61] 17 CFR 201.141(a)(2)(iv).

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 also allows 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 covers situations where existing agreements do not apply, or efforts to serve under such agreements are or would be unsuccessful.

We also proposed to amend Rule 141(a)(3), which requires the Secretary to maintain a record of service on parties, to make clear that in instances where a division of the Commission (rather than the Secretary) serves an OIP, the division must file with the Secretary either an acknowledgement of service by the person served or proof of service.

2. Final Rule

We did not receive comments on this aspect of the proposal and are adopting the amendments as proposed. In addition to clarifying that proper service on persons in foreign countries may be made by any of the above methods, the rule provides certainty regarding whether service of an OIP has been effected properly and allows the Commission to rely on international agreements in which foreign countries have agreed to accept certain forms of service as valid. The final amendment provides that a division that serves an OIP must 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.

E. Rule 161 (Extensions of Time, Postponements and Adjournments)

Rule 161[62] governs extensions of time, postponements, and adjournments requested by parties. Under 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. In recognition of the important role of settlement in administrative proceedings, we proposed to amend Rule 161(c)(2) to allow a stay pending Commission consideration of settlement offers to also stay the timelines set forth in Rule 360.[63] All the other requirements for granting a stay under the current rule would remain unchanged. The Commission did not receive any comments on this aspect of the proposal. We are adopting the amendments as proposed.

F. Rule 180 (Sanctions)

Current 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 proposed 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. The person would have the same right to review of

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[62] 17 CFR 201.161.

[63] We are also adopting a conforming amendment to Rule 360(a)(2)(ii) to include a cross-reference to amended Rule 161(c)(2).

the exclusion or suspension by filing a motion to vacate with the Commission. We did not receive any comments on this aspect of the proposal and are adopting the rule as proposed, with the addition of one ministerial edit to Rule 180(c).

As currently drafted, Rule 180(c) provides that the Commission or hearing officer may enter a default pursuant to Rule 155, dismiss *the case*, decide the particular *matter* at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that *matter* if a person fails to (1) make a filing required under the Rules of Practice; or (2) cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to Rule 180(b).[64] We are amending the Rule to substitute the phrase "one or more claims" for the phrase "the case," and to substitute the word "claim" for the word "matter." These non-substantive changes are designed to more accurately reflect the terminology used in administrative proceedings but are not intended to, and do not, change the substance of the Rule.

G. Rule 220 (Answer to Allegations)

1. Proposed Rule

Current Rule 220 sets forth the requirements for filing answers to allegations in an OIP.[65] Among other things, it requires a respondent to state in the answer whether the respondent is asserting any defenses, including res judicata and statute of limitations.[66] We proposed amendments to Rule 220 to emphasize that a respondent must affirmatively state in an answer

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[64] Emphasis added.

[65] 17 CFR 201.220.

[66] *Id.*

whether the respondent is asserting any avoidance or affirmative defenses, including but not limited to res judicata, statute of limitations or reliance even if such theories are "not technically considered affirmative defenses."[67] Timely assertion of such theories, we explained, "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."[68]

2. Comments Received

Commenters generally opposed the proposed amendment and requested that it be withdrawn. Commenters' principal contention was that "reliance on counsel is not a defense required to be raised in an answer, but simply goes to the evidence of whether a respondent acted in good faith."[69] Commenters also argued that the proposed amendment prejudices respondents, provides an unfair advantage to Division staff in administrative proceedings, improperly requires respondents to disclose their trial strategy, and infringes on the attorney work-product privilege.[70]

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[67] 80 FR at 60095. *Compare* Fed. R. Civ. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.") "Generally speaking," Federal Rule of Civil Procedure 8(c)'s reference to "an avoidance or affirmative defense" "encompasses two types of defensive allegations: those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, and those that concern allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer." 5 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* section 1271 (3d ed.). As discussed below, in the final rule we have clarified the reference to "reliance" in the proposed rule.

[68] 80 FR at 60095.

[69] NJSBA (citing *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (holding that "reliance on the advice of counsel need not be a formal defense")); *see also* Hudson II (citing anonymous blog post) and *infra* note 72.

[70] NJSBA; Hudson II.

3. Final Rule

We continue to believe that timely assertion of reliance would focus the use of prehearing discovery and foster early identification of key issues, so that they may be explored in discovery and depositions, and, as a result, make the discovery process more effective and efficient. We therefore are adopting the amended Rule substantially as proposed, with one clarifying modification. The final rule is not intended to change the substantive law regarding reliance or any of the securities laws. The Commission recognizes that, in cases involving scienter-based misconduct, the Division bears the burden of proof on demonstrating that the respondent acted with scienter.

However, we have modified the final rule to give more content to and clarify the requirement that respondents disclose "reliance." As adopted, the final rule now requires a respondent to state in the answer "whether the respondent relied on the advice of counsel, accountants, auditors, or other professionals, in connection with any claim, violation alleged, or remedy sought." The reference to accountants, auditors, and other professionals reflects that, in addition to arguing that they relied on the advice of counsel, respondents in Commission administrative proceedings (and defendants in Commission civil enforcement actions) often assert that the respondent (or defendant) relied on such professionals in connection with the conduct alleged.[71] The amended rule therefore requires respondents to state in their answer whether they intend to

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[71] *See, e.g.*, Answer of Respondent Jim Hopkins at 25, ¶ 4, *In re Flannery*, No. 3-14081 (Oct. 26, 2010); Answer of John Patrick ("Sean") Flannery to Order Instituting Administrative and Cease-and-Desist Proceedings at 12, ¶¶ 5, 6, *In re Flannery*, No. 3-14081 (Oct. 26, 2010); Answer of Defendant Samuel E. Wyly, Doc. 58 at 29, *SEC v. Wyly*, 10-cv-5760 (S.D.N.Y.) (Apr. 28, 2011) ("Plaintiff's claims are barred in whole or in part because Defendant relied in good faith upon the judgment, advice, and counsel of professionals."); *see also* NJSBA.

raise the issue of reliance on professional advice in the proceeding, whether as part of an assertion of a formal affirmative defense or an argument in response to the claims alleged in the OIP on which the Division retains the burden of proof. The amended rule provides that failure to do so may be deemed a waiver.

Contrary to the comments discussed above, the Commission believes this change will not materially alter current practice and will not unfairly advantage the Division because, as noted, even in the absence of this clarification, respondents often assert reliance in their answers to Commission OIPs.[72] Finally, this amendment would align administrative proceedings with civil litigation in generally aiming to eliminate surprise and identifying the issues for the hearing.[73]

H. Rule 221 (Prehearing Conference)

Rule 221 permits a hearing officer to direct the parties to meet for an initial prehearing conference and includes a list of subjects to be discussed.[74] We proposed amendments to Rule 221(c) to add depositions and expert witness disclosures or reports to the list of subjects to be discussed at the prehearing conference. We received no comments on this aspect of the proposal.

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[72] Whether, and to what extent, the assertion of reliance on advice or involvement of counsel in the answer to the OIP results in the waiver of the attorney-client privilege depends on the facts of any given proceeding. As a general matter, "the attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). In determining whether the privilege is waived, hearing officers should consider how respondents have framed their reliance on counsel in the answer, the allegations in the OIP, and the facts and circumstances underlying the assertion of reliance. The parties may discuss these issues at the prehearing conference pursuant to Rule 221.

[73] *See Pierce v. Pierce*, 5 F.R.D. 125 (D.D.C. 1946); c*f.* Fed.R.Civ.P. 1.

[74] 17 CFR 201.221(b).

We are adopting the amendment as proposed with respect to depositions and expert witness disclosures. The addition of depositions to certain proceedings will potentially raise issues, including the identity of the persons to be deposed and the timing of any depositions, that will benefit from early discussion between the parties and with the hearing officer. At a prehearing conference, the parties and the hearing officer may discuss the timing of depositions, the proposed deponents, whether any party will be making a motion seeking leave to conduct additional depositions pursuant to amended Rule 233, and any issues any party foresees arising in connection with the proposed depositions.

In addition, we are modifying Rule 221(c) in two other respects. First, in response to comments advocating amendments that would require a date certain by which the Division should complete its document production under Rule 230,[75] we are amending Rule 221(c) to include in the list of subjects to be discussed at a prehearing conference the timing for completion of production of documents as set forth in Rule 230. The Commission expects that the Division will continue its practice of timely producing documents, and any potential concerns surrounding the completion of document production should be discussed with the hearing officer at a prehearing conference.[76]

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[75] *See* Calfee (suggesting rule should require production to be completed not later than seven days prior to the deadline for filing an answer); Gibson (suggesting a time period of 45 days from initiation of a proceeding).

[76] Rule 230(d) provides, *inter alia*, unless otherwise ordered by the Commission or the hearing officer, the Division shall commence making documents available to a respondent for inspection and copying pursuant to the section no later than 7 days after service of the order instituting proceedings. 17 CFR 201.230(d).

Second, we are amending Rule 221(c)(8) to clarify that the subjects to be discussed at the prehearing conference include the filing of any motion pursuant to Rule 250. As amended, Rule 250 contemplates the filing of various types of dispositive motions (*i.e.*, motion for a ruling on the pleadings, motion for summary disposition, and motion for a ruling as a matter of law following completion of a case in chief). Parties may discuss at a prehearing conference whether they anticipate filing any motions pursuant to amended Rule 250, and the timing of such motions.[77]

I. Rule 222 (Prehearing Submissions)

1. Proposed Rule

Rule 222(b)[78] provides that a party who intends to call an expert witness shall disclose information related to the expert's background, including qualifications, prior testimony, and publications. We proposed 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 publications authored or co-authored by their expert witness. As proposed, Rule 222(b) limits the list of proceedings to the previous four years, and limits the list of publications to the previous ten years.

The proposed amendment requires disclosure of a written report for a witness retained or specially employed to provide expert testimony in the case, or for an employee of a party whose duties regularly involve giving expert testimony. The proposed amendment outlines the elements of that written report, including a complete statement of all opinions the witness will

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[77] *See infra* discussion of Rule 250 at Section M.

[78] 17 CFR 201.222.

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.

As proposed, the amendment provides for two categories of information protected from discovery: (1) drafts of any report or other disclosure 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, unless the communications related to the expert's compensation, or certain facts, information, or assumptions provided by the attorney to the expert.

2. Comments Received

We received one comment on this aspect of the proposal. The commenter generally supported the amendment in light of the similarity of the proposed rule to Rule 26(b) of the Federal Rules of Civil Procedure but urged the Commission to adopt a rule allowing the parties to present direct expert testimony at all hearings.[79]

3. Final Rule

We are adopting the rule substantially as proposed, with one ministerial edit. As proposed, the rule text provided that communications between a party's attorney and the party's expert witness who is *identified* under this section need not be furnished, subject to certain exceptions. Consistent with the requirements for expert witness disclosures and expert reports in the Federal Rules of Civil Procedure, and to align the rule text with the description of the amendments in the

[79] Gibson.

proposing release, we have revised the rule to clarify that the protections afforded to communications between a party's attorney and the party's expert witness under section (b)(2) apply to communications with experts who are required to provide a report under the rule.[80]

We believe the amendments to Rule 222 will promote efficiency in both prehearing discovery and the hearing.[81] Moreover, the final rule comports with current practices of some hearing officers, who have required such expert reports in proceedings before them.[82]

The final rule requires each party who intends to call an expert witness to submit a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony during the previous four years, and a list of publications authored or co-authored by the expert in the previous ten 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

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[80] Section (b) only addresses experts whom a party intends to call at the hearing. The rule does not cover consulting experts, i.e., experts who have been retained or specially employed in anticipation of litigation or to prepare for the hearing, but who are not expected to be called as witnesses at the hearing.

[81] *See* Fed.R.Civ.P. 26(b)(4), (a)(2), respectively.

[82] *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 (last visited July 11, 2016) (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.").

testimony in the case. Consistent with the proposal, amended Rule 222 protects from disclosure (1) draft reports or other disclosure required to be submitted in final form, and (2) communications between a party's attorney and the party's expert witness required to provide a report under the rule, 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.

We disagree with the comment suggesting that the rule be altered to require that expert witnesses testify at the hearing in all cases. Hearing officers currently use expert reports as evidence and permit direct examination as necessary,[83] a practice that we understand comports with the practice followed by a number of district judges in federal court bench trials. We believe that the final rule furthers the goal of efficiency without compromising a respondent's ability to present direct expert testimony.

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[83] *See, e.g., Leslie A. Arouh*, Admin Proc. File No. 3-10884, 2003 SEC LEXIS 3210 (Feb. 19, 2003) (ordering production of respondent's expert report as evidence, "to be fleshed out as needed by further direct testimony, and subject to cross examination."); *Reliance Financial Advisors, LLC*, Admin Proc. Ruling Rel. No. 2627, 2015 SEC LEXIS 1703 (May 4, 2015) (order following prehearing conference stating that a hearing officer "will accept the Division's expert report as testimony but will expect brief direct testimony by the expert during the hearing as well"); *Ambassador Capital Management, LLC*, Admin Proc. Ruling Rel. No. 1149 n.1, 2014 SEC LEXIS 45 (Jan. 7, 2014) (order setting prehearing schedule stating, "[a]t the prehearing conference, it was established that any party offering expert testimony shall be prepared to conduct direct examination of the expert for no more than forty-five minutes at the hearing").

J. Rule 230 (Enforcement and Disciplinary Proceedings: Availability of Documents for Inspection and Copying)

1. Proposed Rule

After the institution of proceedings, Rule 230(a)[84] requires the Division to make available to respondents certain documents obtained by the Division in connection with an investigation. Rule 230(b)[85] provides a list of documents that may be withheld from this production. We proposed to amend Rule 230(b) to provide that the Division may redact certain sensitive personal information from documents that will be made available, unless the information concerns the person to whom the documents are being produced. We also proposed 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.

2. Comments Received

One commenter supported the proposal but advocated additional amendments to Rule 230.[86] The commenter argued that, in addition to the categories of documents listed in Rule 230(a)(1)(i), the rule should require disclosure by the Division of all persons that the Division interviewed or took testimony from during the investigation, including a summary of the factual topics covered in each interview.[87] The commenter also advocated amendments to Rule 230(b) that would preclude Division staff from introducing, as evidence in administrative proceedings,

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[84] 17 CFR 201.230(a).

[85] 17 CFR 201.230(b).

[86] CCMC.

[87] *Id.*

any Wells submissions, pre-Wells submissions and white papers submitted by a party to the proceeding. This commenter argued that the same policy arguments supporting an exclusion of settlement negotiations from disclosure also apply to the content of Wells submissions.[88]

3. Final Rule

We are adopting Rule 230 as proposed, with one ministerial change unrelated to the proposal.[89] The final rule permits the Division to redact an individual's social security number, an individual's date-of-birth, 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. We believe this amendment provides an important safeguard that should enhance the protection afforded to sensitive personal information. It is also consistent with privacy rules of some federal district courts.[90] In addition, final Rule 230(b) provides 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. As we explained in the proposal, this amendment is consistent with the important public policy interest in candid settlement negotiations,[91] and we believe it will help to preserve the confidentiality of settlement

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[88] *Id.*

[89] Specifically, we are amending the reference in current Rule 230(a)(1)(vi) to the Division of Market Regulation to reflect the current name of the Division—*i.e.,* the Division of Trading and Markets.

[90] *See, e.g.,* Fed.R.Civ.P. 5.2(a); DDC Local Civ. R. 5.4(f).

[91] *See generally,* Federal Rule of Evidence 408 ("Compromise Offers and Negotiations"), *Advisory Committee Notes*; 2 McCormick on Evid. section 266 (7th ed.).

discussions and safeguard the privacy of potential respondents with whom the Division has negotiated.

We decline to expand Rule 230 to require the Division to disclose all persons interviewed during the investigation, or to require the staff to produce summaries of all such interviews, as suggested by one commenter. Rule 230(a) generally requires the Division to make available for inspection and copying documents obtained by the Division from persons not employed by the Commission during the course of its investigation prior to the institution of proceedings.[92] This includes each subpoena issued during the investigation, all other written requests to persons not employed by the Commission to provide documents or to be interviewed, the documents turned over in response to any such subpoenas or other written requests, all transcripts and transcript exhibits, and any other documents obtained from persons not employed by the Commission.[93] Rule 232 permits a party to request the issuance of subpoenas requiring the production of documents and subpoenas compelling the testimony of witnesses. The Commission believes that, taken together, these discovery tools will enable the parties to identify witnesses who may possess relevant information and to determine who should be deposed prior to the hearing.[94]

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[92] *See* 17 CFR 201.230(a).

[93] 17 CFR 201.230(a)(1)(i) – (v).

[94] We do not believe it is necessary or appropriate to require disclosure by the Division of every person interviewed or deposed during an investigation, or to require the Division to prepare summaries of all such interviews, as suggested by the commenter. In its fact-gathering role, Division staff may interview dozens of potential witnesses in the course of an investigation that can span many months. Such interviews often serve to narrow the scope of an investigation, and the persons interviewed ultimately may bear no relevance to the proceedings instituted by the Commission.

With the exception of certain final inspection or examination reports that the Division intends to use at the hearing, documents prepared by Commission staff are treated as attorney work-product, and are not required to be produced pursuant to Rule 230.[95] The Commission believes it appropriate to continue the current practice of allowing the hearing officer to evaluate attorney work-product production disputes on a case-by-case basis.[96] This comports with federal district court practice for resolving discovery disputes concerning the production of attorney work-product under Federal Rule of Civil Procedure 26(b).[97]

The final rule will not, as one commenter suggested, prohibit the use of Wells submissions and white papers as evidence in administrative proceedings. A Wells notice provided to a respondent by the Division states that the Commission may use the information contained in such a submission as an admission, or in any other manner permitted by the Federal

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[95] *See* 17 CFR 201.230 (b)(1)(ii); *see also 1995 Release*, 60 FR at 32762 (comments (a) and (b) to Rule 230). Work product includes any notes, working papers, memoranda or other similar materials, prepared by an attorney in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *see also* Fed. R. Civ. P. 26(b)(3) and (b)(5).

[96] Rule 230(c) authorizes the hearing officer to review any documents withheld by the Division pursuant to Rule 230(b)(1)(i) – (iv). *See, e.g., Piper Capital Management, Inc. et al.,* Admin. Proc. Rel. No. 577, 1999 SEC LEXIS 301 at *20 (Jan. 15, 1999) (granting motion for *in camera* inspection of documents comprising, reflecting or summarizing off-record interviews which Division conducted with one witness"); *Jeffrey R. Patterson, et al.* Admin. Proc. File No. 3-10936, 2003 SEC LEXIS 3217 (finding, following *in camera* review, that staff's handwritten notes of witness's interview did not contain exculpatory evidence and thus were not required to be made available under Rule 230).

[97] *See, e.g., SEC v. NIR Group*, 283 F.R.D. 127; 2012 U.S. Dist. LEXIS 116062 at *21, *23 (E.D.N.Y. Aug. 17, 2012) (denying, in part, defendant's motion to compel following *in camera* review of sample Division interview notes and memoranda relating to same); *SEC v. Treadway, et al.*, 229 F.R.D. 454, 455-56, 2005 U.S. Dist. LEXIS 15167, at *4-5 (S.D.N.Y. July 26, 2005) (following *in camera* review, upholding Magistrate Judge determination that proffer session notes prepared by Division attorneys were protected attorney work-product).

Rules of Evidence, or for any of the Routine Uses of Information described in Form 1662, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena."[98] A respondent is therefore given notice prior to providing any Wells submissions of the various uses the Division may make of the information included therein.

The Commission does not treat Wells submissions as settlement materials.[99] The procedures for submitting offers of settlement to the Commission are governed by Rule 240.[100] Those procedures require, among other things, an offer of settlement signed by the person making the offer, as well as a waiver by the person of, among other things, the right to claim bias or prejudgment by the Commission based on the consideration of or discussions concerning settlement of all or any part of the proceeding.[101] In contrast, the Wells submission process is governed by Rule 5(c) of the Commission's Informal and Other Procedures, which provides persons who become involved in preliminary or formal investigations the opportunity to voluntarily submit "a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation."[102]

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[98] Form 1662 can be found at: http://www.sec.gov/about/forms/sec1662.pdf.

[99] *Cf. In re IPO Securities Litig.*, 2003 U.S. Dist. LEXIS 23102 at *13 (S.D.N.Y. Jan 12, 2004) ("Wells submissions are not in themselves settlement materials, although they may sometimes contain offers of settlement").

[100] 17 CFR 201.240.

[101] 17 CFR 201.240(b) and (c)(5).

[102] 17 CFR 202.5(c).

The Commission's longstanding view has been that Wells submissions "will normally prove most useful in connection with questions of policy, and on occasion, questions of law, *bearing upon the question of whether a proceeding should be initiated*, together with considerations relevant to a particular prospective defendant or respondent that might not otherwise be brought clearly to the Commission's attention."[103] We believe this approach remains sound because it furthers the Commission's goal of having before it the position of persons under investigation at the time it is asked to consider initiating an enforcement action. In addition, we believe that the credibility of a respondent's Wells submission could be diminished if the final rule restricted the use of such submissions in subsequent administrative proceedings. Such a rule could enable a potential respondent to freely deny, or make arguments fundamentally inconsistent with, statements or claims made in prior Wells submissions. We therefore believe it is appropriate not to treat Wells submissions as settlement materials. Rather, hearing officers may continue the current practice of determining whether, under the facts and circumstances, a Wells submission should be excluded from a proceeding.

K. Rule 234 (Depositions Upon Written Questions)

Current Rule 234 contains procedures for taking depositions through 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 proposed 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. We did not receive any comments on this aspect of the

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[103] *See Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations,* Securities Act Rel. No. 5310, 1972 SEC LEXIS 238 (Sept. 27, 1972) (emphasis added).

proposal and are adopting the amendment as proposed, with one ministerial change to paragraph (a), which in the proposal inadvertently referred to Rule 232 instead of Rule 233. The amendment is intended to provide a clear standard under which the hearing officer or Commission would review such a motion. The amendment replaces 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.

L. Rule 235 (Introducing Prior Sworn Statements or Declarations)

1. Proposed Rule

Current Rule 235[104] allows the introduction of certain prior sworn statements into the record. Current Rule 235(a) sets forth the standards for persons making a motion to introduce prior sworn statements of non-party witnesses. We proposed to amend Rule 235(a) to include in the list of prior sworn statements depositions taken pursuant to Rules 233 or 234, as well as investigative testimony and declarations taken under penalty of perjury pursuant to 28 U.S.C. 1746. In addition, we proposed to add new paragraph (b) to Rule 235 to permit the use of statements made by a party or a party's officers, directors, or managing agents, and to clarify that such statements may be used by an adverse party for any purpose. Consistent with the proposed amendments to Rule 235(a), the amendments to new Rule 235(b) included depositions taken pursuant to Rules 233 or 234, as well as investigative testimony and declarations taken under penalty of perjury pursuant to 28 U.S.C. 1746.

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[104] 17 CFR 201.235.

2. Comments Received

We received one comment on this aspect of the proposal. A securities blog entry cited by the commenter objected to the introduction of sworn statements under current Rule 235.[105] The author of the blog asserted, without providing support, that hearing officers currently admit unreliable investigative testimony into the record and that the proposal endorses this practice. The author opposed the admission of investigative testimony and declarations and argued that the proposal would unfairly benefit the Division.

3. Final Rule

We are adopting the amendments as proposed. We believe that current Rule 235 contains sufficient safeguards to prevent the introduction of unreliable testimony. For instance, to introduce a prior sworn statement under current Rule 235(a), a person must make a motion setting forth reasons for introducing the statement. The standard for granting such a motion focuses on the admissibility and relevance of the statement, the availability of the witness for the hearing, and the presumption favoring oral testimony of witnesses in an open hearing. The statements that will be admissible pursuant to amended Rule 235(a)—including statements made pursuant to 28 U.S.C. 1746, deposition testimony, investigative testimony, and other sworn statements—will be subject to these standards.

Amended Rule 235(b) will permit an adverse party to seek the admission of statements made by a party or the party's officer, director, or managing agent. A party opposing the

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[105] *See* Hudson II (citing anonymous blog).

introduction or use of such statements may still object to their admission under amended Rule 320 to the extent such evidence is "irrelevant, immaterial, unduly repetitious, or unreliable."[106]

M. Rule 250 (Dispositive Motions)

Rule 250 currently provides that a party may move for summary disposition after a respondent's answer is filed and documents have been made available to the respondent and sets forth the procedures and standards governing such a motion. If the "interested division," *e.g.*, the Division of Enforcement, has not completed its case in chief, a motion for summary disposition may be made only with leave of the hearing officer. Rule 250 has been used by parties in our proceedings in a manner analogous to the summary judgment procedure in the Federal Rules of Civil Procedure. It also has been used as a means of seeking a ruling on the pleadings or seeking dismissal as a matter of law either early in a proceeding or following the Division's completion of its evidentiary presentation at the hearing.

A principal purpose of Rule 250 is to facilitate the efficient resolution of proceedings by disposing of issues prior to the hearing, where appropriate, without introducing unnecessary delays or costs into the proceeding. As we have previously explained, the rule "balances the potential efficiency gained by allowing the hearing officer to eliminate unnecessary hearings in some cases against the costs of allowing additional motions, prehearing procedures and the

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[106] *See infra* discussion at Section N.

attendant delay in cases where a hearing in which all evidence can be presented and witness demeanor can be observed is warranted."[107]

We did not propose to amend Rule 250. However, one commenter suggested that the Commission modify the current rule to permit a respondent to challenge the Division's "legal theories . . . as of right"[108] prior to the hearing. As discussed below, we are amending Rule 250 both to respond to the commenter's suggestion and to clarify how summary disposition motions will operate in conjunction with the amendments to Rules 233 and 360 that permit parties to take depositions and that provide for a longer maximum prehearing period in 120-day proceedings. Consistent with the Commission's prior commentary on Rule 250, these amendments are intended to maintain the balance between encouraging more streamlined proceedings while protecting against unwarranted delays and costs.[109]

Amended Rule 250 provides that three types of dispositive motions may be filed at different stages of an administrative proceeding and sets forth the standards and procedures governing each type of motion. These motions – described in paragraphs (a) – (d) of the amended rule – generally correspond to certain dispositive motions that may be filed in federal court under the Federal Rules of Civil Procedure.

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[107] *See 1995 Release*, 60 FR at 32767-68; *see also id.* at 32767 ("Summary disposition is a procedure that can resolve issues prior to hearing, thereby reducing the costs of hearing and expediting resolution of the proceeding.").

[108] Gibson.

[109] As noted *supra* at n.16 and pursuant to current Rule 360(a)(1), unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to Rule 202. These amendments do not alter this requirement.

Paragraph (a) of amended Rule 250 governs the filing of motions for a ruling on the pleadings. It provides that, no later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, it is entitled to a ruling as a matter of law. Paragraph (a) thus permits a respondent to seek a ruling as a matter of law based on the factual allegations in the OIP and permits either party to seek a ruling as a matter of law after the filing of an answer.[110] Consistent with the commenter's suggestion, we believe that obtaining leave of the hearing officer prior to filing such a motion is unnecessary; a motion under paragraph (a) is, therefore, available to any party as a matter of right. Additionally, paragraph (a) provides that a hearing officer shall promptly grant or deny the motion. This is intended to help ensure that such motions do not serve to delay proceedings.[111]

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[110] This is analogous to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 12(b)(6) (failure to state a claim upon which relief can be granted); 12(c) (judgment on the pleadings).

[111] The same commenter suggested that the Commission be required to promptly hear and resolve all appeals from hearing officer denials of prehearing motions for summary disposition that attack the statutory or regulatory basis for the proceeding, or that challenge the constitutionality thereof. *See* Gibson. The Commission has not adopted this suggestion because we believe the existing mechanism for review is appropriate and is consistent with the overall goal of ensuring an efficient resolution of proceedings. *See generally Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513 (June 14, 2016). Under Rule 400(a), we "may, at any time, on [our] own motion, direct that any matter be submitted to [us] for review." Consistent with Rule 400(a), a respondent may seek review of issues such as those raised by the commenter at any point in an administrative proceeding. We have likewise not adopted the commenter's suggestion that we adopt a rule providing that an administrative proceeding will be automatically stayed pending final resolution of a respondent's challenge to the legality of the proceeding. *See* Gibson. We decline to adopt such a blanket rule because, among other things, it would unduly delay proceedings where the underlying legal challenge lacks merit. Moreover,

Paragraph (b) of amended Rule 250 governs the filing of motions for summary disposition in proceedings designated as 30- and 75-day proceedings pursuant to amended Rule 360. It provides that after a respondent's answer has been filed and documents have been made available to that respondent pursuant to Rule 230, any party may move for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to Rule 323 show (1) that there is no genuine issue with regard to any material fact and (2) that the movant is entitled to summary disposition as a matter of law.[112] If it appears that a party, for good cause shown, cannot present prior to the hearing facts essential to oppose the motion, paragraph (b) provides that the hearing officer shall deny or defer the motion. Leave of the hearing officer is not required to file such a motion in 30- and 75-day cases. This is consistent with existing practice

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any respondent may seek a stay of the administrative proceeding and, where appropriate, the Commission in its discretion may issue such a stay.

[112] This is analogous to Federal Rule of Civil Procedure 56. *See* Fed.R.Civ.P. 56 (summary judgment). To streamline amended Rule 250, we have deleted the portion of current Rule 250(a) that provided that, the facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323. This is not intended to be a substantive change. Consistent with current Commission opinions regarding summary disposition motions, the facts should be construed in the light most favorable to the non-moving party. *See, e.g.*, *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014). Importantly, a non-moving party "may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing." *Id.*; *see also Kornman v. SEC*, 592 F.3d 173, 182 (D.C. Cir. 2010) (finding that summary disposition was properly granted where the respondent "proffered no evidence to contradict either his admissions or the Division's evidence"); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633 at *4 n.25 (Sept. 26, 2007) ("[Respondent] must set forth specific facts establishing a genuine issue of material fact and may not rely upon mere allegations in his pleadings to the law judge to create a genuine issue."), *petition denied*, 548 F.3d 129, 136 (D.C. Cir. 2008).

in the proceedings we have designated for shorter timeframes—including, for example, proceedings pursuant to Exchange Act Section 12(j)[113] as well as follow-on proceedings[114]—where we have repeatedly observed that summary disposition is typically appropriate because the issues to be decided are narrowly focused and the facts not genuinely in dispute.

Paragraph (c) of amended Rule 250 governs the filing of motions for summary disposition in proceedings designated as 120-day proceedings pursuant to amended Rule 360. It provides that after a respondent's answer has been filed and documents have been made available to that respondent pursuant to Rule 230, any party may make a motion for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, deposition transcripts, documentary evidence or facts officially noted pursuant to Rule 323 show (1) that there is no genuine issue with regard to any material fact and

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[113] *See, e.g.*, *China Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013) (explaining that summary disposition in a proceeding pursuant to Section 12(j) was appropriate when the respondent "still has not identified any evidence demonstrating a genuine issue of material fact"); *Citizens Capital Corp.*, Exchange Act Release No. 67313, at 16 (June 19, 2012) ("We have found that summary disposition is appropriate in proceedings like this one brought pursuant to Exchange Act Section 12(j), where the issuer has not disputed the facts that constitute the violation.").

[114] *See, e.g.*, *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *19-20 (Feb. 4, 2008) ("Use of the summary disposition procedure has been repeatedly upheld in cases such as this one where the respondent has been enjoined or convicted, and the sole determination concerns the appropriate sanction.") *petition denied*, 561 F.3d 548, 555 (6th Cir. 2009); *Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission*, Exchange Act Release No. 52846 (Nov. 29, 2005), 70 FR 72566, 72567 (Dec. 5, 2005), available at http://www.sec.gov/rules/final/34-52846.pdf (last visited July 8, 2016) ("Motions for summary dispositions are often made in cases where a respondent has been criminally convicted or an injunction has been entered and the conviction or injunction provides the basis for an administrative order against the respondent.").

(2) that the movant is entitled to summary disposition as a matter of law.[115] If it appears that a party, for good cause shown, cannot present prior to the hearing facts essential to justify opposition to the motion, paragraph (c) provides that the hearing officer shall deny or defer the motion.

Leave of the hearing officer must be obtained in order to file a Rule 250(c) motion. Leave may be granted only if the moving party establishes good cause and if consideration of the motion will not delay the scheduled start of the hearing. Paragraph (c) further provides that the hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion.

The requirement that leave be obtained to make a motion under paragraph (c) is consistent with the Commission's long-held view that because "[t]ypically, Commission proceedings that reach litigation involve basic disagreement as to material facts . . . [t]he circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare."[116] In contrast to matters like 12(j) proceedings that are amenable to resolution on summary disposition,[117] we have noted that the proceedings designated for the longest timeline may not be "appropriate vehicle[s]" for summary disposition.[118] This is

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[115] This is analogous to Federal Rule of Civil Procedure 56 (summary judgment); *see also supra* note 112.

[116] *1995 Release*, 60 FR at 32768.

[117] *See supra* note 113.

[118] *Comeaux*, 2014 WL 4160054, at *4 n.30 ("We urge parties in the future to consider whether, if the Commission has determined that a particular matter is not an appropriate vehicle for the

so because, as a general matter, hearings are necessary in 120-day proceedings for evidence to be taken on fact-intensive issues such as a respondent's state of mind that generally are not susceptible to summary disposition.

Consequently, we have previously stated in discussing Rule 250 that "leave to file such a motion shall be granted only for good cause shown, and if consideration of the motion will not delay the scheduled start of the hearing."[119] We now codify this as the two-part standard for a hearing officer to grant leave for a party to file a motion for summary disposition under amended Rule 250(c).[120] It is the Commission's view that good cause may generally be demonstrated where there is a substantial likelihood that the party seeking leave to file a motion under paragraph (c) will be successful on the merits of the motion.[121] Additional factors the hearing officer generally should consider in assessing whether a party has demonstrated good cause include, but are not limited to, whether (1) there is agreement among the parties on the operative facts that are the basis of the motion; (2) the motion, if granted, would obviate the need to conduct a substantial portion, or all, of the final hearing; and (3) the motion would not impose undue expense or harassment on the opposing party. Consideration of these factors is intended

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120- or 210-day time periods [under current Rule 360], it is an appropriate vehicle for a motion for summary disposition.").

[119] *See 1995 Release*, 60 FR at 32768.

[120] Hearing officers have cited to this standard in assessing whether to grant leave to file a summary disposition motion under current Rule 250. *See, e.g.*, *Arthur F. Jacob*, CPA, Admin. Proc. Ruling No. 3370, 2015 SEC LEXIS 4945, at *3 (Dec. 4, 2015).

[121] *See 1995 Release*, 60 FR at 32768, Comment to Rule 250 ("Where a genuine issue as to material facts clearly exists as to an issue, it would be inappropriate for a party to seek leave to file a motion for summary disposition or for a hearing officer to grant the motion.").

to further the goal of Rule 250 to promote efficient resolution of proceedings, without introducing unnecessary costs or delays. Consistent with the Commission's prior statements regarding summary disposition in proceedings designated for the longest timeframe, we believe that the good cause standard under paragraph (c) will rarely be satisfied.[122] Granting leave to file a motion for summary disposition only in exceptional cases where good cause is established, and limiting summary disposition to the rare cases where it is appropriate, promotes efficiency by avoiding the attendant delays that may ensue if a hearing officer grants summary disposition and the Commission subsequently remands the case for an evidentiary hearing.[123]

Paragraph (d) of amended Rule 250 governs the filing of motions for a ruling following completion of the Division's case in chief at a hearing. It provides that following the interested division's presentation of its case in chief, any party may make a motion, asserting that it is entitled to a ruling as a matter of law on one or more claims or defenses.[124] Leave from the

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[122] We note that we have removed the provision in current Rule 250(b) stating that denial of leave to file a summary disposition motion "is not subject to interlocutory appeal." The denial of leave to file a motion pursuant to paragraph (c) in amended Rule 250 is subject to Commission review, consistent with the Commission's plenary authority over our administrative proceedings. *See supra* note 111.

[123] *See, e.g.*, *Diane M. Keefe*, Exchange Act Release No. 61928, 2010 SEC LEXIS 1122, at *4 - 5 (Apr. 16, 2010) (reversing grant of summary disposition, remanding for a hearing, and noting "[w]e have reviewed the limited record before us and believe that the record would benefit from direct and cross-examination of any relevant witnesses and the fact-finding determinations of a law judge" and "that amplification of the current record with facts supporting either party's position on the issue of materiality would aid any decisional process"); *Joseph P. Doxey*, Exchange Act Release No. 77773, 2016 WL 2593988 (May 5, 2016) (finding evidence did not support grant of summary disposition as to Division's allegations of antifraud and registration violations and remanding claims to the law judge).

[124] This is analogous to Federal Rule of Civil Procedure 50(a) (judgment as a matter of law).

hearing officer is not required to file such a motion. But as with the motion for summary disposition discussed in paragraph (c), it is the Commission's view that proceedings designated for the longest timeframe will rarely be amenable to resolution based solely on the Division's case in chief, and prior to the respondent's presentation of evidence, and therefore we believe that Rule 250(d) motions should be granted in only the rarest of cases.[125]

Paragraph (e) of amended Rule 250 provides the length limitations applicable to dispositive motions under paragraphs (a) – (d) of amended Rule 250.[126] It provides that dispositive motions, together with any supporting memorandum of points and authorities (exclusive of any declarations, affidavits, deposition transcripts or other attachments), shall not exceed 9,800 words and that requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored.[127] A party should not circumvent this length limitation by filing or appending a separate document, incorporated by reference into the supporting

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[125] In *Rita Villa*, Exchange Act Release No. 39518, 1998 WL 4530 (Jan. 6, 1998), the Commission stated that it did not favor an "abbreviated procedure" in which a hearing officer orally granted a motion for summary disposition following the presentation of the Division's case in chief. We clarify today that *Rita Villa*, which interpreted a prior Rule of Practice, should not be read to apply to amended Rule 250(d) to suggest that a party may never make a motion for summary disposition after a hearing has begun. Such a motion is available as of right: under amended Rule 250(d), a party may move for a ruling as a matter of law following completion of the Division's case in chief.

[126] Motions made pursuant to amended Rule 250(d) may be made orally, or in writing, but such motions should not be used as a means of delaying completion of the hearing. Should the hearing officer decide that a motion made pursuant to Rule 250(d) requires briefing, the hearing officer may require the parties to brief the motion while the hearing continues to proceed.

[127] We note that paragraph (e) of amended Rule 250 contains the same length limitations as were applicable to summary disposition motions under current Rule 250(c). We have added the term "deposition transcripts" to the list of documents excluded from the page count to comport with the language of amended Rule 250(d) and the amendments to Rule 233.

memorandum, that contains a recitation of any allegedly undisputed facts. To the extent that a party does incorporate a separate statement of facts by reference in its memorandum, such a document counts towards the length limitations in paragraph (e). A motion that does not, together with any accompanying memorandum of points and authorities, exceed 35, double-spaced pages in length, inclusive of pleadings incorporated by reference (but excluding any declarations, affidavits, deposition transcripts or attachments) is presumptively considered to contain no more than 9,800 words. Any motion that exceeds this page limit must include a certificate by the attorney, or an unrepresented party, stating that the brief complies with the word limit set forth in this paragraph and stating the number of words in the motion. The person preparing the certificate may rely on the word count of a word-processing program to prepare the document.

Paragraph (f) of amended Rule 250 provides the length limitations and response times for opposition and reply briefs pertaining to motions under paragraphs (a) – (d) of amended Rule 250. Paragraph (f)(1) provides that the length limitations in paragraph (e) apply to any opposition to a motion under paragraphs (a) – (d) of amended Rule 250. This reflects the Commission's belief that, in the context of summary disposition motions, affording the responding party the same page limitation as the moving party should help to ensure that the responding party has a sufficient opportunity to respond to all of the positions advanced in the motion. Paragraph (f)(1) further provides that the length limitations in Rule 154(c) apply to any reply; this is consistent with current practice. Paragraph (f)(2)(i) provides that the response times in Rule 154(b) apply to all opposition and reply briefs pertaining to motions under paragraphs (a), (b), and (d) of amended Rule 250. Paragraph (f)(2)(ii) provides that, for any motion for which leave has been granted consistent with the standard in paragraph (c), any opposition must

be filed within 21 days after service of a Rule 250(c) motion and that any reply shall be filed within seven days after the service of any opposition. These expanded response times for oppositions and replies pertaining to summary disposition motions pursuant to paragraph (c) are intended to provide sufficient time to respond to the motion in those rare instances where good cause to file such a motion has been established.

N. Rule 320 (Evidence: Admissibility)

1. Proposed Rule

Rule 320 provides the standards 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 proposed to amend the rule to add "unreliable" to the list of evidence that shall be excluded. In addition, we proposed adding 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.

2. Comments Received

Commenters raised a number of concerns about the admissibility of hearsay under proposed Rule 320(b). Most commenters argued that the Commission should incorporate Federal Rules of Evidence governing hearsay into the Commission's administrative proceedings.[128] Commenters, focusing on the importance of cross-examination to test "credibility, memory, [and] bias," argued for limiting the admission of hearsay.[129] Commenters

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[128] FSR; Gibson; Hudson II (citing anonymous blog); Brune; Grundfest; NJSBA.

[129] Gibson; CCMC.

also argued that applying the federal court hearsay rules would ensure consistency and objectivity in administrative proceedings,[130] and suggested that allowing hearsay evidence in administrative proceedings incentivizes forum selection based on the quality and nature of the evidence and witnesses rather than other more appropriate considerations.[131] Some commenters contended that the Commission had not, or could not, "establish a principled basis for adopting a different standard" than the federal rules or other rules requiring "greater scrutiny of hearsay evidence."[132]

Other commenters acknowledged the longstanding admissibility of hearsay in administrative proceedings,[133] but argued that the proposed hearsay standards are nevertheless insufficient.[134] One such commenter argued that the Commission should be bound by the federal rules, and advocated the exclusion of hearsay evidence in proceedings involving civil monetary penalties or bars from association in the securities industry.[135] The other commenter advocated various other limitations on hearsay, including heightened standards for admitting hearsay;

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[130] Calfee.

[131] Gibson.

[132] FSR; *see also* Brune; NJSBA.

[133] Gibson; CCMC.

[134] Gibson; CCMC.

[135] Gibson.

notice requirements; and provisions allowing additional depositions to counter proposed hearsay.[136]

A number of the commenters argued that the proposed standards provide insufficient guidance and are prone to unfair application.[137] One commenter argued that hearing officers currently "err on the side of admitting hearsay" and apply the reliability standard inconsistently.[138] Commenters further objected that the proposed standards will "fail to offer any meaningful protection" or improve current practices.[139] Commenters claimed that the absence of more bright-line guidance or procedural hurdles to introducing hearsay creates an undue burden on hearing officers and parties.[140]

3. Final Rule

We are adopting the amendments to Rule 320 as proposed. As the proposing release explained, the standard for excluding unreliable evidence is consistent with the APA. The admission of hearsay evidence that satisfies a threshold showing of relevance, materiality, and reliability also is consistent with the APA, and the "indicia of reliability" standard for admitting such evidence is grounded in well-established interpretations of administrative law.[141]

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[136] CCMC.

[137] FSR; Brune.

[138] Gibson.

[139] Gibson; Grundfest.

[140] Brune; FSR.

[141] *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

We are not persuaded of the need to incorporate federal court hearsay rules or the other suggested standards for pre-emptively excluding or challenging hearsay.[142] We believe that Rule 320(b) appropriately focuses on the relevance, materiality, reliability and fairness of proposed hearsay evidence. Nor are we persuaded that the proposed admissibility standards provide insufficient guidance or impose an undue burden on hearing officers or the parties. Hearsay evidence is currently evaluated on a case-by-case basis in light of, among other things, the motives or potential bias of the declarant; the availability and credibility of the declarant; whether the statements are contradicted or consistent with direct testimony; the type of hearsay (*e.g.*, sworn, written, attributable to an identified person); the availability of the missing witness and any attempts to compel witness testimony; and whether or not the hearsay is corroborated by other evidence in the record.[143] We continue to believe that a case-by-case determination of the

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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, 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).

[142] The Supreme Court has stated that "…it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials [the Federal Rules of Evidence] do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed." *Opp. Cotton Mills v. Administrator*, 312 U.S. 126, 155 (1941).

[143] *See, e.g., Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *14 (Dec. 11, 2009); *Edgar B. Alacan*, Exchange Act Release No. 49970, 2004 WL 1496843, at *6 (July 6, 2004); *Wheat, First Securities, Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at

admissibility of hearsay evidence is more appropriate than the broad exclusionary rules and procedures proposed by the commenters, and therefore adopt the rule as proposed.

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

1. Proposed Rules

We proposed amendments to Rules 410 (Appeal of Initial Decisions by Hearing Officers),[144] 411 (Commission Consideration of Initial Decisions by Hearing Officers),[145] 420 (Appeal of Determinations by Self-Regulatory Organizations),[146] 440 (Appeal of Determinations by the Public Company Accounting Oversight Board),[147] and 450 (Briefs Filed with the Commission),[148] which govern appeals to the Commission.

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*12 (Aug. 20, 2003); *Harry Gliksman*, Exchange Act Release No. 42255, 1999 WL 1211765 (Dec. 20, 1999); *Carlton Wade Fleming, Jr.*, Exchange Act Release No. 36215, 1995 WL 539462 (Sept. 11, 1995). The Commission and hearing officers have declined to credit hearsay evidence based on these standards. *See, e.g.*, *Wheat*, 2003 WL 21990950, at *12 (noting that hearing officer declined to admit statements that "had no bearing on" the relevant issue and concluding they were "unreliable," were not "written, signed, or made under oath" and "[t]here was no showing that any of the officials was unavailable to testify at the hearing"); *Mark James Hankoff*, Exchange Act Release No. 30778, 1992 WL 129520, at *3 (finding an affidavit and hearsay statement an unreliable basis for the NASD's finding of fact); *Gary L. Greenberg*, Exchange Act Release No. 28076, 1990 WL 1104065, at *3 (June 1, 1990) (noting that the record as a whole did not provide "sufficient assurance" of the truthfulness or reliability of hearsay evidence to "justify [] crediting it over the first-hand testimony" of the respondent).

[144] 17 CFR 201.410.

[145] 17 CFR 201.411.

[146] 17 CFR 201.420.

[147] 17 CFR 201.440.

[148] 17 CFR 201.450.

Rule 410(b) currently requires petitioners to set forth all the specific findings and conclusions of the initial decision to which exception is taken, and provides that an exception that is not stated in the notice may be deemed to have been waived by the petitioner.[149] We proposed to amend Rule 410(b) to state, instead, that a petitioner is required to set forth only a summary statement of the issues presented for review.[150] In addition, we proposed to amend Rule 410(c) to limit the length of petitions for review to three pages and to bar incorporation of pleadings or filings by reference.[151] We reasoned that these changes would be consistent with Federal Rule of Appellate Procedure 3(c), which requires only notice pleading and filing where an appellant may appeal as of right.[152]

To help effectuate the amendments to Rule 410(b), we also proposed an amendment to Rule 411(d).[153] Current Rule 411(d) provides 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.[154] We proposed to amend Rule 411(d) 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

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[149] 17 CFR 201.410(b).

[150] 80 FR at 60096.

[151] *Id.*

[152] *Id.* at n.36.

[153] *Id.* at 60096.

[154] 17 CFR 201.411(d).

initial decision not supported in an opening brief may be deemed to have been waived by the petitioner.[155]

We also proposed to amend Rule 450(c) to no longer allow parties to incorporate pleadings or filings by reference.[156] We explained that, as a practical matter, it is difficult to enforce a word count that allows for incorporation by reference.[157] In addition, we reasoned that current Rule 450(c) encouraged parties to rely on pleadings or filings from the hearing below, rather than addressing the relevant evidence or developing the arguments central to the appeal before the Commission.[158] We explained that prohibiting incorporation by reference was intended to sharpen the arguments and require parties to provide specific support for each assertion.[159]

Finally, we proposed amendments to Rules 420(c) and 440(b) to make them consistent with the proposed amendments to Rules 410(b) and 450(b).[160] Rule 420 governs appeals of determinations by self-regulatory organizations (SROs), and Rule 440 governs appeals of determinations by the Public Company Accounting Oversight Board (PCAOB).[161] We proposed

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[155] 80 FR at 60096.

[156] *Id*.

[157] *Id.* at 60097.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 60097.

[161] *Id.*

to amend Rule 440(b) to include a two-page limit for the application for review from a PCAOB decision, which is consistent with the current page limit under Rule 420(c) for applications from SROs.[162] We also proposed to amend both Rule 420(c) and Rule 440(b) 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.[163] We explained that these proposed amendments to Rules 420 and 440 would align these rules with the rules governing appeals from initial decisions issued by Commission hearing officers.[164]

2. Comments Received

Two commenters generally supported the proposed amendment to Rule 410(b) insofar as the amended rule would adopt a notice standard for filing appeals with the Commission.[165] But both commenters opposed the proposed limit of the notice of appeal to three pages.[166]

One of the commenters argued that, because the notice of appeal will provide for a caption and other identifying information, three pages may not be sufficient to accurately describe the issues even in a summary format. This commenter suggested that the Commission increase the page limit for notices to five pages.[167]

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[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] FSR; NJSBA.

[166] FSR; NJSBA.

[167] NJSBA.

The second commenter argued that the Commission's analogy to Federal Rule of Appellate Practice 3(c) was misplaced because, the commenter reasoned, appeals of initial decisions are not as of right.[168] This commenter suggested that, if the Commission were to limit petitions for review to three pages, it should also adopt one or more of the following proposals: (i) extend the word limit to opening briefs to 16,000 words; (ii) permit pleadings to be incorporated by reference, without counting their contents against any word limit; or (iii) remove language in Rule 450(c) providing that motions to file oversized briefs are disfavored.[169]

3. Final Rules

We are adopting the rules as proposed. We continue to believe that a three-page limit for petitions for review is sufficient to allow petitioners to provide notice of the issues that they are appealing. Based on the Commission's experience with appeals from initial decisions, we continue to believe that a default limit of 14,000 words is reasonable, that allowing briefs to incorporate pleadings by reference would be impractical, and that motions to file oversized briefs should be disfavored.

Finally, and in response to the comment regarding appeals from initial decisions not being as of right, we note that we are unaware of any case in which the Commission has declined to grant a procedurally proper petition for review.[170] As we explained when we eliminated the filing of oppositions to petitions for review, such oppositions are "pointless" because "'the

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[168] FSR.

[169] FSR.

[170] *See David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *20, n.110 (Oct. 29, 2015).

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.'"[171] We therefore do not find persuasive the argument that "the content and length of a petition for review should be compared to that described by Federal Rules of Appellate Practice Rule 5 (governing discretionary appeals)."[172]

P. Amendments to Rule 900 Guidelines

1. Proposed Rule

Rule 900 sets forth guidelines for the timely completion of proceedings, and provides for status reports to the Commission on pending cases and the publication of information concerning the pending case docket.[173] As noted in the proposing release, these guidelines are examined periodically for readjustment in light of changes in the pending caseload and staff resources. Consistent with such examination, we proposed 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 an SRO or the PCAOB, 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. Under the proposed rule, 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

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[171] *Id.* (quoting Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003)).

[172] FSR.

[173] 17 CFR 201.900.

completion of briefing. If a decision cannot be issued within the specified eight or ten-month period, the proposed rule provides that the Commission may issue orders extending the period as it deems appropriate in its discretion.

We also proposed to amend Rule 900(c), which sets forth the information to be included in a semi-annual published report concerning the pending case docket. The current rule requires that the report show, among other things, the number of pending cases before the administrative law judges and the Commission, changes in the caseload, the median age of cases at resolution, and the number of cases decided within the guidelines. Proposed Rule 900(c) provides that the report for each time period would include, in addition to the information currently provided, the median number of days from the completion of briefing to the Commission's decision for each appeal resolved.

2. Comments Received

One commenter objected to the proposed changes to the Commission review timeframes under Rule 900(a), arguing that the length of Commission review undermines the efficiency of administrative proceedings.[174] This commenter argued that the proposed amendments improperly relaxed the guidelines. Another commenter raised similar concerns about the length of time required to resolve Commission appeals.[175]

3. Final Rule

We are adopting the amendments as proposed. We believe that the amendments

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[174] CCMC.

[175] Grundfest.

appropriately balance the public interest in efficient resolution of litigated matters with the public interest in carefully considered decision-making, particularly in resolving complex matters. Moreover, we believe that the final amendments balance these revised timeframes with mechanisms for enhancing the efficiency, transparency, and oversight of administrative proceedings, including through the mechanism for Commission orders extending periods for review in individual cases under Rule 900(a)(1)(iv) and the enhanced disclosure required under Rule 900(c).

Q. Effective Date, Applicability Dates and Transition Period

1. Proposed Rule

We proposed that amendments govern any proceeding commenced after the effective date of the final rules.[176] We solicited comments as to whether the amendments as proposed 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.[177]

2. Comments Received

Commenters generally agreed that certain of the amended rules should apply to at least some pending proceedings. But commenters offered different standards for determining when and how the amended rules should apply.

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[176] 80 FR at 60097.

[177] *Id.*

One commenter, for instance, suggested that the amended rules apply "in whole to cases pending as of the effective date where possible."[178] Another commenter proposed that any changes that "enhance the rights of respondents, no matter how small, should apply to proceedings pending on their effective date."[179] A third commenter, citing the general practice in federal court, argued that "[i]nstead of implementing a uniform prospective application," the Commission should require that the amendments apply to pending cases "insofar as just and practicable"—that is, to "pending cases which have yet to proceed to an evidentiary hearing."[180]

Finally, one commenter suggested that the amended rules apply to pending matters "to the fullest extent possible," and provided specific examples of how the various rules would apply to pending proceedings, depending on the phase of the proceeding.[181] Specifically, this commenter suggested that "the new rules for timing and depositions should apply at least to proceedings for which the prehearing conference has not yet taken place, and the new evidentiary rules should apply to any matter for which no hearing has yet taken place."[182]

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[178] Navistar.

[179] Zornow/Gunther/Silverman.

[180] Hudson I (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994)).

[181] Gibson.

[182] Gibson.

3. Final Rule

The amended rules will become effective 60 days after publication in the Federal Register and shall apply to proceedings initiated on or after that date.[183] For proceedings instituted on or after the date of these amended rules[184] but before the effective date, there will be a transition period. The parties may elect to have these amended rules apply to such proceedings. Specifically, in proceedings that are instituted on or after the date of these amended rules but before the effective date, all of the amended rules (except the amendments to Rule 141, governing service of OIPs) shall apply to such proceedings if, within 14 days of service of the OIP, every party to the proceeding, including the Division, submits a request in writing to the Secretary that the proceedings be conducted under the amended rules. This approach is similar to the approach we took in the 1995 amendments to the Rules of Practice.[185] If any party does not submit such a request, the former rules shall apply, except as provided below.

For all other proceedings instituted before the effective date of these rules, the applicability of the amended rules is described more fully below.

There are many rational ways to implement amendments to procedural rules. When we amended the Rules of Practice in 1995, the new rules became effective one month after

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[183] *See* 5 U.S.C. 553(d).

[184] For purposes of this section, the "date of these amended rules" means the date on the last page of this release.

[185] *See 1995 Release*, 60 FR at 32738 ("Any proceeding docketed by the Commission after the date of this Federal Register publication but prior to the effective date shall be conducted under the former Rules of Practice unless, within 30 days of the effective date, each respondent in the proceeding submits a request in writing to the Secretary that the proceeding be conducted under the Rules of Practice adopted today.").

publication in the Federal Register, and the former rules continued to apply in full to pending administrative proceedings.[186] Other agencies take varying approaches; sometimes they apply amendments to rules prospectively,[187] and at other times they apply such amendments to pending proceedings.[188] Finally, as commenters observed, amendments to the Federal Rules of Civil Procedure generally apply to pending proceedings "insofar as just and practicable."[189]

We conclude that the amended evidentiary rules should apply to proceedings where the hearing has not begun as of the effective date, and that other amended rules should sometimes apply, depending on the stage of the proceeding, as set forth in detail below.[190] For example, amended Rules 221, 233, and 360 shall apply to proceedings where the prehearing conference has not been held as of the effective date of these rules, as well as to proceedings that are stayed (other than pursuant to consideration of a settlement offer under Rule 161(c)(2)(i)),[191] whether by

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[186] *See 1995 Release*, 60 FR at 32738.

[187] *See, e.g.,* Department of Labor, *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges*, 80 FR 28767 (May 19, 2015), providing that the rules would be effective 30 days after publication.

[188] *See, e.g.*, Federal Trade Commission, *Revisions to Rules of Practice*, 80 FR 25940 (May 6, 2015), providing that the rules would generally apply to pending proceedings, as well as to newly instituted proceedings.

[189] Federal Rules of Civil Procedure, 2015 Amendments.

[190] Gibson.

[191] Under current Rule 161(c)(2)(i), proceedings may be stayed upon notification by the parties that they have agreed in principle to a settlement on all major terms. In the interest of prompt resolution of such proceedings, we are excluding such proceedings from the application of amended Rules 221, 233 and 360. Such proceedings would have been operating under the current rules, and should a stay in such a proceeding be lifted, we believe that application of these amended rules could result in unnecessary delays.

court or Commission order, as of the effective date. Based on the Commission's experience with administrative proceedings, we believe that applying the amended rules in such proceedings would not unduly disrupt pending proceedings.

With respect to a commenter's suggestion of using a "just and practicable" standard to determine whether the amended rules should apply in a given proceeding, the tables below reflect the Commission's determinations of what is just and practicable.

The tables below provide whether and how the amended rules apply:[192]

***Rules regarding initial filings*—apply to proceedings instituted on or after the effective date of these amendments**

Rule 141	Requirements for serving OIP
Rule 220	Requirements for answers to OIP
Rule 230	Documents that may be withheld or redacted by the Division

***Rules regarding depositions, timing of proceedings and dispositive motions*—apply to those proceedings where, as of the effective date of these amendments: (i) the initial prehearing conference pursuant to Rule 221 has not been held; or (ii) the proceedings have been stayed, except for proceedings stayed pursuant to Rule 161(c)(2)(i)**

Rule 221	Rule amended to add depositions, expert witness disclosures or reports, and timing for completion of production of documents by the Division to the list of subjects to be discussed at the prehearing conference
Rule 222	Rule amended to change information that is required to be submitted in conjunction with expert reports
Rule 233	Rule amended to expand use of depositions
Rule 234	Rule amended to provide that moving party may take a deposition on written questions either by stipulation of the parties or by filing a motion demonstrating good cause
Rule 250	Dispositive motions
Rule 360	Rule amended to change timing of proceedings

[192] All of the amended rules apply to proceedings instituted on or after the effective date of these amendments.

***Evidentiary rules and rules governing hearings*—apply to all proceedings where hearing has not begun as of the effective date of these amendments**

Rule 180	Rule amended to allow the Commission or a hearing officer to exclude or summarily suspend a person for any portion of a deposition if the person engages in contemptuous conduct before either the Commission or a hearing officer
Rule 232	Rule amended to clarify standards for the issuance of subpoenas and motions to quash
Rule 235	Standard for granting a motion to introduce prior sworn statement of a non-party witness
Rule 320	Standard for admissibility of evidence

***Rule governing motions*—apply to all proceedings pending as of the effective date of these amendments**

Rule 154	Rule governing motions and related filings, except where another rule expressly governs

***Rule governing extensions of time, postponements, and adjournments*—apply to all proceedings pending as of the effective date of these amendments**

Rule 161	Rule governing extensions of time, postponements, and adjournments requested by parties – amended to allow a stay pending Commission consideration of settlement offers to also stay timelines set forth in Rule 360

***Amendments to appellate procedure rules*—apply to appeals filed on or after the effective date of these amendments**

Rule 410	Procedure for filing petition for review
Rule 411	Standards for granting petition for review and limitation on matters reviewed
Rule 420	Appeals from SRO determinations
Rule 440	Appeals from PCAOB determinations
Rule 450	Briefs filed with the Commission
Rule 900	Guidelines for timely completion of proceedings

III. Economic Analysis

The Commission is sensitive to the economic effects that could result from the final rules, including the benefits and costs of the final rules, as well as effects on efficiency, competition, and capital formation. These quantitative and qualitative economic effects are discussed below.

In adopting these amendments, we seek to enhance flexibility in the conduct of administrative proceedings while maintaining the ability to timely and efficiently resolve administrative proceedings. The amendments include changes or clarifications to, among other things, the timing of hearings, the use of depositions, the filing of motions for summary disposition, and the submission of expert reports. The current rules governing administrative proceedings serve as the baseline against which we assess these final rules.

We continue to believe that there will not be significant economic consequences stemming from the amendments to Rules 141, 154, 161, 220, 230, 235, 320, 410, 411, 420, 440, 450, and 900. Thus, those sections are not discussed below. As explained in further detail below, we expect the amendments to Rules 222, 232, 233, 250, and 360 will have an impact on the costs and efficiency of administrative proceedings, but we do not expect them to significantly affect the efficiency of securities markets, competition, or capital formation.

A. Benefits, Costs, and Effects on Efficiency, Competition, and Capital Formation

As discussed in further detail above, the amendments to Rule 360 concern the timing for the various stages of an administrative proceeding, providing additional time for discovery. The amendments to Rule 233 permit a limited number of depositions, while the amendments to Rule 232 support this change by providing standards governing motions to quash or modify deposition notices or subpoenas. The amendments to Rule 222 concern requirements for a written report for expert witnesses. The amendments to Rule 250 clarify how dispositive motions will operate with the amendments to Rules 233 and 360 and provide the procedures and standards governing the various types of dispositive motions.

Current 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. In addition, rules governing the testimony of expert witnesses have not previously been formalized, but some hearing officers require expert reports in proceedings before them.

We continue to believe that the aggregate benefits and costs of the final rules will depend, among other things, on the expected volume of administrative proceedings. For example, Rule 360 adjusts the potential timing of administrative proceedings, and an increase or a decrease in the number of administrative proceedings will scale up or down, respectively, the total magnitude of costs and benefits of the new timeline for administrative proceedings. Similarly, Rules 232 and 233 provide the framework for expanded use of depositions in administrative proceedings, and an increase or a decrease in the number of administrative proceedings may scale up or down, respectively, the total magnitude of the costs and benefits of the expanded use of depositions.

However, we are unable to precisely predict the economic effect of the final rules on administrative proceedings, as the number and type of proceedings can vary based on many factors unrelated to the Rules of Practice. Over the last three completed fiscal years, the number of new administrative proceedings initiated and not immediately settled has ranged from approximately 170 to approximately 230 proceedings, only a portion of which would be

impacted by certain of the amended rules.[193] As a result, we are unable to quantify the overall costs and benefits expected to flow from the amended rules.

1. Amendments to Rules Governing Depositions and the Timing of Hearings in Administrative Proceedings

The amendments to Rules 232, 233, and 360, as described above, may benefit both respondents and the Division by providing them with additional time and tools to potentially discover additional relevant facts. Specifically, the amendments to Rule 233 permit respondents and the Division to notice the oral depositions of fact witnesses, expert witnesses and document custodians. The amendments to Rule 232 correspond with the new provisions for depositions in Rule 233 and establish the requirement that a proposed deponent be a fact witness, an expert witness, or a document custodian. The amendments to Rule 360 enlarge the potential maximum prehearing period. We anticipate that the potential for a longer maximum prehearing period would allow, in appropriate cases, additional time to review investigative records, conduct depositions under amended Rule 233, and prepare for a hearing.

These amendments may facilitate information acquisition during the prehearing stage, ultimately resulting in more focused hearings. We are unable to quantify these benefits, however, because any potential cost savings would depend on multiple factors, including the specific claims, facts, and defenses in a particular proceeding.

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[193] The total number of administrative proceedings initiated and not immediately settled each fiscal year encompasses various types of proceedings. These include proceedings under Section 12(j) of the Exchange Act and "follow-on" proceedings following certain injunctions or criminal convictions, which constitute the vast majority of all proceedings instituted. On average, approximately 20% of all administrative proceedings initiated over the last three completed fiscal years were designated as 300-day proceedings.

The depositions and a longer prehearing period will, however, impose additional costs compared to the current practice in administrative proceedings where, with limited exception, depositions are not permitted and maximum prehearing periods are shorter. We continue to believe that the costs of the adopted amendments will be borne by the Division as well as by respondents and deponents who provide deposition testimony. These costs will primarily stem from the potential costs of depositions and the extension of the maximum prehearing period.

Aggregate costs stemming from depositions depend on the number of depositions that respondents and the Division take and assume they attend depositions of third parties noticed by another party to the proceeding. Costs of depositions may include travel expenses, attorney's fees, and reporter and transcription expenses. Based on Commission staff experience, we estimate the cost to a respondent of conducting one non-expert deposition to be approximately $45,640, and the cost of conducting one expert witness deposition to be approximately $75,696.[194] This cost estimate has been increased relative to the cost estimate in the proposal to

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[194] The $45,640 estimate is comprised of the following expenses: (i) travel expenses: $4,000; (ii) reporter/videographer: $8,200; and (iii) professional costs for two attorneys (including reasonable preparation for the deposition): 40 hours x $504/hr and 40 hours x $332/hr = $33,440. The hourly rates for the attorneys and paralegal are based on the 2015-2016 Laffey Matrix. The Laffey Matrix is a matrix of hourly rates for attorneys of varying experience levels and paralegals that is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia. *See* Laffey Matrix – 2015-2016, available at https://www.justice.gov/usao-dc/file/796471/download (last visited July 8, 2016) (the "Laffey Matrix"). In addition, if the deponent is an expert witness, we estimate the expert's fees and travel expenses will be approximately $30,056 per deposition, for a combined total of $75,696. This includes (i) file review and preparation costs estimated at 80 hours, at a rate of $333/hr, which totals $26,640; and (ii) expert fees incurred with appearing for the deposition, 8 hours x $427/hr = $3,416. The hourly rate for expert witnesses is based on survey data of expert witness fees from the SEAK, Inc. 2014 Survey of Expert Witness Fees. *See* SEAK, Inc. 2014 Survey of Expert Witness Fees, which can be found at http://www.seak.com/wp-content/uploads/2014/07/Expert-Witness-Fee-Data.pdf (last visited July 8, 2016). These

reflect the increased time-limit for depositions in amended Rule 233 from six hours to seven hours and to include the costs associated with expert depositions. In single-respondent proceedings, if both the Division and the respondent each take three depositions, one of which is of an expert witness, and each attend each other's depositions, then respondents may incur the cost of conducting or attending up to six depositions plus expert witness fees and costs – an estimated total of $303,896. Similarly, in multi-respondent proceedings, respondents may incur the cost of conducting or attending up to ten depositions plus expert witness fees and costs – an estimated total of $486,456. We recognize that respondents and the Division play a large role in managing their own costs by determining, for example, whether to take depositions or participate in the depositions of others, and whether to mitigate attorney costs, including by adjusting the number of attorneys attending each deposition, contracting with a competitively priced reporter, or arranging for less expensive travel. We note that determinations regarding the approach to requesting depositions will likely reflect parties' beliefs regarding the potential benefits they expect to realize from taking or attending depositions. However, the costs of depositions are borne by all attendees of the deposition, including not only the deposing party, but also the other parties to the proceeding, the deponent, and third parties, in the form of lost wages, travel, preparation, and attorney costs.[195]

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estimates exclude transcription costs, which are estimated at $3.65 per page, based on the Federal Court Maximum Transcription Rates for Court Reporters, available at http://www.uscourts.gov/services-forms/federal-court-reporting-program (last visited July 8, 2016).

[195] 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 be

Relative to the proposed amendments to Rule 233, the adopted amendments expand the potential use of depositions by allowing each side to request an additional two depositions from a hearing officer. This would place the ultimate limit on depositions at five depositions for each side in a single-respondent proceeding, and seven depositions for each side in a proceeding against multiple respondents. In single-respondent proceedings, if the Division and the respondent each take five depositions, one of which is of an expert witness, and each attend each other's depositions, then respondents may incur the cost of conducting or attending as many as ten depositions plus expert witness fees and costs – an estimated total of $486,456. Similarly, in multi-respondent proceedings, respondents may incur the cost of conducting or attending as many as fourteen depositions plus expert witness fees and costs – an estimated total of $669,016.[196] Although the total number of depositions increases, we believe that parties will make the decision to request an additional deposition by considering the expected costs and benefits of acquiring information from the deponent. To the extent that additional depositions may reveal important information or evidence relevant to the proceeding and thus lead to more focused hearings, this provision may improve the efficiency of administrative proceedings. However, neither the parties to a proceeding nor the hearing officer can predict whether additional depositions will ultimately have such an effect, and in situations where additional depositions ultimately prove to be unhelpful or unnecessary, permitting those additional depositions may impose delays and costs that can have an adverse effect on efficiency.

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represented by counsel at the deposition. Moreover, the party seeking the deposition might choose to reimburse the witness for some costs.

[196] *See supra* note 194.

Similarly, the longer maximum prehearing periods permitted by the amendment to Rule 360 may impose costs on the parties. Based on our estimates of staffing requirements and corresponding hourly rates, we estimate that the potential to lengthen the overall timeline in 120-day proceedings by up to six months to allow more time for discovery may result in additional costs to respondents of up to $754,080.[197] We thus estimate that the combined costs of the lengthened prehearing period and the availability of depositions could cost respondents in a single-respondent 120-day proceeding $1,240,536.[198] Similar combined costs for respondents in a 120-day multi-respondent proceeding could be as high as $1,423,096.[199] Again, however, we recognize that while a party is likely to take actions under the amended rules that result in these costs only to the extent that the party expects to receive benefits from a longer maximum prehearing period and the availability of depositions, actions taken by one party to a proceeding

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[197] The $754,080 estimate is comprised of the following expenses: (i) 1 senior attorney x 40 hours per week x 24 weeks x $504/hr = $483,840; (ii) 1 mid-level attorney x 20 hours per week x 24 weeks x $332/hr = $159,360; (iii) 1 paralegal x 30 hours per week x 24 weeks x $154/hr = $110,880. The hourly rates for the attorneys and paralegal are based on the Laffey Matrix. We do not anticipate the amendments to Rule 360 concerning the timing of hearings in 75-day and 30-day proceedings will generally result in a significant departure from current practice in the length of time necessary for completion of such proceedings, which often are resolved by default or summary disposition.

[198] $754,080 + $486,456 =$1,240,536. This estimate is comprised of the potential costs associated with the maximum lengthening of the prehearing period in 120-day proceedings and the total estimated costs of depositions in single-respondent proceedings. To the extent the hours spent during the prehearing period are used to prepare and/or respond to depositions, this may overestimate the total costs of a single-respondent proceeding.

[199] $754,080 + $669,016 = $1,423,096. As explained *supra*, this figure may overestimate the total costs in multi-respondent proceedings to the extent there is overlap with the hourly rate calculations associated with depositions.

during the additional time for discovery may result in costs incurred by the other parties to the proceeding.

The amendments related to the timing of hearings and the use of depositions may also affect the efficiency of proceedings. To the extent that the adopted amendments facilitate the discovery of relevant facts and information through depositions and the extension of the maximum prehearing periods, they may lead to more expeditious resolution of proceedings. For example, for cases that may benefit significantly from the additional information, there could be efficiency gains from the final 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 individuals and/or entities, a potential consequence of the adopted amendments to Rule 233 is that parties may engage in more discovery than is efficient. For example, for proceedings that may not benefit significantly from information gained from a deposition, requesting depositions may result in inefficiency by imposing costs on all attendees of the deposition, including the deposing party, the other parties to the proceeding, the deponent, and third parties, without any significant informational benefit. However, we believe that the amendments to Rules 232 and 233 may mitigate the risk of this efficiency loss by setting forth standards for the issuance of subpoenas and motions to quash deposition notices and subpoenas, and setting a limit on the maximum number of depositions each side may notice.

Ultimately, it is difficult to predict with any certainty the economic efficiency gains, if any, from the addition of depositions, a longer prehearing period, and associated rule changes. At the same time, we recognize that there are necessarily cost increases from longer hearing periods and additional discovery tools, and as we have explained, those costs are borne by

respondents and the Division, as well as other attendees of depositions, including deponents, and third parties. We continue to believe that any such costs are appropriate given the benefits of such rule changes.

2. Amendments Concerning Expert Reports and Testimony

The final amendments to Rule 222 specify a set of submissions and disclosures that hearing officers may require from parties to a proceeding, and require parties to a proceeding who intend to call expert witnesses to submit information about these expert witnesses. Though producing submissions and disclosures may cause parties to proceedings to incur costs, these amendments may yield benefits by facilitating access to information that may aid in interpreting statements, evidence, and testimony during hearings. We are aware that some hearing officers may currently require submissions and disclosures similar to those referenced in amended Rule 222, so the final rule will impose costs and yield benefits only to the extent that they result in additional information being submitted to hearing officers beyond that submitted under current practice.

3. Amendments Concerning Dispositive Motions

As discussed above, Rule 250 has been amended to provide that both sides to a proceeding shall be permitted, as a matter of right, to make certain dispositive motions in certain types of proceedings. The amendments to Rule 250 clarify how dispositive motions will operate in conjunction with the amendments to Rules 233 and 360, which permit parties to take depositions and provide for a longer maximum prehearing period.

Amended Rule 250 may improve the efficiency of administrative proceedings by eliminating unnecessary hearings. The ability of either side to bring a dispositive motion serves several functions, including those attendant to potential early resolution of claims. For example,

in proceedings where the underlying facts are not in dispute, the granting of a dispositive motion may reduce the costs borne by all parties by narrowing the focus of or entirely eliminating the need for a hearing. On the other hand, where motions are filed in proceedings not susceptible to resolution via dispositive motion, the decision to allow dispositive motions could delay proceedings or otherwise result in inefficiencies. For example, if the hearing officer grants summary disposition, delays could result if the Commission subsequently remands the case for an evidentiary hearing. Such delays could result in costs to parties to the proceeding.

Because the amendments to Rule 250 largely clarify how pre-existing motion practice will operate alongside the amendments to Rules 233 and 360, the rule change may not result in a significant departure from current practice. Further, we cannot predict with certainty how practice will change in response to the availability of dispositive motions filed pursuant to amended Rules 250(a), (b), and (d) as a matter of right—rather than with leave of the hearing officer—given that parties will respond based on the individual facts of each case and their own cost estimates of filing the motions. We are thus unable to estimate the total potential costs associated with these amendments. Moreover, to the extent a party files a motion under amended Rule 250 where it would not have filed under previous Rule 250, we do not have sufficient information to quantify the individual costs associated with such a motion because the scope of each motion may vary significantly depending on the facts and circumstances of each case and the approach of the filing party.

B. Alternatives

As mentioned previously, although commenters generally supported extensions of the prehearing period previously proposed under Rule 360, some suggested that longer periods be adopted. Longer prehearing periods for discovery, whether restricted only to 120-day

proceedings, or permitted for all proceedings as one commenter suggested, would allow parties more time to prepare for a hearing, but might adversely affect the timely and efficient resolution of administrative proceedings.

As alternatives to the final rule amending Rule 233, we could continue to permit depositions only when a witness is likely to be unable to attend or testify at a hearing, or we could authorize 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 might reduce some of the costs of the discovery process (*i.e.*, the cost of depositions), they might entail other costs (resulting from the time attorneys and parties need to prepare responses) and also might yield less useful information for the administrative proceeding given the limited nature of questioning and information these forms permit. Therefore, regardless of their lower cost, interrogatories and other discovery tools may not provide the same qualitative benefits.

Commenters also suggested that the Commission allow even more depositions per side than proposed. As we have noted previously, permitting parties to the proceedings to take additional depositions may result in both benefits and costs for all parties. Additional depositions could lead to more focused hearings, but may impose costs on entities involved in the depositions, and ultimate resolution of the proceeding may be delayed. We believe that the final amendments to Rule 233 that permit the hearing officer to grant an additional two depositions to a side will make administrative proceedings flexible enough to realize the benefits of additional depositions when they are necessary, while avoiding unnecessarily delaying proceedings for additional depositions.

Another alternative to amended Rule 233 would be to adopt the proposed limit of three depositions per side for single-respondent proceedings and five depositions per side for multi-

respondent proceedings and not permit the hearing officer to allow two additional depositions per side. As discussed previously, the informational benefit of each additional deposition would depend on the particulars of the administrative proceeding, and some proceedings may present unique challenges that warrant affording the parties additional opportunities to conduct prehearing depositions. The Commission believes that providing an opportunity for two additional depositions strikes a balance between the potential benefits from additional fact-finding and the corresponding impact on the overall goal of timely resolving administrative proceedings.

IV. Administrative Law Matters

The Commission finds, in accordance with Section 553(b)(3)(A) of the Administrative Procedure Act,[200] 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[201] therefore does not apply.[202] Nonetheless, we previously determined that it would be useful to publish the rules for notice and comment before adoption. The Commission has considered all comments received. To the extent these rules relate to agency information collections during the

[200] 5 U.S.C. 553(b)(3)(A).

[201] 5 U.S.C. 601- 612.

[202] *See* 5 U.S.C. 604.

conduct of administrative proceedings, they are exempt from review under the Paperwork Reduction Act.[203]

VI. Statutory Basis

These amendments to the Rules of Practice are being adopted 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 in 17 CFR Part 201

Administrative practice and procedure.

Text of the Amendments

For the reasons set out in the preamble, 17 CFR part 201 is amended as follows:

PART 201 – RULES OF PRACTICE

Subpart D – 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, 78*l*, 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.

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[203] *See* 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4 (exempting collections during the conduct of administrative proceedings or investigations).

2. Section 201.141 is amended by revising paragraphs (a)(2)(iv) and (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. Section 201.154 is amended by adding introductory text and revising the first sentence of paragraph (b) to read as follows:

§201.154. Motions.

The requirements in this section apply to motions and related filings except where another rule expressly governs.

* * * * *

(b) * * * Briefs in opposition to a motion shall be filed within five days after service of the motion. * * *

* * * * *

4. Section 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).

5. Section 201.180 is amended by revising paragraphs (a)(1) introductory text, (a)(1)(i), (a)(2), and (c) introductory text to 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.

* * * * *

(c) *Failure to make required filing or to cure deficient filing.* The Commission or the hearing officer may enter a default pursuant to §201.155, dismiss one or more claims, decide the particular claim(s) at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that claim if a person fails:

* * * * *

6. Revise § 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 required to file an answer as provided in paragraph (a) of this section 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. Any allegation not denied shall be deemed admitted. A respondent must affirmatively state in the answer any avoidance or affirmative defense, including but not limited to res judicata and statute of limitations. In this regard, a respondent must state in the answer whether the respondent relied on the advice of counsel, accountants, auditors, or other professionals in connection with any claim, violation alleged or remedy sought. Failure to do so may be deemed a waiver.

(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).

7. Section 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 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) The filing of any motion pursuant to §201.250;

(9) Settlement of any or all issues;

(10) Determination of hearing dates;

(11) Amendments to the order instituting proceedings or answers thereto;

(12) Production, and timing for completion of the 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.

* * * * *

8. Section 201.222 is amended by revising the section heading and paragraph (b) to 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 four years, and a list of publications authored or co-authored by the expert in the previous ten 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 required to provide a report 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.

9. Section 201.230 is amended by:

a. In paragraph (a)(1)(vi), removing the term "Division of Market Regulation" and adding in its place "Division of Trading and Markets";

b. Revising the paragraph (b) heading;

c. Removing “or” at the end of paragraph (b)(1)(iii);

d. Redesignating paragraph (b)(1)(iv) as paragraph (b)(1)(v) and adding a new paragraph (b)(1)(iv);

e. Redesignating paragraph (b)(2) as paragraph (b)(3) and adding a new paragraph (b)(2); and

f. In paragraph (c), removing the term "(b)(1)(i) through (b)(1)(iv)" and adding in its place "(b)(1)(i) through (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.*

(1) * * *

(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.

* * * * *

10. Section 201.232 is amended by revising paragraphs (a) introductory text, (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) *Procedure.* 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, any defense, or anything else required to be included in an answer pursuant to §201.220(c) by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of these matters 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.

11. Section 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 designated pursuant to §201.360(a)(2), depositions upon written notice may be taken as set forth in this paragraph. No other depositions shall be permitted except as provided in paragraph (b) of this section.

(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.

(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.

(3) *Additional depositions upon motion*. Any side may file a motion with the hearing officer seeking leave to notice up to two additional depositions beyond those permitted pursuant to paragraphs (a)(1) and (2) of this section.

(i) *Procedure.* (A) A motion for additional depositions must be filed no later than 90 days prior to the hearing date. Any party opposing the motion may submit an opposition within five days after service of the motion. No reply shall be permitted. The motion and any oppositions each shall not exceed seven pages in length. These limitations exclusively govern motions under this section; notwithstanding §201.154(a), any points and authorities shall be included in the

motion or opposition, with no separate statement of points and authorities permitted, and none of the requirements in §201.154(b) or (c) shall apply.

(B) Upon consideration of the motion and any opposing papers, the hearing officer will issue an order either granting or denying the motion. The hearing officer shall consider the motion on an expedited basis.

(C) The proceeding shall not automatically be stayed pending the determination of the motion.

(ii) *Grounds and standards for motion*. A motion under this paragraph (a)(3) shall not be granted unless the additional depositions satisfy §201.232(e) and the moving side demonstrates a compelling need for the additional depositions by:

(A) Identifying each of the witnesses whom the moving side plans to depose pursuant to paragraph (a)(1) or (2) of this section as well as the additional witnesses whom the side seeks to depose;

(B) Describing the role of each witness and proposed additional witness;

(C) Describing the matters concerning which each witness and proposed additional witness is expected to be questioned, and why the deposition of each witness and proposed additional witness is necessary for the moving side's arguments, claims, or defenses; and

(D) Showing that the additional deposition(s) requested will not be unreasonably cumulative or duplicative.

(iii) If the moving side proposes to take and submit the additional deposition(s) on written questions, as provided in §201.234, the motion shall so state. The motion for additional depositions shall constitute a motion under §201.234(a), and the moving party is required to

submit its questions with its motion under this rule. The procedures for such a deposition shall be governed by § 201.234.

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

(5) The Commission or hearing officer may rule on a motion that a deposition noticed under paragraph (a)(1) or (2) of this section 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. 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 time and place of the deposition; provided that a subpoena for a deposition may command a person to attend a deposition only as follows:

(i) Within 100 miles of where the person resides, is employed, or regularly transacts business in person;

(ii) 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;

(iii) At such other location that the parties and proposed deponent stipulate; or

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

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

(d) *Producing documents.* In connection with any deposition pursuant to this section, 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.

(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, at that party's expense. Each party shall bear its own costs for obtaining copies of any transcripts or audio or audiovisual recordings.

(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 shall 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 shall still proceed and the testimony shall be 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) O*bjection 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 seven 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*. Upon a motion under paragraph (j)(2)(i) of this section, 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, as directed by the party or person paying such charges.

(m) *Presentation of objections or disputes*. Any party seeking relief with respect to disputes over the conduct of a deposition may file a motion with the hearing officer to obtain relief as permitted by this part.

12. Section 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 §201.233 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.

13. Section 201.235 is amended by revising the section heading and paragraphs (a) introductory text, (a)(2), (4), and (5) and adding paragraph (b) to 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;

* * * * *

(4) The party offering the prior sworn statement or declaration has been unable to procure the attendance of the witness by subpoena; or

(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.

14. Section 201.250 is revised to read as follows:

§201.250 Dispositive motions.

(a) *Motion for a ruling on the pleadings.* No later than 14 days after a respondent’s answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant’s factual allegations as true and

drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law. The hearing officer shall promptly grant or deny the motion.

(b) *Motion for summary disposition in 30- and 75-day proceedings.* In any proceeding under the 30- or 75-day timeframe designated pursuant to §201.360(a)(2), after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying pursuant to §201.230, any party may make a motion for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to §201.323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law. The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. If it appears that a party, for good cause shown, cannot present prior to the hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion.

(c) *Motion for summary disposition in 120-day proceedings.* In any proceeding under the 120-day timeframe designated pursuant to §201.360(a)(2), after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying pursuant to §201.230, a party may make a motion for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, deposition transcripts, documentary evidence or facts officially noted pursuant to §201.323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law. A motion for summary disposition shall be made only with leave of the hearing officer. Leave shall be granted only for good cause shown and if consideration of the motion will not delay the scheduled start of the hearing. The hearing officer

shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. If it appears that a party, for good cause shown, cannot present prior to the hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion.

(d) *Motion for a ruling as a matter of law following completion of case in chief.* Following the interested division's presentation of its case in chief, any party may make a motion, asserting that the movant is entitled to a ruling as a matter of law on one or more claims or defenses.

(e) *Length limitation for dispositive motions.* Dispositive motions, together with any supporting memorandum of points and authorities (exclusive of any declarations, affidavits, deposition transcripts or other attachments), shall not exceed 9,800 words. Requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored. A double-spaced motion that does not, together with any accompanying memorandum of points and authorities, exceed 35 pages in length, inclusive of pleadings incorporated by reference (but excluding any declarations, affidavits, deposition transcripts or attachments) in the dispositive motion, is presumptively considered to contain no more than 9,800 words. Any motion that exceeds this page limit must include a certificate by the attorney, or an unrepresented party, stating that the brief complies with the word limit set forth in this paragraph and stating the number of words in the motion. The person preparing the certificate may rely on the word count of a word-processing program to prepare the document.

(f) *Opposition and reply length limitations* and *response time*. A non-moving party may file an opposition to a dispositive motion and the moving party may thereafter file a reply.

(1) *Length limitations*. Any opposition must comply with the length limitations applicable to the movant's motion as set forth in paragraph (e) of this section. Any reply must comply with the length limitations set forth in §201.154(c).

(2) *Response time*. (i) For motions under paragraphs (a), (b), and (d) of this section, the response times set forth in §201.154(b) apply to any opposition and reply briefs.

(ii) For motions under paragraph (c) of this section, any opposition must be filed within 21 days after service of such a motion, and any reply must be filed within seven days after service of any opposition.

15. Section 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.

16. Section 201.360 is amended by revising the section heading and paragraphs (a)(2) and (3), (b) introductory text, and (c) to read as follows:

§201.360 Initial decision of hearing officer and timing of hearing.

(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. The time period will run from the occurrence of the following events:

(A) The completion of post-hearing briefing in a proceeding where the hearing has been completed; or

(B) The completion of briefing on a §201.250 motion in the event the hearing officer has determined that no hearing is necessary; or

(C) The determination by the hearing officer that, pursuant to §201.155, a party is deemed to be in default and no hearing is necessary.

(ii) *Hearing*. Under the 120-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately four months (but no more than ten months) from the date of service of the order instituting the proceeding. 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 six months) from the date of service of the order instituting the proceeding. Under the 30-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately one month (but no more than four months) from the date of service of the order instituting the proceeding. 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 14 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:

* * * * *

(c) *Filing, service and publication.* The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof on the SEC Website. Thereafter, the Secretary shall publish the initial decision in the SEC Docket; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

* * * * *

17. Section 201.410 is amended by revising paragraph (b), redesignating paragraph (c) as paragraph (d), and adding a new paragraph (c) to 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 into the petition is not permitted. Motions to file petitions in excess of those limitations are disfavored.

* * * * *

18. Section 201.411 is amended by:

a. In paragraph (c), removing the term "§ 210.410(b)" and adding in its place "§ 201.410(b)"; and

b. Revising paragraph (d).

The revision reads 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.

* * * * *

19. Section 201.420 is amended by:

a. Revising paragraph (a); and

b. Adding a sentence to the end of paragraph (c).

The revision and addition read as follows:

§201.420 Appeal of determinations by self-regulatory organizations.

(a) *Application for review; when available*. An application for review by the Commission may be filed by any person who is aggrieved by a determination of a self-regulatory organization with respect to any:

(1) Final disciplinary sanction;

(2) Denial or conditioning of membership or participation;

(3) Prohibition or limitation in respect to access to services offered by that self-regulatory organization or a member thereof; or

(4) Bar from association as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1).

* * * * *

(c) * * * 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.

* * * * *

20. Section 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.

* * * * *

21. Section 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 into briefs submitted to the Commission 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 paragraph (c) of this section 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.

22. Section 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 ten 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) of this section, 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 through 200.30-18. 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: July 13, 2016.

Robert W. Errett,
Deputy Secretary.