SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201, 202, 203, 209, 228, 229, 230, 232, 240, 250, 260, 270 and 275

[Release No. 34–35833; File No. S7–40–92]

RIN 3235–AF91

Rules of Practice

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission today announces the adoption of comprehensive revisions to its Rules of Practice (''Rules''), the procedural rules that govern Commission administrative proceedings. Enforcement proceedings initiated by the Commission and review of disciplinary proceedings brought by self-regulatory organizations are among the most frequently occurring and significant proceedings governed by the Rules. Adoption of the Rules and the other actions taken today implement recommendations made by the Commission's Task Force on Administrative Proceedings in its final Report, entitled *Fair and Efficient Administrative Proceedings.*

The Rules contain procedures implementing authority granted to the Commission by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 to issue administrative temporary cease-and-desist and disgorgement orders. The Rules also implement revised procedures for the conduct of hearings, including simplified service of orders instituting proceeding, expanded use of prehearing conferences, codification of policies on the availability of certain investigation files to respondents in enforcement and disciplinary proceedings, issuance of subpoenas returnable prior to hearing and the consideration by administrative law judges of dispositive motions prior to hearing. In addition, the Rules contain revised procedures governing appeals to the Commission including various procedural requirements governing Commission review of self-regulatory determinations that were previously contained in part in Rules 19d–2 and 19d–3 under the Securities Exchange Act of 1934.

The revised Rules better facilitate full, fair and efficient proceedings by setting forth applicable procedural requirements more completely and in an easier to use format; by streamlining procedures that had become burdened with archaic requirements; and by the addition of provisions that address changes in statutory requirements, judicial and administrative case law developments, Commission policies, and litigation practices since the Rules were last revised.

The Commission also announces the issuance of a statement of Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings. This statement establishes guidelines for the completion of key phases of contested adjudications; requires periodic case status reports that will formally apprise the Commission if an adjudicatory matter is pending for longer than specified periods of time, so that the Commission can determine whether additional steps are necessary to reach a fair and timely resolution of the matter; and provides for increased and more timely disclosure concerning the Commission's adjudicatory docket through the periodic publication in the *SEC Docket* of summary statistical information concerning changes in the Commission's case load.

EFFECTIVE DATE: These rules are effective July 24, 1995.

TRANSITION PROVISION: Any administrative proceeding that has been docketed by the Commission—*i.e.*, in which an administrative proceedings file number has been assigned by the Secretary—prior to the date of this **Federal Register** publication, June 23, 1995, shall be completed pursuant to the former Rules of Practice. 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 proceedings be conducted under the Rules of Practice adopted today.

ADDRESSES: Printed copies of the revised Rules of Practice including the comments will be available from the Commission's Publications Branch, U.S. Securities and Exchange Commission, 450 Fifth Street, NW.; Stop C–11; Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Andrew Z. Glickman or Daniel O. Hirsch, Office of the General Counsel at (202) 942–0870; U.S. Securities and Exchange Commission; 450 Fifth Street, N.W.; Stop 6–6; Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

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I. Background

Today's adoption of comprehensive revisions to the Rules of Practice (''Rules'') of the Securities and Exchange Commission (''Commission'') and issuance of a statement of informal procedures with respect to Commission adjudications culminate an extensive review of the Commission's adjudication procedures and process. In July 1990, then-Commissioner Mary L. Schapiro was appointed chairman of the Task Force on Administrative Proceedings (''Task Force'' or ''Schapiro Task Force''). The mission of the Task Force was to review the rules and procedures relating to Commission administrative proceedings, to identify sources of delay in those proceedings and to recommend steps to make the adjudicatory process more efficient and effective.[1] Following passage of the Securities Enforcement Remedies and Penny Stock Reform Act (''Remedies Act''),[2] the Task Force greatly expanded its work to include preparing procedures to implement the authority granted to the Commission by the Remedies Act. The Task Force ultimately determined that it would be

[1] SEC Creates Task Force on Administrative Proceedings, News Release 90–39 (July 19, 1990).

[2] Pub. L. 101–429, 104 Stat. 931 (1990).

necessary and appropriate to revise completely the entire Rules of Practice.

In January 1991 and December 1991, the Schapiro Task Force presented to the Chairman interim findings and recommendations concerning the need to reduce the pending case backlog. Implementation of these recommendations included, among other things, a reorganization of the Adjudications Group within the Office of the General Counsel, significant increases in staff resources assigned to adjudicatory proceedings, and more frequent Commission meetings to consider proposed adjudicatory opinions.

In August 1992, the Secretary published approximately 400 orders issued by the Commission and administrative law judges between 1964 and 1992.[3] The previously unpublished orders, which were assembled and organized by the Task Force, concerned interpretations of the Rules of Practice or other procedural issues. The orders provide litigants with additional information about applicable procedure and thereby reduce the likelihood that previously decided issues will need to be relitigated. Also, as recommended by the Task Force, the Commission began regular publication in the *SEC Docket* of initial decisions of the administrative law judges as well as significant procedural orders.

In March 1993, the Schapiro Task Force issued its final report, *Fair and Efficient Administrative Proceedings* (''the Task Force Report'').[4] The Task Force concluded that the fundamental structure of the Commission's administrative process is sound. The Task Force found, however, that there was unnecessary delay in deciding litigated adjudicatory proceedings.[5] The Task Force recommended a comprehensive revision of the Rules of Practice and included proposed new Rules in its Report. In addition, the Task Force made various other recommendations designed to improve the efficiency and fairness of the Commission's administrative proceedings.[6] These included steps that were intended to make structural changes that would reduce the likelihood of a recurrence of the conditions that led to unnecessary delay and a backlog of pending cases.

In November 1993, the Commission published in the **Federal Register** a release proposing to adopt the Task Force's proposals pertaining to the Rules and asking interested persons for comment.[7]

II. Discussion of the Revised Rules

The Commission received seven comment letters from various interested persons.[8] Although not numerous, the comment letters as a group contained very extensive commentary on the proposed Rules. Commenters generally greeted the Commission's proposals favorably. All commenters praised the Commission's initiating a review of its Rules with the goal of further promoting fair and efficient administrative proceedings. All commenters submitted proposals to make various modifications to the Rules including many suggestions in response to the specific requests for comment contained in the proposing release. A number of comments also addressed matters not directly within the scope of the Rules. These included internal Commission management issues, such as the organizational structure of the Commission's divisions and offices, or enforcement policy issues, such as the frequency with which the Commission will initiate administrative proceedings. Significant changes to the Rules are discussed below.

A. New Organizational Structure of the Rules

The former Rules, which had not been comprehensively revised since 1960, contained requirements which were out-of-date or inconsistent with current practices and, in a few cases, inconsistent with other rules. In revising the Rules, emphasis was placed on maintaining consistency with applicable statutory language while improving intelligibility, ensuring that the Rules accurately reflected current Commission practice, and providing internal consistency in the use of terms between individual rules.

The Commission has adopted a new organizational structure and numbering system for the Rules of Practice based on model administrative rules prepared by the Administrative Conference of the United States (''ACUS''). As originally proposed, the Commission's Rules had been arranged in roughly the order in which an administrative proceeding progresses and numbered consecutively. The new format groups rules together in six broad categories based on which phase or type of proceeding they govern. The first four groups—general rules; institution of proceedings and prehearing rules; hearing rules; and rules regarding appeals to the Commission and Commission review—are predicated upon the four classifications suggested by ACUS. The two additional groups are related to specific Commission proceedings and administrative remedies and sanctions—rules regarding temporary orders, suspension of a registration and summary suspensions of trading; and rules governing disgorgement and penalty payments.

Within each group, related rules are placed together. Rules which, as proposed, covered multiple topics have been divided into shorter rules each limited to fewer topics. The new structure increases the use of rule headings and subheadings to guide a user to the appropriate rule. To the extent possible, related provisions cross-reference each other. Each of the six major groups of rules is numbered in a separate series, from 100 through 600. In addition to improving the ease of use of the rules, the new numbering system will provide the Commission with greater flexibility when future amendments and additions to the Rules occur.

B. Comments Accompanying the Rules

The Commission has prepared explanatory comments for the Rules of Practice; these comments appear with the Rules in this ''Supplementary Information'' section. The complete text of the Rules without comments appears below in Section VII. Each explanatory remark is identified as either a ''comment'' or a ''revision comment.'' ''Comments'' are statements explaining the basis for a rule, describing the rule's rationale, referencing related rules, or providing information concerning pertinent Commission practice. Comments are not a part of the rules, and are not included in the Code of Federal Regulations. The Commission believes, however, that information in the comment section will assist persons consulting the Rules in a more thorough understanding of the Rules. Printed copies of the revised Rules of Practice including the comments will be

[3] 52 SEC Docket 3, 3–792 (Aug. 18, 1992).

[4] Task Force on Administrative Proceedings, Securities and Exchange Commission, *Fair and Efficient Administrative Proceedings: Report of the Task Force* (Feb. 1993) [hereinafter *Task Force Report*].

[5] *Id.* at 13. *See also id.* at 19–22 (summary of statistical data concerning proceedings adjudicated from 1982 through 1992).

[6] *Id.* 12–19.

[7] Proposed Rules of Practice, Exchange Act Release No. 33163, 58 FR 61732 (Nov. 22, 1993). Most of the rules in the Rules of Practice deal with agency procedure and practice and are exempt from the Administrative Procedure Act's notice and comment requirement for rulemaking, 5 U.S.C. 553(b)(3). Consistent with the recommendation of the Task Force, though, all the Rules were published for comment. *See Task Force Report, supra* note 4, at 12.

[8] The comment letters may be inspected and copied at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549, File No. S7–40–92.

available from the Commission's Publications Branch, U.S. Securities and Exchange Commission; 450 Fifth Street, N.W.; Stop C–11; Washington, D.C. 20549. A copy of this publication will be provided to each respondent by the Secretary at the commencement of proceedings.

''Revision comments'' are statements explaining changes from the proposed Rules to the adopted Rules. In addition, revision comments include, where appropriate, a brief discussion of responses to the requests for comment in the proposing release.

C. Summary of Major Changes to the Rules From the Former Rules

This section contains a capsule summary of major changes from the former Rules.

1. *Temporary cease-and-desist orders.* The Rules include procedures for the issuance of a temporary cease-and-desist order (''TCDO'').[9–10] Rules 510, 511 and 512 contain the application procedures, notice requirements, hearing procedures and issuance requirements for TCDO's. Rule 513 contains additional requirements for *ex parte* issuance of a TCDO. Rule 514 sets forth the availability of judicial review and the duration of a TCDO. Rule 530 governs special procedures relating to issuance of an initial decision whether to enter a permanent order if a temporary order is pending. Rules 531 and 540 govern Commission review of that initial decision, and duration of the temporary order pending that review.

The Division of Enforcement may file an application for a TCDO simultaneously with or after the commencement of proceedings seeking a permanent cease-and-desist order with respect to a registered entity or associated person.[11] The application must be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein; a memorandum of points and authorities; a proposed order imposing the temporary relief sought; and, unless relief is sought *ex parte,* a proposed notice of hearing and order to show cause whether the temporary relief should be imposed. If a proceeding for a permanent cease-and-desist order has not already been commenced, the Division must also file a proposed order instituting proceedings to determine whether a permanent cease-and-desist order should be imposed.

Unless the conditions warranting issuance of an *ex parte* order are met, a respondent shall be served with the application and additional papers and a hearing on the application shall be scheduled.

If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on such an application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. If the Commission does not render its decision within 10 days of the application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

A temporary cease-and-desist order may be appealed to a federal district court within 10 days of service of an order entered with prior notice, or within 10 days after the Commission's issuance of its decision upon a respondent's application to set aside, limit or suspend an *ex parte* order.

After issuance of a temporary cease-and-desist order, the proceeding to determine whether to enter a permanent order shall go forward with a hearing before a hearing officer and the issuance of an initial decision. The Rules establish procedures with respect to expedited consideration of any appeal of the initial decision. The Rules also set forth limitations on the duration and scope of the temporary cease-and-desist order pending issuance of the Commission's opinion on review of the initial decision.

2. *Suspension of Registered Entity.* Rules 520, 521, 522 and 524 include extensive revisions to the provisions of former Rule 19 relating to the suspension of a registered broker or dealer pending a final determination whether the registration shall be revoked. Consistent with amendments to the Securities Exchange Act, the new rules apply to a municipal securities dealer, government securities broker, government securities dealer, or transfer agent as well as a broker or dealer. Where possible, the new procedures for suspensions pending a final determination whether to revoke a registration parallel the procedures relating to temporary cease-and-desist orders.

3. *Disgorgement.* The 600 series of the revised Rules contains new provisions governing payment of disgorgement, interest and penalties. Rule 600 requires prejudgment interest to be assessed on any sum required to be paid pursuant to an order of disgorgement. The rate of interest is set at the IRS underpayment rate and compounded quarterly unless the Commission specifies a lower rate with respect to funds placed in an approved escrow. Under Rule 601 unless otherwise provided, funds due pursuant to an order by the Commission requiring the payment of disgorgement, interest or penalties must be paid no later than 21 days after service of the order. After disgorgement has been paid, a proposed plan of disgorgement will be submitted pursuant to Rule 610.

Rule 611 lists the required elements of such disgorgement plan. A plan may provide for distribution of funds to investors or to a court registry or court-appointed receiver for injured investors. Where return of disgorged funds to investors is not justified, funds may be paid to the U.S. Treasury. Rule 612 requires that notice of a proposed plan be published in the *SEC News Digest* and the *SEC Docket* and other publications as required. A plan may be approved, approved with modifications, republished for additional comments or disapproved pursuant to Rule 613. Rule 614 contains provisions governing the administration of an approved plan.

Rule 620 addresses conditions under which a non-party will be granted leave to intervene or to participate in a proceeding for the purpose of challenging a disgorgement order or plan of disgorgement. The Rule provides that no person shall be granted leave to intervene or to participate for such a purpose based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

Persons claiming an inability to pay disgorgement, interest or a penalty must do so in accordance with Rule 630. A respondent who asserts inability to pay may be required to file a sworn financial statement and to keep the statement current. Failure to file a required statement may be deemed a waiver of the claim of inability to pay.

4. *Expanded Role for Prehearing Conferences.* The Rules significantly expand the role of prehearing

[9–10] Rules 510–514, 530, 531 and 540.

[11] Prior to filing an application for temporary relief, the staff would, in all cases, have to obtain authority to seek a temporary order from the Commission. As with any other decision to initiate enforcement action prior to the institution of proceedings, Commission deliberations and discussions with the staff concerning the decision whether to authorize an application for temporary relief would be nonpublic, privileged, and not ordinarily reviewable by a court.

conferences and encourage more active prehearing case management by administrative law judges. Under the proposed rule, no initial prehearing conference was required. In accordance with suggestions by commenters, revised Rule 221 requires that except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, both an initial and a final prehearing conference shall be held. The initial conference is to be held within 14 days of service of an answer, or if no answer is required, within 14 days of the issuance of an order instituting proceedings. The final conference is to be held as close to the beginning of the hearing as is reasonable.

The Rules make an initial prehearing conference mandatory in most cases because such a conference can eliminate unnecessary delay and improve the quality of adjudicative decisionmaking by sharpening the preparation of cases and presentation of issues. The increased role for prehearing conferences will facilitate the new procedures that provide for access to certain categories of investigation file documents in enforcement and disciplinary proceedings and for the prehearing production of documents pursuant to subpoena.

5. *Prehearing Access to Certain Investigative Documents.* Pursuant to new Rule 230, in an enforcement or disciplinary proceeding, the Division of Enforcement will provide any party with an opportunity for inspection and copying of certain categories of documents obtained by the Division in connection with the investigation leading to the Division's recommendation to institute proceedings. The rule codifies the prevailing practice of the Division of Enforcement staff in the Headquarters Office and various regional offices. A respondent's right to inspect and copy documents under this Rule is automatic; the respondent does not need to make a formal request for access through the hearing officer.

Documents to which access must be provided include: (1) Each subpoena issued; (2) every other written request to persons not employed by the Commission to provide documents or to be interviewed; (3) the documents turned over in response to any such subpoenas or other written requests; (4) all transcripts and transcript exhibits; (5) any other documents obtained from persons not employed by the Commission; and (6) any final examination or inspection reports prepared by the Division of Market Regulation or the Division of Investment Management. The Division of Enforcement's obligation under this rule relates only to documents obtained by the Division of Enforcement. Documents located only in the files of other divisions or offices are beyond the scope of the rule.

The Division of Enforcement may withhold a document if: (1) The document is privileged; (2) the document is an internal memorandum, note or writing prepared by a Commission employee, other than certain examination or inspection reports prepared by the Divisions of Market Regulation or Investment Management, or is otherwise attorney work-product and will not be offered in evidence; (3) the document would disclose the identity of a confidential source; or (4) the hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

Rule 230 is not the exclusive means by which a respondent may obtain access to documents. Production of documents prepared by the staff may be required under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963), or pursuant to Jencks Act requirements made applicable to the Commission pursuant to rule, or may be sought by subpoena or through other procedures. *See, e.g.*, the Freedom of Information Act, 5 U.S.C. 552.

The document access policy in Rule 230 has been revised significantly from the proposed rule. Under the proposed rule, the staff was required to make a relevancy determination before a document would be produced. The Commission decided to change this rule, based in part upon comments received that contended that a relevancy determination by the staff was problematic.[12]

6. *Prehearing Document Production Pursuant to Subpoena.* Rule 232(a) allows for production of documents pursuant to subpoena prior to the start of a hearing. The Rule states that a party may request ''subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place.'' Under former Rule 14(b)(1), such documents were only to be turned over at the hearing. As adopted, the rule will reduce delay and eliminate the need for postponements by allowing for documents to be reviewed and copied, and for proposed exhibits to be selected, all prior to a final prehearing conference.

7. *Summary Disposition.* Under former Rule 11(e), a motion that would dispose of a proceeding in whole or in part could not be made, or considered by a hearing officer, prior to the completion of the interested division's case or the conclusion of the hearing. *See* 17 CFR 201.11(e) (1994). Rule 250 makes substantial changes to these procedures. The Rule provides for a motion for summary disposition by any party after each party required to file an answer has done so and, in an enforcement or disciplinary proceeding, after documents have been made available to the respondent for inspection and copying. If the interested division has not completed presentation of its case in chief at the hearing, a summary decision motion may be made only with leave of the hearing officer. 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. In accordance with suggestions of a commenter, the Rule now provides that if a party cannot, for good cause, present facts essential to justify opposition to the motion by affidavit prior to hearing, the hearing officer shall deny the motion.

A motion for summary disposition is subject to a 35-page limit.

8. *Protective Orders.* The revised Rules contain provisions allowing certain persons involved in an evidentiary hearing to obtain a protective order for confidential information. Documents and testimony introduced in a public hearing are presumed to be public. Rule 322 allows any party intending to introduce material as evidence during a hearing, any person who is the subject or creator of such material, or any witness who testifies at a hearing to file a motion requesting a protective order for such material or testimony. A protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

The former Rules of Practice contained a confidential treatment provision that related solely to applications for materials filed in connection with registration statements and other statutorily required filings; it required that confidential treatment be sought at the time of filing. *See* 17 CFR 201.25 (1994). Proposed Rule 33 would have responded to this situation by

[12] Specifically, it was suggested that the proposed standard might deny respondents access to documents that ''while possibly not directly relevant to any of the Commission's allegations, may bear directly on the lines of defense the respondent is developing.'' ABA comment letter dated Feb. 28, 1994, at 59. It was also suggested that asking the staff to make such a determination was inappropriate because of the staff's ''outlook and allegiance.'' *Id.*

allowing a party to seek confidential treatment under any ''applicable statute or rule,'' without limiting the scope of materials sought to be protected or the timing of the application.

The Commission has decided that a separate rule for protective orders would be more efficient and easier for adjudicatory litigants to use than a rule that encompassed not only protective orders, but also requests for confidential treatment under the federal securities laws [13] or the Freedom of Information Act.[14]

9. *Service.* The rule for service of orders by the Commission, Rule 141, and the rule for service of papers by parties, Rule 150, contain a number of revisions. Rule 141 contains new provisions specifically addressing service upon persons in a foreign country and upon persons currently registered with the Commission. Rule 141 also contains a new provision allowing a waiver of formal service to permit a party to accept service by facsimile transmission. For parties wishing to use facsimile transmission to serve one another, Rule 150 allows delivery of papers by fax when two conditions are met: (i) there must be a written agreement between the persons intending to serve each other by fax specifying such terms as they deem necessary with respect to telephone numbers, hours of facsimile operation, provision of paper original or other matters; and (ii) receipt of each document served by fax must be confirmed by a manually signed receipt delivered by fax or other means agreed to by the parties. These conditions are intended to ensure that service by fax will be both an efficient and an effective means of service.

D. Technical Changes and Appendices

A number of technical changes have been made and appendices created in order to implement the Rules. First, former Rule 24 concerning incorporation by reference, which related to the making of disclosure or regulatory filings has been moved from the Rules of Practice to Regulation S–K section 10, paragraph (d) (17 CFR 229.10(d); a comparable provision has been added to Regulation S–B section 10, paragraph (f) (17 CFR 228.10(f)). Second, Commission procedures for summary suspensions pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78*l*(k), have been moved from Part 202 of 17 CFR into new Rule 550. Third, new cross-reference tables showing the location of the former rules in the revised rules and vice versa have been included in an appendix to appear in the Code of Federal Regulations. Finally, all references to the Rules of Practice in the Commission's other rules and forms have been updated.

III. Discussion of the Statement of Informal Procedures and Supplemental Information Concerning Adjudicatory Proceedings

In 1990, at the time the Schapiro Task Force was created, there was significant delay in the disposition of administrative proceedings. For example, in fiscal years 1991 and 1992, the Commission issued a total of 10 opinions in Commission-initiated administrative proceedings. These 10 cases took an average of four years from institution of proceedings to conclusion.[15]

Interim recommendations made by the Task Force to eliminate unnecessary delay and reduce the backlog were implemented in 1991 and 1992. The Commission reorganized the Adjudications Group within the Office of the General Counsel and appointed new senior staff to supervise the adjudicatory work assigned to the Office of the General Counsel. On a Commission-wide basis, the total number of staff assigned to adjudicatory matters was increased over three fold. For approximately one year attorneys throughout the General Counsel's Office assisted the Adjudications Group in preparing opinions for the Commission. Further, the Commission gave greater priority to adjudicatory matters, held oral arguments on a more timely basis, and met to consider proposed opinions more frequently.[16]

In fiscal year 1994, the number of new appeals to the Commission declined and the number of cases resolved increased compared with the prior year. As a result, in fiscal year 1994 the pending appellate caseload declined for the first time in over a decade. In addition, the number of cases pending on appeal for more than one year has declined significantly from the level of four years ago.

Despite these strides, the Commission's past experience strongly suggests that additional steps should be taken, especially given the increase in proceedings assigned to the administrative law judges [17] and the likelihood that the number and complexity of new appeals may increase again in coming years. Backlogs in the Commission's disposition of adjudicatory proceedings have recurred periodically over at least the past 30 years.[18] The Task Force examined prior efforts to address delay in the administrative proceedings process, and considered why earlier ''solutions'' gave way to new backlogs.

The Task Force considered various alternatives aimed at eliminating systemic causes of the recurring backlog problems. In its Report, the Task Force recommended: (1) That the Commission establish guidelines for the timely completion of adjudicatory proceedings; (2) that the Commission be specifically apprised of matters not completed within designated periods, so that the Commission has a specific opportunity to determine what, if any, steps to take to advance the fair and timely resolution of those particular matters; and (3) that the Commission make increased public disclosure of the status of the pending case docket and changes in its case load.

The Statement of Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings (''Statement of Informal Procedures'') adopts, with modifications, these three recommendations. Implementation of these recommendations will increase accountability for the timely and efficient completion of adjudicatory proceedings and consolidate on a more permanent basis the improvements in the adjudications process made since the creation of the Task Force.

A. Guidelines for the Timely Completion of Proceedings

The Guidelines For the Timely Completion of Proceedings provide that an administrative law judge's initial

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[13] *See* Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30), and Rule 406 thereunder, 17 CFR 230.406; Section 24(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b)(2), and Rule 24b–2 thereunder, 17 CFR 240.24b–2; Section 22(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(b), and Rule 104 thereunder, 17 CFR 250.104; Section 45(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–44(a), and Rule 45a–1 thereunder, 17 CFR 270.45a–1; and Section 210(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–10(a). *See* also Rule of Practice 190, 17 CFR 201.190 (specifying procedures by which registrants may request confidential treatment of certain information contained in regulatory filings).

[14] *See* 17 CFR 200.83 (providing for procedures by which persons submitting information to the Commission can request that the information not be disclosed pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552).

[15] *See* Task Force Report, *supra* note 4, at 20–22.

[16] Also pursuant to a recommendation of the Task Force, the Office of the General Counsel organized a conference with self-regulatory organizations, held in June 1994, to address problems of mutual concern. Changes in adjudicatory procedures or practices by the self-regulatory organizations resulting from the conference may eliminate or simplify certain issues that would otherwise be appealed to the Commission.

[17] There were 56 cases pending before the administrative law judges as of October 1, 1994, up from 32 cases on October 1, 1993 and 25 cases on October 1, 1992.

[18] *See* Task Force Report, *supra* note 4, at 33 n.46.

decision should be filed within 10 months of issuance of the order for proceedings and that a decision by the Commission on appeal of an initial decision, review of a self-regulatory organization determination or remand of a prior decision by a court of appeals should be issued within 11 months of the filing of a petition for review or application for review or the issuance of a mandate of the court.[19]

The primary purposes of the guidelines are to provide a basis to gauge the Commission's and administrative law judges' productivity in issuing opinions, and to permit the allocation of appropriate Commission, management and staff resources for the timely completion of proceedings. Establishment of guidelines by the Commission indicates the priority of adjudicatory matters for the Commission, as well as for persons delegated authority or assigned responsibility for adjudicatory matters. Among other benefits, the guidelines can lend important authority to the deadlines set by the administrative law judges for hearing dates and pre- and post-hearing submissions, and by the General Counsel and the Secretary for oral argument dates and the filing of briefs.

The Schapiro Task Force had recommended that ''normative guidelines'' for the completion of adjudicatory proceedings be included in the Rules of Practice themselves. The existing Rules of Practice use this approach in some instances,[20] and other federal agencies and departments also have used similar approaches.[21] The Commission believes, however, that since the guidelines are not themselves rules, it is preferable to publish them in a supplemental statement, and thereby eliminate a potential source of confusion or collateral litigation concerning their status as non-binding criteria for monitoring the age of pending cases rather than a legal standard. This approach is consistent with the publication in the Code of Federal Regulation of other non-binding, informal procedures.[22]

The guidelines do not create a requirement that each portion of a proceeding or the entire proceeding be completed within the periods described. Proceedings at either the hearing stage or on review by the Commission may require additional time because they are unusually complex or because the record is exceptionally long or for other reasons. In addition, fairness to all parties requires that the Commission's deliberative process not be 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.

As noted in the supplemental statement, the guidelines adopted today will need to be examined periodically and may need to be readjusted in light of changes in the Commission's case load and the availability of Commission resources.

One alternative approach, considered by the Task Force, was to set fixed deadlines for the issuance of initial decisions and Commission opinions, and to provide for a remedy, such as dismissal, if cases were not completed within the deadline. Applying this approach to adjudicatory proceedings, including enforcement actions and review of self-regulatory organization determinations, places too great a premium on the benefits of achieving resolution of a proceeding, without due consideration to the resolution reached. In light of its broad responsibilities, the Commission should retain the flexibility to delay the resolution of proceedings in order to address higher priority matters, without abandoning the opportunity to adjudicate issues properly before it, particularly those relating to whether the protection of the public or investors requires that a securities law violator be subject to remedial sanctions.

B. Reports to the Commission on Pending Cases

Prior reviews of the administrative process concluded that delegation of certain functions to the staff is desirable, as it frees the Commission from having to deal with routine matters and can expedite Commission action.[23] Unmonitored delegation, however, can also create a source of delay. The Schapiro Task Force observed that, once a case is assigned to an administrative law judge or to the staff, ''there is no procedure to return cases to the Commission for a status conference if significant milestones are not reached or no opinion is prepared within specified periods.'' [24] The Task Force recommended that if a case does not proceed through each major phase on a timely basis, it should automatically be returned to the Commission to determine whether any additional steps should be taken to advance the resolution of the case. The Task Force stated that ''[b]y establishing this procedure, the Commission will require the staff to identify non-routine matters, shortages in staff or other impediments that are preventing the timely completion of delegated decisionmaking.'' [25]

In response to this recommendation, one commenter advocated that the Commission should ''encourage more ALJ autonomy and thereby avoid SEC involvement between the times when cases are authorized and appealed.'' [26] Accordingly, this commenter suggested, unless absolutely necessary, interim Commission review of cases assigned to an administrative law judge should not occur, even on a case management basis such as for status conferences. The commenter suggested, as an alternative to status conferences, that the administrative law judges have a periodic requirement to report any case backlog to the Commission and the public. The Commission has modified the recommendation of the Schapiro Task Force to address the concerns raised by this commenter.

Under the informal procedures adopted today, a requirement formally to apprise the Commission of proceedings beyond a specified age is being integrated into a case status reporting system overseen by the Secretary. Use of written status reports as a tool to improve docket control is a widely accepted practice. For example, federal court judges are required to report periodically to the Office of United States Courts on the status of certain matters pending beyond specified periods. Face-to-face status conferences between the Commission and an administrative law judge, or discussion of the merits of a proceeding, will not be a part of the more formal case status reporting system.

Periodically, confidential status reports with respect to all filed

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[19] The guidelines also set 45 days for a Commission decision on interlocutory matters, and up to 45 days to decide a motion for stay, depending upon whether the action to be stayed has already taken effect.

[20] *See, e.g.,* former Rule 16(e), 17 CFR 201.16(e) (1994) (period prescribed for filing of proposed findings and conclusions ''normally should be no more than 30 days after the close of the hearing, and if the hearing officer directs that the first filing be made at a date later than 30 days after the close of the hearing, the reasons for so doing shall be stated in his order'').

[21] *See, e.g.,* 37 CFR 10.139(c) (ALJ in Patent and Trademark Office, Dept. of Commerce, shall normally issue initial decisions in disciplinary cases within six months of the date a complaint is filed).

[22] *See, e.g.,* 17 CFR 202.

[23] *Task Force Report, supra* note , at 32–33.

[24] *Id.* at 33.

[25] *Id.* at 42.

[26] ABA comment letter to Commissioner Mary Schapiro on the Report of the Task Force on Administrative Proceedings dated Nov. 10, 1993, at 8.

adjudicatory proceedings shall be made to the Commission. The Chief Administrative Law Judge shall report on proceedings assigned to an administrative law judge. The General Counsel shall report on proceedings assigned to the Office of the General Counsel, as well as any other pending proceedings. These status reports shall be made through the Secretary, with a minimum frequency established by the Commission. In connection with these reports, the Chief Administrative Law Judge and the General Counsel shall specifically apprise the Commission of any proceeding that exceeds the guidelines established for the timely completion of proceedings by more than 30 days. The report shall describe the procedural posture of any such proceeding, estimate a date for conclusion of the proceeding, and provide such other information as is necessary to enable the Commission to determine whether additional steps are necessary to reach a fair and timely resolution of the matter.

In some cases, additional resources may be necessary to free an administrative law judge or staff to address a matter of unusually large size or exceptional complexity.[27] In some instances, consultation with the Commission by the General Counsel may speed the completion of a particular case. In others, the length of the hearing, the number or respondents, the complexity of a case or the urgency of other matters may justify delay in reaching a decision at a delegated level, in which case no action in response to the status report would be needed. Coupled with the guidelines for the timely completion of proceedings, however, the use of a comprehensive and formalized case status reporting system will provide greater assurance that the resolution of a proceeding that has been delayed will be treated as a priority matter.

As noted by the Schapiro Task Force, an increasing number of status reports concerning cases that are not completed within the guidelines may provide an ''early warning signal'' that additional resources are necessary. Had a more detailed and more formal case status reporting requirement been in effect in the mid-1980's, the Commission might have been in a better position to address the developing case backlog before it gained the magnitude it had reached by 1990 when the Task Force was created.

The Commission believes that the case status reporting requirements announced today will fulfill the purpose of the Schapiro Task Force recommendation discussed above by establishing a mechanism that will automatically address cases that are not timely resolved and by increasing accountability by and to the Commission for management of the docket.

The Task Force recommended that the requirement to formally apprise the Commission if a proceeding is not completed within specified periods should be implemented through changes in the Commission's formal delegations to the administrative law judges, the Secretary, and the General Counsel. See 17 CFR 200.30–1 *et. seq.* The Commission believes that publication of these case status reporting procedures in the Statement of Informal Procedures will be equally effective in implementing this recommendation.

C. Increased Public Disclosure Concerning the Pending Case Docket

The Task Force recommended publishing more information concerning the status of the Commission's adjudicatory docket.[28] Ongoing disclosure of information about the adjudication program caseload increases awareness of the importance of the program, facilitates oversight of the program, and promotes public confidence in the efficiency and fairness of the program. Under the procedures adopted today, the Secretary will publish each October and April in the *SEC Docket* summary statistical information about the status of the pending adjudicatory docket and changes in the Commission's caseload over the prior six months.[29]

The Commission will also continue to follow the Task Force recommendation that it adopt the practice of several federal courts of appeals by publishing with each opinion the date the appeal or review was commenced and the date of oral argument, if any.

The Task Force suggested publication of information about the Commission's caseload in the Annual Report. Although a useful adjunct to publication in the *SEC Docket*, publication in the Annual Report alone is not sufficient. The *Docket* is more widely available (both on commercial database services and in other places such as libraries) than the Annual Report. In addition, publication in the *Docket* allows more frequent and more timely disclosure.

IV. Rules of Practice: Table of Contents

[27] For example, additional administrative law judges might be necessary on a temporary basis, *see, e.g.*, 5 U.S.C. 3344, to allow the judge assigned responsibility for a proceeding to complete that proceeding without the burden of new cases, or additional law clerks, paralegals or other staff might be needed on temporary assignment.

[28] *See* Recommendation 4, *Task Force Report, supra* note , at 43–44.

[29] The report shall 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 shall 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 and the number of cases decided within the guidelines for the timely completion of adjudicatory proceedings.

General Rules

Rule 100. Scope of the Rules of Practice

(a)Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter; or

(2) actions taken by the duty officer pursuant to delegated authority under 17 CFR 200.43.

Comment: The Rules of Practice govern a wide range of Commission processes, including Commission-initiated enforcement and disciplinary proceedings, proceedings to review disciplinary actions initiated by self-regulatory organizations and certain other self-regulatory decisions, proceedings to review Commission staff decisions made pursuant to delegated authority, and proceedings in which an exemptive application is contested and a hearing ordered. Certain agency processes are specifically excluded from the scope of the Rules. First, Commission investigations are not governed by the Rules unless a rule explicitly provides otherwise. *See, e.g.*, Rule 240 (concerning offers of settlement); *see also* 17 CFR 203.8 (service of subpoenas in formal investigations is governed by Rule 232). Second, these Rules do not cover an appeal from a decision of the duty officer. Rules governing appeals of such decisions are contained in 17 CFR 200.43(c).

Each rule indicates whether that rule applies generally to all proceedings, or only to a particular category of proceedings, such as ones in which an order instituting proceedings has been entered. A majority of the Rules address procedures in those matters where the Commission has ordered an evidentiary hearing pursuant to an order instituting proceedings. When an order instituting proceedings has been entered, it may specify particular procedures to be used in the proceeding to which it applies.

The Administrative Procedure Act (''APA''), 5 U.S.C. 551 *et seq.*, is the source of various provisions of the Rules. In addition, in any particular proceeding the APA may govern the Rules or the specific procedures that the Commission is required to employ. Which requirements of the Administrative Procedure Act are applicable to a particular Commission proceeding depends on the language of the statute authorizing the proceeding. An adjudication is subject to the requirements of 5 U.S.C. 554, 556 and 557 if the Commission is authorized by statute to make its determination ''on the record, after notice and opportunity for an agency hearing.'' Such adjudications are often referred to as ''on the record'' or formal adjudications. Other adjudications, including those where the Commission is authorized by statute to make its determination ''after opportunity for hearing,'' are often referred to as informal adjudications. *See* Rules 191 and 326 and associated comments.

Rule 101. Definitions

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

(1) *Commission* means the United States Securities and Exchange Commission, or a panel of Commissioners constituting a quorum of the Commission, or a single Commissioner acting as duty officer pursuant to 17 CFR 200.43;

(2) *counsel* means any attorney representing a party or any other person representing a party pursuant to Rule 102(b);

(3) *disciplinary proceeding* means an action pursuant to Rule 102(e);

(4) *enforcement proceeding* means an action, initiated by an order instituting proceedings, held for the purpose of determining whether or not a person is about to violate, has violated, has caused a violation of, or has aided or abetted a violation of any statute or rule administered by the Commission, or whether to impose a sanction as defined in section 551(10) of the Administrative Procedure Act, 5 U.S.C. 551(10);

(5) *hearing officer* means an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing;

(6) *interested division* means a division or an office assigned primary responsibility by the Commission to participate in a particular proceeding;

(7) *order instituting proceedings* means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

(8) *party* means the interested division, any person named as a respondent in an order instituting proceedings, any applicant named in the caption of any order, persons entitled to notice in a stop order proceeding as set forth in Rule 200(a)(2) or any person seeking Commission review of a decision;

(9) *proceeding* means any agency process initiated by an order instituting proceedings; or by the filing, pursuant to Rule 410, of a petition for review of an initial decision by a hearing officer; or by the filing, pursuant to Rule 420, of an application for review of a self-regulatory organization determination; or by the filing, pursuant to Rule 430, of a notice of intention to file a petition for review of a determination made pursuant to delegated authority;

(10) *Secretary* means the Secretary of the Commission; and

(11) *temporary sanction* means a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending final determination whether the registration shall be revoked.

(b) [Reserved]

Rule 102. Appearance and Practice Before the Commission

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing Oneself.* In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing Others.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission Employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR 200.735.

(d) *Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal.*

(1) *Representing Oneself.* When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in Rule 101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(2) *Representing Others.* When a person first makes any filing or otherwise appears in a representative capacity before the Commission or a hearing officer in a proceeding as defined in Rule 101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address and telephone number; and the name and address of the person or persons represented.

(3) *Power of Attorney.* Any individual appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

(4) *Withdrawal.* Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Commission or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal.

(e) *Suspension and Disbarment.*

(1) *Generally.* The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:

(i) not to possess the requisite qualifications to represent others; or

(ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or

(iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

(2) *Certain Professionals and Convicted Persons.* Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this rule shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether an appeal of such judgment or order is pending or could be taken.

(3) *Temporary Suspensions.* An order of temporary suspension shall become effective upon service on the respondent. No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this rule more than 90 days after the date on which the final judgment or order entered in a judicial

or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

(A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) of this rule may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent.

(iii) Within 30 days after the filing of a petition in accordance with paragraph (e)(3)(ii) of this rule, the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both, and, after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in accordance with Rule 500. If the hearing is held before a hearing officer, the time limits set forth in Rule 531 will govern review of the hearing officer's initial decision.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii) of this rule, the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) of this rule or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) of this rule and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner may not contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) of this rule without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4) *Filing of Prior Orders.* Any person appearing or practicing before the Commission who has been the subject of an order, judgment, decree, or finding as set forth in paragraph (e)(3) of this rule shall promptly file with the Secretary a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper, order, judgment, decree or finding shall not impair the operation of any other provision of this rule.

(5) *Reinstatement.* (i) An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this rule may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (e)(2) of this rule shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment, or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (e)(2) of this rule may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(6) *Other Proceedings Not Precluded.* A proceeding brought under paragraph (e)(1), (e)(2) or (e)(3) of this rule shall not preclude another proceeding brought under these same paragraphs.

(7) *Public Hearings.* All hearings held under this paragraph (e) shall be public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.

(f) *Practice Defined.* For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:

(1) transacting any business with the Commission; and

(2) the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

Revision Comment: Rule 102, which governs appearance and practice before the Commission, contains two changes from former Rule 2. First, as suggested by one commenter, the rule now explicitly requires that individuals and other persons filing a notice of appearance keep the information contained in the notice, such as address and telephone number, up-to-date. Current information is necessary to permit the expeditious service of orders as well as other efforts to contact a party.

The same commenter suggested that the Commission consider adopting a provision that would require an attorney to file a written notice of withdrawal when the attorney seeks to withdraw from a matter before the Commission. New paragraph (d)(4) accomplishes this by requiring that, a person appearing in a representative capacity who wishes to withdraw from a proceeding, must file a motion seeking leave to withdraw and obtain such leave from the Commission or the hearing officer.

In addition, language has been added to paragraph (d) (1) and (2) to clarify the longstanding policy of the Commission that a person who makes a filing with the Commission thereby makes an appearance before the Commission.

Rule 103. Construction of Rules

(a) The Rules of Practice shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.

(b) In any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control.

(c) For purposes of these rules:

(1) any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate;

(2) any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate; and

(3) unless the context requires otherwise, counsel for a party may take any action required or permitted to be taken by such party.

Comment (a): Paragraph (a) is based on Rule 1 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 1.

Rule 104. Business Hours

The Headquarters office of the Commission, at 450 Fifth Street, NW., Washington, DC 20549, is open each day, except Saturdays, Sundays, and Federal legal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect in Washington, DC Federal legal holidays consist of New Year's Day; Birthday of Martin Luther King, Jr.; Presidents Day; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans Day; Thanksgiving Day; Christmas Day; and any other day appointed as a holiday in Washington, D.C. by the President or the Congress of the United States.

Rule 110. Presiding Officer

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30–10, the administrative law judge to preside.

Comment: Ordinarily the assignment to a hearing officer is part of the order instituting proceedings. The Rules use the term ''hearing officer,'' defined in Rule 101(a), to refer to a person who presides at a hearing. While an administrative law judge presides at most hearings at which the Commission itself does not preside, other persons may preside. *See* Securities Exchange Act § 4A, 15 U.S.C. 78d–1; Administrative Procedure Act § 556(b), 5 U.S.C. 556(b).

Revision Comment: Rule 110 has been revised to specify the process by which administrative law judges are assigned by referencing the authority the Commission has previously delegated to the Chief Administrative Law Judge to assign matters to any of the administrative law judges.

Rule 111. Hearing Officer: Authority

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

(a) administering oaths and affirmations;

(b) issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;

(c) receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(d) regulating the course of a proceeding and the conduct of the parties and their counsel;

(e) holding prehearing and other conferences as set forth in Rule 221 and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(f) recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) subject to any limitations set forth elsewhere in these rules, considering and ruling upon all procedural and other motions;

(i) preparing an initial decision as provided in Rule 360;

(j) upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

Comment: This rule is based upon Section 556(c) of the Administrative Procedure Act, 5 U.S.C. 556(c). By its terms, the list of powers is illustrative, not exhaustive. The hearing officer is permitted to take any action necessary and appropriate to discharge his or her duties.

Revision Comment: One commenter suggested that the Commission include in Rule 111 two powers recently added to Section 556(c) of the Administrative Procedure Act by the Administrative Dispute Resolution Act: the power to require attendance at a prehearing conference by a representative of each party who has the authority to negotiate concerning the resolution of issues in controversy and the power to inform parties as to the availability of alternate means of dispute resolution (ADR) and to encourage the use of such methods.

The Commission has decided to modify this rule to address these concerns.

Rule 112. Hearing Officer: Disqualification and Withdrawal

(a) *Notice of Disqualification.* At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefor.

(b) *Motion for Withdrawal.* Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding.

Comment: Section 556(b) of the Administrative Procedure Act, 5 U.S.C. 556(b), provides that a hearing officer may disqualify himself or herself at any time. The standard for making a motion to disqualify requires that the movant have a reasonable good-faith basis. This standard is intended to emphasize that there must be objective reasons to seek a disqualification, not just a subjective, though sincerely held, belief. A party seeking disqualification must do so promptly upon learning of the relevant information. A party may not await the outcome of the hearing officer's decision to determine if the alleged grounds for disqualification affected the decision.

Rule 120. Ex Parte Communications

(a) Except to the extent required for the disposition of *ex parte* matters as authorized by law, the person presiding over an evidentiary hearing may not:

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Commission.

(b) The Commission's code of behavior regarding *ex parte* communications between persons outside the Commission and decisional employees, 17 CFR 200.110–200.114, governs other prohibited communications during a proceeding conducted under the Rules of Practice.

Comment: Paragraph (a) is based on Section 554(d)(1) of the Administrative Procedure Act (APA), 5 U.S.C. 554(d)(1). Paragraph (b) references the Commission's rules applying to communications between Commission members or decisional employees and persons outside the agency, which incorporate the requirements of Section 557(d)(1) of the APA, 5 U.S.C. 557(d)(1). *See also* 17 CFR 200.62 (ethical canon for Commission members regarding *ex parte* communications); Securities Act Release No. 5815 (Mar. 10, 1977), 11 SEC Docket 1933 (Mar. 22, 1977) (amending Commission's code of behavior governing *ex parte* communications between persons outside the Commission and decisional employees to conform to requirements of Section 4 of the Government in the Sunshine Act, 5 U.S.C. § 552b).

Revision Comment: Although the Commission's administrative proceedings were previously subject to the requirements of the Administrative Procedure Act governing *ex parte* communications, 5 U.S.C. 554(d)(1) and 557(d)(1), the prior rules did not mention them. Rule 120 makes no substantive changes to these requirements—it simply restates the APA's directive with regard to *ex parte* contacts. The Rule was added so that these requirements were more readily available to persons subject to proceedings under the Rules of Practice. *See,* Model Adjudication Rule 120(A), Administrative Conference of the United States (Dec. 1993).

Rule 121. Separation of Functions

Any Commission officer, employee or agent engaged in the performance of investigative or prosecutorial functions for the Commission in a proceeding as defined in Rule 101(a) may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Commission review of the decision pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. 557, except as a witness or counsel in the proceeding.

Comment: Rule 121 is based on Section 554(d) of the Administrative Procedure Act (APA), 5 U.S.C. 554(d), which governs the separation of personnel involved in prosecutorial and investigative functions in certain cases from decisionmaking in those cases.

Revision Comment: Although the Commission's administrative proceedings were previously subject to the requirements of Section 554(d) of the APA governing separation of functions, 5 U.S.C. 554(d), the prior rules did not mention them. Rule 121 makes no substantive changes to these requirements—it simply restates the APA's position on separation of functions. The Rule was added so that these requirements were more readily available to persons subject to proceedings under the Rules of Practice. *See* Model Adjudication Rule 121, Administrative Conference of the United States (Dec. 1993).

Rule 140. Commission Orders and Decisions: Signature and Availability

(a) *Signature Required.* All orders and decisions of the Commission shall be signed by the Secretary or any other person duly authorized by the Commission.

(b) *Availability for Inspection.* Each order and decision shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry.

(c) *Date of Entry of Orders.* The date of entry of a Commission order shall be the date the order is signed. Such date shall be reflected in the caption of the order, or if there is no caption, in the order itself.

Revision Comment (b): Changes to the text of the Commission's rule regarding availability of orders are technical. The Office of the Secretary has for many years maintained a practice of holding Commission orders for five days before release to the public. Under Rule 140(b), unless an order or decision is nonpublic, it will be available to the public from the date of entry.

Revision comment (c): This paragraph has been simplified. No substantive change is intended.

Rule 141. Orders and Decisions: Service of Orders Instituting Proceeding and Other Orders and Decisions

(a) *Service of an Order Instituting Proceedings.*

(1) *By Whom Made.* The Secretary, or another duly authorized officer of the Commission, shall serve a copy of an order instituting proceedings on each person named in the order as a party. The Secretary may direct an interested division to assist in making service.

(2) *How made.*

(i) *To Individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the order instituting proceedings to the individual or to an agent authorized by appointment or by law to receive such notice. *Delivery* means—handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt; or giving confirmed telegraphic notice.

(ii) *To Corporations or Entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive such notice, by any method specified in paragraph (a)(2)(i) of this rule.

(iii) *Upon Persons Registered with the Commission.* In addition to any other method of service specified in paragraph (a)(2) of this rule, notice may be made to a person currently registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent by sending a copy of the order addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

(iv) *Upon Persons in a Foreign Country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this 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.

(v) *In Stop Order Proceedings.* Notwithstanding any other provision of paragraph (a)(2) of this rule, 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 obtain pursuant to paragraph (a)(4) of this rule.

(3) *Certificate of Service.* The Secretary shall place in the record of the proceeding a certificate of service 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 service is made in person, the certificate 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, registered or Express Mail, the certificate shall be accompanied by a confirmation of receipt or of attempted delivery, as required. If service is made to an agent authorized by appointment to receive service, the certificate shall be accompanied by evidence of the appointment.

(4) *Waiver of Service.* In lieu of service as set forth in paragraph (a)(2) of this rule, the party may be provided a copy of the order instituting proceedings by first-class mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(b) *Service of Orders or Decisions Other Than an Order Instituting Proceedings.* Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this rule or Rule 150(c). Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be made by the Secretary or the hearing officer.

Comment (a): The Rule is derived, in part, from Rules 4 and 5(b) of the Federal Rules of Civil Procedure. The Rule is also based, in part, on Section 40(a) of the Investment Company Act, 15 U.S.C. 80a–39(a), and Section 211(c) of the Investment Advisers Act, 15 U.S.C. 80b–11(c), which set forth acceptable methods for service of orders instituting proceedings under those Acts, and on Sections 8 and 10 of the Securities Act of 1933, 15 U.S.C. 77h and 77j, and Sections 305 and 307 of the Trust Indenture Act of 1939, 15 U.S.C. 77eee and 77ggg, which set forth acceptable methods of service for orders instituting stop order proceedings pursuant to those statutory sections.

The Commission commences proceedings to enforce the Federal securities laws by issuing an ''order instituting proceedings.'' The Commission is required to give each party appropriate notice of an order instituting proceedings. *See* Rule 200 (setting forth requirements in connection with the issuance of such orders). While service of the order instituting proceedings satisfies notice requirements, it is not the exclusive means of providing notice sufficient to meet the requirements of due process. In some circumstances—for example, where emergency or expedited relief is sought—actual notice of the institution of a proceeding may be made by telephone. *See, e.g.,* Rule 511. Although formal service of the order is still required in such circumstances, action on an application for emergency or expedited relief may precede service of the order.

Rule 141(a)(2) allows service by those means specifically mentioned by statute. Rule 141 also allows service to be made by U.S. Postal Service Express Mail which, like certified or registered mail, both traditionally relied upon under the former rule, is a U.S. Post Office service that provides each letter a unique identification number, is traceable, and allows for a receipt upon delivery. Under Rule 141, alternative methods of service to persons located in the United States, such as service by publication, are not permitted. A party may, however, waive service and receive notice by accepting a copy of an order instituting proceedings by facsimile transmission, U.S. Mail, private overnight courier, or other means. Whatever method of service is used, Rule 141 requires a certificate of service establishing how notice was given, or a written waiver of service.

The Rule establishes specific criteria for service of orders upon persons registered with the Commission and upon persons in a foreign country. A person who is currently registered with the Commission to engage in the securities business with the public may reasonably be expected to receive mail sent to the address shown on their registration form or to make appropriate arrangements for such mail to be forwarded or delivered. Rule 141 provides that a person currently registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be served by sending a copy of the order to the last business address shown on their registration form by U.S. Postal Service certified, registered or Express Mail and that confirmation of attempted delivery to that address is sufficient for valid service if no confirmation of receipt can be obtained.

A person in a foreign country may be served by any method of service, reasonably calculated to give notice, that is not prohibited by the law of the foreign country.

Comment (b): Service of an order instituting proceedings places a party on notice that there will be subsequent filings or other papers. Unless a party defaults, a party's response to receipt of an order instituting proceedings must include the filing of a notice of appearance. *Cf.* Rule 155 (governing defaults). The notice will provide an address of record where the party can be served with subsequent orders. Therefore, a return receipt or other confirmation of delivery is not required for subsequent orders.

Subject to statutory limitations governing particular types of orders, orders other than an order instituting proceedings may be served pursuant to any method provided for in Rule 141(a) or in Rule 150(c), which governs service of papers filed by parties. The Commission may serve an order on a party, as well as on the party's counsel. It is the Commission's practice to send orders instituting proceedings and final orders to each party in addition to serving counsel, if any. *Cf.* Rule 150(b) (if a party is represented by counsel, counsel shall be served with papers filed by other parties with the Commission).

Revision Comment (a): The Rule has been revised to permit a waiver of formal service and thereby allow the use of methods of service, such as private courier service or facsimile transmission, in circumstances where such methods might otherwise be inconsistent with statutory requirements.

The Rule has been revised to include a provision specifically addressing service by the Commission on a person in a foreign country. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents does not apply to the service of Commission orders.

The rule has also been revised to include a specific provision for service on persons registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent.

Rule 150. Service of Papers by Parties

(a) *When Required.* In every proceeding as defined in Rule 101(a), each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in the

proceeding in accordance with the provisions of this rule; provided, however, that absent an order to the contrary, no service shall be required for motions which may be heard *ex parte.*

(b) *Upon a Person Represented by Counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to Rule 102, service shall be made pursuant to paragraph (c) of this rule upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How Made.* Service shall be made by delivering a copy of the filing. *Delivery* means:

(1) personal service—handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof; or leaving a copy at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(2) mailing the papers through the U.S. Postal Service by first class, certified, registered, or Express Mail delivery addressed to the person;

(3) sending the papers through a commercial courier service or express delivery service addressed to the person; or

(4) transmitting the papers by facsimile machine where the following conditions are met:

(i) the persons serving each other by facsimile transmission have agreed to do so in a writing, signed by each party, which specifies such terms as they deem necessary with respect to facsimile machine telephone numbers to be used, hours of facsimile machine operation, the provision of non-facsimile original or copy, and any other such matters; and

(ii) receipt of each document served by facsimile is confirmed by a manually signed receipt delivered by facsimile machine or other means agreed to by the parties.

(d) *When Service Is Complete.* Personal service, service by U.S. Postal Service Express Mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission by delivery of a manually signed receipt.

Comment (a): Each document a party files in connection with a proceeding, as defined in Rule 101(a), must be served on all other parties admitted to the proceeding. In general, the party serving a paper should use the same method of service on all other parties and for filing with the Commission. Where a party uses different methods of service, the reason for doing so must be stated. Where a party is represented by counsel who has filed a notice of appearance, service ordinarily shall be made on counsel.

Revision Comment: The rule now contains a provision, paragraph (c)(4), allowing the use of facsimile transmission (''fax'') for the delivery of papers. The Commission received a large number of comments on this subject. Commenters had a number of suggestions for how to implement service by fax, including: that service should not be deemed complete unless a manually signed receipt acknowledges that the transmission was readable and was received in full within the time permitted for filing; that the hearing officer be given discretion to determine whether, and under what circumstances, fax service should be allowed; that an initial agreement to allow service by fax should include an undertaking to serve documents leaving sufficient time before the filing deadline and to notify the sender promptly of any fax transmission errors; that simultaneous service of an original copy should also be made through other means; and that a written agreement of terms should be required when the parties agree to the use of fax service. Commenters disagreed whether the Commission should limit the use of facsimile transmission to cases in which all parties agree on the terms for service.

In federal court, filing by fax is permitted where authorized by local rule subject to standards approved by the Judicial Conference. *See* Fed. R. Civ. P. 5(e); Fed. R. App. P. 25(a). The Commission has decided to allow service by facsimile transmission where two conditions have been met. First, persons serving each other by fax must agree to do so in writing. The written agreement shall contain such terms as are necessary with respect to telephone numbers, hours of operation, and provision of paper original and any other matters. Second, receipt of a document served by fax must be confirmed by a manually signed receipt. These conditions are intended to ensure that service by fax will be both an efficient and an effective means of service.

One commenter objected to the provision in the proposed rule that would have allowed service directly upon a party where the party was represented by counsel. In response, Rule 150(b) has been amended to clarify that service upon counsel by another party is required unless service upon the person represented is specifically ordered by the Commission or the hearing officer.

Rule 151. Filing of Papers With the Commission: Procedure

(a) *When to File.* All papers required to be served by a party upon any person shall be filed with the Commission at the time of service or promptly thereafter. Papers required to be filed with the Commission must be received within the time limit, if any, for such filing.

(b) *Where to File.* Filing of papers with the Commission shall be made by filing them with the Secretary. When a proceeding is assigned to a hearing officer, a person making a filing with the Secretary shall promptly provide to the hearing officer a copy of any such filing; provided, however, that the hearing officer may direct or permit filings to be made with him or her, in which event the hearing officer shall note thereon the filing date and promptly provide the Secretary with either the original or a copy of any such filings.

(c) *To Whom to Direct the Filing.* Unless otherwise provided, where the Commission has assigned a case to a hearing officer, all motions, objections, applications or other filings made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of briefs with the Commission, shall be directed to and decided by the hearing officer.

(d) *Certificate of Service.* Papers filed with the Commission or a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service and the mailing address or facsimile telephone number to which service was made, if not made in person. If the method of service to any party is different from the method of service to any other party or the method for filing with the Commission, the certificate shall state why a different means of service was used.

Comment: Since hearing officers frequently preside at locations away from the Commission's Headquarters in Washington, D.C., persons are permitted to make filings with the hearing officer, who then can forward the filings to the Secretary. Rule 351 contains additional procedures for the transmittal of the record of a proceeding before a hearing officer (and the index of the record) from the hearing officer to the Secretary.

Rule 151 requires that where the Commission has assigned a hearing officer to preside at a proceeding, the person making a motion direct his or her requests and arguments to the hearing officer, not the Commission. If

a motion is directed to the Commission in a case in which a hearing officer is assigned, the Secretary must refer the motion to the hearing officer unless a motion directly to the Commission is authorized. In those unusual circumstances where a motion is properly directed to the Commission, the proceeding before the hearing officer should continue, unless otherwise ordered.

Revision Comment (d): The requirements for the certificate of service have been modified to require that the certificate list the name of the person served and the method of service used if other than personal service is made. Additionally, if the method of service to any party is different from the method of service to any other party or the method for filing with the Commission, the certificate must state why a different method was used.

Rule 152. Filing of Papers: Form

(a) *Specifications.* Papers filed in connection with any proceeding as defined in Rule 101(a) shall:

(1) be on one grade of unglazed white paper measuring 8½ x 11 inches, except that, to the extent that the reduction of larger documents would render them illegible, such documents may be filed on larger paper;

(2) be typewritten or printed in either 10- or 12-point typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;

(3) include at the head of the paper, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(4) be paginated with left hand margins at least 1 inch wide, and other margins of at least 1 inch;

(5) be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and

(6) be stapled, clipped or otherwise fastened in the upper left corner.

(b) *Signature Required.* All papers must be dated and signed as provided in Rule 153.

(c) *Suitability for Recordkeeping.* Documents which, in the opinion of the Commission, are not suitable for computer scanning or microfilming may be rejected.

(d) *Number of Copies.* An original and three copies of all papers shall be filed.

(e) *Form of Briefs.* All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

(f) *Scandalous or Impertinent Matter.* Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer.

Rule 153. Filing of Papers: Signature Requirement and Effect

(a) *General Requirements.* Following the issuance of an order instituting proceedings, every filing of a party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing.

(b) *Effect of Signature.*

(1) The signature of a counsel or party shall constitute a certification that:

(i) the person signing the filing has read the filing;

(ii) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(iii) the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.

(2) If a filing is not signed, the hearing officer or the Commission shall strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

Comment: Rule 153(b) is based upon Rule 11 of the Federal Rules of Civil Procedure. Persons signing a filing bear personal responsibility for the contents of the filing. If a filing is contrary to the provisions of this rule, the person or persons signing the filing may be subject to sanctions under Rule 180.

Rule 154. Motions

(a) *Generally.* Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. All written motions shall be served in accordance with Rule 150, be filed in accordance with Rule 151, meet the requirements of Rule 152, and be signed in accordance with Rule 153. The Commission or the hearing officer may order that an oral motion be submitted in writing. Unless otherwise ordered by the Commission or the hearing officer, if a motion is properly made to the Commission concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Commission. No oral argument shall be heard on any motion unless the Commission or the hearing officer otherwise directs.

(b) *Opposing and Reply Briefs.* Except as provided in Rule 401, briefs in opposition to a motion shall be filed within five days after service of the motion. Reply briefs shall be filed within three days after service of the opposition.

(c) *Length Limitation.* A brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. Requests for leave to file briefs in excess of 10 pages are disfavored.

Rule 155. Default; Motion to Set Aside Default

(a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

(1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to Rule 180(b).

(b) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

Comment: Pursuant to Rule 155 the Commission or the hearing officer may enter a default against any party who fails to appear in person or, if appropriate, through a representative, at a hearing or conference of which the party has notice. Thus, for example, failure to appear at a prehearing conference may be a grounds for default.

In addition, for example, this rule permits the entry of default against any party who fails to answer, to respond to a dispositive motion, or otherwise to defend the proceeding, or to file a required brief either before the hearing officer or on appeal before the Commission. This provision retains the existing standards for setting aside a default contained in former Rule of Practice 12(d), 17 CFR 201.12(d) (1994).

Revision Comment: Failure to file a notice of appearance has been eliminated as a basis for a default. Failure to file a notice of appearance, like the failure to make any other required filing, is subject to sanctions under Rule 180(c).

Rule 160. Time Computation

(a) *Computation.* In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the Commission, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal legal holiday (as defined in Rule 104), in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal legal holiday. Intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this rule. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a Federal legal holiday.

(b) *Additional Time For Service by Mail.* If service is made by mail, three days shall be added to the prescribed period for response.

Revision Comment (b): This paragraph has been simplified. No substantive change is intended. One commenter requested that the amount of time for service by mail be increased. Rule 6(e) of the Federal Rules of Civil Procedure, which allows only three days to be added to a prescribed period when service is by mail, establishes a widely used and familiar standard for the computation of additional time when service is by mail. No change in the additional time period for service by mail was deemed warranted.

Rule 161. Extensions of Time, Postponements and Adjournments

(a) *Availability.* Except as otherwise provided by law, the Commission, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, may, for good cause shown, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers and may, consistent with paragraph (b) of this rule, postpone or adjourn any hearing.

(b) *Limitations on Postponements, Adjournments and Extensions.* A hearing shall begin at the time and place ordered, provided that, within the limits provided by statute, the Commission or the hearing officer may for good cause shown postpone the commencement of the hearing or adjourn a convened hearing for a reasonable period of time or change the place of hearing.

(1) *Additional Considerations.* In considering a motion for postponement of the start of a hearing, adjournment once a hearing has begun, or extensions of time for filing papers, the hearing officer or the Commission shall consider, in addition to any other factors:

(i) the length of the proceeding to date;

(ii) the number of postponements, adjournments or extensions already granted;

(iii) the stage of the proceedings at the time of the request; and

(iv) any other such matters as justice may require.

(2) *Time Limit.* Postponements, adjournments or extensions of time for filing papers shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

Comment: 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. The factors listed in the rule build on existing standards applied by the administrative law judges.

Rule 180. Sanctions

(a) *Contemptuous Conduct.*

(1) *Subject to Exclusion or Suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including any conference, shall be grounds for the Commission or the hearing officer to:

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

(ii) summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review Procedure.* A person excluded from a 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 Rule 500.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in Rule 161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient Filings; Leave to Cure Deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(c) *Failure to Make Required Filing or to Cure Deficient Filing.* The Commission or the 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:

(1) to make a filing required under these Rules of Practice; or

(2) to cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this rule.

Comment (a): Paragraph (a) is based on former Rule 2(f), which provided that contemptuous conduct was grounds for exclusion and summary suspension for the duration of a hearing. Contemptuous conduct during the course of a proceeding that would warrant

sanctions has been rare. Under Rule 180(a), any person found to have engaged in contemptuous conduct can be excluded from all or a portion of a particular hearing or conference.

In the event that a hearing officer or the Commission excludes or suspends a party's counsel, the party may make a motion for an adjournment to obtain new counsel. *See* 5 U.S.C. 555(b) (right in administrative proceedings to be accompanied by retained counsel); *cf. Feeney* v. *SEC*, 564 F.2d 260, 262 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978) (no right to appointed counsel in administrative proceedings where respondent assumed to be indigent (citing *Boruski* v. *SEC*, 340 F.2d 991, 992 (2d Cir.), *cert. denied*, 381 U.S. 943 (1965)). Whether or not an exclusion or summary suspension order is issued, conduct during a hearing may be the basis for further disciplinary action, *e.g.*, pursuant to Rule 102(e), or, as to a staff member, under the Commission's personnel regulations.

Comment (b): A filing may be rejected if it fails to meet the requirements of any rule or order. *See In the Matter of Fischbach*, Admin. Proc. File No. 3–7384 (June 18, 1991). For example, filings that are not served as required by Rule 150, that fail to cite to the record as required by Rule 450, that are longer than permitted by Rule 450, or that fail to comply with a prehearing order pursuant to Rule 221, could be found to be deficient.

The rule permits the hearing officer or the Commission to fix a period of time during which a deficiency must be cured and a new filing made. The authority to reject a filing or to permit an opportunity to cure a deficiency is discretionary. Whether a particular filing should be rejected or whether leave to cure a deficient filing should be granted requires a case-by-case determination. Parties, including those appearing *pro se*, are obligated to familiarize themselves with the Rules of Practice. The fact that a person may represent himself or herself or be represented by counsel who has not previously practiced before the Commission may be a factor in considering how to address a deficient filing, but should not, standing alone, be determinative. Deficiencies that are technical, *de minimis*, or non-prejudicial, however, may not warrant any action pursuant to this rule.

Comment (c): This provision permits the entry of sanctions for the failure to file a document required under the Commission's Rules of Practice or for failure to cure a deficient filing within the time ordered. In response to such failures, the Commission or the hearing officer may determine the particular matter at issue against the person who has failed to perform or may preclude that person from introducing evidence or testimony on that matter. It is intended that the provision will be invoked for failures that do not warrant the entry of a default under Rule 155.

Revision Comment (b): The rule now states explicitly that a rejected filing is not part of the record. If a filing is rejected, the entry of that filing on the docket may be stricken.

Revision Comment (c): The revised rule allows for a sanction less severe than a default for a deficient filing.

Rule 190. Confidential Treatment of Information in Certain Filings

(a) *Application.* An application for confidential treatment pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30), and Rule 406 thereunder, 17 CFR 230.406; Section 24(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b)(2), and Rule 24b–2 thereunder, 17 CFR 240.24b–2; Section 22(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(b), and Rule 104 thereunder, 17 CFR 250.104; Section 45(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–44(a), and Rule 45a–1 thereunder, 17 CFR 270.45a–1; or Section 210(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–10(a), shall be filed with the Secretary. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought.

(b) *Procedure For Supplying Additional Information.* The applicant may be required to furnish in writing additional information with respect to the grounds for objection to public disclosure. Failure to supply the information so requested within 14 days from the date of receipt by the applicant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the information to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such 14-day period.

(c) *Confidentiality of Materials Pending Final Decision.* Pending the determination of the application for confidential treatment, transcripts, non-final orders including an initial decision, if any, and other materials in connection with the application shall be placed under seal; shall be for the confidential use only of the hearing officer, the Commission, the applicant, and any other parties and counsel; and shall be made available to the public only in accordance with orders of the Commission.

(d) *Public Availability of Orders.* Any final order of the Commission denying or sustaining an application for confidential treatment shall be made public. Any prior findings or opinions relating to an application for confidential treatment under this rule shall be made public at such time as the material as to which confidentiality was requested is made public.

Comment: Pursuant to the statutory provisions and rules set forth in paragraph (a), persons who file a registration statement, report, application or other such materials may file an application for confidential treatment of required information included in such filings. Securities Act Rule 406, 17 CFR 230.406, Exchange Act Rule 24b-2, 17 CFR 240.24b-2, and Pubic Utility Holding Company Act Rule 104, 15 CFR 250.104, set forth certain procedures governing application for confidential treatment for materials filed under the Securities Act, Exchange Act and Public Utility Holding Company Act respectively. There are no corresponding rules governing applications for confidential treatment under the Investment Company Act or Investment Advisers Act, although Investment Company Act Rule 45a-1, 17 CFR 270.45a-1, sets forth certain procedures governing applications for confidential treatment of the names and addresses of dealers of registered investment companies.

Rule 190 is based in part on former Rule 25. The Rule governs applications for confidential treatment with respect to information required to be filed with the Commission in connection with a registration statement, report, application or other such materials. Rule 322 applies to requests for a protective order for materials introduced at hearings conducted pursuant to these Rules of Practice. Thus, both rules address material that would ordinarily be placed in a public file but is treated as confidential pending the determination of the request for confidentiality. The Commission's Freedom of Information Act regulations, 17 CFR 200.83, apply to requests for confidential treatment of information, such as testimony in an enforcement investigation, that is not ordinarily placed in a public file at the time received by the Commission but which may be made public pursuant to a request under the Freedom of Information Act (''FOIA''). Requests to keep materials confidential under FOIA are not evaluated until the Commission

receives a request for access to the information.

An application for confidential treatment may be heard by the Commission or referred to a hearing officer. Authority to act on applications for confidential treatment has been delegated to the staff, *see, e.g.*, Delegation to the Director of the Division of Corporation Finance, 17 CFR 200.30–1(a)(3). In practice, applications are determined by delegated authority. Review of delegated decisionmaking may be sought pursuant to Rule 430.

Rule 191. Adjudications Not Required To Be Determined on the Record After Notice and Opportunity for Hearing

(a) *Scope of the Rule.* This rule applies to every case of adjudication, as defined in 5 U.S.C. 551, pursuant to any statute which the Commission administers, where adjudication is not required to be determined on the record after notice and opportunity for hearing and which the Commission has not chosen to determine on the record after notice and opportunity for hearing.

(b) *Procedure.* In every case of adjudication under paragraph (a) of this rule, the Commission shall (1) give prompt notice of any adverse action or final disposition to any person who has requested the Commission to make (or not to make) any such adjudication, and (2) furnish to any such person a written statement of reasons therefor. Additional procedures may be specified in rules relating to specific types of such adjudications. Where any such rule provides for the publication of a Commission order, notice of the action or disposition shall be deemed to be given by such publication.

(c) *Contents of the Record.* If the Commission provides notice and opportunity for the submission of written comments by parties to the adjudication or, as the case may be, by other interested persons, written comments received on or before the closing date for comments, unless accorded confidential treatment pursuant to statute or rule of the Commission, become a part of the record of the adjudication. The Commission, in its discretion, may accept and include in the record written comments filed with the Commission after the closing date.

Comment: Section 23(c) of the Exchange Act, 15 U.S.C. 78w(c) requires the Commission to prescribe the procedures applicable to Exchange Act adjudications ''not required to be determined on the record after notice and opportunity for hearing.'' Rule 191 contains these required procedures and also applies them to adjudications arising under all statutes administered by the Commission.

The Administrative Procedure Act recognizes a distinction between an ''adjudication required by statute to be determined on the record after opportunity for an agency hearing,'' *See* 5 U.S.C. 554(a), and other types of adjudications. The former are often referred to as ''formal'' or ''on the record'' adjudications. The latter, such as proceedings in which a hearing is required to be conducted after ''notice and opportunity for hearing,'' but not specifically ''on the record,'' are often referred to as ''informal'' adjudications. Various Administrative Procedure Act requirements, particularly with respect to hearing procedures, apply only to an ''adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *'' *See, e.g.*, 5 U.S.C. 556(a), 557(a) (requirements of those sections apply only to an adjudication ''on the record'' as set forth in Section 554(a)); *cf.* 5 U.S.C. 555 (requirements not limited to proceedings ''on the record'' as set forth in Section 554(a)).

Where an ''on the record'' hearing is not mandated by statute, this rule establishes certain basic requirements for the proceedings. The Commission, as a matter of discretion, can order a ''formal'' hearing or provide other alternative procedures in addition to the minimum requirements of Rule 191.

Rule 192. Rulemaking: Issuance, Amendment and Repeal of Rules of General Application

(a) *By Petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. Such petition shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission.

(b) *Notice of Proposed Issuance, Amendment or Repeal of Rules.* Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the **Federal Register** a notice of the proposed action. Such notice shall include:

(1) a statement of the time, place, and nature of the rulemaking proceeding, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceeding;

(2) reference to the authority under which the rule is proposed; and

(3) the terms or substance of the proposed rule or a description of the subjects and issues involved.

Rule 193. Applications by Barred Individuals for Consent to Associate

Preliminary Note

This rule governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this rule must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the rule, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with

a particular registered entity and may also be subject to specific terms and conditions.

Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

In addition to the factors set forth in paragraph (d) of this rule, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to Rule 5(e) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(e). Among other things, Rule 5(e) sets forth the Commission's policy ''not to permit a * * * respondent [in an administrative proceeding] to consent to * * * [an] order that imposes a sanction while denying the allegations in the * * * order for proceedings.'' Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this rule was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order.

(a) *Scope of Rule.* Applications for Commission consent to associate, or to change the terms and conditions of association, with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be made pursuant to this rule where a Commission order bars the individual from association with a registered entity and:

(1) such barred individual seeks to become associated with an entity that is not a member of a self-regulatory organization; or

(2) the order contains a proviso that application may be made to the Commission after a specified period of time.

(b) *Form of Application.* Each application shall be supported by an affidavit, manually signed by the applicant, that addresses the factors set forth in paragraph (d) of this rule. One original and three copies of the application shall be filed pursuant to Rules 151, 152 and 153. Each application shall include as exhibits:

(1) a copy of the Commission order imposing the bar;

(2) an undertaking by the applicant to notify immediately the Commission in writing if any information submitted in support of the application becomes materially false or misleading while the application is pending;

(3) the following forms, as appropriate:

(i) a copy of a completed Form U–4, where the applicant's proposed association is with a broker-dealer or municipal securities dealer;

(ii) a copy of a completed Form MSD–4, where the applicant's proposed association is with a bank municipal securities dealer;

(iii) the information required by Form ADV, 17 CFR 279.1, with respect to the applicant, where the applicant's proposed association is with an investment adviser;

(iv) the information required by Form TA–1, 17 CFR 249b.100, with respect to the applicant, where the applicant's proposed association is with a transfer agent; and

(4) a written statement by the proposed employer that describes:

(i) the terms and conditions of employment and supervision to be exercised over such applicant and, where applicable, by such applicant;

(ii) the qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant;

(iii) the compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and

(iv) the names of any other associated persons in the same office who have previously been barred by the Commission, and whether they are to be supervised by the applicant.

(c) *Required Showing.* The applicant shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest.

(d) *Factors to be Addressed.* The affidavit required by paragraph (b) of this rule shall address each of the following:

(1) the time period since the imposition of the bar;

(2) any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar;

(3) the applicant's compliance with the order imposing the bar;

(4) the applicant's employment during the period subsequent to imposition of the bar;

(5) the capacity or position in which the applicant proposes to be associated;

(6) the manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant;

(7) any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and

(8) any other information material to the application.

(e) *Notification to Applicant and Written Statement.* In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this rule, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall then have 30 days to submit a written statement in response.

(f) *Concurrent Applications.* The Commission will not consider any application submitted pursuant to this rule if any other application for consent to associate concerning the same applicant is pending before any self-regulatory organization.

Initiation of Proceedings and Prehearing Rules

Rule 200. Initiation of Proceedings.

(a) *Order Instituting Proceedings: Notice and Opportunity For Hearing.*

(1) *Generally.* Whenever an order instituting proceedings is issued by the Commission, appropriate notice thereof shall be given to each party to the proceeding by the Secretary or another duly designated officer of the Commission. Each party shall be given notice of any hearing within a time reasonable in light of the circumstances, in advance of the hearing; provided, however, no prior notice need be given to a respondent if the Commission has authorized the Division of Enforcement to seek a temporary sanction *ex parte.*

(2) *Stop Order Proceedings: Additional Persons Entitled to Notice.* Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to Section 8(d) of the Securities Act of 1933, 15 U.S.C. 77h(d), shall be sent to or served on the issuer; or, in the case of a foreign government or political subdivision thereof, sent to or served on the underwriter; or, in the case of a foreign or territorial person, sent to or served on its duly authorized representative in the United States named in the registration statement, properly directed in the case of telegraphic notice to the address

given in such statement. In addition, if such proceeding is commenced within 90 days after the registration statement has become effective, notice of the proceeding shall be given to the agent for service named on the facing sheet of the registration statement and to each other person designated on the facing sheet of the registration statement as a person to whom copies of communications to such agent are to be sent.

(b) *Content of Order.* The order instituting proceedings shall:

(1) state the nature of any hearing;

(2) state the legal authority and jurisdiction under which the hearing is to be held;

(3) contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to Rule 220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto; and

(4) state the nature of any relief or action sought or taken.

(c) *Time and Place of Hearing.* The time and place for any hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives.

(d) *Amendment to Order Instituting Proceedings.*

(1) *By the Commission.* Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.

(2) *By the Hearing Officer.* Upon motion by a party, the hearing officer may, at any time prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

(e) *Publication of Notice of Public Hearings.* Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the *SEC News Digest* and, where directed, by publication in the **Federal Register**.

Comment (a): Paragraph (a) requires that appropriate notice of an order instituting proceedings be given. Ordinarily, notice is accomplished through service of the order pursuant to the procedures set forth in Rule 141. Where emergency or expedited action is sought, however, notice of a hearing may be given prior to formal service of the order instituting proceedings. *See* Rules 511(a) and 521(a). Notice may be delayed if the Commission determines to hear a matter *ex parte. See* Rule 513.

Comment (c): The provisions of this paragraph are based on Section 554(b) of the Administrative Procedure Act, 5 U.S.C. § 554(b). It is the policy of the Commission that in a proceeding under the Public Utility Holding Company Act, the Investment Company Act (except Section 9(b)), Section 206A of the Investment Advisers Act, Section 8 of the Securities Act, or Sections 305 and 307 of the Trust Indenture Act or any proceeding in which a temporary sanction is sought, the hearing should normally be held at the Commission's Headquarters.

Comment (d): The Commission has stated that amendment of orders instituting proceeding should be freely granted, subject only to the consideration that other parties should not be surprised, nor their rights prejudiced. *Carl L. Shipley*, 45 S.E.C. 589, 595 (1974). Where amendments to an order instituting proceedings are intended to correct an error, to conform the order to the evidence or to take into account subsequent developments which should be considered in disposing of the proceeding, and the amendments are within the scope of the original order, either a hearing officer or the Commission has authority to amend the order. *See, e.g., Don A. Long,* Admin. Proc. Rulings Release No. 233 (Mar. 31, 1980), 52 SEC Docket 497 (Aug. 18, 1992) (hearing officer's grant of motion to conform pleading to evidence adduced at hearing). Since, however, the Commission has not delegated its authority to authorize orders instituting proceedings, hearing officers do not have authority to initiate new charges or to expand the scope of matters set down for hearing beyond the framework of the original order instituting proceedings. *See* Securities Act Release No. 5309 (Sept. 27, 1972).

Revision Comment (c): Comment was requested as to the Commission's practice with respect to holding hearings in multiple cities, in locations outside Washington, or in locations other than those where the Commission maintains Regional Offices. Commenters supported the current practice. The Commission has determined not to change the substance of the rule. The statement of policy in former Rule 6(b) that certain specified hearings would normally be held in Washington, D.C. has been moved into a comment to Rule 200. The policy statement contained in the comment has been modified to reflect that the hearing location should normally be at the Commission's Headquarters, and that hearings as to whether a temporary sanction will be imposed are covered by the policy.

Rule 201. Consolidation of Proceedings

By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Commission or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules of Practice and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this rule, no distinction is made between joinder and consolidation of proceedings.

Comment: Rule 201 is modeled after Model Adjudication Rule 201, Administrative Conference of the United States (Dec. 1993).

Revision Comment: Former Rule 10 provided that proceedings could be ''joined'' and ''consolidated.'' Rule 201 does not draw a distinction between joinder and consolidation.

One commenter suggested that the Commission should refrain from making decisions on whether to consolidate proceedings in order to avoid the appearance that in deciding the consolidation issue the Commission had reached an opinion as to the merits of a case. Just as judges make preliminary decisions regarding joinder, consolidation, evidentiary motions and other matters without losing either their objectivity or the appearance of objectivity, so the Commission or a hearing officer must decide matters preliminary to a final decision. There is neither a loss of objectivity nor an appearance of less objectivity from doing so. Although the Commission does not agree with the rationale provided by the commenter, the rule as adopted permits the decision on consolidation to be made by a hearing officer because it may be more efficient to have a hearing officer issue a decision on consolidation.

The commenter also suggested that consolidation should be permitted only if consolidation tends to avoid unnecessary cost or delay as under former Rule 10. Rule 201 as revised includes a standard substantially similar to that of former Rule 10.

Rule 202. Specification of Procedures by Parties in Certain Proceedings

(a) *Motion to Specify Procedures.* In any proceeding other than an enforcement or disciplinary proceeding

or a proceeding to review a determination by a self-regulatory organization pursuant to Rules 420 and 421, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding, with particular reference to:

(1) whether there should be an initial decision by a hearing officer;

(2) whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

(b) *Objections; Effect of Failure to Object.* Any other party may object to the procedures so specified, and such party may specify such additional procedures as it considers necessary or appropriate. In the absence of such objection or such specification of additional procedures, such other party may be deemed to have waived objection to the specified procedures.

(c) *Approval Required.* Any proposal pursuant to paragraph (a) of this rule, even if not objected to by any party, shall be subject to the written approval of the hearing officer.

(d) *Procedure Upon Agreement to Waive an Initial Decision.* If an initial decision is waived pursuant to paragraph (a) of this rule, the hearing officer shall notify the Secretary and, unless the Commission directs otherwise within 14 days, no initial decision shall be issued.

Comment: Allowing for the specification of procedures by the parties under the supervision of a hearing officer has been effective in promoting efficiency in certain proceedings involving regulatory matters. By contrast, in an enforcement or disciplinary proceeding in which the government is seeking to impose sanctions on particular persons, or on review of a determination by a self-regulatory organization, it is not in the public interest to subject basic procedures to negotiation by the parties. Accordingly, Rule 202 excludes enforcement, disciplinary, and self-regulatory organization review proceedings from its scope.

Consistent with the operation of Rule 221, the Rule requires motions to specify procedures to be made at least 20 days prior to a hearing. As a result, any such motions may be timely answered and resolved prior to the final prehearing conference.

Rule 210. Parties, Limited Participants and Amici Curiae

(a) *Parties in an Enforcement or Disciplinary Proceeding or a Proceeding to Review a Self-Regulatory Organization Determination.*

(1) *Generally.* No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to Rules 420 and 421.

(2) *Disgorgement Proceedings.* In an enforcement proceeding, a person may state his or her views with respect to a proposed plan of disgorgement or file a proof of claim pursuant to Rule 612.

(b) *Intervention as a Party.*

(1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this rule would be inadequate for the protection of his or her interests.

(i) In a proceeding under the Public Utility Holding Company Act of 1935, any representative of interested consumers or security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors or consumers, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(ii) In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(2) *Intervention as of Right.*

(i) In proceedings under the Public Utility Holding Company Act of 1935, any interested representative, agency, authority or instrumentality of the United States or any interested State, State commission, municipality or other political subdivision of a state shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(ii) In proceedings under the Investment Company Act of 1940, any interested State or State agency shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(c) *Leave to Participate On a Limited Basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to participate on a limited basis as a non-party participant as to any matter affecting the person's interests.

(1) *Procedure.* Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. Leave to participate pursuant to this paragraph (c) may include such rights of a party as the hearing officer may deem appropriate. Persons granted leave to participate shall be served in accordance with Rule 150; provided, however, that a party to the proceeding may move that the extent of notice of filings or other papers to be provided to persons granted leave to participate be limited, or may move that the persons granted leave to participate bear the cost of being provided copies of any or all filings or other papers. Persons granted leave to participate shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to participate pursuant to this paragraph (c) shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer.

(2) *Certain Persons Entitled to Leave to Participate.* The hearing officer is directed to grant leave to participate under this paragraph (c) to any person to whom it is proposed to issue any security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve

the terms and conditions of such issuance and exchange after a hearing upon the fairness of such terms and conditions.

(d) *Amicus Participation.*

(1) *Availability.* An amicus brief may be filed only if:

(i) a motion for leave to file the brief has been granted;

(ii) the brief is accompanied by written consent of all parties;

(iii) the brief is filed at the request of the Commission or the hearing officer; or

(iv) the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth.

(2) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Commission or hearing officer, for cause shown, grants leave for a later filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief. A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(e) *Permission to State Views.* Any person may make a motion seeking leave to file a memorandum or make an oral statement of his or her views. Any such communication may be included in the record; provided, however, that unless offered and admitted as evidence of the truth of the statements therein made, any assertions of fact submitted pursuant to the provisions of this paragraph (e) will be considered only to the extent that the statements therein made are otherwise supported by the record.

(f) *Modification of Participation Provisions.* The Commission or the hearing officer may, by order, modify the provisions of this rule which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

Comment (b): Paragraph (b) reflects requirements of Section 19 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79s, and Section 40(c) of the Investment Company Act of 1940, 15 U.S.C. § 80a–39(c).

Comment (c): Through leave to participate on a limited basis, this rule provides an interested person the opportunity to express concerns relating to any matter affecting the person's interests. Unlike the consent to submission by an amicus, written consent of all parties is not sufficient to obtain status as a limited participant. Approval from the hearing officer is required.

By their terms, certain rules within the Rules of Practice apply to the rights and responsibilities of ''parties.'' When non-party participants are admitted, the order granting leave to participate may specify the extent to which they are to have the obligations or rights of a party under the Rules. Depending on the extent of the participant's interest and the facts of each case, the degree of participation will vary. *See, e.g., In the Matter of College Retirement Equities Fund,* Admin. Proc. Rulings Release No. 288 (Feb. 11, 1988), 52 SEC Docket 448 (Aug. 18, 1992) (order scheduling prehearing conference to discuss inter alia procedures to limit duplicative cross-examination of witnesses without diminishing the opportunity for full cross-examination by participants).

In an enforcement or disciplinary proceeding, or a proceeding to review a self-regulatory organization determination, the only persons who may be parties are those specified by the Commission in the order instituting proceedings. Status as a limited, non-party participant pursuant to paragraph (c) is not allowed. A person may seek to participate in such proceedings as an amicus, pursuant to paragraph (d), or, if that person has knowledge of specific facts relevant to the proceeding, as a witness. In addition, pursuant to Rule 612, persons desiring to comment on a proposed plan of disgorgement will have an opportunity to submit their written views to the Commission and, as appropriate under the plan, to file a claim against the disgorgement pool.

Paragraph (c)(2) reflects the requirements of Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(10).

Comment (d): The provisions for amicus participation are based on Rule 29 of the Federal Rules of Appellate Procedure. Amicus participation contemplates the limited action of filing a brief setting forth the filer's views on particular legal or policy issues in the proceeding.

Comment (e): This paragraph allows for the submission of a statement of views with less formality than that required for an amicus brief or for participation on an ongoing basis as a non-party. From time to time persons, particularly individual security holders or members of the public, who do not otherwise wish to participate in a proceeding on any extended basis will seek to make written statements of their views in a letter or by appearing at a hearing. The factual assertions in such letters or statements will be considered only to the extent that the statements therein made are otherwise supported by the record.

Revision Comment (d): One commenter suggested that the consent of the Division of Enforcement should not be required for the filing of an amicus brief on behalf of a respondent in an enforcement proceeding. The Commission or a hearing officer can more fairly and more adequately assess the benefits of a proposed amicus filing if the Division of Enforcement or any other party with views on the proposal may set forth its objections on the record. Accordingly, the Commission decided not to make the suggested rule change.

Rule 220. Answer to Allegations

(a) *When Required.* In its order instituting proceedings, the Commission may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party 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 Rule 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 party required to file an answer as provided in paragraph (a) of this rule shall do so within 20 days after service upon the party of the order instituting proceedings. Persons granted leave to participate on a limited basis in the proceeding pursuant to Rule 210(c) may file an answer within a reasonable time, as determined by the Commission or the hearing officer. If the order instituting proceedings is amended, the Commission or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) *Contents; Effect of Failure to Deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute

of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

(d) *Motion for More Definite Statement.* A party 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 party 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 party respondent fails to file an answer required by this rule within the time provided, such person may be deemed in default pursuant to Rule 155(a). A party may make a motion to set aside a default pursuant to Rule 155(b).

Comment (b): The time allowed to file an answer, 20 days, conforms to the time for answers under Rule 12 of the Federal Rules of Civil Procedure.

Revision Comment (c): The provision relating to the filing of affirmative defenses is based on Rule 8(c) of the Federal Rules of Civil Procedure. The change is intended to improve efficiency and fairness by clarifying issues at an early stage of the proceeding that may affect the timing, duration or necessity for a hearing.

Revision Comment (e): Proposed Rule 9(b) provided for amendment of an answer only when ordered by the Commission or a hearing officer. As adopted, Rule 220(e) allows amendment of an answer by consent of all parties or by leave of the Commission or hearing officer. Amendment of an answer may increase efficiency and fairness by sharpening the issues in dispute. Moreover, the provisions for a summary disposition prior to hearing pursuant to Rule 250 increase the importance of the answer. The modification to the rule is in accordance with Rule 15 of the Federal Rules of Civil Procedure. No provision is made, however, for allowing a period for an amendment as of right, because a meaningful period for exercise of such a right, such as the 20-day period provided under the Federal Rules of Civil Procedure, is inconsistent with the prompt start of the hearing. *See, e.g.,* Exchange Act § 21C(b), 15 U.S.C. 78u–3(b) (cease-and-desist proceedings to begin no later than 60 days after institution, other than with consent of respondent).

Rule 221. Prehearing Conferences

(a) *Purposes of Conferences.* The purposes of prehearing conferences include, but are not limited to:

(1) expediting the disposition of the proceeding;

(2) establishing early and continuing control of the proceeding by the hearing officer; and

(3) improving the quality of the hearing through more thorough preparation.

(b) *Procedure.* On his or her own motion or at the request of a party, the hearing officer may, in his or her discretion, direct counsel or any party to meet for an initial, final or other prehearing conference. Such conferences may be held with or without the hearing officer present as the hearing officer deems appropriate. Where such a conference is held outside the presence of the hearing officer, the hearing officer shall be advised promptly by the parties of any agreements reached. Such conferences also may be held with one or more persons participating by telephone or other remote means.

(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) stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(4) matters of which official notice may be taken;

(5) the schedule for exchanging prehearing motions or briefs, if any;

(6) the method of service for papers other than Commission orders;

(7) summary disposition of any or all issues;

(8) settlement of any or all issues;

(9) determination of hearing dates;

(10) amendments to the order instituting proceedings or answers thereto;

(11) production of documents as set forth in Rule 230, and prehearing production of documents in response to subpoenas duces tecum as set forth in Rule 232;

(12) specification of procedures as set forth in Rule 202; and

(13) such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Required Prehearing Conferences.* Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, both an initial and a final prehearing conference should be held. Unless ordered otherwise, an initial prehearing conference shall be held within 14 days of the service of an answer, or if no answer is required, within 14 days of service of the order instituting proceedings. A final conference shall be held as close to the start of the hearing as reasonable under the circumstances.

(e) *Prehearing Orders.* At or following the conclusion of any conference held pursuant to this rule, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

(f) *Failure to Appear: Default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through a representative, at a prehearing conference of which he or she has been duly notified may be deemed in default pursuant to Rule 155(a). A party may make a motion to set aside a default pursuant to Rule 155(b).

Comment (a): Rule 221 is modeled on Rule 16 of the Federal Rules of Civil Procedure. When properly managed, prehearing conferences can eliminate unnecessary delay and improve the quality of justice by sharpening the preparation of cases, facilitating the prehearing exchange of documents, and promoting settlements in appropriate cases.

Comment (d): Unless ordered otherwise, the initial prehearing conference will be held within 14 days after a respondent files an answer. Pursuant to Rule 230(d), the Division of Enforcement is required to commence making documents available to a respondent for inspection and copying in an enforcement or disciplinary proceeding no later than 14 days after the respondent files an answer. Consequently, the initial prehearing conference can be used to address any pending issues related to the availability of documents for inspection and copying, and thereafter the respondent should ordinarily have access to such documents.

Revision Comment (c): Paragraph (c)(6) was added to bring to the attention of the participants that they may agree among themselves to procedures for the service of papers by facsimile. *See* Rule 150(c)(4).

Revision Comment (d): Under the proposed rule, no initial prehearing

conference was required. In accordance with comments received, the revised rule requires both an initial and a final prehearing conference, except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate.

Rule 222. Prehearing Submissions

(a) *Submissions Generally.* The hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate, including any or all of the following:

(1) an outline or narrative summary of its case or defense;

(2) the legal theories upon which it will rely;

(3) copies and a list of documents that it intends to introduce at the hearing; and

(4) a list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(b) *Expert Witnesses.* Each party who intends to call an expert witness shall submit, in addition to the information required by paragraph (a)(4) of this rule, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert.

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

For purposes of this rule, the term *documents* shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

(a) *Documents to be Available for Inspection and Copying.*

(1) Unless otherwise provided by this rule, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:

(i) each subpoena issued;

(ii) every other written request to persons not employed by the Commission to provide documents or to be interviewed;

(iii) the documents turned over in response to any such subpoenas or other written requests;

(iv) all transcripts and transcript exhibits;

(v) any other documents obtained from persons not employed by the Commission; and

(vi) any final examination or inspection reports prepared by the Division of Market Regulation or the Division of Investment Management.

(2) Nothing in this paragraph (a) shall limit the right of the Division to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(b) *Documents That May Be Withheld.*

(1) The Division of Enforcement may withhold a document if:

(i) the document is privileged;

(ii) the document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence;

(iii) the document would disclose the identity of a confidential source; or

(iv) the hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

(c) *Withheld Document List.* The hearing officer may require the Division of Enforcement to submit for review a list of documents withheld pursuant to paragraphs (b)(1)–(b)(4) of this rule or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying.

(d) *Timing of Inspection and Copying.* Unless otherwise ordered by the Commission or the hearing officer, the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this rule no later than 14 days after the respondent files an answer. In a proceeding in which a temporary cease-and-desist order is sought pursuant to Rule 510 or a temporary suspension of registration is sought pursuant to Rule 520, documents shall be made available no later than the day after service of the decision as to whether to issue a temporary cease-and-desist order or temporary suspension order.

(e) *Place of Inspection and Copying.* Documents subject to inspection and copying pursuant to this rule shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this rule other than by written agreement of the Division of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying Costs and Procedures.* The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at the rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies. The respondent shall be given access to the documents at the Commission's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Issuance of Investigatory Subpoenas After Institution of Proceedings.* The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation (''formal order'') under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

(h) *Failure to Make Documents Available—Harmless Error.* In the event

that a document required to be made available to a respondent pursuant to this rule is not made available by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not a harmless error.

Comment (a): A respondent's right to inspect and copy documents under this rule is automatic; the respondent does not need to make a formal request for access through the hearing officer. Generally, the rule requires that the Division of Enforcement 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. Except for final inspection or examination reports prepared by the Division of Market Regulation or the Division of Investment Management, documents prepared by Commission staff are treated as attorney work product, and do not have to be made available pursuant to this rule.

Rule 230 is not the exclusive means by which a respondent may obtain access to or production of documents. Production of documents prepared by the staff may be required under the doctrine of *Brady* v. *Maryland,* 373 U.S. 83 (1963), or pursuant to Jencks Act requirements made applicable to the Commission pursuant to Rule 231, or may be sought by subpoena pursuant to Rule 232 or through other procedures. *See, e.g.,* Freedom of Information Act, 5 U.S.C. 552.

The Rule states that the Division of Enforcement shall (1) make available for inspection and copying (2) documents (3) obtained by the Division (4) in connection with the investigation leading to the institution of proceedings.

(1) The Division of Enforcement is required to make documents available for inspection and copying. It is not required to produce a copy of the documents to each respondent. The definition of documents is based in part on Federal Rule of Civil Procedure 34.

(2) The definition of the term ''documents'' in paragraph (a) is modeled on the definition of documents in Rule 34 of the Federal Rules of Civil Procedure.

(3) The Division of Enforcement's obligation under this rule relates to documents obtained by the Division of Enforcement. Documents located only in the files of other divisions or offices are beyond the scope of the rule.

(4) The ''investigation leading to the Division's recommendation to institute proceedings'' ordinarily is delineated by the investigation number or numbers under which requests for documents, testimony or other information were made. When an investigation is initiated by the Division of Enforcement it is assigned a number, often referred to as the ''case'' or ''investigation'' number. Each request for documents, testimony or other information from persons not employed by the Commission specifies the investigation or preliminary investigation number to which it relates. In turn, each written recommendation by the Division of Enforcement to institute proceedings identifies on its cover page, by investigation number, the source investigation or investigations to which it relates. Accordingly, the identity and content of the appropriate investigation file or files from which documents must be made available can be based on objective criteria.

Comment (b): Under paragraph (b), the Division can withhold documents under four exceptions. Exception (1) shields information subject to a claim of privilege. Exception (2) protects as attorney work product internal documents prepared by Commission employees, which will not be offered in evidence. 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). Accountants, paralegals and investigators who work on an investigation do so at the direction of the director, an associate director, an associate regional administrator or another supervisory attorney, and their work product is therefore shielded by the rule. An examination or inspection report prepared by the Division of Market Regulation or the Division of Investment Management is not prepared in anticipation of litigation, and is therefore explicitly excluded from the materials that may be withheld. A respondent's claim that work product should be turned over will necessarily be evaluated on a case-by-case basis.

Exception (3) protects the identity of a confidential source. *See* 5 U.S.C. 552(b)(7)(C) and (D). Exception (4) protects any other document or category of documents that the hearing officer determines may be withheld as not relevant to the subject matter of the proceeding, or otherwise for good cause shown. This exception provides a mechanism to address a situation where a single investigation involves a discrete segment or segments that are related only indirectly, or not at all, to the recommendations ultimately made to the Commission with respect to the particular respondents in a specific proceeding. To require that documents not relevant to the subject matter of the proceeding be made available, simply because they were obtained as part of a broad investigation, burdens the respondent as well as the Division of Enforcement with unnecessary costs and delay.

For example, a single investigation may encompass inquiry into an issuer's allegedly false accounting disclosure and an unrelated manipulation of the issuer's securities by a third party. If the recommendation to the Commission and resulting administrative proceeding involve only the accounting disclosures, the Division could seek leave to withhold trading records, transcripts and other documents related to the manipulation investigation.

Comment (c): The hearing officer may, in his or her discretion, override any exception claimed by the Division and order the Division to produce withheld items.

Comment (g): In some circumstances, for example, where a temporary cease-and-desist order is sought, or where a single formal order is being used to investigate several distinct areas of potential violations, proceedings may be instituted prior to the end of all investigative activities. To allow the hearing officer to take appropriate steps to assure that investigative subpoenas are not used for the purpose of gathering information for use in the proceeding, paragraph (g) requires the Division of Enforcement to notify the hearing officer and each party if the Division is continuing to issue investigative subpoenas under the same investigation file number or order directing private investigation (''formal order'') used in the investigation leading to the institution of proceedings.

Revision Comment: As stated in the proposing release, the intent of the Rule is to codify existing staff practice with respect to voluntarily making available documents for inspection or copying. *See* Comments to proposed Rules 20 and 21, 58 FR 61750–51 (Nov. 22, 1993). The staff practice reflected an informal policy of the Division of Enforcement staff in the Headquarters Office and certain Regional Offices to make available to respondents major portions of the Division's investigation file. The policy evolved over many years and was implemented differently by different offices. Rule 230 seeks to respond to the criticism of commenters without establishing document production requirements, suggested by several commenters, that are not a part of existing practice.

Proposed Rule 20 would have required the production of ''all

documents, including transcripts of testimony, relevant to any allegation in the order instituting proceedings'' and excepted from production various documents including those ''obtained during the course of a pending nonpublic investigation, unless the documents will be relied upon by the interested division during the course of the hearing.'' One commenter suggested that the scope of required production was too narrow and ill defined, thereby providing too much discretion to the Division of Enforcement staff to determine whether a document was relevant. For example, it was suggested that a respondent should be entitled to information relevant to the scope of requested relief as well as allegations of liability. Moreover, the commenter explained, the exception for documents from pending investigations could negate the requirement to produce if the investigation that led to an enforcement proceeding is still continuing with respect to other persons or activities.

With exceptions for documents that are privileged, work product, or would reveal a confidential source, the revised rule requires that documents obtained from persons outside the Commission as part of the investigation leading to institution of proceedings be made available for inspection and copying. In addition, the Division of Enforcement may seek leave of the hearing officer to withhold other documents. The rule no longer calls upon the Division of Enforcement staff to make relevancy determinations.

As proposed, Rule 20 would have allowed the Division to withhold documents ''obtained during the course of a pending nonpublic investigation, unless the documents will be relied upon by the interested division during the course of the hearing.'' This provision was intended to address the possibility, particularly where a temporary cease-and-desist order was sought, that the investigation that led to proceedings was continuing as to other persons or events after the institution of proceedings. As revised, Rule 230 provides that the Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same formal order under which the investigation leading to the recommendation to institute proceedings was conducted. The hearing officer will then order such steps as are necessary and appropriate with regard to documents obtained in the ongoing investigation.

In order to provide for the safekeeping of documents subject to inspection, and to control costs associated with implementation of the rule, the revised rule provides that documents shall be made available for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties may agree. The Commission considered alternatives raised by commenters. None appear more likely to result in prompt access to documents obtained by the Division of Enforcement that are the basis of the Division's allegations.

Rule 231. Enforcement and Disciplinary Proceedings: Production of Witness Statements

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to Produce—Harmless Error.* In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

Comment: Prior statements by witnesses memorialized in transcripts during the investigation that led to a proceeding fall within the scope of Rule 230 as well as Rule 231. Where the staff believes a witness statement falls outside the purview of the rule, the hearing officer may require that the documents in question be turned over for *in camera* inspection. *See, e.g., In the Matter of Thomas J. Fittin, Jr.,* Exchange Act Release No. 29173, 48 SEC Docket 1474, 1483 (May 21, 1991); *In the Matter of Robert E. Iles, Sr.,* Admin. Proc. Rulings Release No. 367 (Apr. 19, 1990), 52 SEC Docket 750 (Aug. 18, 1992) (order relating to *Brady* v. *Maryland* and Jencks Act issues).

The Jencks Act does not require production of a witness's prior statement until the witness takes the stand. In Commission proceedings administrative law judges often required production prior to the start of the hearing, and the Division of Enforcement now provides such prehearing production voluntarily in most circumstances. Submission of a witness's prior statement, however, may provide a motive for intimidation of that witness or improper contact by a respondent with the witness. The rule provides, therefore, that the time for delivery of witness statements is to be determined by the hearing officer, so that a case-specific determination of such risks can be made if necessary. Upon a showing that there is substantial risk of improper use of a witness's prior statement, the hearing officer may take appropriate steps, for example, delaying production of a prior statement, or prohibiting parties from communicating with particular witnesses.

Rule 232. Subpoenas

(a) *Availability; Procedure.* In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses 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 Rule 150. A person whose request for a subpoena has been denied or modified may not request that any other person issue the subpoena.

(1) *Unavailability of Hearing Officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance from the first available of the following persons: the Chief Administrative Law Judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner.

(2) *Signing May be Delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

(b) *Standards for Issuance.* Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a

condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the person requested to issue the subpoena determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(c) *Service.* Service shall be made pursuant to the provisions of Rule 150(b)–(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 hearings.

(d) *Tender of fees required.* When a subpoena compelling 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 rule.

(e) *Application to Quash or Modify. (1) Procedure.* Any person to whom a subpoena is directed or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena 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, request that the subpoena be quashed or modified. Such request shall be made by application filed with the Secretary and served on all parties pursuant to Rule 150. The party on whose behalf the subpoena 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 was issued by another person.

(2) *Standards Governing Application to Quash or Modify.* If compliance with the subpoena would be unreasonable, oppressive or unduly burdensome, the hearing officer or the Commission shall quash or modify the subpoena, or may order return of the subpoena 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.

(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.

Comment (a): Rule 232 requires that, unless made on the record at a hearing, subpoena requests must be in writing. *Ex parte,* oral communication with the hearing officer concerning the need for issuance of a subpoena creates the opportunity for unintended and potentially improper discussion of the merits of a case.

Comment (b): Rule 232(b) is based upon Section 555(d) of the Administrative Procedure Act, 5 U.S.C. 555(d).

Revision Comment: Under the former Rule 14 of the Rules of Practice and the proposed rules, neither the fact that a subpoena was sought nor the identity of the person subpoenaed was disclosed. Comment was requested as to whether the identity of the persons subpoenaed should be disclosed to other parties, and if so, when such disclosure should take place. One commenter suggested that the identity of persons subpoenaed should be disclosed to all other parties and an application to quash should be served on all parties. The Commission believes that these suggestions are consistent with other changes made to increase the prehearing exchange of information. Accordingly, Rule 232 has been revised to incorporate these suggestions.

Commenters also suggested that respondents be allowed to issue subpoenas for the purpose of compelling prehearing discovery depositions as is allowed in actions under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 30(a)(1). Discovery under the Federal Rules of Civil Procedure, including deposition practice, is often a source of delay, extensive collateral disputes and high litigation costs. *See Fair and Efficient Administrative Proceedings: Report of the Task Force on Administrative Proceedings* (1993) at 47–48. One commenter suggested that the disadvantages of oral deposition practice under the Federal Rules of Civil Procedure could be avoided by permitting depositions only by order of the hearing officer; by limiting each respondent to five depositions, unless additional depositions were approved by the hearing officer; and by requiring all depositions to be completed within 90 days of the close of document discovery.

The Commission has weighed the arguments advanced in favor of expanding the scope of prehearing discovery to permit oral depositions as suggested and has concluded that a rule authorizing discovery depositions is not warranted.

First, the Commission's experience in federal court litigation strongly suggests that notwithstanding the proposed restriction for the use of discovery depositions, there remains a significant potential for extensive collateral litigation over their use. Under the commenter's proposal, for example, each respondent could seek leave to take more than five depositions, and might contest, through motions for interlocutory review and arguments on appeal, any denial of additional depositions by the hearing officer.

Second, the suggestion to limit depositions to the 90-day period after the close of ''document discovery'' conflicts with the statutory timetable for cease-and-desist proceedings, the fastest growing category of enforcement proceedings. When a cease-and-desist order is sought, the Commission is required to set a hearing date not earlier than 30 days nor later than 60 days after service of the order instituting proceedings, unless an earlier or a later date is set by the Commission with the consent of a respondent. *See, e.g.,* Exchange Act 21C(b), 15 U.S.C. § 78u–3(b). In a proceeding with multiple respondents, one respondent's decision not to consent to a later hearing date, or to consent to an extension less than that sought by other respondents, would give rise to difficult and time-consuming collateral issues over scheduling, and could necessitate multiple hearings. Even without such complications, a 90-day period for depositions, in addition to a period for inspection and copying of documents, would represent a significant departure from the statute.

Third, the rationale for permitting oral depositions in litigation under the Federal Rules of Civil Procedure does not apply equally to a Commission administrative proceeding. In the typical civil action, where neither party can compel testimony prior to the filing of the complaint, oral depositions play a critical role in permitting evidence to be gathered prior to trial. Also, a plaintiff in the typical civil action is not required before filing to vet a proposed

lawsuit either with the defendant or anyone else. In this context, discovery, including depositions, is a crucial adjunct to motions to dismiss, summary judgment, and other procedural mechanisms designed to allow an assessment by the judge whether the allegations of the complaint are sufficient to warrant trial.

By contrast, in administrative proceedings brought by the Commission, there is ordinarily a detailed pre-institution fact finding investigation and a rigorous pre-institution review process. At the close of the investigation, a respondent is usually told the general conclusions reached by the Division of Enforcement and is afforded an opportunity to submit a written ''Wells'' statement presenting arguments against commencement of an action. *See* Commission's decisions on advisory committee recommendations regarding commencement of enforcement proceedings and termination of staff investigations, Securities Act Release No. 5310, 38 FR 5457 (Mar. 1, 1973). No proceedings are instituted unless a majority of the Commission votes to authorize proceedings after reviewing both a report on the investigation's findings from the Division of Enforcement and any Wells statement that is submitted. If proceedings are authorized, the documents and transcripts obtained from persons not employed by the Commission in the investigation are shared with the respondent. The benefits from and need for oral depositions are therefore different and less important in the context of Commission administrative proceedings than they may be in litigation between private parties under the Federal Rules of Civil Procedure.

Finally, the revised Rules of Practice include two new provisions that address in significant part a respondent's interest in obtaining discovery prior to the start of the hearing. Rule 232 authorizes the issuance of subpoenas *duces tecum* for the production of documents returnable at any designated time or place. Rule 230 mandates that the Division of Enforcement generally make available documents and transcripts of testimony obtained from persons other than employees of the Commission in the investigation leading to the proceeding.

One commenter suggested that the opportunity to review transcripts of investigative depositions was not sufficient. The commenter noted that knowledge gained during an investigation is cumulative. Division of Enforcement staff are unable to question each witness as thoroughly during the course of an investigation, particularly in the early stages, as can be done in a post-investigation deposition. Further, an investigator on the Division of Enforcement staff will not necessarily ask the same questions as would a respondent. Moreover, even where investigative testimony is complete, the transcript provided to respondents is not a full substitute for the opportunity during live testimony to observe a witness's demeanor as well as to hear the content of a witness's answers.

These reasons establish support for an opportunity after the investigation for both the respondent and the Division of Enforcement to subpoena witnesses and question them under oath—an opportunity available at the hearing. They do not establish the need for prehearing depositions as well. Permitting post-investigation, prehearing depositions would afford a respondent information that may be useful in advance of hearing. However, given the newly established right to subpoena documents prior to hearing, the marginal benefits of prehearing depositions are not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.

Rule 233. Depositions Upon Oral Examination

(a) *Procedure.* Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

(b) *Required Finding When Ordering a Deposition.* In the discretion of the Commission or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, and that the taking of a deposition will serve the interests of justice.

(c) *Contents of Order.* An order for deposition shall designate by name a deposition officer. The designated officer may be the hearing officer or any other person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. An order for deposition also shall state:

(1) the name of the witness whose deposition is to be taken;

(2) the scope of the testimony to be taken;

(3) the time and place of the deposition;

(4) the manner of recording, preserving and filing the deposition; and

(5) the number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

(d) *Procedure at Depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(e) *Objections to Questions or Evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(f) *Filing of Depositions.* The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(g) *Payment.* The cost of the transcript shall be paid by the party requesting the deposition.

Comment: Depositions under the Rules of Practice are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not allowed for purposes of discovery. *See In the Matter of Central and South West Corp.*, Admin. Proc. Rulings Release No. 184 (July 14, 1976), 52 SEC Docket 375 (Aug. 18, 1992) (citing *L.M. Rosenthal & Co., Inc.*, Admin. Proc. File No. 3–4330 (Jan. 30, 1974)); *see also In the Matter of Gail G. Griseuk*, Admin. Proc. Rulings Release 440 (Aug. 31, 1994), 57 SEC Docket 1488 (Sept. 27, 1994) (formal

discovery procedures are not available in Commission administrative proceedings).

Comment (c): The criteria for serving as a deposition officer are based on the criteria in Rule 28 of the Federal Rules of Civil Procedure.

Revision Comment (b): Under Proposed Rule 22, the criteria for whether to allow a deposition to be taken were not consistent with the criteria for allowing the deposition to be introduced. As revised, the criteria for permitting a deposition are consistent with the criteria of Rule 235 for introducing a prior sworn statement of a witness.

Depositions are no longer required to be filed under seal, although a confidentiality order may be sought. *See* Rule 322.

Rule 234. Depositions Upon Written Questions

(a) *Availability.* Depositions may be taken and submitted on written questions upon motion of any party. The motion shall include the information specified in Rule 233(a). A decision on the motion shall be governed by the provisions of Rule 233(b).

(b) *Procedure.* Written questions shall be filed with the motion. Within 10 days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken pursuant to this rule no persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, shall be present at the examination of the witness. No party shall be present or represented unless otherwise permitted by order. The deposition officer shall propound the questions and cross-questions to the witness in the order submitted.

(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 (g) of Rule 233, except that no cross-examination shall be made.

Comment: The procedures for depositions upon written questions are based in part on Rule 31 of the Federal Rules of Civil Procedure.

Rule 235. Introducing Prior Sworn Statements of Witnesses into the Record

(a) At a hearing, any person wishing to introduce a prior, sworn statement 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 is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement 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 may be granted if:

(1) the witness is dead;

(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;

(3) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) the party offering the prior sworn statement 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 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 in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Revision Comment: Proposed Rule 22, which addressed the introduction of a deposition as part of the record, did not state whether it applied to any deposition, or only a deposition taken pursuant to the Rules of Practice. Rule 235 specifies the circumstances under which prior sworn statements by a witness are admissible. One commenter suggested making the stipulation of the parties to accept a deposition in lieu of live testimony a factor in determining whether a deposition already taken should be admitted in evidence. The rule was revised accordingly.

Rule 240. Settlement

(a) *Availability.* Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement shall state that it is made pursuant to this rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(4) and (5) of this rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the interested division.

(c) *Consideration of Offers of Settlement.* (1) Offers of settlement shall be considered by the interested division when time, the nature of the proceedings, and the public interest permit.

(2) Where a hearing officer is assigned to a proceeding, the interested division and the party submitting the offer may request that the hearing officer express his or her views regarding the appropriateness of the offer of settlement. A request for the hearing officer to express his or her views on an offer of settlement or otherwise to participate in a settlement conference constitutes a waiver by the persons making the request of any right to claim bias or prejudgment by the hearing officer based on the views expressed.

(3) The interested division shall present the offer of settlement to the Commission with its recommendation, except that, if the division's recommendation is unfavorable, the offer shall not be presented to the Commission unless the person making the offer so requests.

(4) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(5) By submitting an offer of settlement the person further waives:

(i) such provisions of the Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any 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.

(6) If the Commission rejects the offer of settlement, the person making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(5) of this rule with respect to any discussions concerning the rejected offer of settlement.

(7) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission.

Comment: In proceedings required to be conducted ''on the record,'' Section 554(c) of the Administrative Procedure Act, 5 U.S.C. § 554(c), requires that administrative agencies give interested parties the opportunity for the submission and consideration of offers of settlement ''when time, the nature of the proceeding, and the public interest permit.'' *Cf.* Table I, Subpart D, 17 CFR 201 (listing Commission proceedings required to be conducted ''on the record''). It is the Commission's practice to provide such an opportunity in all proceedings, whether or not the proceeding is required to be conducted ''on the record.''

Although the staff is authorized to participate in settlement negotiations under various circumstances, the Commission must approve every settlement.

Rule 240 addresses offers of settlement made both prior to and after the institution of proceedings. The Rule requires each offer of settlement to recite or incorporate as part of the offer the provisions of paragraphs (c)(4) and (5). Certain facts necessary for the Commission to make a reasoned judgment as to whether settlement offer is in the public interest are often available only to the staff that negotiated the proposed settlement. Paragraph (c)(5)(i) requires waiver of any provisions that may be construed to prohibit *ex parte* communications regarding the settlement offer between the Commission and staff involved in litigating the proceeding. Paragraph (c)(5)(ii) requires waiver of any right to claim bias or prejudgment by the Commission arising from the Commission's consideration or discussion concerning settlement of all or any part of the proceeding.

Revision Comment: The Commission considered but declined to accept one commenter's suggestion that the rule regarding settlements should retain a provision of former Rule 8(a)(3) that, where the Commission deemed it appropriate, the Commission also may give the party making an offer an opportunity to make an oral presentation. The Commission considers hundreds of settlement offers each year. Given the volume of settlements, it would require significant resources to rule on oral presentation requests, to address collateral disputes if a request was denied, and to hear presentations if requests were granted. While the Commission has authority to permit oral presentations at any time, *see* Rule 451, based on its experience, the Commission does not believe that oral presentations by a respondent in support of a written offer of settlement would aid the Commission's decisional process.

Rule 250. Motion for Summary Disposition

(a) After a respondent's answer has been filed and, in an enforcement or a disciplinary proceeding, documents have been made available to that respondent for inspection and copying pursuant to Rule 230, the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent. If the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. 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.

(b) The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. If it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion. A hearing officer's decision to deny leave to file a motion for summary disposition is not subject to interlocutory appeal.

(c) The motion for summary disposition, supporting memorandum of points and authorities, and any declarations, affidavits or attachments shall not exceed 35 pages in length.

Comment: The rule applies to enforcement proceedings and disciplinary proceedings as well as any other proceeding in which a hearing is scheduled. Motions for disposition prior to hearing may provide particular benefits in regulatory proceedings. Enforcement or disciplinary proceedings in which a motion for disposition prior to hearing would be appropriate are likely to be less common. Typically, enforcement and disciplinary proceedings that reach litigation involve genuine disagreement between the parties as to material facts. 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. While partial disposition may be appropriate in some cases, a hearing will still often be necessary in order to determine a respondent's state of mind and the need for remedial sanctions if liability is found.

Summary disposition is a procedure that can resolve issues prior to hearing, thereby reducing the costs of hearing and expediting resolution of the proceeding. The possibility that such motions may simplify the proceeding should not be allowed to delay the planned start of the hearing, however. The hearing officer is authorized to set schedules for the submission of summary disposition motions in order to prevent the use of such motions as a tactic for delay or as a means for needlessly increasing the costs of prehearing preparation. The hearing officer may deny or defer a ruling on such a motion if it is not filed timely in light of the prehearing schedule. Nothing in Rule 250 should be construed to create a right to prehearing depositions or other discovery not otherwise provided for by these rules in order to support or oppose such a motion.

Revision Comment: Most major agencies in the federal system have made available some form of summary disposition procedure. *See Puerto Rico Aqueduct & Sewer Authority* v. *EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995) (listing agencies that provide for summary disposition). Rule 250 expressly permits a dispositive motion prior to hearing to be made to and decided by the hearing officer, a reversal of practice under former Rule 11(e) which required such decisions to be made by the Commission.

One commenter recommended that the proposed rule allowing for dispositive motions be modified to permit a procedure similar or identical to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. That commenter also recommended that a summary judgment remedy be available to respondents only, unless a staff motion for summary judgment triggered a respondent's right to take discovery depositions to secure evidence necessary to show the existence of a genuine factual dispute.

The Commission gave detailed consideration to both proposals. Rule 250 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 attendant delay in cases where a hearing in which all evidence can be presented and witness demeanor can be observed is warranted.

As noted in the Revision Comment to Rule 232, pretrial procedures developed under the Federal Rules of Civil Procedure, including summary judgment under Rule 56, must be viewed in context. The Federal Rules of Civil Procedure govern a judicial system that deals most frequently with disputes between private parties. Unlike in Commission proceedings, in the typical private party civil action there is no opportunity to conduct a pre-filing investigation with the use of subpoenas; no formal opportunity such as a Wells submission, *see* 17 CFR 202.5(c), for the opposing party to present reasons against the initiation of an action; and no panel of public officials, such as the Commission, that must authorize the filing of a complaint. In addition, because of the priority of criminal caseloads, there is a high premium on providing trial dates for civil matters. Thus, the rationales that justify prehearing summary disposition procedures under the Federal Rules of Civil Procedure do not apply equally to Commission administrative proceedings.

Also as noted in the Revision Comment to Rule 232, the statutory schedule for cease-and-desist proceedings provides no realistic opportunity for summary judgment procedures comparable to those allowed under the Federal Rules of Civil Procedure. It is the Commission's view, therefore, that procedures to allow for the disposition of a case prior to hearing have a potentially useful role in the administrative process, but one that is more limited than summary judgment under the Federal Rules of Civil Procedure.

It was also suggested that the Commission should permit the use of affidavits in support of a motion for summary disposition. The text of the proposed rule did not set forth any limitation on the filing of affidavits in connection with a dispositive motion. The comment to the proposed rule, however, stated that affidavits were not contemplated. After further consideration, the Commission has decided that affidavits or declarations should be allowed, subject to limitations on their length.

Typically, Commission proceedings that reach litigation involve basic disagreement as to material facts. Based on past experience, the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare. Consistent with the goal of various other rules to facilitate the hearing officer's control over the prehearing scheduling, the revised rule requires leave of the hearing officer prior to filing a motion for summary disposition at any time prior to completion of the interested division's case in chief. *See* Rules 221 and 222. Such 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 Commission will monitor closely the use of the procedures for disposition prior to hearing to determine whether they operate as intended to create more streamlined proceedings and an elimination of needless hearings, or whether the availability of such procedures operates as a source of delay, expense or harassment.

Rules Regarding Hearings

Rule 300. Hearings

Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

Rule 301. Hearings to Be Public

All hearings, except hearings on applications for confidential treatment filed pursuant to Rule 190, hearings held to consider a motion for a protective order pursuant to Rule 322, and hearings on *ex parte* application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

Rule 302. Record of Hearings

(a) *Recordation.* Unless ordered otherwise by the hearing officer or the Commission, all hearings shall be recorded and a written transcript thereof shall be prepared.

(b) *Availability of a Transcript.* Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings, and transcripts subject to a protective order pursuant to Rule 322, shall be available for purchase only by parties, provided, however, that any person compelled to submit data or evidence in a hearing may purchase a copy of his or her own testimony.

(c) *Transcript Correction.* Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as directed by the Commission or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation pursuant to Rule 324, or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Comment (b): The Administrative Procedure Act (APA) provides that any person compelled to submit data or evidence in a non-investigatory proceeding may purchase a copy of his or her own testimony. *See* 5 U.S.C. 555(c). In addition, Section 11 of the Federal Advisory Committee Act (FACA) requires that an agency make available copies of transcripts of agency proceedings as defined in Section 551(12) of the APA, 5 U.S.C. § 555(c). *See* FACA, 5 U.S.C. App. (1988), 86 Stat. 770.

Rule 310. Failure to Appear at Hearings: Default

Any person named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default pursuant to Rule 155(a). A party may make a motion to set aside a default pursuant to Rule 155(b).

Rule 320. Evidence: Admissibility

The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Comment: Rule 320 restates the Administrative Procedure Act (APA) standard for the reception of evidence. 5 U.S.C. 556(c)(3) and (d). While Section 556 of the APA applies only to proceedings which are ''on the record'' pursuant to 5 U.S.C. 554(a), Rule 320 applies to all proceedings, as defined in Rule 101(a), before the Commission or a hearing officer.

Rule 321. Evidence: Objections and Offers of Proof

(a) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Commission, however, unless raised:

(1) pursuant to interlocutory review in accordance with Rule 400;

(2) in a proposed finding or conclusion filed pursuant to Rule 340; or

(3) in a petition for Commission review of an initial decision filed in accordance with Rule 410.

(b) *Offers of Proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 350(b).

Rule 322. Evidence: Confidential Information, Protective Orders

(a) *Procedure.* In any proceeding as defined in Rule 101(a), a party; any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence; or any witness who testifies at a hearing may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents without revealing confidential details. If the movant seeks a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties. Unless the documents are unavailable, the movant shall file for *in camera* inspection a sealed copy of the documents as to which the order is sought.

(b) *Basis for Issuance.* Documents and testimony introduced in a public hearing are presumed to be public. A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

(c) *Requests for Additional Information Supporting Confidentiality.* A movant under paragraph (a) of this rule may be required to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(d) *Confidentiality of Documents Pending Decision.* Pending a determination of a motion under this rule, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the Commission or the hearing officer. Any order issued in connection with a motion under this rule shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

Comment: A protective order under Rule 322 is available only in proceedings as defined in Rule 101(a). Rule 322 is distinct from other Commission rules relating to the treatment of requests for preserving the confidentiality of information. *See* 17 CFR 200.83 (providing for procedures by which persons submitting information generally to the Commission can request that the information not be disclosed pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552). *See also* Rule 190 (specifying procedures by which registrants may request confidential treatment of certain information contained in regulatory filings).

Revision Comment: The former Rules of Practice did not have a provision that specifically allowed the entry of protective orders for documents submitted as evidence in connection with a hearing. Former Rule 25 related solely to applications for confidential treatment of materials filed in connection with registration statements and other such filings and required that confidential treatment be sought at the time of filing. Proposed Rule 33 allowed a party to seek confidential treatment under any ''applicable statute or rule,'' without limiting the scope of materials sought to be protected or the timing of the application. The proposed rule was intended to allow for issuance of a protective order in connection with a hearing. Rule 322 has been added to clarify the availability of protective orders for documents filed or testimony given in an adjudicative proceeding.

Comment was requested as to whether the filing of an application for confidential treatment of evidentiary information should be permitted *ex parte.* The Commission has decided that allowing such filings will not be necessary because Rule 322 allows a party to file a motion containing a general summary or extract of the materials without revealing confidential details.

Rule 323. Evidence: Official Notice

Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

Comment: This provision is based on Section 556(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e).

Rule 324. Evidence: Stipulations

The parties may, by stipulation, at any stage of the proceeding agree upon any pertinent facts in the proceeding. A stipulation may be received in evidence and, when received, shall be binding on the parties to the stipulation.

Revision Comment: Stipulation as to facts not in dispute can aid in the efficient conduct of a hearing and reduce costs for all parties. Rule 324 has been added to clarify that stipulations may be entered into at any stage of the proceeding, including prior to the start of the hearing. Rule 324 is based, in part, on Rule 324 of the Model Adjudication Rules, Administrative Conference of the United States (Dec. 1993).

Rule 325. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 326. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.

Comment: The requirements of Section 556 of the Administrative Procedure Act, including those regarding the right to present evidence, submit rebuttal evidence and conduct cross-examination, apply only to ''formal'' adjudications: those hearings

required by statute to be conducted ''on the record'' after opportunity for hearing. *See* 5 U.S.C. §§ 554(a), 556(a). In contrast, ''informal'' adjudications are proceedings where the statutory requirement for an ''opportunity for hearing'' does not specifically require the hearing to be held ''on the record.'' The Commission may, but is not required to, follow procedures mandated for ''formal'' adjudications under Section 556 in ''informal'' adjudications. Thus, in cases of ''informal'' adjudication, such as a proceeding as to whether a temporary cease-and-desist order should be entered, the respondent's opportunity to put on live witnesses at the hearing may be limited. *See also* Rule 191 (regarding adjudications not required to be determined on the record after notice and opportunity for hearing); Rules 510–513 (regarding temporary cease-and-desist orders).

Rule 340. Proposed Findings, Conclusions and Supporting Briefs

(a) *Opportunity to File.* Before an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.

(b) *Procedure.* Proposed findings of fact must be supported by citations to specific portions of the record. If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs, and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate those paragraphs of the proposals already filed as to which there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

(c) *Time for Filing.* In any proceeding in which an initial decision is to be issued:

(1) At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed. The party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary.

(2) The total period within which all such proposed findings and conclusions and supporting briefs and any counter statements of proposed findings and conclusions and reply briefs are to be filed shall be no longer than 90 days after the close of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in an order the reasons why the different period is necessary.

Comment (a): Rule 340 is based on Section 557(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c). By its terms, Section 557(c) applies only to proceedings ''on the record'' after opportunity to be heard. *See* Comment to Rule 326. Consistent with longstanding Commission practice, however, Rule 340 mandates an opportunity for submission of findings and conclusions in any case in which an initial decision is to be prepared, whether or not the proceeding is ''on the record.'' The limitation in Rule 340 that the opportunity to submit proposed findings and conclusions be ''reasonable in light of all the circumstances'' grants the hearing officer or the Commission discretion to restrict the time allowed for filing findings and conclusions. For example, in emergency proceedings, an abbreviated period might be appropriate. Rule 340 does not apply to proceedings in which the Commission itself presides at the taking of evidence since no initial decision is issued in such circumstances. In such a case—for example, where a temporary cease-and-desist order is sought—the Commission has complete discretion whether to allow for post-hearing submissions.

The rule requires that each proposed finding must be supported by appropriate citations to the record. Filings that fail to meet this requirement may be subject to sanctions pursuant to Rule 180.

Rule 350. Record in Proceedings Before Hearing Officer; Retention of Documents; Copies

(a) *Contents of the Record.* The record shall consist of:

(1) the order instituting proceedings, each notice of hearing and any amendments;

(2) each application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) each stipulation, transcript of testimony and document or other item admitted into evidence;

(4) each written communication accepted by the hearing officer pursuant to Rule 210;

(5) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under Rule 112, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(6) all motions, briefs and other papers filed on interlocutory appeal;

(7) all proposed findings and conclusions;

(8) each written order issued by the hearing officer or Commission; and

(9) any other document or item accepted into the record by the hearing officer.

(b) *Retention of Documents Not Admitted.* Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any such documents until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

(c) *Substitution of Copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this rule.

Rule 351. Transmittal of Documents to Secretary; Record Index; Certification

(a) *Transmittal From Hearing Officer to Secretary of Partial Record Index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with an index of such documents. The hearing officer, may, by order, require the interested division or other persons to assist in promptly transporting such documents from the hearing location to the Office of the Secretary.

(b) *Preparation, Certification of Record Index.* Promptly after the close of the hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any

corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. If an initial decision is to be issued, the initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(c) *Final Transmittal of Record Items to the Secretary.* After the close of the hearing, the hearing officer shall transmit to the Secretary originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, or if no initial decision is to be issued, within 60 days of the close of the hearing, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

Comment: The Office of the Secretary is responsible for custody and safekeeping of administrative proceedings records. Hearings, however, are often held away from the Commission's Headquarters in Washington. Exhibits introduced at such hearings or filings made directly with the hearing officer (*see* Rule 151) may be voluminous. Rule 350 establishes procedures to facilitate and safeguard the transfer to the Secretary of motions, exhibits or other record items filed with the hearing officer. Parties and other persons are afforded a specific opportunity to object if they believe that the certified record is incomplete.

Rule 360. Initial Decision of Hearing Officer

(a) *When Required.* 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.

(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 rule:

(1) the initial decision shall become the final decision of the Commission as to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) if a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(c) *Filing, Service and Publication.* The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the *SEC News Digest.* 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.

(d) *When Final.* (1) Unless a party or an aggrieved person entitled to review files a petition for review in accordance with the time limit specified in the initial decision, or unless the Commission on its own initiative orders review pursuant to Rule 411, an initial decision shall become the final decision of the Commission.

(2) If a petition for review is timely filed by a party or an aggrieved person entitled to review, or if the Commission upon its own initiative has ordered review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(e) *Order of Finality.* In the event that the initial decision becomes the final decision of the Commission with respect to a party, the Commission shall issue an order that the decision has become final as to that party. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC News Digest* and the *SEC Docket.*

Comment (a): Paragraph (a) is based on Section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b).

Comment (b): The first sentence of paragraph (b), is based on Section 557(c)(3) of the APA, 5 U.S.C. § 557(c)(3).

Comment (d): Paragraph (d) is based on Sections 557(b) and 704 of the APA, 5 U.S.C. §§ 557(b) and 704. In certain limited circumstances, a non-party may be aggrieved by a decision and entitled to seek review. *See, e.g.*, Exchange Act § 25(a)(1), 15 U.S.C. § 78y(a)(1).

Comment (e): The order of finality provides formal notice that the initial decision will not be reviewed. An initial decision automatically becomes final, however, with the passage of time even if the order of finality is not issued. Formal notice to a respondent that an initial decision has become final is not required for the decision to take effect. A respondent is able to ascertain when the period for filing a petition for review pursuant to Rule 410, or for initiation of review on the Commission's initiative pursuant to Rule 411, has expired. When an initial decision becomes final, any collateral consequences from entry of a final order take effect immediately. Sanctions pursuant to the decision may not be immediately effective, however. Rule 601 specifies when amounts owing pursuant to a disgorgement or penalty order become due. In addition, some period of time may be necessary or appropriate after an initial decision becomes final before sanctions should take effect, for example, to allow a respondent to provide for an orderly termination of a business upon effectiveness of a suspension or bar. Ordinarily, the initial decision will specify when sanctions will take effect if the initial decision becomes final. If the initial decision or applicable rule does not specify when sanctions are to become final, the Commission will enter an appropriate order. The Secretary has delegated authority to fix the date when sanctions become effective. *See* 17 CFR 200.30–7.

Appeal to the Commission and Commission Review

Rule 400. Interlocutory Review

(a) *Availability.* The Commission will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Commission may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) *Expedited Consideration.* Interlocutory review of a hearing officer's ruling shall be expedited in every way, consistent with the Commission's other responsibilities.

(c) *Certification Process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer and shall specify the material relevant to the

ruling involved. The hearing officer shall not certify a ruling unless:

(1) his or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(d) *Proceedings Not Stayed.* The filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order. The Commission will not consider the motion for a stay unless the motion shall have first been made to the hearing officer.

Comment: Rule 400 is based in part on rules governing interlocutory review of the decisions of a United States district court by a court of appeals. *See* 28 U.S.C. § 1292(b). In contrast to the practice in the federal judicial system, however, the Commission may take up a matter on its own motion at any time, even if a hearing officer does not certify it for interlocutory review.

The requirement in paragraph (b) that interlocutory review be ''expedited in every way, consistent with the Commission's other responsibilities,'' conforms to the standard for review in Rules 102(e)(3) and 500. Interlocutory matters should be promptly resolved in order to allow for the timely completion of the entire proceeding.

Revision Comment: The structure of this rule has been significantly modified to break out each of the rule's substantive provisions and thereby improve its readability. Other changes in the rule are technical and are intended only to clarify its operation.

One commenter recommended that a hearing officer's decision with respect to a motion that he or she be disqualified be subject to interlocutory review and that the rule contain an express provision making immediately appealable any decision not to quash a subpoena as requested by a third-party recipient. The Commission has decided not to incorporate these recommendations. Either is subject to interlocutory review if the hearing officer determines that the decision meets the standards of paragraph (c). Moreover, the decision whether to subpoena a witness is best made by the hearing officer who is most familiar with the details of the proceeding.

Rule 401. Issuance of Stays

(a) *Procedure.* A request for a stay shall be made by written motion, filed pursuant to Rule 154, and served on all parties pursuant to Rule 150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) *Scope of Relief.* The Commission may grant a stay in whole or in part, and may condition relief under this rule upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) *Stay of a Commission Order.* A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) *Stay of an Action by a Self-Regulatory Organization.*

(1) *Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to Rule 420, may be made by any person aggrieved thereby.

(2) *Summary Entry.* A stay may be entered summarily, without notice and opportunity for hearing.

(3) *Expedited Consideration.* Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission, by written order, shall specify a different period.

Comment: The Commission has stated that it ''generally considers four factors'' when evaluating the appropriateness of a stay of its own orders:

(1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer irreparable injury; (3) whether there will be substantial harm to any person if the stay were granted; and (4) whether the issuance of a stay would likely serve the public interest.

Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 33870 (Apr. 7, 1994), 56 SEC Docket 1189, 1190–91 (Apr. 26, 1994). The evaluation of the factors enumerated by the Commission, according to the release, will vary with the ''equities and circumstances'' of the case before the Commission. *Id. See also In re Hibbard, Brown & Co. et al.*, Admin. Proc. File No. 3–8418, SEC Press Release No. 94–72 (Aug. 2, 1994) at 4.

The General Counsel has been delegated the authority to decide whether a stay should be granted. 17 CFR 200.30–14(g)(5), (6). Such decisions by the General Counsel are subject to review pursuant to Rule 430.

The Commission may condition the grant of a stay on such terms or upon the implementation of such procedures as it deems appropriate. For example, where a respondent seeks a stay of a disgorgement order, the Commission may require safeguards, such as establishment of an escrow, that would assure that funds will be available for payment at a later date if the disgorgement order is upheld.

Comment (c): Rule 401(c) requires that a motion for a stay of a Commission order pending review by a court be made to the Commission while the Commission retains jurisdiction over the proceeding. Other than a temporary cease-and-desist order, which is subject to judicial review in the first instance in a United States District Court, Commission orders are reviewable by a court of appeals. *See, e.g.*, Exchange Act § 25, 15 U.S.C. 78y (governing judicial review of final orders of the Commission generally), Exchange Act § 21C(d)(2), 15 U.S.C. § 78u–3(d)(2) (governing judicial review of temporary cease-and-desist orders). The Commission loses jurisdiction to grant a stay of an order subject to review in a court of appeals only after the record is filed in a court of appeals. *See, e.g.*, Exchange Act §§ 25(a)(3), (c)(2), 15 U.S.C. 78y(a)(3), (c)(2), and Fed. R. App. P. 18.

Comment (d): This paragraph is based on Section 19(d) of the Exchange Act, 15 U.S.C. § 78s(d), and former Exchange Act Rule 19d–2, 17 CFR 240.19d–2 (1994).

The provision for expedited consideration in paragraph (d)(3) is based on the requirement of Section 19(d)(2) that the Commission establish an expedited procedure for consideration and determination of the question of a stay for ''appropriate cases.'' The Commission has established a guideline for the timely determination of such requests. *See* 17 CFR 201.900 (Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings). A self-regulatory organization controls the effective date of the sanctions it imposes. If it desires additional time to address the issue of whether a stay should issue, it may consider delaying the effective date of its order. If the determination complained of has not taken effect, the time limits for the filing of opposing and reply briefs would be those set forth in Rule 154.

Revision Comment: A commenter suggested that the Commission amend the rule to include substantive standards under which a stay shall be granted or to identify the criteria the Commission applies in considering a request for a stay. As noted in the comment to Rule 401, earlier this year the Commission reiterated in a release the factors generally considered when evaluating the appropriateness of a stay under Section 25(c)(2) of the Exchange Act. Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 33870 (Apr. 7, 1994). The Commission believes that the long-standing enunciation of its policy with respect to such stays provides sufficient guidance.

A commenter suggested that the Commission reconsider its rule allowing motions for stays of a self-regulatory organization (SRO) determination, including a final SRO disciplinary action, to be made ''at any time.'' The commenter proposed that a person seek a stay within 10 days of the filing of an SRO disciplinary decision pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1). The Commission does not agree that respondents should be required to request a stay within such a limited period. Requiring a stay to be sought within a fixed time would place respondents who may have no reason to seek a stay immediately at a disadvantage, as they may be entitled to a stay or other relief as the result of changed circumstances at a later time. *Cf.* Rule 512(e).

Exchange Act Section 19(d)(2) requires that in ''appropriate cases'' the Commission establish an expedited procedure for consideration and determination of the question of a stay. Expedited consideration is appropriate when a sanction or other action complained of has already taken effect or will take effect prior to the time a decision could be made without expedited consideration.

Rule 410. Appeal of Initial Decisions by Hearing Officers

(a) *Petition for Review; When Available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(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 Rule 360(b). The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to Rule 340, may, at the discretion of the Commission, be deemed to have been waived by the petitioner.

(c) *Financial Disclosure Statement Requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b).

(d) *Opposition to Review.* A party may seek leave to file a brief in opposition to a petition for review within five days of the filing of the petition. The Commission will grant leave, or order the filing of an opposition on its own motion, only if it determines that briefing will significantly aid the decisional process. A brief in opposition shall identify those issues which do not warrant consideration by the Commission and shall state succinctly the reasons therefore.

(e) *Prerequisite to Judicial Review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

Comment (a)–(b): Pursuant to Section 557(c) of the Administrative Procedure Act, 5 U.S.C § 557(c), in adjudications required to be conducted ''on the record after opportunity for agency hearing,'' a party is entitled to a reasonable opportunity to file exceptions to the initial decision and supporting reasons for the exceptions or proposed findings or conclusions. The Commission's practice, reflected in paragraph (a), is to provide an opportunity to file exceptions in all proceedings where an initial decision is to be made, not only those in ''on-the-record'' or ''formal'' adjudication. *See* Comments to Rules 100 and 191.

Except in limited cases as specified in Rule 411(b)(1) when the right of appeal is mandatory, the Commission, after considering a petition for review, may determine not to hear an appeal or to limit the issues on appeal. Administrative Procedure Act § 557(b), 5 U.S.C § 557(b) (''[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule''). *Cf.* Section 4A(b) of the Exchange Act, 15 U.S.C. § 78d–1(b) (providing a right to appeal certain decisions to the Commission).

The standards for granting a petition for review are set forth in Rule 411. Under these standards, the Commission grants a petition for review in virtually all cases. The product of a consensus over many years, this result represents a Commission determination that there is a benefit to joint deliberation by the Commission when exception is taken to an initial decision.

Comment (c): In order to make a determination with respect to whether disgorgement, interest or a penalty is appropriate for a respondent who raises inability to pay as an issue, the Commission must have access to complete and current financial information. Although financial disclosure may have occurred during the course of a hearing, by the time an initial decision and petition for review are filed that information is not likely to be current. Accordingly, a current financial disclosure statement is required if a petition for review raises exceptions concerning inability to pay.

Comment (d): The Commission has rarely found grounds for denial of a petition for review under its long-standing standards for determining whether to grant review, now set forth in Rule 411(b). Therefore, routine opposition to a petition for review

serves little purpose. Accordingly, leave from the Commission must be sought prior to filing an opposition to a petition for review. Where the Commission believes briefing would significantly assist its decisional process, it may grant leave to file an opposition or order such a filing. The Commission has delegated authority to the General Counsel to determine whether to grant requests for leave to file an opposition. *See* 17 CFR 200.30–14.

Revision Comments: Comment was requested as to (1) whether, notwithstanding the potential benefits of preparing a petition for review, the requirement for a petition should be eliminated where an appeal is provided as of right by Section 4A(b) of the Exchange Act; and (2) whether, in light of the Commission's longstanding practice of granting virtually all petitions for review, the requirement of filing a petition for review should be eliminated.

One commenter supported retaining the petition for review and suggested that the petition for review is a more appropriate mechanism for noticing an appeal because it helps clarify issues and provides more information than the notice of appeal used under the Federal Rules of Appellate Procedure.

The Commission grants virtually all petitions for review. Although Commission review in a particular case can be time consuming, it establishes authoritative precedent applicable to other cases and promotes accountability for, and confidence in, the Commission's adjudicatory process. Commission review of those cases in which review is sought has tended to encourage acceptance of hearing officers' decisions and to promote the settlement of cases even prior to hearing in similar cases, thereby reducing the overall adjudicatory workload.

The Commission has decided to retain the petition for review process for all cases including those where a right to appeal is statutorily required. The petition for review is a summary document and requires limited resources to prepare. Requiring the petition, however, enhances the efficiency of the appeals process for both the Commission and parties by focusing attention from an early point on those issues considered most significant by the petitioner. Thus, the petition for review offers substantial benefits both to the Commission and to petitioners.

As proposed, the rule would have allowed the filing of an opposition to review by any person opposing review. As noted by one commenter, given the Commission's practices with respect to the grant of petitions for review, an opposition to review serves little benefit to either the Commission or the parties, except in those rare cases where there is a genuine issue as to the necessity or appropriateness of review. As revised, the rule allows a party to seek leave to file a brief in opposition to a petition for review. The Commission believes this mechanism will limit the unnecessary expenditure of time or resources in routine oppositions to petitions for review while allowing, in appropriate cases, for other parties to be heard in opposition. The Commission retains discretion to direct the filing of an opposition on its motion in any case.

Comment was requested as to whether, after the filing of a petition for review, a 10- or 15-day period would be more realistic for filing a brief in opposition to a petition for review or a petition for summary affirmance. As revised, the Rule provides a 10-day period for a person to seek leave to file an opposition. If leave is granted, the Commission will specify the time allowed for filing a brief. Provisions related specifically to the filing of a motion for summary affirmance have been deleted.

Rule 411. Commission Consideration of Initial Decisions by Hearing Officers

(a) *Scope of Review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for Granting Review Pursuant to a Petition for Review.*

(1) *Mandatory Review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h (a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78*l*(d);

(ii) suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78*l*(k); or

(iii) is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary Review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) a prejudicial error was committed in the conduct of the proceeding; or

(ii) the decision embodies:

(A) a finding or conclusion of material fact that is clearly erroneous; or

(B) a conclusion of law that is erroneous; or

(C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission Review Other Than Pursuant to a Petition for Review.* The Commission may, on its own initiative, order review of any initial decision, or a portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to Rule 410(b) or any brief in opposition to a petition for review permitted pursuant to Rule 410(d). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on Matters Reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 450(a). 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.

(e) *Summary Affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

(f) *Failure to Obtain a Majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

Comment (a): Section 557(b) of the Administrative Procedure Act, 5 U.S.C § 557(b), provides that ''[o]n appeal from or review of the initial decision, the agency has all the powers which it

would have in making the initial decision except as it may limit the issues on notice or by rule.''

Comment (b): Paragraph (b) is based, in part, on the requirements of Exchange Act Section 4A, 15 U.S.C. § 78d-1.

Comment (c): Paragraph (c) is based, in part, on the requirements of Exchange Act Section 4A.

Before the Commission determines whether to order review of an issue on its own motion, petitions for review and cross-petitions, if any, should be filed in accordance with Rule 410(b) and opposition briefs, if any, should be filed in accordance with Rule 410(d). Under Rule 411(c), there is a 21-day period after the end of the period for the filing of a petition for review during which the Commission may determine whether to grant review. If time is allowed for filing an opposition, there would be a corresponding increase in the time allowed for the Commission to order review on its own motion.

Comment (e): A provision for summary affirmance was added to the Rules of Practice in 1964 based upon Recommendation Number 9 of the Administrative Conference of the United States (ACUS). *See* also ACUS Recommendation No. 68–6 (suggesting that an agency may accord administrative finality to an initial decision by summarily affirming the initial decision or denying a petition for review). Summary affirmance may be appropriate when exception is taken to conclusions of law, but there is no genuine dispute as to any material facts, or when the Commission believes that deliberation by the Commission would not be useful or appropriate. Summary affirmance has very rarely been granted. *But see In the Matter of Joseph A. Lugo,* Exchange Act Release No. 25982 (Aug. 8, 1988), 41 SEC Docket 946 (Aug 23, 1988) (petitioners failed to file required briefs).

Revision Comment (c): The period during which the Commission can determine whether to grant review on its own initiative has been extended from 15 days to 21 days to conform to the 21-day period allowed in Rule 450(a)(2) for the issuance of a briefing schedule order.

Revision Comment (e): Comment was requested as to whether, in light of the Commission's summarily affirming an initial decision only rarely, the possibility of a summary affirmance should be eliminated. One commenter objected to summary affirmance based solely upon the petition for review and suggested that to the extent that review of an initial decision can be denied at the Commission's discretion, summary affirmance is unnecessary and counteracts the benefits of joint deliberation. The commenter suggested that if summary affirmance is retained it should be considered only after briefs have been filed, and should not be available at all where the Commission has granted review based upon a reasonable showing of error.

While summary affirmance has rarely been used in the past, the Commission's adjudication workload changes over time. Summary affirmance provides a potentially useful mechanism to resolve quickly certain cases. The Commission has decided to retain summary affirmance as a mechanism for disposition of appropriate cases. *See In the Matter of Joseph Lugo,* Admin. Proc. File No. 3–6740 (Aug. 8, 1988), Exchange Act Release No. 25982, 41 SEC Docket 946 (1988) (petitioners failed to file required briefs).

Rule 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

(i) final disciplinary sanction;

(ii) denial or conditioning of membership or participation;

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

(iv) 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).

(b) *Procedure.* An application for review may be filed with the Commission pursuant to Rule 151 within 30 days after notice of the determination was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1), and received by the aggrieved person applying for review. The application shall be served by the applicant on the self-regulatory organization. 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 with the record index. The application shall be accompanied by the notice of appearance required by Rule 102(d).

(c) *Determination Not Stayed.* Filing an application for review with the Commission pursuant to paragraph (b) of this rule shall not operate as a stay of the complained of determination made by the self-regulatory organization unless the Commission otherwise orders either pursuant to a motion filed in accordance with Rule 401 or on its own motion.

(d) *Certification of the Record; Service of the Index.* Fourteen days after receipt of an application for review or a Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record upon which the action complained of was taken, and shall file with the Commission three copies of an index to such record, and shall serve upon each party one copy of the index.

Comment: Rule 420 (a) and (b) are based in part on Exchange Act Section 19(d)(2), 15 U.S.C § 78s(d)(2).

Comment (b): It is the responsibility of the person seeking review to assure that the application for review is actually received by the Commission within the time limit provided. *See* Rule 151. While a method of service that provides proof of delivery is not mandatory, in the event there is a question as to whether an application was timely filed, it is the applicant's burden to establish when the filing was made.

Commission review of self-regulatory organization determinations for which an application may be filed pursuant to paragraph (a) is required by statute. The purpose of the statement of alleged errors and supporting reasons is to provide general notice of the basis for the application, not to justify the need for review. Citations to the record are not required because at the time the application is filed the record index has not been served on the applicant.

Revision Comment (a)–(d): Rules 420 and 421 are the only rules within the Rules of Practice limited expressly to self-regulatory organization (SRO) determinations. The substantive provisions of former Exchange Act Rules 19d–2 (concerning applications for stays of SRO determinations) and 19d–3 (concerning applications for review of SRO determinations generally) have been incorporated into Rules 420, 421 and other rules in the Rules of Practice. Rules 19d–2 and 19d–3 have been revised to cross-reference the Rules of Practice. Their substantive provisions have been deleted. These two rules were not deleted entirely at this time in order to provide a transition period for the updating of reference works, materials published by SROs and other guides relied upon by associated persons of SROs or others who seek information about the Commission's review of SRO determinations.

Comment was requested whether, in light of the potential benefits of a

summary statement of the contested issues early in the review process, respondents appealing the determination of an SRO should be required to file a petition for review that includes a statement of the issues on review and the alleged errors by the SRO. The National Association of Securities Dealers (NASD) suggested that the application for review process should require parallel levels of specificity with the petition for review process governing appeals from an initial decision of a hearing officer. The NASD commented that it believes that the Commission's obligation to conduct a *de novo* review of an SRO disciplinary proceeding requires that the Commission apply a non-deferential standard of review, but does not mandate that the Commission raise issues that the party seeking review overlooked.

The NASD suggested, therefore, that the Rules should provide that issues not raised by the party seeking review are deemed waived. The NASD asserted that briefs filed by the NASD with the Commission typically address not only those issues raised by the parties seeking review, but all issues that the NASD believes that the Commission may wish to address. The NASD stated that in its view, ''[i]t is not uncommon for briefs to devote more discussion to issues that are not in dispute than those that have been raised by the parties.'' Letter from T. Grant Callery, V.P. and General Counsel, NASD, to Jonathan G. Katz, Secretary, SEC 25 n.63 (Jan. 31, 1994).

The Commission believes that the *de novo* standard requires consideration of the entire record of a proceeding including material issues on that record, even if the parties have themselves failed to raise those issues. Over the 10-year period from 1983 through 1992, review of NASD disciplinary sanctions has been sought in less than five percent of all cases. Commission opinions on review play a critical role in setting standards for the securities industry. While it is not inconsistent with a *de novo* standard for the Commission to expect the parties to raise material issues and to bring forward relevant portions of the record, the Commission should not, as a matter of policy, ignore material issues or allow errors unaddressed by the parties to stand. Moreover, since the person seeking review would not have a record index at the time an application for review is filed, failure to note an exception at this preliminary stage would not constitute a waiver of any matters.

In response to the suggestions of the NASD, Rule 420 requires the person seeking review to make a summary statement of alleged errors in the determination complained of, so as to give the Commission and other parties notice of issues on review. This procedure allows the Commission to make a more informed briefing schedule order, pursuant to Rule 450, and to provide earlier opportunities for all parties to consider the content of their briefs.

The NASD also suggested that the Rules of Practice should provide that the Commission give parties notice and an opportunity to address any additional issues that the Commission raises in an administrative appeal. The NASD urged that adoption of a policy advising litigants when the Commission is raising an issue sua sponte could make SRO briefs ''more focused, more succinct, and presumably more helpful.''

Revised Rule 421(b) states that the Commission will provide an opportunity for supplemental briefing with respect to issues not raised by the parties when the Commission believes such briefing would significantly aid the decisional process. Supplemental briefing is not appropriate, however, in each case where the parties overlook an issue deemed material by the Commission. For example, where the law on an issue overlooked by the parties is clear, requiring briefs can inject unnecessary delay and expense with no corresponding benefit to the Commission or the parties.

Comment was also requested whether the requirement to include a financial disclosure statement if a respondent makes a claim of inability to pay should be extended to SRO proceedings. One commentator agreed that the requirement should be added, for purposes of consistency, to the rules governing appeals from SRO decisions. The Commission has decided not to add a financial disclosure requirement for appeals of SRO sanctions. The Commission, however, may require additional evidence as to a respondent's claim of inability to pay, including submission of a financial disclosure form, in particular cases. See Rule 452 (regarding additional evidence). A self-regulatory organization may choose to impose a financial disclosure requirement when a person intends to argue an inability to pay on appeal to the self-regulatory organization. Such a financial statement would provide a standardized baseline for consideration of claims of inability to pay.

Rule 421. Commission Consideration of Determinations by Self-Regulatory Organizations

(a) *Commission Review Other than Pursuant to a Petition for Review.* The Commission may, on its own initiative, order review of any determination by a self-regulatory organization that could be subject to an application for review pursuant to Rule 420(a) within 40 days after notice thereof was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1).

(b) *Supplemental Briefing.* The Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. Notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties shall be given where the Commission believes that such briefing would significantly aid the decisional process.

Comment: Exchange Act Section 19(e) sets forth standards regarding the scope of the Commission's review of a self-regulatory organizations' imposition of a final disciplinary sanction. Exchange Act Section 19(f) sets forth standards with respect to the Commission's review of a self-regulatory organization's denial of membership or participation to an applicant, the barring of a person from becoming associated with a member of a self-regulatory organization, and a self-regulatory organization's prohibition or limitation of a person with respect to access to services offered by the self-regulatory organization or any member thereof. Among the many opinions in which the Commission and the courts of appeal have explained the scope of the Commission's review under Sections 19(e) and 19(f) are the following: *Schellenbach* v. *SEC,* 989 F.2d 907, 909 (7th Cir. 1993) (in considering an appeal under Section 19(e), Commission undertakes an independent review of facts and law); *Todd & Co.* v. *SEC,* 557 F.2d 1008, 1013 (7th Cir. 1977) (self-regulatory organization rules and actions are subject to full review by Commission, which must base its decision on its own findings); *R.H. Johnson & Co.* v. *SEC,* 198 F.2d 690, 695 (2d Cir.), *cert. denied,* 344 U.S. 855 (1952) (noting that provisions of former 15 U.S.C. § 78o–3 called for *de novo* findings by Commission); *Paul Edward Van Dusen,* 47 S.E.C. 668, 690 (1981) (on appeal taken under Section 19(f), in order to sustain self-regulatory organization's action, Commission must find that grounds on which self-regulatory organization based that action exist, that action was in

accordance with organization's rules, and that those rules are, and were applied in a manner, consistent with purposes of Exchange Act); *Sumner B. Cotzin,* 45 S.E.C. 575, 580 (1974) (''[W]e must make our own findings as to the conduct of applicants seeking review of [self-regulatory organization disciplinary action], determine whether such conduct violated the organization's rules, and, if so, determine whether the sanctions imposed are excessive or oppressive having due regard to the public interest.'').

Comment (a): Rule 421(a) allows the Commission 40 days to determine whether to order review on its own initiative. The time limit for Commission review is tied to the Commission's receipt of the notice required by Exchange Act Section 19(d)(1), not receipt of the notice by the respondent, since the Commission would have no practical way of knowing when such receipt occurred.

Rule 430. Appeal of Actions Made Pursuant to Delegated Authority

(a) *Scope of Rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30–1 through 200.30–17 of this chapter may seek review of the action pursuant to paragraph (b) of this rule.

(b) *Procedure.* (1) *Notice of Intention to Petition for Review.* A party or any person aggrieved by an action made pursuant to delegated authority may seek Commission review of the action by filing a written notice of intention to petition for review within five days after actual notice to the party of the action or service of notice of the action pursuant to Rule 141(b), whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to Rule 102(d).

(2) *Petition for Review.* Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (b)(1) of this rule, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form.

(c) *Prerequisite to Judicial Review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an action made by authority delegated in §§ 200.30–1 through 200.30–17 of this chapter is a prerequisite to the seeking of judicial review of a final order entered pursuant to such an action.

Comment (a): Congress granted the Commission explicit authority to delegate certain functions to an individual commissioner, division directors and others in 1962. Pub. L. No. 87–592, 76 Stat. 394. This authority appears in Sections 4A and 4B of the Exchange Act, 15 U.S.C. 78d–1 and 78d–2, and was amended most recently in 1987. *See* Pub. L. No. 100–181, Title III, § 308(a), 101 Stat. 1254. The predecessor rule to Rules 430 and 431, former Rule 26, was adopted in 1963. *See* Securities Act Release No. 4588 (Mar. 8, 1963) (adopting release).

Due to the different nature of matters delegated to hearing officers, senior staff or the duty officer, the Commission's rules provide different mechanisms for review of such actions. *See* Rules 410 and 411 (procedures relating to initial decisions by a hearing officer); 17 CFR 200.43 (procedures relating to duty officer). Rule 430 relates to certain delegations made to staff. It applies only to review of actions taken pursuant to authority delegated in 17 CFR 200.30–1 through 200.30–17. Authority delegated by other provisions—for example, the delegation of authority to issue subpoenas pursuant to a private order directing investigation (''formal order'')—is not subject to the Rule.

Comment (b): Decisions made by division directors or other senior staff pursuant to delegated authority often relate to registration statements, proxy statements, applications, periodic filings or other matters which are highly time sensitive. Generally, the record in actions made pursuant to delegated authority is not extensive. The rule therefore requires a prompt decision by a party as to whether review will be sought. Under Rule 430, a party or other aggrieved person must file a notice of intent to petition for review within five days after actual notice of the decision, or within five days after service of a written decision pursuant to Rule 141(b), whichever is earlier. Actual notice of a decision pursuant to delegated authority may be conveyed by any means, including a telephone call. The required information in a petition for review is essentially the same as that required for a petition for review of a hearing officer's initial decision. *See* Rule 410(b).

Rule 431. Commission Consideration of Actions Made Pursuant to Delegated Authority

(a) *Scope of Review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in §§ 200.30–1 through 200.30–17 of this chapter.

(b) *Standards for Granting Review Pursuant to a Petition for Review.*

(1) *Mandatory Review.* After a petition for review has been filed, the Commission shall review any action that it would be required to review pursuant to Rule 411(b)(1) if the action was made as the initial decision of a hearing officer.

(2) *Discretionary Review.* The Commission may decline to review any other action. In determining whether to grant review, the Commission shall consider the factors set forth in Rule 411(b)(2).

(c) *Commission Review Other Than Pursuant to a Petition for Review.* The Commission may, on its own initiative, order review of any action made pursuant to delegated authority at any time, provided, however, that where there are one or more parties to the matter, such review shall not be ordered more than ten days after the action. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Required Items in an Order for Review.* In an order granting a petition for review or directing review on the Commission's own initiative, the Commission shall set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority and shall state whether a stay shall be granted, if none is in effect, or shall be continued, if in effect pursuant to paragraph (e) of this rule.

(e) *Automatic Stay of Delegated Action.* An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon filing with the Commission of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Commissioner that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise, provided, however, there shall be no automatic stay of an action:

(1) to grant a stay of action by the Commission or a self-regulatory organization as authorized by 17 CFR 200.30–14(g)(5)–(6); or

(2) to commence a subpoena enforcement proceeding as authorized by 17 CFR 200.30–4(a)(10).

(f) *Effectiveness of Stay or of Commission Decision to Modify or*

Reverse a Delegated Action. As against any person who shall have acted in reliance upon any action at a delegated level, any stay or any modification or reversal by the Commission of such action shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

Comment: See Comment (a) to Rule 430.

Comment (b): Paragraph (b) is based, in part, on requirements of Exchange Act Section 4A, 15 U.S.C. § 78d-1.

Comment (c): Paragraph (c) is based, in part, on requirements of Exchange Act Section 4A, 15 U.S.C. § 78d-1. In practice, the authority to review decisions on the Commission's own initiative is used very rarely.

Revision Comment (c): Comment was requested as to whether the period in which the Commission could order review on its own initiative should be retained at five days or extended to 15 days. One commenter supported the extension of the period to 10 days. The Commission has adopted a 10-day standard.

Revision Comment (e): After publication of the proposed rules, the delegation to the Director of the Division of Enforcement was amended to permit the Director to authorize a subpoena enforcement proceeding in Federal Court. *See* 17 CFR 200.30–4(a)(10). Under Rule 431, the Director's decision to commence a proceeding is not automatically stayed when notice of intention to file a petition for review is given since a stay would unnecessarily disrupt judicial proceedings commenced on the basis of the Director's decision. The presence of a Federal judge overseeing the subpoena enforcement proceeding makes an automatic stay unnecessary for the limited period before the Commission reviews the Director's decision.

Rule 450. Briefs Filed with the Commission

(a) *Briefing Schedule Order.* Other than review ordered pursuant to Rule 431, if review of a determination is mandated by statute, rule, or judicial order or the Commission determines to grant review as a matter of discretion, the Commission shall issue a briefing schedule order directing the party or parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission. The briefing schedule order shall be issued:

(1) at the time the Commission orders review on its own initiative pursuant to Rules 411 or 421, or orders interlocutory review on its own motion pursuant to Rule 400(a); or

(2) within 21 days, or such longer time as provided by the Commission, after:

(i) the last day permitted for filing a petition for review pursuant to Rule 410(b) or a brief in opposition to a petition for review pursuant to Rule 410(d);

(ii) receipt by the Commission of an index to the record of a determination of a self-regulatory organization filed pursuant to Rule 420(d);

(iii) receipt by the Commission of the mandate of a court of appeals with respect to a judicial remand; or

(iv) certification of a ruling for interlocutory review pursuant to Rule 400(c).

(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, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) *Length Limitation.* Opening and opposition briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Commission.

Comment (a): When the Commission reviews an action made by delegated authority pursuant to Rules 430 and 431, briefs are generally not submitted and no briefing schedule order is required.

Under Rule 450, the first brief on the merits would usually be due 40 days from the date of the scheduling order. The rules allot substantial time prior to issuance of the scheduling order for filing of a petition for review or, in the case of an appeal from a self-regulatory organization decision, for filing of a notice pursuant to Exchange Act Rule 19d-1, 17 CFR 240.19d-1, an application for review and the record index. *See* Rule 360 (21-day maximum for filing petition for review of initial decision); Rule 420(b) (30 days for filing application for review of determination by self-regulatory organization); Rule 420(d) (14 days to file record index). The time taken by the Commission to issue the briefing schedule order—up to 21 days in the ordinary case—affords additional time for parties to review the record and begin preparation of a merits brief. Accordingly, requests for extensions of time to file briefs will be disfavored. Failure to file a required brief may be grounds for dismissal. *See* Rule 180(c).

Comment (b): Failure to cite to the record in briefs can result in unnecessary delay, particularly where the record is long. Under Rule 450, the obligation to support claims made in a brief lies with the person submitting the brief. Briefs that fail to include appropriate citations to the record, or to conform to other requirements of the Rules of Practice relating to the form and content of briefs, may be rejected or subject to other sanction. *See* Rule 180(b).

Revision Comment (a): Paragraph (a) requires that if review is granted or ordered, the Commission shall issue a briefing schedule order in all cases except pursuant to Rule 431 for review of an action made pursuant to certain delegated authority. Prior to the submission of merits briefs the Commission will make a formal determination whether to grant petitions for review where review is not mandatory, and in any case may choose to specify particular issues as to which briefing should be limited or directed. Also, where there are cross-petitions for review, there may be particular reasons to designate the side that will file opening briefs. In proceedings arising on review of self-regulatory organization proceedings a scheduling order is useful in assuring that the respondent is on notice of applicable filing deadlines. The briefing schedule order therefore provides an efficient, uniform mechanism for the Commission to address issues raised by a petition for review, to order review on its own initiative if it chooses to do so, and to establish a schedule for the filing of briefs.

As revised, Rule 450 includes a requirement for issuance of a briefing schedule order when the Commission is ordered to conduct further proceedings on remand from a court.

Comment was requested as to whether the time ordinarily allowed for filing of briefs under Rule 450 should be

increased to 45 days for the opening brief, 35 days for a brief in opposition and 21 days for a reply brief. One commenter supported such an increase. The Commission has decided, however, that the presumptive filing deadlines set forth in paragraph (a), which are identical to those under the Federal Rules of Appellate Procedure, are reasonable and do not need to be extended in the typical appeal. *See* Fed. R. App. P. 31.

Unless the Commission provides for a longer time, the Commission will have 21 days to issue the briefing schedule order after the filing of the last petition for review or other filing that triggers the issuance of a briefing schedule order. In the revised rule, this period was increased from 15 days to correspond to the 21-day period allowed the Commission pursuant to Rule 411 to decide whether to order review of an initial decision on its own initiative if no petition for review is received.

Ordinarily, issuance of a briefing schedule order will be a ministerial act, undertaken by staff in the Office of the General Counsel, pursuant to delegated authority. *See* 17 CFR 200.30–14. Timely issuance of the briefing schedule order is a crucial step in assuring that matters on appeal to the Commission are completed promptly. Consistent with the recommendation of the Task Force on Administrative Proceedings that the Commission itself be involved in resolving problems if proceedings are delayed, the delegation to issue a briefing schedule order is limited. *See, Fair and Efficient Administrative Proceedings: Report of the Task Force on Administrative Proceedings* (1993) at 45. If an order is not issued within the 21-day time-frame established by Rule 450, the Secretary shall submit a proposed order for consideration by the Commission.

Rule 451. Oral Argument Before the Commission

(a) *Availability.* The Commission, on its own motion or the motion of a party or any other aggrieved person entitled to Commission review, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) *Procedure.* Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) *Time Allowed.* Unless the Commission orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Commission may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

(d) *Participation of Commissioners.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

Comment: Rule 451 is based on former Rule of Practice 21(a) and former Exchange Act Rule 19d-3(f).

Comment (c): The term ''side'' is used in this rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. *See* Fed. R. App. P. 34(b). If multiple appellants or appellees have a common interest, they may constitute only a single side.

Revision Comment (a): Comment was requested as to (1) whether the Commission's practice with respect to granting requests for oral argument should be changed to limit the opportunity for oral argument on appeals from decisions of administrative law judges to the most significant cases; and (2) whether the Commission should change its standards for granting oral argument in self-regulatory organization appeals to allow argument only in the most significant cases—such as cases in which fines exceed certain dollar limits, in which a member or associated person with no prior disciplinary record is permanently barred from membership, or in which the decisional process as to an important matter of law would be significantly aided by oral argument.

The Commission received a number of comments on the proposed changes to its oral argument rule. The commenters were divided as to whether the Commission should change its standards for granting oral argument in self-regulatory organization appeals. Some commenters objected to the Commission's current practice of denying oral argument in such proceedings. The comments were also divided as to whether to support the proposed criteria for identifying self-regulatory organization cases that warrant oral argument. One commenter recommended that the Commission provide for oral argument in cases where self-regulatory organization sanctions (either by fine or permanent membership bar) are significant, or where an important issue of law is in question. Another suggested that certain of the proposed criteria (specifically a large fine or bar against a person without a disciplinary record) would not assist the Commission in identifying those self-regulatory organization cases that warrant oral argument. According to this commenter, the total circumstances of the case should be considered. One commenter suggested that as an alternative to increasing oral argument in self-regulatory organization cases, the Commission consider adopting a policy of requesting additional briefing on issues that are of particular interest and not raised by the parties in their briefs. In response to this comment, the Commission has adopted Rule 421(b) relating to supplemental briefing on review of self-regulatory organization determinations.

One commenter supported the proposal to require that requests for oral argument be set forth in a separate motion accompanying the initial brief on the merits. The Commission believes that this requirement will make oral argument requests more readily identifiable than at present.

Where the Commission itself has instituted proceedings, a respondent has a substantial claim for the opportunity to argue directly to the Commission. In the context of issues presented in appeals from self-regulatory organizations, the Commission has determined that, in general, its decisionmaking process would not be significantly aided by oral argument. Accordingly, after careful consideration of the other comments and given the

Commission's decision to adopt Rule 421(b) on supplemental briefing, the Commission has decided to modify its oral argument rule. The Rule continues the Commission policy of ordinarily granting requests for oral arguments on appeals from an initial decision of an administrative law judge, but not holding oral argument on review of a determination by a self-regulatory organization. The Rule makes clear, however, that oral argument will be allowed where the Commission believes the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

Rule 452. Additional Evidence

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

Comment: Rule 452 is based on former Rule 21(d) and former Exchange Act Rule 19d-3(e). *See In the Matter of Jonathan Scott Saluk*, Exchange Act Release No. 35371 (Feb. 14, 1995), 58 SEC Docket 2273 (Mar. 14, 1995) (Order Remanding Proceedings) (remand to a self-regulatory organization to consider new evidence not available when decision was reached); *In the Matter of Klaus Langheinrich*, Exchange Act Release No. 32603 (July 8, 1993), 54 SEC Docket 1376 (July 27, 1993) (Order Remanding Proceedings) (remand on motion of Commission to a self-regulatory organization to supplement record with additional evidence).

Rule 460. Record Before the Commission

The Commission shall determine each matter on the basis of the record.

(a) *Contents of the Record.*

(1) In proceedings for final decision before the Commission other than those reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) all items part of the record below in accordance with Rule 350;

(ii) any petitions for review, cross-petitions or oppositions; and

(iii) all briefs, motions, submissions and other papers filed on appeal or review.

(2) In a proceeding for final decision before the Commission reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) the record certified pursuant to Rule 420(d) by the self-regulatory organization;

(ii) any application for review; and

(iii) any submissions, moving papers, and briefs filed on appeal or review.

(b) *Transmittal of Record to Commission.* Within 14 days after the last date set for filing briefs or such later date as the Commission directs, the Secretary shall transmit the record to the Commission.

(c) *Review of Documents Not Admitted.* Any document offered in evidence but excluded by the hearing officer or the Commission and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Commission on appeal but shall be transmitted to the Commission by the Secretary if so requested by the Commission. In the event that the Commission does not request the document, the Secretary shall retain the document not admitted into the record until the later of

(1) the date upon which the Commission's order becomes final, or

(2) the conclusion of any judicial review of that order.

Rule 470. Reconsideration

(a) *Scope of Rule.* A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission.

(b) *Procedure.* A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Commission may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Commission, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Commission.

Comment: This rule is based in part on former Rules of Practice 21(e), Rules 35 and 40 of the Federal Rules of Appellate Procedure with respect to petitions for rehearing, and Rule 450 of the Model Adjudication Rules, Administrative Conference of the United States (Dec. 1993). The page limit for motions for reconsideration is based on the page limit for petitions for reconsideration before federal courts of appeals. A motion for reconsideration is intended to be an exceptional remedy. As a result, Rule 470 provides that no responses to motions for reconsideration shall be filed unless requested by the Commission.

Rule 490. Receipt of Petitions for Judicial Review Pursuant to 28 U.S.C. 2112(a)(1)

The Commission officer and office designated pursuant to 28 U.S.C. 2112(a)(1) to receive copies of petitions for review of Commission orders from the persons instituting review in a court of appeals, are the Secretary and the Office of the Secretary at the Commission's Headquarters. Ten copies of each petition shall be submitted. Each copy shall state on its face that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the person or persons who filed the petition in the court of appeals.

Comment: Unless directed otherwise by statute, appeals of Commission orders and decisions to a court of appeals are instituted by the filing of a petition for review in accordance with the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 15(a). Section 2112(a)(2) of Title 28 of the U.S. Code requires the Commission to designate the officer and office who must receive copies of any petitions for review of Commission orders filed in the federal courts of appeals.

Persons seeking judicial review of Commission orders should be aware that if the Commission receives, within ten days after approval of its order, petitions for judicial review properly filed in more than one court of appeals, the Judicial Panel on Multidistrict Litigation will randomly select one of those courts to have jurisdiction over all cases challenging the order. *See* 28 U.S.C. 2112(a). If no petition for review is received during the 10-day period and petitions are subsequently filed in two or more courts of appeals, the appeal will be heard in the court of appeals where the first petition for review was filed. *Id.*

Rules Relating to Temporary Orders and Suspensions

Rule 500. Expedited Consideration of Proceedings

Consistent with the Commission's or the hearing officer's other responsibilities, every hearing shall be held and every decision shall be

rendered at the earliest possible time in connection with:

(a) an application for a temporary sanction, as defined in Rule 101(a), or a proceeding to determine whether a temporary sanction should be made permanent;

(b) a motion or application to review an order suspending temporarily the effectiveness of an exemption from registration pursuant to Regulations A, B, E or F under the Securities Act, §§ 230.258, 230.336, 230.610 or 230.656 of this chapter; or,

(c) a motion to or petition to review an order suspending temporarily the privilege of appearing before the Commission under Rule 102(e)(3), or a sanction under Rule 180(a)(1).

Comment: Rule 500's requirement that ''Consistent with the Commission's or the hearing officer's other responsibilities, every hearing shall be held and every decision shall be rendered at the earliest possible time'' is derived from two sources. First, when a temporary cease-and-desist order is entered *ex parte* and the respondent timely seeks Commission review of the decision, the Commission is required by statute to hold a hearing and render its decision ''at the earliest possible time.'' *See, e.g.*, Exchange Act § 21C(d)(1), 15 U.S.C. § 78u–3(d)(1). Second, former Rule 2(e)(3)(iii) contained the requirement that proceedings in connection with Commission review of temporary suspensions of persons appearing or practicing before the Commission ''be expedited in every way consistent with the Commission's other responsibilities.''

The rule requires expedited consideration when temporary sanctions are sought or ordered against a respondent. Temporary sanction orders generally arise from exigent circumstances. Expedited consideration of the decision whether to enter or continue such an order is necessary both to protect the public from harm, by promptly restraining improper ongoing or threatened activities, and to protect the rights of respondents, who may be adversely affected by an application for a temporary sanction even if the sanction is ultimately denied. After a temporary sanction is entered, fairness to the public—especially persons harmed by violative conduct—and to the respondent further dictates expediting proceedings to determine whether a permanent sanction or other appropriate relief is warranted.

The rule also requires expedited consideration of a motion, application or petition to review a temporary suspension of an exemption from registration, a temporary suspension from practice before the Commission pursuant to Rule 102(e)(3), or a sanction for misconduct during the course of the hearing pursuant to Rule 180(a)(1).

Rule 510. Temporary Cease-and-Desist Orders: Application Process

(a) *Procedure.* A request for entry of a temporary cease-and-desist order shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated; the temporary relief sought against each respondent, including whether the respondent would be required to take action to prevent the dissipation or conversion of assets; and whether the relief is sought *ex parte.*

(b) *Accompanying Documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary relief sought, and, unless relief is sought *ex parte,* a proposed notice of hearing and order to show cause whether the temporary relief should be imposed. If a proceeding for a permanent cease-and-desist order has not already been commenced, a proposed order instituting proceedings to determine whether a permanent cease-and-desist order should be imposed shall also be filed with the application.

(c) *With Whom Filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of Proceedings.* Hearings, including *ex parte* presentations made by the Division of Enforcement pursuant to Rule 513, shall be recorded or transcribed pursuant to Rule 302.

Comment (a)–(c): Rule 510 requires requests for a temporary cease-and-desist order be made by application, not motion, to make clear that the time limitations governing the filing of an opposition to a motion do not apply. The information required in the application and accompanying documents is similar to the type of information required in a request for a temporary restraining order under Rule 65(b) of the Federal Rules of Civil Procedure.

The rule requires the Division of Enforcement to file a declaration of facts and a memorandum of points and authorities in order to provide the Commission with a clearly articulated record on which to base the temporary cease-and-desist order. A declaration may be made by a staff member or any other person.

If notice of the application is to be given to the respondent, the rule requires the Division to file a proposed notice of hearing and order to show cause why a temporary cease-and-desist order should not be issued. A proposed temporary order is also required. If warranted, and with such modifications as may be appropriate, these orders can be entered by the Commission without the delay otherwise required while an order is drafted and then submitted to the Commission.

A temporary cease-and-desist order may only be issued pending a proceeding to determine whether to issue a permanent cease-and-desist order. *See, e.g.,* Exchange Act § 21C(c)(1), 15 U.S.C. § 78u–3(c)(1). If an order instituting proceedings has not already been issued, a proposed order is required so that proceedings can be instituted before action is taken on the application for a temporary cease-and-desist order.

The rule also specifies that the application and accompanying documents are to be filed with the Secretary. The Secretary will promptly forward such documents to each Commissioner. If the Secretary is unavailable, the application may be filed with the duty officer. Rule 151(b), which provides generally that a hearing officer may allow filings to be made with the hearing officer, does not authorize the filing of an application for a temporary cease-and-desist order with an administrative law judge, even if the request for a temporary order arises from an ongoing proceeding where an administrative law judge has been assigned.

Comment (d): Rule 302 requires that except as otherwise ordered, all hearings are to be recorded or transcribed. Paragraph (d) clarifies that the appearance of the Division of Enforcement, *ex parte,* to seek entry of a temporary cease-and-desist order after institution of proceedings constitutes a hearing subject to Rule 302. A Commission meeting prior to the institution of proceedings at which the Commission considers a recommendation by the Division of Enforcement that the Commission authorize the filing of an application for a temporary cease-and-desist order is not a hearing, however, and a transcript of the meeting would not be a part of the record or otherwise available to a respondent.

Revision Comment: As proposed, Rule 510 included a provision allowing the Commission to waive the filing of any or all of the supporting documents that

would ordinarily accompany the application for a temporary cease-and-desist order. The proposed rule also provided that proceedings should be recorded or transcribed ''or otherwise memorialized to the extent that circumstances permit.'' As the comments to the proposed rules stated, the possible waiver of requirements with respect to accompanying documents or the creation of a transcript was included in the proposed rule to address limited circumstances such as the need to hold a hearing in emergency circumstances at night, over a weekend, or when no Commissioners were present in Washington, and certain hearing formalities could not be observed. However, as noted by one commenter, the proposed rule was subject to interpretations which could have allowed the use of waivers more frequently than intended. In addition, consideration of a request for a waiver could raise collateral issues that would delay prompt, effective remedial action.

The Commission has authority under these rules, *see, e.g.*, Rule 161 (extension of time to file documents) and Rule 302 (hearings to be recorded and transcribed except as otherwise ordered), and in its inherent powers as an adjudicative body to respond to truly exigent or emergency conditions. The Commission concluded that the extraordinary circumstances justifying the proposed waivers have been so rare that having separate provisions to account for them is unnecessary at this time.

Rule 511. Temporary Cease-and-Desist Orders: Notice; Procedures for Hearing

(a) *Notice: How Given.* Notice of an application for a temporary cease-and-desist order shall be made by serving a notice of hearing and order to show cause pursuant to Rule 141(b) or, where timely service of a notice of hearing pursuant to Rule 141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing. If an application is made *ex parte*, pursuant to Rule 513, no notice to a respondent need be given prior to the Commission's consideration of the application.

(b) *Hearing Before the Commission.* Except as provided in paragraph (d) of this rule, hearings on an application for a temporary cease-and-desist order shall be held before the Commission.

(c) *Presiding Officer: Designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at Hearing.*

(1) The presiding officer shall have all those powers of a hearing officer set forth in Rule 111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to: whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or of counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion, or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made by such a hearing officer.

Comment (a): If an order instituting proceedings has not been issued prior to the filing of an application for a temporary cease-and-desist order, an order instituting proceedings must be entered in conjunction with entry of a notice of hearing and order to show cause. *See, e.g.*, Exchange Act § 21C(c)(1), 15 U.S.C. § 78u–3(c)(1). Provided that the respondent receives actual notice of the hearing, which may be made by telephone, formal service of the order instituting proceedings pursuant to Rule 141 is not required prior to the commencement of the hearing. Absent a waiver, as provided for in Rule 141(a)(4), furnishing a copy of the order by facsimile transmission would not meet the service requirements of Rule 141. At or promptly after the hearing, however, the Secretary must serve a copy of the order instituting proceedings and the notice of hearing in accord with Rule 141 and the Division of Enforcement must serve its application and accompanying documents pursuant to Rule 150.

Comment (b): Rule 101(a) defines the term ''Commission'' to include the duty officer as provided for by 17 CFR 200.43. Pursuant to that section, the duty officer may preside at the taking of evidence.

Comment (d): Hearings held pursuant to the Commission's authority to impose a temporary cease-and-desist order are not required to be formal, ''on the record'' adjudications within the meaning of Sections 554, 556–557 of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556–57. *See Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1481–82 (D.C. Cir. 1989) (no presumption that a statutory ''hearing'' requirement compels the agency to undertake a formal ''hearing on the record''). A full, trial-type evidentiary hearing will not ordinarily be held because of the exigent nature of the proceedings, the temporary nature of any sanction, and the opportunity for immediate post-sanction review by a federal district court. *See Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (''The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'').

Rule 511(d) incorporates the statutory provision that the hearing does not have to be a formal, trial-type proceeding. The amount of process due will vary based on the facts and circumstances of each case. *See Boddie*, 401 U.S. at 378. The Commission may determine the form of evidence (for example, whether live or by affidavit), the duration of the hearing (for example, by restricting the time for argument) or the extent of post-hearing procedures (for example, whether to allow submissions of post-hearing briefs). Relevant factors in making these determinations may include, among others, the risk of harm to investors or the public, the nature of the alleged or threatened violations, the nature of the proposed sanction, the potential effect of a sanction on the respondent, and the likely duration of the sanction before opportunity for further hearings.

Ordinarily, the Commission expects that the hearing on an application for a temporary cease-and-desist order will proceed on the basis of affidavits and oral argument in similar fashion to a

hearing on a Commission request under Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order in federal court.

Due to the exigent circumstances in cases in which a temporary cease-and-desist order would be sought, respondents, their counsel and the participating Commission staff may not be able to be present in Washington, D.C., where the Commission ordinarily meets. The rule provides that parties and witnesses may participate by telephone. Alternative technologies that would allow remote access to the hearing may be used in the Commission's discretion.

Revision Comment (b): The comment to proposed Rule 41 noted the recommendation of the Task Force on Administrative Proceedings that applications for temporary cease-and-desist orders be heard by the Commission. The proposed rules provided, in addition, that a hearing could be held before a hearing officer, which was defined as an administrative law judge or duty officer. While the comment noted that ''the Commission could make such an assignment when an application for a temporary sanction has arisen during the course of a proceeding already assigned to a hearing officer,'' the proposed rule did not, by its terms, limit the proceedings that would be assigned to a hearing officer to such rare circumstances.

Referral of a temporary cease-and-desist order application to a hearing officer for hearing and preparation of an initial decision would likely require approximately three days at a minimum, and up to a week or more, depending upon the time allowed for submission of proposed findings of fact and conclusions of law and for the preparation of the initial decision. It would be inconsistent for the Commission to authorize a proceeding in which the Division of Enforcement alleged that there were exigent circumstances warranting a temporary order and to then assign the matter to a hearing officer for preparation of a non-binding initial decision, which would be subject to briefing and argument to the Commission before a binding order could be entered.

After careful consideration, the Commission has decided to require that hearings on an application for a temporary cease-and-desist order be held before the Commission, not a hearing officer. In judicial proceedings on an application for a temporary restraining order, evidence is often submitted solely by affidavit. Proceedings for a temporary cease-and-desist order also may not involve live testimony. The Rules recognize, however, that testimony may be offered and allowed. *See* Rule 510. Due to considerations of efficiency, expertise and the demands of other Commission business, the Commission itself does not ordinarily preside at the taking of testimony in an enforcement or disciplinary proceeding. In recognition of this fact, the rule permits the Commission to assign a hearing officer to preside solely at the taking of testimony and to certify the resulting record to the Commission, without a recommended or initial decision. There would be no argument, briefing or submissions to the hearing officer.

Rule 512. Temporary Cease-and-Desist Orders: Issuance After Notice and Opportunity for Hearing

(a) *Basis for Issuance.* A temporary cease-and-desist order shall be issued only if the Commission determines that the alleged violation or threatened violation specified in an order instituting proceedings whether to enter a permanent cease-and-desist order pursuant to Securities Act Section 8A(a), 15 U.S.C. 77h–1(a), Exchange Act Section 21C(a), 15 U.S.C. 78u–3(a), Investment Company Act Section 9(f)(1), 15 U.S.C. 80a–9(f)(1), or Investment Advisers Act Section 203(k)(1), 15 U.S.C. 80b–3(k)(1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of proceedings on the permanent cease-and-desist order.

(b) *Content, Scope and Form of Order.* Every temporary cease-and-desist order granted shall:

(1) describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) be indorsed with the date and hour of issuance.

(c) *Effective Upon Service.* A temporary cease-and-desist order is effective upon service upon the respondent.

(d) *Service: How Made.* Service of a temporary cease-and-desist order shall be made pursuant to Rule 141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission Review.* At any time after the respondent has been served with a temporary cease-and-desist order, the respondent may apply to the Commission to have the order set aside, limited or suspended. The application shall set forth with specificity the facts that support the request.

Comment (a): Rule 512(a) sets forth the statutory criteria for issuance of a temporary cease-and-desist order when the order is preceded by notice and an opportunity to be heard. *See, e.g.,* Exchange Act § 21C(c), 15 U.S.C. § 78u-3(c).

Comment (b): Rule 512(b) requires that a temporary cease-and-desist order describe the basis for the order and the acts that the respondent is to take or refrain from taking to comply with the order. These requirements, which are modeled on Rule 65(d) of the Federal Rules of Civil Procedure, are meant to ensure that a respondent will have adequate notice of the constraints placed upon him or her by the order and to provide the predicate notice for enforcement of the order if the respondent fails to comply with it.

Rule 512(b) also requires that a temporary cease-and-desist order be indorsed with the date and hour of issuance. Although a temporary cease-and-desist order is not effective until served, requiring this indorsement minimizes the potential for disputes over when an order was entered. A similar provision is included in Rule 65(b) of the Federal Rules of Civil Procedure.

Comment (c): A temporary cease-and-desist order becomes effective upon service upon the respondent. *See, e.g.,* Exchange Act § 21C(c)(1), 15 U.S.C. § 78u–3(c)(1).

Comment (e): Paragraph (e) is based on statutory provisions permitting respondents to seek to set aside, limit or suspend a temporary order at any time. *See, e.g.,* Exchange Act § 21C(d)(1), 15 U.S.C. § 78u-3(d)(1).

Rule 513. Temporary Cease-and-Desist Orders: Issuance Without Prior Notice and Opportunity For Hearing

In addition to the requirements for issuance of a temporary cease-and-desist order set forth in Rule 512, the following requirements shall apply if a temporary cease-and-desist order is to be entered without prior notice and opportunity for hearing:

(a) *Basis for Issuance Without Prior Notice and Opportunity for Hearing.* A

temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, from specific facts in the record of the proceeding, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

(b) *Content of the Order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

(c) *Hearing Before the Commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on such an application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. The Commission shall render a decision on the application within five calendar days of its filing, provided, however, that the Commission, by order, for good cause shown, may extend the time within which a decision may be rendered for a single period of five calendar days, or such longer time as consented to by the applicant. If the Commission does not render its decision within 10 days of the respondent's application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

(d) *Presiding Officer, Procedure at Hearing.* Procedures with respect to the selection of a presiding officer and the conduct of the hearing shall be in accordance with Rule 511.

Comment (a): The rule sets forth the statutory requirement for entry of a temporary cease-and-desist order without prior notice. *See, e.g.*, Exchange Act § 21C(c)(1), 15 U.S.C. § 78u-3(c)(1). The requirement that the Commission's determination be based on ''specific facts'' is modeled on Rule 65(b) of the Federal Rules of Civil Procedure.

Comment (b): The requirement that an *ex parte* order state why it was issued without notice and hearing is modeled on Rule 65(b) of the Federal Rules of Civil Procedure which requires a similar statement of reasons if a temporary restraining order is issued without notice. A statement of the reasons why an order was entered *ex parte* aids the Commission's decisional process by ensuring that the statutory criteria for *ex parte* action have been met and facilitates review of the order. *See* Rule 514 (*ex parte* order must be appealed to the Commission before seeking judicial review).

Comment (c): Rule 513(c) restates the statutory standards with respect to opportunity for a hearing after service of a temporary cease-and-desist order entered *ex parte. See, e.g.*, Exchange Act § 21C(d)(1), 15 U.S.C. § 78u–3(d)(1). The requirement that a hearing be held and a decision rendered ''at the earliest possible time'' is not elaborated upon in the legislative history.

The Due Process Clause of the Fifth Amendment requires that if a person is subject to an *ex parte* deprivation of property, he or she shall be provided a ''prompt'' opportunity for hearing thereafter. *FDIC* v. *Mallen*, 486 U.S. 230, 241–42 (1988); *Barry* v. *Barchi*, 443 U.S. 55, 65–66 (1979) (hearing must be provided ''at a meaningful time'') (citation omitted). While the hearing must be held and a decision rendered promptly, judicial decisions should be made in a ''considered and deliberate manner,'' and without excessive or undue haste. *Mallen*, 486 U.S. at 244. The Commission must allow an appropriate amount of time for each party to prepare its case prior to hearing and must allow time for each Commissioner to review all evidence or other submissions and, as necessary, to engage in joint deliberation. *See id.* at 243–244. What would be ''possible'' in terms of the earliest time for hearing or resolution of a case would depend, therefore, on the specific facts of each case and the Commission's other responsibilities.

When a temporary cease-and-desist order is entered *ex parte*, the respondent must, as a prerequisite to judicial review of the order, first apply to the Commission to have the order set aside, limited or suspended, and the Commission must then hold a hearing, if requested, and render a decision on the application. *See, e.g.*, Exchange Act § 21C(d)(2), 15 U.S.C. § 78u-3(d)(2). While recognizing that some cases may demand more time than others, Rule 513(c) establishes a maximum time limit on the continuing effectiveness of an *ex parte* order pending its review by the Commission.

Under the rule, a hearing on the application to set aside a temporary cease-and-desist order will begin within two days of the filing of the application, unless the respondent requests a longer period or the Commission determines, by order, for good cause shown, that a longer time is necessary. A temporary cease-and-desist order entered *ex parte* will be suspended, however, if the Commission does not hold the hearing and render a decision on an application to set aside, limit or suspend the order within 10 calendar days of the date of application, or such longer time as consented to by the respondent. While the Commission may take as long as needed to decide the application, after the 10-day period or such longer time as consented to by the respondent, the respondent does not remain bound by the temporary order pending the Commission's decision. If the Commission then upholds the temporary cease-and-desist order, the order will once again become binding and the respondent can seek judicial review.

The time limits set forth in Rule 513 are consistent with the statutory time limits established with respect to orders entered after notice and hearing. If an order is entered after notice and hearing, the respondent is allowed to seek judicial review within 10 days of service of the order. Under Rule 513, a respondent will not be subject to an *ex parte* order for any longer than 10 days prior to having the opportunity to seek judicial review.

The provisions of Rule 513(c) are similar to the provisions of Rule 65(b) of the Federal Rules of Civil Procedure, that a party subject to a temporary restraining order obtained without notice may, on two days notice to the adverse party, or such shorter time as permitted by the court, appear and move for dissolution of the temporary restraining order. Rule 65(b) does not require that a hearing be held or a decision on the motion be issued within the two-day period allowed for the making of a motion to dissolve the temporary restraining order. Rather, the rule requires the court to hear and determine the motion ''as expeditiously as the ends of justice require.'' Such motions are ordinarily resolved within the initial 10-day duration of a temporary restraining order. Extension of an *ex parte* temporary restraining order for an additional ten days, though permitted by rule, is uncommon.

Revision Comment (c): By statute, a respondent given notice and opportunity to be heard prior to entry of a temporary cease-and-desist order may seek judicial review of the order within 10 days of service of the order. In contrast, under the proposed rules a respondent could be subject to a temporary order entered *ex parte* for an indefinite period of time without access to judicial review. Judicial review of an *ex parte* order is unavailable until the Commission acts on the respondent's

application to set aside, limit or suspend the order. The proposed rules established no time limit for the Commission to act or, in the alternative, for the effectiveness of the order. As adopted, the rule includes standards for the start of the hearing on a respondent's application for review of an *ex parte* order and limits the effectiveness of an *ex parte* order to 10 days after the respondent files an application for review of the order.

Rule 514. Temporary Cease-and-Desist Orders: Judicial Review; Duration

(a) *Availability of Judicial Review.* Judicial review of a temporary cease-and-desist order shall be available as provided in Section 8A(d)(2) of the Securities Act, 15 U.S.C. 77h–1(d)(2), Section 21C(d)(2) of the Exchange Act, 15 U.S.C. 78u–3(d)(2), Section 9(f)(4)(B) of the Investment Company Act, 15 U.S.C. 80a–9(f)(4)(B), or Section 203(k)(4)(B) of the Investment Advisers Act, 15 U.S.C. 80b–3(k)(4)(B).

(b) *Duration.* Unless set aside, limited, or suspended, either by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to Rule 531, or by operation of Rule 513, a temporary cease-and-desist order shall remain effective and enforceable until the earlier of:

(1) the completion of proceedings to determine whether a permanent order shall be entered; or

(2) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to Rule 540(b), if an initial decision whether a permanent order should be entered is appealed.

Comment: Rule 514(b) sets forth provisions governing the duration of a temporary cease-and-desist order. After entry of a temporary cease-and-desist order, proceedings to determine whether a permanent order is warranted will be assigned to an administrative law judge. The case will follow the same procedural steps as any other proceeding assigned to an administrative law judge for hearing. Depending upon the pace of judicial review of the temporary order, the filing of the respondent's answer, prehearing preparation or the hearing on issuance of the permanent order may take place prior to the completion of judicial review of the temporary order.

Unless set aside, limited, or suspended, either by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to Rule 531, or pursuant to the operation of Rule 513(c), a temporary cease-and-desist order remains effective and enforceable pending issuance of the administrative law judge's initial decision as to whether a permanent order will be issued. *See, e.g.*, Exchange Act § 21C(c)(1), 15 U.S.C. § 78u–3(c)(1).

Rule 500 requires that during the pendency of the temporary order every hearing be held and every decision be rendered at the earliest possible time, consistent with the Commission's or the hearing officer's other responsibilities. The number of respondents, the complexity of the allegations, the number and location of witnesses and other such factors, however, will affect, to a substantial degree, the length of the hearing before the administrative law judge. Rule 530 provides for expedited preparation of an initial decision once the hearing is concluded. When the initial decision is issued, Rule 531 requires that if the original terms of a temporary order are not to be made permanent, the administrative law judge shall set aside, limit or suspend the terms of the order in accordance with their initial decision. *See* 17 CFR 200.30–9 (authority delegated to the administrative law judges to set aside, limit or suspend temporary orders in accord with an initial decision). Hence, if the initial decision denies a permanent cease-and-desist order, the temporary order may be suspended pending any appeal of the initial decision.

If an initial decision would make a pending temporary order permanent the temporary order will not be suspended. If the initial decision is appealed, the Commission may take as long as needed to reach a decision on the need for a permanent order. Rule 514(b) provides, however, that the temporary order shall be suspended after 180 days from issuance of the briefing schedule order pursuant to Rule 540 in connection with the appeal, or such longer time as consented to by the respondent, if the Commission has not issued its decision by that time.

Rule 520. Suspension of Registration of Brokers, Dealers, or other Exchange Act-Registered Entities: Application

(a) *Procedure.* A request for suspension of a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending a final determination whether the registration shall be revoked shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated and the temporary suspension sought as to each respondent.

(b) *Accompanying Documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary suspension of registration sought, and a proposed notice of hearing and order to show cause whether the temporary suspension of registration should be imposed. If a proceeding to determine whether to revoke the registration permanently has not already been commenced, a proposed order instituting proceedings to determine whether a permanent sanction should be imposed shall also be filed with the application.

(c) *With Whom Filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of Hearings.* All hearings shall be recorded or transcribed pursuant to Rule 302.

Comment: The Exchange Act provides for the Commission's authority to suspend certain entities registered under the Act. *See* Exchange Act §§ 15(b)(5), 15B(c)(3), 15C(c)(1)(B), 17A(c)(4)(A), 15 U.S.C. §§ 78*o*(b)(5), 78*o*–4(c)(3), 78*o*–5(c)(1)(B), 78q–1(c)(4)(A). The procedures for the suspension of Exchange Act-registered entities are based upon the applicable statutory standards and modeled upon provisions applicable to temporary cease-and-desist order proceedings. From 1936 through 1981, the Commission brought over 30 proceedings to suspend temporarily the registration of a broker or dealer pending final determination whether the registration would be permanently revoked. In contrast to practice before 1981, the Rules provide that the Commission, without prior assignment to a hearing officer for initial decision, will decide applications to suspend a registration pending final determination whether the registration should be permanently revoked.

Rule 521. Suspension of Registration of Brokers, Dealers, or Other Exchange Act-Registered Entities: Notice and Opportunity for Hearing on Application

(a) *How Given.* Notice of an application to suspend a registration pursuant to Rule 520 shall be made by serving a notice of hearing and order to show cause pursuant to Rule 141(b) or, where timely service of a notice of hearing pursuant to Rule 141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held,

including telephonic notification of the general subject matter, time, and place of the hearing.

(b) *Hearing: Before Whom Held.* Except as provided in paragraph (d) of this rule, hearings on an application to suspend a registration pursuant to Rule 520 shall be held before the Commission.

(c) *Presiding Officer: Designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at Hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in Rule 111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to: whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made.

Rule 522. Suspension of Registration of Brokers, Dealers, or other Exchange Act-Registered Entities: Issuance and Review of Order

(a) *Basis for Issuance.* An order suspending a registration, pending final determination as to whether the registration shall be revoked shall be issued only if the Commission finds that the suspension is necessary or appropriate in the public interest or for the protection of investors.

(b) *Content, Scope and Form of Order.* Each order suspending a registration shall:

(1) describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) be indorsed with the date and hour of issuance.

(c) *Effective Upon Service.* An order suspending a registration is effective upon service upon the respondent.

(d) *Service: How Made.* Service of an order suspending a registration shall be made pursuant to Rule 141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission Review.* At any time after the respondent has been served with an order suspending a registration, the respondent may apply to the Commission or the hearing officer to have the order set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request.

Comment (b): When an order suspending a registration is issued, there may be trades in process or other commitments which the respondent is obligated to meet as well as other ongoing activities which would have to be addressed to permit an orderly cessation of business. The Rule, therefore, requires a description, in reasonable detail of the act or acts the respondent is to take or refrain from taking. To protect investors or the public, the order may provide that a suspension will be effective in stages, or only after a period of time.

Rule 523. [Reserved]

Rule 524. Suspension of Registrations: Duration

Unless set aside, limited or suspended by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to Rule 531, an order suspending a registration shall remain effective and enforceable until the earlier of:

(a) the completion of proceedings to determine whether the registration shall be permanently revoked; or

(b) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to Rule 540(b), if an initial decision whether the registration shall be permanently revoked is appealed.

Rule 530. Initial Decision on Permanent Order: Timing for Submitting Proposed Findings and Preparation of Decision

Unless otherwise ordered by the Commission or hearing officer, if a temporary cease-and-desist order or suspension of registration order is in effect, the following time limits shall apply to preparation of an initial decision as to whether such order should be made permanent:

(a) proposed findings and conclusions and briefs in support thereof shall be filed 30 days after the close of the hearing;

(b) the record in the proceedings shall be served by the Secretary upon the hearing officer three days after the date for the filing of the last brief called for by the hearing officer; and

(c) the initial decision shall be filed with the Secretary at the earliest possible time, but in no event more than 30 days after service of the record, unless the hearing officer, by order, shall extend the time for good cause shown for a period not to exceed 30 days.

Rule 531. Initial Decision on Permanent Order: Effect on Temporary Order

(a) *Specification of Permanent Sanction.* If, at the time an initial decision is issued, a temporary sanction is in effect as to any respondent, the initial decision shall specify:

(1) which terms or conditions of a temporary cease-and-desist order, if any, shall become permanent; and

(2) whether a temporary suspension of a respondent's registration, if any, shall be made a permanent revocation of registration.

(b) *Modification of Temporary Order.* If any temporary sanction shall not become permanent under the terms of the initial decision, the hearing officer shall issue a separate order setting aside,

limiting or suspending the temporary sanction then in effect in accordance with the terms of the initial decision. The hearing officer shall decline to suspend a term or condition of a temporary cease-and-desist order if it is found that the continued effectiveness of such term or condition is necessary to effectuate any term of the relief ordered in the initial decision, including the payment of disgorgement, interest or penalties. An order modifying temporary sanctions shall be effective 14 days after service. Within one week of service of the order modifying temporary sanctions any party may seek a stay or modification of the order from the Commission pursuant to Rule 401.

Comment: If, after hearing all the evidence as to whether a permanent cease-and-desist order or permanent suspension of registration should be issued, a hearing officer issues an initial decision denying a permanent order, consideration must be given to the necessity for continuation of the temporary order.

Rule 531 requires that the hearing officer modify the temporary sanction order in accordance with the initial decision. *See* 17 CFR 200.30–9 (authority delegated to the administrative law judges to set aside, limit or suspend temporary orders in accord with an initial decision). In order to allow time for each party to seek Commission review of any modification to the temporary sanction, the hearing officer's order will not become effective for 14 days.

The initial decision of the hearing officer to deny a permanent order in whole or in part is reached after all evidence has been heard and briefs have been submitted. By contrast, the decision to enter a temporary sanction, and in the case of a temporary cease-and-desist order, any judicial review, is more limited in scope. Nonetheless, the hearing officer's judgment that continuation of a temporary order is not necessary must be balanced against the fact that the initial decision may be reversed. The Commission's decision whether to stay or modify the hearing officer's order is an interim procedural ruling that is not be subject to judicial review.

Rule 540. Appeal and Commission Review of Initial Decision Making a Temporary Order Permanent

(a) *Petition for Review.* Any person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to Rule 410, provided, however, that the petition must be filed within 10 days after service of the initial decision.

(b) *Review Procedure.* If the Commission determines to grant or order review, it shall issue a briefing schedule order pursuant to Rule 450. Unless otherwise ordered by the Commission, opening briefs shall be filed within 21 days of the order granting or ordering review, and opposition briefs shall be filed within 14 days after opening briefs are filed. Reply briefs shall be filed within seven days after opposition briefs are filed. Oral argument, if granted by the Commission, shall be held within 90 days of the issuance of the briefing schedule order.

Rule 550. Summary Suspensions Pursuant to Exchange Act Section 12(k)(1)(A)

(a) *Petition for Termination of Suspension.* Any person adversely affected by a suspension pursuant to Section 12(k)(1)(A) of the Exchange Act, 15 U.S.C. 78l(k)(1)(A), who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated. The petition shall set forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies.

(b) *Commission Consideration of a Petition.* The Commission, in its discretion, may schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission. If the petitioner fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission, such conduct shall be grounds to deny the petition.

Comment: Exchange Act Section 12(k) authorizes the Commission summarily to suspend trading in securities for 10-day periods, if in its opinion the public interest or the protection of investors so requires. *See* 15 U.S.C. 78*l*(k). Orders suspending trading in particular securities pursuant to Section 12(k)(1)(A) are directed towards a security; they do not name a person or entity as a respondent. Accordingly, Rule 550 establishes a special mechanism to allow persons adversely affected by a suspension to petition for relief.

The usual purpose of a suspension is to alert the investing public that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices. Consequently, the primary issues normally to be considered by the Commission in determining whether or not a 10-day suspension should be instituted are whether or not there is sufficient public information upon which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activities.

Rules Regarding Disgorgement and Penalty Payments

Rule 600. Interest on Sums Disgorged

(a) *Interest Required.* Prejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement. The disgorgement order shall specify each violation that forms the basis for the disgorgement ordered; the date which, for purposes of calculating disgorgement, each such violation was deemed to have occurred; the amount to be disgorged for each such violation; and the total sum to be disgorged. Prejudgment interest shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made. The order shall state the amount of prejudgment interest owed as of the date of the disgorgement order and that interest shall continue to accrue on all funds owed until they are paid.

(b) *Rate of Interest.* Interest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly. The Commission or the hearing officer may, by order, specify a lower rate of prejudgment interest as to any funds which the respondent has placed in an escrow or otherwise guaranteed for payment of disgorgement upon a final determination of the respondent's liability. Escrow and other guarantee arrangements must be approved by the Commission or the hearing officer prior to entry of the disgorgement order.

Comment: The Commission is authorized to order disgorgement, ''including reasonable interest,'' in any administrative proceeding in which a cease-and-desist order is sought or a civil monetary penalty could be imposed. *See, e.g.*, Exchange Act § 21B(e), 15 U.S.C. 78u–2(e) (monetary penalty proceedings); Exchange Act

§ 21C(e), 15 U.S.C. 78u–3(e) (cease-and-desist proceedings). The purpose of disgorgement in Commission administrative proceedings is to deny a wrongdoer his ill-gotten gains. *See* The Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, S. Rep. No. 337, 101st Cong., 2d Sess. 16 (1990) (''[D]isgorgement forces a defendant to give up the amount by which he was unjustly enriched.''). Unless prejudgment interest is assessed on funds to be disgorged, the wrongdoer benefits unjustly by having had the equivalent of an interest free loan from the victims of his wrongdoing. In order to effectuate fully the remedial purposes of disgorgement, Rule 600 therefore requires that prejudgment interest be assessed on all funds to be disgorged.

Rule 600 prescribes the payment of prejudgment interest at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2). The Commission or hearing officer, by order, may specify a lower rate of prejudgment interest, however, as to funds which the respondent, with the approval of the Commission or hearing officer, and prior to entry of the disgorgement order, placed in an approved escrow or otherwise guaranteed for payment of disgorgement upon a finding of liability. In calculating the rate of prejudgment interest as to such funds, the Commission or hearing officer may take into account the actual interest obtained on the funds while in escrow, with appropriate adjustments for expenses of the escrow or guarantee.

An adjustment to the rate of prejudgment interest may be appropriate if a respondent makes arrangements to escrow or guarantee payment of disputed funds prior to a formal adjudication of liability because the respondent's continuing benefit from those funds is significantly limited. Providing such an adjustment to the prejudgment interest facilitates the prompt and cost-efficient return of investor funds upon a finding of liability, and permits a respondent to limit its liability for prejudgment interest pending resolution of a proceeding. A person who concludes prior to the institution of proceedings that he or she may be liable for disgorgement claims may, in anticipation of proceedings, seek to limit potential prejudgment interest by establishing an escrow or equivalent arrangement on terms in accord with this rule. Such terms would include approval of the escrow by the Commission or by the staff, pursuant to delegated authority.

Revision Comment: A number of comments addressed criteria for whether prejudgment interest should be assessed and what an appropriate rate of prejudgment interest would be. A respondent who wrongfully takes for his own use monies that belong to investors or other persons has received the equivalent of an interest free loan from the victims of his wrongdoing. The proper measurement of the benefit of this loan to the respondent is the cost the respondent would otherwise have paid for a comparable, unsecured loan. The actual use to which the respondent put the funds, or the rate of return the respondent earned is irrelevant. Similarly, it is irrelevant to the calculation of the respondent's economic benefit whether he obtained use of the funds by fraud or negligence. In order to fulfill the remedial purposes of disgorgement, a respondent should never be allowed free use of funds wrongfully obtained from others. Therefore, the Commission concluded that prejudgment interest should be assessed on all funds to be disgorged.

Seeking to determine the specific interest rate for borrowed funds a particular respondent might have obtained in an arms length transaction would involve an inquiry into a wide variety of factors, including unique characteristics of the respondent's credit history and general economic conditions at the time of the violation. Typically, however, the interest rate charged to small entities or individuals for unsecured credit by a lender with no prior relationship to the borrower will be at the prime rate plus two to five points. The Internal Revenue Code underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), a widely published, floating rate based on a fixed margin above the rate for treasury bills, is a reasonable proxy for an unsecured loan rate. Accordingly, Rule 600 prescribes the payment of prejudgment interest at the Internal Revenue Code underpayment rate.

Commenters suggested that a lower rate, such as the treasury bill rate, was a more appropriate measure of prejudgment interest. The treasury bill rate, which reflects the rate paid by the U.S. Government to borrow money, is lower than the cost of funds rate that ordinarily could be obtained by an unsecured, private borrower. That rate, or any other below-market rate for the cost of funds is therefore not an appropriate measure of prejudgment interest to charge in remedial proceedings, where the purpose of the prejudgment interest is to deny a wrongdoer any economic benefit from his violations. One commenter advocated that in assessing prejudgment interest the Commission should be guided by factors which a court would consider in awarding prejudgment interest in a dispute between private parties. The criteria courts use in seeking to balance competing private economic interests, particularly in commercial settings voluntarily entered into by the parties, should not govern assessment of prejudgment interest authorized by statute in a remedial law enforcement action.

The Commission considered whether any other prejudgment interest rate, or a case by case determination of a rate, would be more appropriate than the Internal Revenue Code underpayment rate. No other widely published, floating rate appears to offer a proxy for borrowing costs which would better approximate a typical respondent's cost of funds. A case-by-case approach to assessing prejudgment interest would be unduly complicated, particularly in light of the speculative nature of a post-hoc determination of the costs a particular respondent would have been able to obtain in connection with activities that violated the federal securities laws. Finally, restitution payments or other factors that might be appropriately considered to have diminished the duration of a respondent's use of ill-gotten gains would affect the calculation of disgorgement principal owed at various times, and thereby reduce prejudgment interest by a corresponding amount, but should not alter the rate of interest. Based on all these considerations, the Commission concluded that ordinarily, the IRS underpayment rate is a reasonable and appropriate rate to use in assessing prejudgment interest on disgorgement ordered as the result of remedial administrative proceedings.

If, however, a respondent, with the approval of the Commission or the hearing officer, sets aside allegedly ill-gotten gains in an escrow, or makes other approved arrangements guaranteeing payment upon a finding of liability, the rationale for assessing prejudgment interest at a cost of funds rate is less compelling. Since the rate of return a respondent can earn by placing potential disgorgement funds in a conservative, risk-free investment will ordinarily be less than the rate established under 26 U.S.C. § 6621(a)(2), an adjustment to the rate of prejudgment interest may be appropriate when an approved escrow is established. Cases in which respondents have sought to return or escrow funds prior to a finding of liability have been rare. Rule 600 has

been revised, however, to adopt Commission practice which permits an adjustment to the prejudgment interest rate when an approved escrow or equivalent arrangement is established prior to a finding of liability.

Rule 601. Prompt Payment of Disgorgement, Interest and Penalties

(a) *Timing of Payments.* Unless otherwise provided, funds due pursuant to an order by the Commission requiring the payment of disgorgement, interest or penalties shall be paid no later than 21 days after service of the order, and funds due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to Rule 360.

(b) *Stays.* A stay of any order requiring the payment of disgorgement, interest or penalties may be sought at any time pursuant to Rule 401.

Comment (a): Prompt collection of disgorgement, interest and penalties is essential to prevent a dissipation of assets that would thwart the disgorgement order. Since collection of disgorgement, interest and penalties becomes increasingly more difficult the longer it is delayed, timely determination of whether a respondent will pay disgorgement, interest and penalties as ordered is necessary so that appropriate collection efforts can be initiated. Procedures for execution of a money judgment are not available in an administrative proceeding. If a respondent does not pay disgorgement, interest and penalties as ordered, the Commission must determine whether to seek enforcement of its order by bringing a judicial action or by referring the matter to the Department of Justice for collection. Both processes often require significant periods of time.

Rule 601 provides, therefore, that funds due pursuant to an order by a hearing officer are to be paid on the first day after the order becomes final. Since Rule 360 provides at least a 21-day period before a hearing officer's order becomes final, even if no review of the order is sought, a respondent will have at least 22 days notice before payment is due. If a respondent seeks review of the hearing officer's order, the Commission, by order, must deny the petition for review or affirm the initial decision before payment would be required. Rule 601 provides that disgorgement, interest and penalties owed pursuant to an order by the Commission are to be paid no later than 21 days after service of the order. The one-day and 21-day time periods specified in Rule 601(a) may be modified by order in a particular case.

Rule 610. Submission of Proposed Plan of Disgorgement

The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of disgorgement funds. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after funds or other assets have been turned over by the respondent pursuant to a Commission disgorgement order and any appeals of the disgorgement order have been waived or completed, or appeal is no longer available.

Comment: The rules relating to disgorgement are based on the Commission's experience in judicial actions involving disgorgement. In most civil actions the court orders the Commission to submit a proposed plan for administration and distribution of disgorgement funds which, after notice and a hearing, the court later approves, modifies or disapproves. At the hearing, parties and other persons may present their objections to the court. Ordinarily, the Division of Enforcement seeks to avoid disputes over the plan and attempts, when preparing the plan, to consult with other parties and any other persons who have notified the staff or the court of an interest in the disposition of disgorgement funds. Since the development of a disgorgement plan may be a significant undertaking, it is not required in most proceedings until the funds to be disgorged have been transferred from the control of the respondent and, if the disgorgement order is subject to appeal, until after the appeal is decided.

Similar procedures are established under Rules 610 through 614. Rule 610 requires that unless ordered otherwise, the Division of Enforcement shall submit a plan of disgorgement no later than 60 days after funds are turned over by the respondent pursuant to a disgorgement order and appeals of the order, if any, are concluded. In some cases a respondent may be in a better position than the Division of Enforcement to propose a disgorgement plan. Any party, therefore, may be required to submit a plan of disgorgement in addition to or in lieu of the plan of the Division of Enforcement. Also, the presumptive 60-day period set forth in the Rule may be modified by order. For example, in a case with multiple respondents, where some respondents settle and others choose to litigate, it may be appropriate to await the resolution of the case against all respondents before making a determination as to the disposition of disgorgement funds received from those who settled.

Rule 611. Contents of Plan of Disgorgement; Provisions for Payment

(a) *Required Plan Elements.* Unless otherwise ordered, a plan for the administration of a disgorgement fund shall include the following elements:

(1) procedures for the receipt of additional funds, including the specification of an account where funds will be held and the instruments in which the funds may be invested;

(2) specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) procedures for making and approving claims, procedures for handling disputed claims and a cut-off date for the making of claims;

(5) a proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) procedures for the administration of the fund, including selection, compensation and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns and, subject to the approval of the Commission, make distributions from the fund to investors; and

(7) such other provisions as the Commission or the hearing officer may require.

(b) *Payment to Registry of the Court or Court-Appointed Receiver.* Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan of disgorgement may provide for payment of disgorgement funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(c) *Payment to the United States Treasury Under Certain Circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the funds shall be paid directly to the general fund of the United States Treasury.

Comment (b): To minimize the costs of administering a plan of disgorgement, the Commission has in certain civil injunctive proceedings consented to the payment of disgorgement funds obtained as the result of a Commission initiated proceeding into a fund established for the benefit of persons in a related private civil action. *See, e.g., SEC v. Levin,* No. 3–92CV–399D (N.D. Tex. Mar. 2, 1992) (settlement directed payment into court registry); *SEC v. Boesky,* No. 86–CIV–2299, slip op. (S.D.N.Y. Nov. 14, 1986) (settlement directed payment to escrow agent). Rule 611 provides for a similar disposition of disgorgement funds obtained in an administrative proceeding. Transfer of disgorgement funds into a fund established in a judicial proceeding may be subject to conditions on the use of the funds. For example, the Commission has routinely prohibited the use of any funds obtained in a Commission initiated action to pay attorneys' fees in a private lawsuit.

Comment (c): The Commission has the authority to provide for the return of ill-gotten gains to investors, but there is no requirement that it do so. *See, e.g.,* Exchange Act §§ 21B(e) and 21C(e), 15 U.S.C. §§ 78u-2(e) and 78u-3(e) (''[t]he Commission is authorized to adopt rules, regulations, and orders * * * concerning payments to investors''). Returning funds to the United States Treasury when the expense of locating or making distributions to injured investors is prohibitive is consistent with treatment by the courts in similar situations. *SEC v. Marcus Schloss & Co.,* 714 F. Supp. 100 (S.D.N.Y. 1989); *SEC* v. *Courtois,* [1984–85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,000 (S.D.N.Y. 1985); *SEC v. Lund,* 570 F. Supp. 1397, 1404–1405 (C.D. Cal. 1983).

Revision Comment (b): The respondent named in a Commission action may have settled a related civil action brought by private parties or may not have been named in a related private party litigation. The rule has been revised to permit the payment of disgorged funds to a fund established in connection with a judicial proceeding against the respondent or against any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

Rule 612. Notice of Proposed Plan of Disgorgement and Opportunity for Comment by Non-Parties

Notice of a proposed plan of disgorgement shall be published in the *SEC News Digest,* in the *SEC Docket,* and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

Comment: Publication of notice that a proposed plan has been submitted is required in order to provide potential claimants or other persons with an opportunity to make known their views prior to adoption of the plan.

Rule 613. Order Approving, Modifying or Disapproving Proposed Plan of Disgorgement

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer or the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission or the hearing officer, a proposed plan of disgorgement that is substantially modified prior to adoption may be republished for an additional comment period pursuant to Rule 612. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

Comment: After submission of comments, if any, the plan should be promptly approved, approved as modified or disapproved. The Commission or the hearing officer may hold a hearing on the proposed plan or may rule on the plan based only on written submissions, if any.

Rule 614. Administration of Plan of Disgorgement

(a) *Appointment and Removal of Administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission or the hearing officer deem appropriate to ensure the proper distribution of funds. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Administrator to Post Bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(c) *Administrator's Fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, he or she may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(d) *Source of Funds.* Unless otherwise ordered, fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(f) *Amendment.* A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion.

Comment (a): In some circumstances, for example, where the number of potential claimants to a fund is small and the identity of the claimants is known in advance, the plan of disgorgement may be relatively uncomplicated and may not require extensive resources to administer. In such a case, an administrative law judge or a staff member may administer the plan of disgorgement most effectively.

As in court actions, however, if the amount of disgorgement is large or there are many potential claimants, administration of a disgorgement plan may involve extensive time and resources and may be accomplished most effectively by selecting an administrator with expertise in handling disgorgement-type proceedings. Such a person would, as necessary, be able to retain an accounting firm, a law firm, or any other entity necessary to assist in the administration of the disgorgement plan.

Rule 614 does not specify a method for selecting an administrator. In court proceedings, the Commission may have an advisory role in recommending individuals to the court as possible administrators, but the court itself must select and appoint the administrator. In administrative proceedings, however, the Commission itself is responsible for appointing the administrator. Selection of an administrator by the Commission may be subject to various statutory provisions or regulations regarding personnel matters, procurement and contract requirements, or other matters. In addition, the selection process should promote public confidence that the selection was made on an impartial basis.

In some proceedings, particularly those in which a settlement has been reached, the respondent may be required or allowed to assist in administering a disgorgement plan. *See, e.g., In the Matter of Donaldson, Lufkin & Jenrette Sec. Corp.*, Exchange Act Release No. 27889 (Apr. 11, 1990), 45 SEC Docket 1826, 1834 (Apr. 24, 1990). Especially in such self-administered disgorgement plans, the Commission may require affidavits, an accountant's certification, or other safeguards to assure that funds have been distributed only in accordance with the plan.

Comment (b): Funds or other assets paid as disgorgement will be placed into an escrow, custodial or similar account established by the Commission or with the Commission's approval for the purpose of holding such funds or assets until they are disbursed. No funds will be transferred to the Commission itself. *See* 31 U.S.C. § 3302(b) (requiring agencies receiving funds for the government to deposit the money into the Treasury without deduction for any charge or claim).

Funds paid pursuant to a disgorgement order do not become the property of the Commission and internal control and audit procedures mandated by statute for the Commission's own funds are not applicable to disgorgement funds. Rule 614(b) requires, therefore, that if the administrator is not a Commission employee, the administrator must obtain a surety bond comparable to that when a trustee is appointed in a SIPC liquidation or bankruptcy proceeding. *See* 15 U.S.C. § 78eee(b)(3); 11 U.S.C. § 322. See also Rule 614(e) (quarterly accountings required).

Comment (c): If the administrator is not a Commission employee, reasonable fees may be paid to the administrator. Payment of the administrator's fees may be made only upon a public application filed by the administrator and subject to the approval of the Commission or a hearing officer. Filings by the administrator, including fee applications, should conform to the filing requirements of Rule 151 and be served on all parties pursuant to Rule 150.

Comment (d): The Commission has broad authority to adopt rules, regulations and orders it deems appropriate to implement its authority to order disgorgement. *See, e.g.*, Exchange Act § 21B(e), 15 U.S.C. § 78u–2(e). Paragraph (d) provides that fees and expenses be paid first out of interest earned on disgorged funds, and if the interest is insufficient, then out of the corpus of the funds. Subject to any applicable requirements established by Congress with respect to the use of appropriated funds, and except to the extent a Commission employee is appointed administrator, or an administrative law judge administers a disgorgement fund without the assistance of an administrator, appropriated funds ordinarily will not be used to defray the direct costs of administering a disgorgement plan. Where the value of the available disgorgement funds relative to the expense of administrating a plan of disgorgement from the corpus or the interest earned would not justify distribution of funds, the disgorged funds may be turned over to the general fund of the United States Treasury. *See* Rule 611(c).

Comment (f): After a plan is approved, changed circumstances may require amendment of the plan. A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion. Procedures for publication of notice or hearing on the motion will be subject to case by case determination.

Rule 620. Right to Challenge Order of Disgorgement

Other than in connection with the opportunity to submit comments as provided in Rule 612, no person shall be granted leave to intervene or to participate in a proceeding or otherwise to appear to challenge an order of disgorgement; or an order approving, approving with modifications, or disapproving a plan of disgorgement; or any determination relating to a plan of disgorgement based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

Comment: The opportunity to submit comments on a plan of disgorgement does not give a person any right to become a party to or intervene in an enforcement proceeding. *See* Rule 210 (no one may become a party or receive leave to intervene in an enforcement proceeding).

Although return of ill-gotten gains to injured investors is often an appropriate disposition of disgorged funds, the purpose of the Commission's administrative disgorgement remedy is to deprive violators of ill-gotten gains and thus serve as a deterrent to violations, rather than to compensate injured investors. *See* The Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, S. Rep. No. 337, 101st Cong., 2d Sess. 16 (1990) (''In contrast to an award of damages in a private action, which is designed to compensate an injured plaintiff, disgorgement forces a defendant to give up the amount by which he was unjustly enriched.''). The statutory remedy is consistent in this regard with the equitable remedy available in civil injunctive actions brought by the Commission. *See, e.g., SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230, 1232 n.24 (D.C. Cir. 1989) (the primary purpose of disgorgement is not to compensate investors); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert.* denied, 486 U.S. 1014 (1988); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, H.R. Rep. No. 616, 101st Cong., 2d Sess. at 22 (1990).

Where it is not practical to locate persons who have been harmed, disgorgement in injunctive actions has been ordered paid into the general fund of the U.S. Treasury. *See SEC* v. *Marcus Schloss & Co.*, 714 F. Supp. 100, 103 (S.D.N.Y. 1989); *SEC v. Courtois*, [1984–85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,000, at 90,959 (S.D.N.Y. 1985); *SEC v. Lund*, 570 F. Supp. 1397, 1404–1405 (C.D. Cal. 1983). In insider trading cases, courts have required that disgorgement be made available to persons other than investors. *See SEC v. Materia*, [1983–84 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,583, at 97,284–85 (S.D.N.Y. 1983), *aff'd on other grounds*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). *See generally* Louis Loss, *Fundamentals of Securities Regulation* 1007 (2d ed. 1988) (discussing discretion exercised by courts in designating recipients of disgorged funds).

Since there is not a requirement that funds obtained in an administrative enforcement proceeding be paid to

investors, persons who may have a private right of action in federal court against a respondent do not thereby have standing in the Commission's enforcement proceeding against that respondent to challenge a plan of disgorgement solely because of dissatisfaction with their potential eligibility to receive funds from the Commission's disgorgement pool. *See Marino v. Ortiz,* 484 U.S. 301, 304 (1988) (per curiam) (explicitly disapproving of the suggestion in *SEC v. Certain Unknown Purchasers,* 817 F.2d 1018, 1021 & n.1 (2d Cir. 1987), *cert. denied,* 484 U.S. 1060 (1988), that a person has standing to appeal whenever he ''has an interest that is affected by the trial court's judgment.'').

The limitations in Rule 620 on participation in the proceedings before a hearing by a person with potential claims against the disgorgement pool does not preclude a person who is aggrieved by a decision concerning the disposition of disgorgement assets and entitled to review of the decision from petition the Commission for such review. A person aggrieved by a final decision of the Commission who is entitled to review may also seek a stay of the Commission order or judicial review of the order. *See* Rules 360, 401 and 410; Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702. *See also SEC v. Wozniak,* 33 F.3d 13 (7th Cir. 1994) (persons not parties to the litigation who objected to a disgorgement plan could have sought a stay of district court's judgment and distribution of the plan in order to have standing to appeal).

Rule 630. Inability to Pay Disgorgement, Interest or Penalties

(a) *Generally.* In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. The Commission may, in its discretion, or the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.

(b) *Financial Disclosure Statement.* Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed. By order, the Commission or the hearing officer may prescribe the use of the Disclosure of Assets and Financial Information Form (*see* Form D–A at § 209.1 of this chapter) or any other form, may specify other time periods for which disclosure is required, and may require such other information as deemed necessary to evaluate a claim of inability to pay.

(c) *Confidentiality.* Any respondent submitting financial information pursuant to this rule or Rule 410(c) may make a motion, pursuant to Rule 322, for the issuance of a protective order against disclosure of the information submitted to the public or to any parties other than the Division of Enforcement. Prior to a ruling on the motion, no party receiving information as to which a motion for a protective order has been made may transfer or convey the information to any other person without the prior permission of the Commission or the hearing officer.

(d) *Service Required.* Notwithstanding any provision of Rule 322, a copy of the financial disclosure statement shall be served on the Division of Enforcement.

(e) *Failure to File Required Financial Information: Sanction.* Any respondent who, after making a claim of inability to pay either disgorgement, interest or a penalty, fails to file a financial disclosure statement when such a filing has been ordered or is required by rule may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay. No sanction pursuant to Rules 155 or 180 shall be imposed for a failure to file such a statement.

Comment (a): A respondent may present evidence of ability to pay a penalty, and the Commission may, in its discretion, consider such evidence. *See, e.g.*, Exchange Act § 21B(d), 15 U.S.C. § 78u–2(d). A respondent's ability to pay becomes a significant issue not only in proceedings in which a penalty is ordered, but also when disgorgement and interest is ordered. Although no statutory requirement addresses inability to pay disgorgement or interest, the Commission considers evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest as well as penalties. Rule 630 codifies this practice.

Comment (b): A respondent may not be entirely candid about his or her financial position when asserting an inability to pay disgorgement, interest or penalties. The Commission or a hearing officer may require persons who assert an inability to pay disgorgement, interest or penalties to file sworn, verifiable financial disclosure statements before consideration of inability to pay as a basis for waiving disgorgement, interest or penalties.

Rule 630 provides that the Commission or the hearing officer may require ''such other information as deemed necessary to evaluate a claim of inability to pay.'' Accordingly, the Division of Enforcement may seek an order to question the respondent under oath or may seek the issuance of subpoenas to obtain documents or testimony concerning an asserted inability to pay. In addition, the rule provides that, by order, the Commission or the hearing officer may prescribe a particular financial disclosure form to be used and may specify time periods for which disclosure is required. Form D–A, the Disclosure of Assets and Financial Information Form, includes a waiver by the respondent that authorizes ''The Securities and Exchange Commission and any of its staff * * * to obtain any such information from credit bureaus, financial institutions or any other source as may be needed to verify the statements made on this form.'' If such a waiver is obtained, the Division of Enforcement may rely on it as a basis to seek confirmation of information in the financial disclosure form without further approval from the hearing officer or Commission.

Comment (c): The public's right to review financial disclosure statements submitted in connection with a respondent's claim of inability to pay should be balanced against the respondent's legitimate interest in protecting confidential or personal information from premature or unnecessary disclosure. Each request for confidentiality must be decided based on the procedural status of the case, the extent to which financial information has already been disclosed, and the individual facts and circumstances underlying the request.

While financial circumstances may change during the course of a proceeding, a respondent who intends to assert a claim of inability to pay may be required by the hearing officer to specify in connection with prehearing submissions or conferences whether the issue will be raised. Early submission of a financial disclosure form to support a planned claim of inability to pay will allow the hearing officer and parties to better prepare for hearing and to assess the time needed for the hearing. Part I of Form D–A requires only summary information as to which confidentiality

interests are limited. Part II requires detailed back-up information that is more likely to call for personal, confidential data, such as bank account numbers and information about regular medical payments. The earlier in a proceeding the respondent is required to submit financial information, however, the more compelling the case for the confidentiality of personal financial information such as that called for in Part II of Form D–A. Providing for confidential treatment of personal financial information at the early stages of a proceeding or prior to the respondent's own introduction of evidence of inability to pay protects a respondent's privacy interests to the maximum extent in the event that the Division fails in its case in chief or that the case settles prior to completion of the hearing.

Comment (d): A copy of the financial disclosure statement must be served on the Division of Enforcement notwithstanding any motion for a protective order. The Division of Enforcement must have the respondent's financial information in order to determine whether to challenge a claim of inability to pay. Notice that a disclosure statement has been filed must also be provided to other respondents, who may seek all or part of the information submitted unless a protective order has been sought or granted pursuant to Rule 322.

Form

209.1. Form D–A: Disclosure of Assets and Financial Information

(a) Rules 410 and 630 of the Rules of Practice (17 CFR 201.410 and 630 of this chapter) provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement, interest or penalties may be required to disclose certain financial information. Unless otherwise ordered, this form may be used by individuals required to supply such information.

(b) The respondent filing Form D–A is required promptly to notify the Commission of any material change in the answer to any question on this form.

(c) Form D–A may not be withheld from the Division of Enforcement. A respondent making financial information disclosures on this form after the institution of proceedings may make a motion, pursuant to Rule 322 of the Commission's Rules of Practice (17 CFR 201.322 of this chapter), for the issuance of a protective order to limit disclosure of the information submitted on Form D–A to the public or parties other than the Division of Enforcement. A request for a protective order allows the requester an opportunity to justify the need for confidentiality. The making of a motion for a protective order does not, however, guarantee that disclosure will be limited.

(d) No party receiving information for which a motion for a protective order has been made may transfer or convey the information to any other person prior to a ruling on the motion without the prior permission of the Commission or a hearing officer.

(e) A person making financial information disclosures on Form D–A prior to the institution of proceedings, in connection with an offer of settlement or otherwise, may request confidential treatment of the information pursuant to the Freedom of Information Act. *See* the Commission's Freedom of Information Act (''FOIA'') regulations, 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to substantiate the need for confidentiality. No determination as to the validity of any request for confidential treatment will be made until a request for disclosure of the information under FOIA is received.

Note: Form D–A appears in the appendix to this document.

V. Regulatory Flexibility Analysis

The initial Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 603 and published in the Proposing Release. No comments were received on this analysis. The Commission has prepared a Final Regulatory Flexibility Analysis, a copy of which may be obtained by writing to Andrew Glickman, Esq., Office of the General Counsel, Mail Stop 6–6, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549.

VI. Statutory Basis For Rules

These amendments to the Rules of Practice and related rules are being adopted pursuant to: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78*o*(d), 78*o*–3, 78s, 78u–2, 78u–3, 78v, 78w, 79c, 79s, 79t, 79z–5a, 77sss, 77ttt, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, and 80b–12.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies), Securities.

17 CFR Part 201

Accountants, Administrative practice and procedure, Brokers, Claims, Confidential business information, Equal access to justice, Fraud, Lawyers, Penalties, Securities.

17 CFR Part 202

Administrative practice and procedure.

17 CFR Part 203

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 209

Administrative practice and procedure—financial disclosure form.

17 CFR Part 228

Reporting and recordkeeping requirements, Securities.

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

17 CFR Part 232

Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Accountants, Administrative practice and procedure, Brokers, Lawyers, Penalties, Reporting and recordkeeping requirements, Securities.

17 CFR Part 250

Reporting and recordkeeping requirements, Securities.

17 CFR Part 260

Reporting and recordkeeping requirements, Securities.

17 CFR Part 270

Reporting and recordkeeping requirements, Securities.

17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

Text of Adopted Rules

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

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

1. The authority citation for part 200, subpart A, continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 79t, 79sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.1(j) is revised to read as follows:

§ 200.1 General statement and statutory authority.

* * * * *

(j) Administrative sanctions, injunctive remedies, civil money penalties and criminal prosecution. There are also private rights of action for investors injured by violations of the Acts.

§ 200.16 [Amended]

3. In § 200.16, remove the words ''Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter)'', and, in their place, add the words ''Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter)''.

§ 200.30–4 [Amended]

4. In § 200.30–4(a)(5), remove the words ''Rule 29 of the Commission's Rules of Practice (17 CFR 201.1–201.29)'', and, in their place, add the words ''Rule 193 of the Commission's Rules of Practice, § 201.193 of this chapter''.

§ 200.30–7 [Amended]

5. In § 200.30–7(a)(1), remove the words ''Rule 21(a) of the Commission's rules of practice, § 201.21(a)'', and, in their place, add the words ''Rule 451 of the Commission's Rules of Practice, § 201.451''.

6. In § 200.30–7(a)(2), remove the words ''Rule 21(b) of the Commission's rules of practice, § 201.21(b)'', and, in their place, add the words ''Rule 451(c) of the Commissions Rules of Practice, § 201.451(c)''.

7. In § 200.30–7 (a)(3) and (a)(4), remove the words ''Rule 13 of the Commission's rules of practice, § 201.13'', and, in their place, add the words ''Rule 161 of the Commission's Rules of Practice, § 201.161'' .

8. In § 200.30–7(a)(5), remove the words ''Rule 22(d) of the Commission's rules of practice, § 201.22(d)'', and, in their place, add the words ''Rule 450(c) of the Commission's Rules of Practice, § 201.450(c)''.

9. In § 200.30–7(a)(9), remove the words ''rules 6 and 23 of the Commission's rules of practice'', and, in their place, add the words ''Rules 141 and 150 of the Commission's Rules of Practice, §§ 201.141 and 201.150 of this chapter''.

10. In § 200.30–7 paragraph (a)(10) is added to read as follows: § 200.30–7 Delegation of Authority to Secretary of the Commission.

(a) * * *

(10) To set the date for sanctions to take effect if an initial decision is not appealed and becomes final pursuant to Rule 360(d) or if an initial decision is affirmed pursuant to Rule 411.

* * * * *

11. Section 200.30–9 is revised to read as follows:

§ 200.30–9 Delegation of authority to hearing officers.

Pursuant to the provisions of Section 4A of the Securities Exchange Act of 1934 (15 U.S.C. 78d-1), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, to each Administrative Law Judge (''Judge'') the authority:

(a) To make an initial decision in any proceeding at which the Judge presides in which a hearing is required to be conducted in conformity with the Administrative Procedure Act (5 U.S.C. 557) unless such initial decision is waived by all parties who appear at the hearing and the Commission does not subsequently order that an initial decision nevertheless be made by the Judge, and in any other proceeding in which the Commission directs the Judge to make such a decision; and

(b) To issue, upon entry pursuant to Rule 531 of the Commission's Rules of Practice, § 201.531 of this chapter, of an initial decision on a permanent order, a separate order setting aside, limiting or suspending any temporary sanction, as that term is defined in Rule 101(a)(11) of the Commission's Rules of Practice, § 201.101(a) of this chapter, then in effect in accordance with the terms of the initial decision.

§ 200.30–10 [Amended]

12. In § 200.30–10(a)(1), remove the words ''Rule 6(b) of the Commission's rules of practice, § 201.6(b) of this chapter, and Rule 11(a) of the Commission's rules of practice (§ 201.11(a) of this chapter)'', and, in their place, add the words ''Rule 200 of the Commission's Rules of Practice, § 201.200 of this chapter''.

13. In § 200.30–10(a)(2), remove the words ''Rule 11(b) of the Commission's rules of practice (§ 201.11(b) of this chapter)'', and, in their place, add the words ''Rule 110 of the Commission's Rules of Practice, § 201.110 of this chapter''.

14. In § 200.30–10(a)(3), remove the words ''Rule 13 of the Commission's rules of practice, § 201.13'', and, in their place, add the words ''Rule 161 of the Commission's Rules of Practice, § 201.161''.

15. In § 200.30–10(a)(4), remove the words ''Rule 13 of the Commission's rules of practice (§ 201.13 of this chapter)'', and, in their place, add the words ''Rule 161 of the Commission's Rules of Practice, § 201.161 of this chapter''.

16. In § 200.30–10(a)(5), remove the words ''Rule 22(d) of the Commission's rules of practice (§ 201.22(d) of this chapter)'', and, in their place, add the words ''Rule 450(c) of the Commission's Rules of Practice, § 201.450(c) of this chapter''.

17. In § 200.30–10 paragraph (a)(6) is removed and paragraphs (a)(7) and (a)(8) are redesignated as paragraphs (a)(6) and (a)(7).

18. In newly redesignated § 200.30–10(a)(6), remove the words ''Rule 14(b) of the Commission's rules of practice (201.14(b) of this chapter)'', and, in their place, add the words ''Rule 232 of the Commission's Rules of Practice, § 201.232 of this chapter''.

19. Section 200.30–14 is amended by revising the introductory text of paragraph (g)(1), adding paragraphs (g)(1)(x) through (g)(1)(xiv), and revising paragraphs (g)(2), and (g)(4) through (g)(7) to read as follows:

§ 200.30–14 Delegation of authority to the General Counsel.

* * * * *

(g)(1) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a, *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a, *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*),the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter);

* * * * *

(x) To determine motions to consolidate proceedings pending before the Commission.

(xi) To determine whether to permit or require that a record of proceedings be supplemented with additional evidence.

(xii) To determine requests for leave to file an opposition to a petition for review filed pursuant to the provisions of Rule 411 of the Commission's Rules of Practice, § 201.411 of this chapter.

(xiii) To issue a briefing schedule order pursuant to Rule 450 of the Commission's Rules of Practice, § 201.450 of this chapter.

(xiv) To determine motions for expedited briefing schedules.

(2) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a, *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*), the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter), to issue findings and orders taking the remedial action described in the order for proceedings where the respondents expressly consent to such action, fail to appear or default in the filing of answers required to be filed; or to grant a request, based upon a showing of good cause, to vacate an order of default, so as to permit presentation of a defense.

* * * * *

(4) With respect to proceedings under Sections 19 (d), (e) and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e) and (f)), to determine that an application for review under those sections has been abandoned, under the provisions of Rule 420, § 201.420 of this chapter, or otherwise, and to issue an order dismissing the application in such event.

(5) With respect to proceedings conducted or reviewed pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice, § 201.102(e) of this chapter, to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine applications to vacate such stays.

(6) With respect to review proceedings pursuant to Sections 19 (d), (e), and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e), and (f)), to determine applications for a stay of action taken by a self-regulatory organization pending Commission review of that action and to determine applications to vacate such stays.

(7) In connection with Commission review of actions taken by self-regulatory organizations, pursuant to Sections 19 (d), (e) and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e) and (f)), to grant or deny requests for oral argument in accordance with the provisions of Rule 451, § 201.451 of this chapter.

* * * * *

Subpart B—Disposition of Commission Business

20. The authority citation for part 200, subpart B continues to read as follows:

Authority: 5 U.S.C. 522b.

21. Section 200.43 is amended by adding '', except that the duty officer may preside at the taking of evidence with respect to the issuance of a temporary cease-and-desist order as provided by Rule 511(c) of the Commission's Rules of Practice, § 201.511(c) of this chapter.'' before the period.

Subpart F—Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees

22. The authority citation for part 200, subpart F is revised to read as follows:

Authority: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11; 5 U.S.C. 557.

§ 200.111 [Amended]

23. In § 200.111(d)(1)(i), remove the words ''Rule 23 of the Commission's Rules of Practice, § 201.23'', and, in their place, add the words ''Rule 150 of the Commission's Rules of Practice, § 201.150''.

24. In § 200.111(d)(2), remove the words ''Rule 9(c) of the Commission's Rules of Practice, § 201.9(c)'', and, in their place, add the words '' Rule 210(c) of the Commission's Rules of Practice, § 201.210(c)''.

Subpart H—Regulations Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Commission

25. The general authority citation for part 200, subpart H is revised to read as follows:

Authority: 5 U.S.C. 552a(f), unless otherwise noted.

* * * * *

§ 200.312 [Amended]

26. In § 200.312(a)(8), remove the words ''Rule 2(e)'', and, in their place, add the words ''Rule 102(e)''.

Subpart K—Regulations Pertaining to the Protection of the Environment

27. The authority citation for part 200, subpart K is revised to read as follows:

Authority: 15 U.S.C. 78w(a)(2).

§ 200.554 [Amended]

28. In § 200.554(a), remove the words ''§ 201.20'', and, in their place, add the words ''Rule 460 of the Commission's Rules of Practice, § 201.460''.

Subpart M—Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

29. The authority citation for part 200, subpart M continues to read as follows:

Authority: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11; E. O. 11222; 3 CFR, 1964–1965 Comp.; 5 CFR 735.104 unless otherwise noted.

§ 200.735–13 [Amended]

30. In § 200.735–13(c), remove the words ''Rule 2(e) of the Commission's Rules of Practice, 17 CFR 201.2(e)'', and ''17 CFR 201.1'' and, in their place, add the words ''Rule 102(e) of the Commission's Rules of Practice, § 201.102(e) of this chapter'' and ''17 CFR 201.100''.

PART 201—RULES OF PRACTICE

31. The authority citation for Part 201 is removed.

Subpart A—[Removed and Reserved]

32. Subpart A is removed and reserved.

Subpart B—Regulations Pertaining to the Equal Access to Justice Act

33. The authority citation for Subpart B of Part 201 is revised to read as follows:

Authority: 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a–37 and 80b–11; 5 U.S.C. 504(c)(1).

34. In § 201.42: the reference to ''201.25'' in paragraph (b) is corrected to read ''201.190''.

35. In § 201.54: the reference to ''201.8'' is corrected to read ''201.240''.

36. In § 201.57: the reference to ''201.17'' is corrected to read ''201.410 and 201.411''.

37. Section 201.60 is removed and reserved.

Subpart C—Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

38. The authority citation for Subpart C of Part 201 is revised to read as follows:

Authority: 15 U.S.C. 78u–1 and 78w.

39. Subpart D is added to read as follows:

Subpart D—Rules of Practice

General Rules

Initiation Of Proceedings And Prehearing Rules

Rules Regarding Hearings

Appeal To The Commission And Commission Review

Rules Relating To Temporary Orders And Suspensions

Rules Regarding Disgorgement And Penalty Payments

Informal Procedures And Supplementary Information Concerning Adjudicatory Proceedings

Subpart D—Rules of Practice

Authority: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78d-1, 78d-2, 78*l*, 78m, 78n, 78*o*(d), 78*o*-3, 78s, 78u-2, 78u-3, 78v, 78w, 79c, 79s, 79t, 79z-5a, 77sss, 77ttt, 80a-8, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12 unless otherwise noted.

General Rules

§ 201.100 Scope of the rules of practice.

(a) Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter; or

(2) Actions taken by the duty officer pursuant to delegated authority under 17 CFR 200.42.

§ 201.101 Definitions.

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

(1) *Commission* means the United States Securities and Exchange Commission, or a panel of Commissioners constituting a quorum of the Commission, or a single Commissioner acting as duty officer pursuant to 17 CFR 200.43;

(2) *Counsel* means any attorney representing a party or any other person representing a party pursuant to § 201.102(b);

(3) *Disciplinary proceeding* means an action pursuant to § 201.102(e);

(4) *Enforcement proceeding* means an action, initiated by an order instituting proceedings, held for the purpose of determining whether or not a person is about to violate, has violated, has caused a violation of, or has aided or abetted a violation of any statute or rule administered by the Commission, or whether to impose a sanction as defined in Section 551(10) of the Administrative Procedure Act, 5 U.S.C. 551(10);

(5) *Hearing officer* means an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing;

(6) *Interested division* means a division or an office assigned primary responsibility by the Commission to participate in a particular proceeding;

(7) *Order instituting proceedings* means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

(8) *Party* means the interested division, any person named as a respondent in an order instituting proceedings, any applicant named in the caption of any order, persons entitled to notice in a stop order proceeding as set forth in § 201.200(a)(2) or any person seeking Commission review of a decision;

(9) *Proceeding* means any agency process initiated by an order instituting proceedings; or by the filing, pursuant to § 201.410, of a petition for review of an initial decision by a hearing officer; or by the filing, pursuant to § 201.420, of an application for review of a self-regulatory organization determination; or by the filing, pursuant to § 201.430, of a notice of intention to file a petition for review of a determination made pursuant to delegated authority;

(10) *Secretary* means the Secretary of the Commission; and

(11) *Temporary sanction* means a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending final determination whether the registration shall be revoked.

(b) [Reserved]

§ 201.102 Appearance and practice before the Commission.

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this section or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing oneself.* In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing others.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR 200.735.

(d) *Designation of address for service; notice of appearance; power of attorney; withdrawal.* (1) *Representing oneself.* When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(2) *Representing others.* When a person first makes any filing or otherwise appears in a representative capacity before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address and telephone number; and the name and address of the person or persons represented.

(3) *Power of attorney.* Any individual appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

(4) *Withdrawal.* Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Commission or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal.

(e) *Suspension and disbarment.* (1) *Generally.* The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:

(i) Not to possess the requisite qualifications to represent others; or

(ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or

(iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

(2) *Certain professionals and convicted persons.* Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this section shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether an appeal of such judgment or order is pending or could be taken.

(3) *Temporary suspensions.* An order of temporary suspension shall become effective upon service on the respondent. No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this section more than 90 days after the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) of this section has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

(A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) of this section may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent.

(iii) Within 30 days after the filing of a petition in accordance with paragraph (e)(3)(ii) of this section, the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both, and, after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in accordance with § 201.500. If the hearing is held before a hearing officer, the time limits set forth in § 201.531 will govern review of the hearing officer's initial decision.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii) of this section, the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) of this section or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) of this section and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner may not contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) of this section without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4) *Filing of prior orders.* Any person appearing or practicing before the Commission who has been the subject of an order, judgment, decree, or finding as set forth in paragraph (e)(3) of this section shall promptly file with the Secretary a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper, order, judgment, decree or finding shall not impair the operation of any other provision of this section.

(5) *Reinstatement.* (i) An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (e)(2) of this section shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment, or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (e)(2) of this section may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(6) *Other proceedings not precluded.* A proceeding brought under paragraph (e)(1), (e)(2) or (e)(3) of this section shall not preclude another proceeding brought under these same paragraphs.

(7) *Public hearings.* All hearings held under this paragraph (e) shall be public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.

(f) *Practice defined.* For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:

(1) Transacting any business with the Commission; and

(2) The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

§ 201.103 Construction of rules.

(a) The Rules of Practice shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.

(b) In any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control.

(c) For purposes of these rules:

(1) Any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate;

(2) Any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate; and

(3) Unless the context requires otherwise, counsel for a party may take any action required or permitted to be taken by such party.

§ 201.104 Business hours.

The Headquarters office of the Commission, at 450 Fifth Street, N.W., Washington, D.C. 20549, is open each

day, except Saturdays, Sundays, and Federal legal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect in Washington, D.C. Federal legal holidays consist of New Year's Day; Birthday of Martin Luther King, Jr.; Presidents Day; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans Day; Thanksgiving Day; Christmas Day; and any other day appointed as a holiday in Washington, D.C. by the President or the Congress of the United States.

§ 201.110 Presiding officer.

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30–10, the administrative law judge to preside.

§ 201.111 Hearing officer: authority.

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

(a) Administering oaths and affirmations;

(b) Issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;

(c) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(d) Regulating the course of a proceeding and the conduct of the parties and their counsel;

(e) Holding prehearing and other conferences as set forth in § 201.221 and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(f) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these rules, considering and ruling upon all procedural and other motions;

(i) Preparing an initial decision as provided in § 201.360;

(j) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) Informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

§ 201.112 Hearing officer: disqualification and withdrawal.

(a) *Notice of disqualification.* At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefor.

(b) *Motion for withdrawal.* Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding.

§ 201.120 Ex parte communications.

(a) Except to the extent required for the disposition of *ex parte* matters as authorized by law, the person presiding over an evidentiary hearing may not:

(1) Consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Commission.

(b) The Commission's code of behavior regarding *ex parte* communications between persons outside the Commission and decisional employees, 17 CFR 200.110 through 200.114, governs other prohibited communications during a proceeding conducted under the Rules of Practice.

§ 201.121 Separation of functions.

Any Commission officer, employee or agent engaged in the performance of investigative or prosecutorial functions for the Commission in a proceeding as defined in § 201.101(a) may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Commission review of the decision pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. 557, except as a witness or counsel in the proceeding.

§ 201.140 Commission orders and decisions: signature and availability.

(a) *Signature required.* All orders and decisions of the Commission shall be signed by the Secretary or any other person duly authorized by the Commission.

(b) *Availability for inspection.* Each order and decision shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry.

(c) *Date of entry of orders.* The date of entry of a Commission order shall be the date the order is signed. Such date shall be reflected in the caption of the order, or if there is no caption, in the order itself.

§ 201.141 Orders and decisions: service of orders instituting proceeding and other orders and decisions.

(a) *Service of an order instituting proceedings.* (1) *By whom made.* The Secretary, or another duly authorized officer of the Commission, shall serve a copy of an order instituting proceedings on each person named in the order as a party. The Secretary may direct an interested division to assist in making service.

(2) *How made.* (i) *To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the order instituting proceedings to the individual or to an agent authorized by appointment or by law to receive such notice. *Delivery* means—handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt; or giving confirmed telegraphic notice.

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive such notice, by any method specified in paragraph (a)(2)(i) of this section.

(iii) *Upon persons registered with the Commission.* In addition to any other method of service specified in paragraph (a)(2) of this section, notice may be made to a person currently registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent by sending a copy of the order addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this section, 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.

(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 obtain pursuant to paragraph (a)(4) of this section.

(3) *Certificate of service.* The Secretary shall place in the record of the proceeding a certificate of service 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 service is made in person, the certificate 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, registered or Express Mail, the certificate shall be accompanied by a confirmation of receipt or of attempted delivery, as required. If service is made to an agent authorized by appointment to receive service, the certificate shall be accompanied by evidence of the appointment.

(4) *Waiver of service.* In lieu of service as set forth in paragraph (a)(2) of this section, the party may be provided a copy of the order instituting proceedings by first class mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(b) *Service of orders or decisions other than an order instituting proceedings.* Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this section or § 201.150(c). Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be made by the Secretary or the hearing officer.

§ 201.150 Service of papers by parties.

(a) *When required.* In every proceeding as defined in § 201.101(a), each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which may be heard *ex parte.*

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 201.102, service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How made.* Service shall be made by delivering a copy of the filing. *Delivery* means:

(1) Personal service—handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person;

(3) Sending the papers through a commercial courier service or express delivery service; or

(4) Transmitting the papers by facsimile machine where the following conditions are met:

(i) The persons serving each other by facsimile transmission have agreed to do so in a writing, signed by each party, which specifies such terms as they deem necessary with respect to facsimile machine telephone numbers to be used, hours of facsimile machine operation, the provision of non-facsimile original or copy, and any other such matters; and

(ii) Receipt of each document served by facsimile is confirmed by a manually signed receipt delivered by facsimile machine or other means agreed to by the parties.

(d) *When service is complete.* Personal service, service by U.S. Postal Service Express Mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission by delivery of a manually signed receipt.

§ 201.151 Filing of papers with the Commission: procedure.

(a) *When to file.* All papers required to be served by a party upon any person shall be filed with the Commission at the time of service or promptly thereafter. Papers required to be filed with the Commission must be received within the time limit, if any, for such filing.

(b) *Where to file.* Filing of papers with the Commission shall be made by filing them with the Secretary. When a proceeding is assigned to a hearing officer, a person making a filing with the Secretary shall promptly provide to the hearing officer a copy of any such filing, provided, however, that the hearing officer may direct or permit filings to be made with him or her, in which event the hearing officer shall note thereon the filing date and promptly provide the Secretary with either the original or a copy of any such filings.

(c) *To whom to direct the filing.* Unless otherwise provided, where the Commission has assigned a case to a hearing officer, all motions, objections, applications or other filings made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of briefs with the Commission, shall be directed to and decided by the hearing officer.

(d) *Certificate of service.* Papers filed with the Commission or a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service and the mailing address or facsimile telephone number to which service was made, if not made in person. If the method of service to any party is different from the method of service to any other party or the method for filing with the Commission, the certificate shall state why a different means of service was used.

§ 201.152 Filing of papers: form.

(a) *Specifications.* Papers filed in connection with any proceeding as defined in § 201.101(a) shall:

(1) Be on one grade of unglazed white paper measuring 8½ x 11 inches, except that, to the extent that the reduction of larger documents would render them illegible, such documents may be filed on larger paper;

(2) Be typewritten or printed in either 10- or 12-point typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;

(3) Include at the head of the paper, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(4) Be paginated with left hand margins at least 1 inch wide, and other margins of at least 1 inch;

(5) Be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and

(6) Be stapled, clipped or otherwise fastened in the upper left corner.

(b) *Signature required.* All papers must be dated and signed as provided in § 201.153.

(c) *Suitability for recordkeeping.* Documents which, in the opinion of the Commission, are not suitable for computer scanning or microfilming may be rejected.

(d) *Number of copies.* An original and three copies of all papers shall be filed.

(e) *Form of briefs.* All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

(f) *Scandalous or impertinent matter.* Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer.

§ 201.153 Filing of papers: signature requirement and effect.

(a) *General requirements.* Following the issuance of an order instituting proceedings, every filing of a party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing.

(b) *Effect of signature.* (1) The signature of a counsel or party shall constitute a certification that:

(i) the person signing the filing has read the filing;

(ii) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(iii) the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.

(2) If a filing is not signed, the hearing officer or the Commission shall strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

§ 201.154 Motions.

(a) *Generally.* Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. All written motions shall be served in accordance with § 201.150, be filed in accordance with § 201.151, meet the requirements of § 201.152, and be signed in accordance with § 201.153. The Commission or the hearing officer may order that an oral motion be submitted in writing. Unless otherwise ordered by the Commission or the hearing officer, if a motion is properly made to the Commission concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Commission. No oral argument shall be heard on any motion unless the Commission or the hearing officer otherwise directs.

(b) *Opposing and reply briefs.* Except as provided in § 201.401, briefs in opposition to a motion shall be filed within five days after service of the motion. Reply briefs shall be filed within three days after service of the opposition.

(c) *Length limitation.* A brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. Requests for leave to file briefs in excess of 10 pages are disfavored.

§ 201.155 Default; motion to set aside default.

(a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the commission or the hearing officer pursuant to § 201.180(b).

(b) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

§ 201.160 Time computation.

(a) *Computation.* In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the Commission, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal legal holiday (as defined in § 201.104), in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal legal holiday. Intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this section. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a Federal legal holiday.

(b) *Additional time for service by mail.* If service is made by mail, three days shall be added to the prescribed period for response.

§ 201.161 Extensions of time, postponements and adjournments.

(a) *Availability.* Except as otherwise provided by law, the Commission, at any time, or the hearing officer, at any time prior to the filing of his or her

initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, may, for good cause shown, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers and may, consistent with paragraph (b) of this section, postpone or adjourn any hearing.

(b) *Limitations on postponements, adjournments and extensions.* A hearing shall begin at the time and place ordered, provided that, within the limits provided by statute, the Commission or the hearing officer may for good cause shown postpone the commencement of the hearing or adjourn a convened hearing for a reasonable period of time or change the place of hearing.

(1) *Additional considerations.* In considering a motion for postponement of the start of a hearing, adjournment once a hearing has begun, or extensions of time for filing papers, the hearing officer or the Commission shall consider, in addition to any other factors:

(i) The length of the proceeding to date;

(ii) The number of postponements, adjournments or extensions already granted;

(iii) The stage of the proceedings at the time of the request; and

(iv) Any other such matters as justice may require.

(2) *Time limit.* Postponements, adjournments or extensions of time for filing papers shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

§ 201.180 Sanctions.

(a) *Contemptuous conduct.*

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

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

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review procedure.* A person excluded from a 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.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in § 201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient filings; leave to cure deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(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 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:

(1) To make a filing required under these Rules of Practice; or

(2) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this section.

§ 201.190 Confidential treatment of information in certain filings.

(a) *Application.* An application for confidential treatment pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30), and Rule 406 thereunder, 17 CFR 230.406; Section 24(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b)(2), and Rule 24b–2 thereunder, 17 CFR 240.24b–2; Section 22(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(b), and Rule 104 thereunder, 17 CFR 250.104; Section 45(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–44(a), and Rule 45a–1 thereunder, 17 CFR 270.45a–1; or Section 210(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–10(a), shall be filed with the Secretary. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought.

(b) *Procedure for supplying additional information.* The applicant may be required to furnish in writing additional information with respect to the grounds for objection to public disclosure. Failure to supply the information so requested within 14 days from the date of receipt by the applicant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the information to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such 14-day period.

(c) *Confidentiality of materials pending final decision.* Pending the determination of the application for confidential treatment, transcripts, non-final orders including an initial decision, if any, and other materials in connection with the application shall be placed under seal; shall be for the confidential use only of the hearing officer, the Commission, the applicant, and any other parties and counsel; and shall be made available to the public only in accordance with orders of the Commission.

(d) *Public availability of orders.* Any final order of the Commission denying or sustaining an application for confidential treatment shall be made public. Any prior findings or opinions relating to an application for confidential treatment under this section shall be made public at such time as the material as to which confidentiality was requested is made public.

§ 201.191 Adjudications not required to be determined on the record after notice and opportunity for hearing.

(a) *Scope of the rule.* This rule applies to every case of adjudication, as defined in 5 U.S.C. 551, pursuant to any statute which the Commission administers, where adjudication is not required to be determined on the record after notice and opportunity for hearing and which the Commission has not chosen to determine on the record after notice and opportunity for hearing.

(b) *Procedure.* In every case of adjudication under paragraph (a) of this section, the Commission shall give prompt notice of any adverse action or final disposition to any person who has requested the Commission to make (or not to make) any such adjudication, and furnish to any such person a written statement of reasons therefor. Additional procedures may be specified in rules relating to specific types of such adjudications. Where any such rule provides for the publication of a Commission order, notice of the action

or disposition shall be deemed to be given by such publication.

(c) *Contents of the record.* If the Commission provides notice and opportunity for the submission of written comments by parties to the adjudication or, as the case may be, by other interested persons, written comments received on or before the closing date for comments, unless accorded confidential treatment pursuant to statute or rule of the Commission, become a part of the record of the adjudication. The Commission, in its discretion, may accept and include in the record written comments filed with the Commission after the closing date.

§ 201.192 Rulemaking: issuance, amendment and repeal of rules of general application.

(a) *By petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. Such petition shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission.

(b) *Notice of proposed issuance, amendment or repeal of rules.* Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the **Federal Register** a notice of the proposed action. Such notice shall include:

(1) A statement of the time, place, and nature of the rulemaking proceeding, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceeding;

(2) Reference to the authority under which the rule is proposed; and

(3) The terms or substance of the proposed rule or a description of the subjects and issues involved.

§ 201.193 Applications by barred individuals for consent to associate.

Preliminary note

This rule governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this section must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the rule, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with a particular registered entity and may also be subject to specific terms and conditions.

Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

In addition to the factors set forth in paragraph (d) of this section, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to Rule 5(e) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(e). Among other things, Rule 5(e) sets forth the Commission's policy ''not to permit a * * * respondent [in an administrative proceeding] to consent to * * * [an] order that imposes a sanction while denying the allegations in the * * * order for proceedings.'' Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this section was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order.

(a) *Scope of rule.* Applications for Commission consent to associate, or to change the terms and conditions of association, with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be made pursuant to this section where a Commission order bars the individual from association with a registered entity and:

(1) Such barred individual seeks to become associated with an entity that is not a member of a self-regulatory organization; or

(2) The order contains a proviso that application may be made to the Commission after a specified period of time.

(b) *Form of application.* Each application shall be supported by an affidavit, manually signed by the applicant, that addresses the factors set forth in paragraph (d) of this section. One original and three copies of the application shall be filed pursuant to §§ 201.151, 201.152 and 201.153. Each application shall include as exhibits:

(1) A copy of the Commission order imposing the bar;

(2) An undertaking by the applicant to notify immediately the Commission in writing if any information submitted in support of the application becomes materially false or misleading while the application is pending;

(3) The following forms, as appropriate:

(i) A copy of a completed Form U–4, where the applicant's proposed association is with a broker-dealer or municipal securities dealer;

(ii) A copy of a completed Form MSD–4, where the applicant's proposed association is with a bank municipal securities dealer;

(iii) The information required by Form ADV, 17 CFR 279.1, with respect to the applicant, where the applicant's proposed association is with an investment adviser;

(iv) The information required by Form TA–1, 17 CFR 249b.100, with respect to the applicant, where the applicant's proposed association is with a transfer agent; and

(4) A written statement by the proposed employer that describes:

(i) The terms and conditions of employment and supervision to be

exercised over such applicant and, where applicable, by such applicant;

(ii) The qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant;

(iii) The compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and

(iv) The names of any other associated persons in the same office who have previously been barred by the Commission, and whether they are to be supervised by the applicant.

(c) *Required showing.* The applicant shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest.

(d) *Factors to be addressed.* The affidavit required by paragraph (b) of this section shall address each of the following:

(1) The time period since the imposition of the bar;

(2) Any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar;

(3) The applicant's compliance with the order imposing the bar;

(4) The applicant's employment during the period subsequent to imposition of the bar;

(5) The capacity or position in which the applicant proposes to be associated;

(6) The manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant;

(7) Any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and

(8) Any other information material to the application.

(e) *Notification to applicant and written statement.* In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this section, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall then have 30 days to submit a written statement in response.

(f) *Concurrent applications.* The Commission will not consider any application submitted pursuant to this section if any other application for consent to associate concerning the same applicant is pending before any self-regulatory organization.

Initiation of Proceedings and Prehearing Rules

§ 201.200 Initiation of proceedings.

(a) *Order instituting proceedings: notice and opportunity for hearing.*(1) *Generally.* Whenever an order instituting proceedings is issued by the Commission, appropriate notice thereof shall be given to each party to the proceeding by the Secretary or another duly designated officer of the Commission. Each party shall be given notice of any hearing within a time reasonable in light of the circumstances, in advance of the hearing; provided, however, no prior notice need be given to a respondent if the Commission has authorized the Division of Enforcement to seek a temporary sanction *ex parte*.

(2) *Stop order proceedings: additional persons entitled to notice.* Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to Section 8(d) of the Securities Act of 1933, 15 U.S.C. 77h(d), shall be sent to or served on the issuer; or, in the case of a foreign government or political subdivision thereof, sent to or served on the underwriter; or, in the case of a foreign or territorial person, sent to or served on its duly authorized representative in the United States named in the registration statement, properly directed in the case of telegraphic notice to the address given in such statement. In addition, if such proceeding is commenced within 90 days after the registration statement has become effective, notice of the proceeding shall be given to the agent for service named on the facing sheet of the registration statement and to each other person designated on the facing sheet of the registration statement as a person to whom copies of communications to such agent are to be sent.

(b) *Content of order.* The order instituting proceedings shall:

(1) State the nature of any hearing;

(2) State the legal authority and jurisdiction under which the hearing is to be held;

(3) Contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to § 201.220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto; and

(4) State the nature of any relief or action sought or taken.

(c) *Time and place of hearing.* The time and place for any hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives.

(d) *Amendment to order instituting proceedings.*(1) *By the Commission.* Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.

(2) *By the hearing officer.* Upon motion by a party, the hearing officer may, at any time prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

(e) *Publication of notice of public hearings.* Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the *SEC News Digest* and, where directed, by publication in the **Federal Register**.

§ 201.201 Consolidation of proceedings.

By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Commission or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules of Practice and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this section, no distinction is made between joinder and consolidation of proceedings.

§ 201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding, with particular reference to:

(1) Whether there should be an initial decision by a hearing officer;

(2) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) Whether there should be a 30-day waiting period between the issuance of

the Commission's order and the date it is to become effective.

(b) *Objections; effect of failure to object.* Any other party may object to the procedures so specified, and such party may specify such additional procedures as it considers necessary or appropriate. In the absence of such objection or such specification of additional procedures, such other party may be deemed to have waived objection to the specified procedures.

(c) *Approval required.* Any proposal pursuant to paragraph (a) of this section, even if not objected to by any party, shall be subject to the written approval of the hearing officer.

(d) *Procedure upon agreement to waive an initial decision.* If an initial decision is waived pursuant to paragraph (a) of this section, the hearing officer shall notify the Secretary and, unless the Commission directs otherwise within 14 days, no initial decision shall be issued.

§ 201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding or a proceeding to review a self-regulatory organization determination.* (1) *Generally.* No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421.

(2) *Disgorgement proceedings.* In an enforcement proceeding, a person may state his or her views with respect to a proposed plan of disgorgement or file a proof of claim pursuant to § 201.612.

(b) *Intervention as a party. (*1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section would be inadequate for the protection of his or her interests.

(i) In a proceeding under the Public Utility Holding Company Act of 1935, any representative of interested consumers or security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors or consumers, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(ii) In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(2) *Intervention as of right.* (i) In proceedings under the Public Utility Holding Company Act of 1935, any interested representative, agency, authority or instrumentality of the United States or any interested State, State commission, municipality or other political subdivision of a state shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(ii) In proceedings under the Investment Company Act of 1940, any interested State or State agency shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(c) *Leave to participate on a limited basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to participate on a limited basis as a non-party participant as to any matter affecting the person's interests.

(1) *Procedure.* Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. Leave to participate pursuant to this paragraph (c) may include such rights of a party as the hearing officer may deem appropriate. Persons granted leave to participate shall be served in accordance with § 201.150; provided, however, that a party to the proceeding may move that the extent of notice of filings or other papers to be provided to persons granted leave to participate be limited, or may move that the persons granted leave to participate bear the cost of being provided copies of any or all filings or other papers. Persons granted leave to participate shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to participate pursuant to this paragraph (c) shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer.

(2) *Certain persons entitled to leave to participate.* The hearing officer is directed to grant leave to participate under this paragraph (c) to any person to whom it is proposed to issue any security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve the terms and conditions of such issuance and exchange after a hearing upon the fairness of such terms and conditions.

(d) *Amicus participation.*

(1) *Availability.* An amicus brief may be filed only if:

(i) A motion for leave to file the brief has been granted;

(ii) The brief is accompanied by written consent of all parties;

(iii) The brief is filed at the request of the Commission or the hearing officer; or

(iv) The brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth.

(2) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Commission or hearing officer, for cause shown, grants leave for a later filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief. A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(e) *Permission to state views.* Any person may make a motion seeking leave to file a memorandum or make an oral statement of his or her views. Any such communication may be included in the record; provided, however, that unless offered and admitted as evidence

of the truth of the statements therein made, any assertions of fact submitted pursuant to the provisions of this paragraph (e) will be considered only to the extent that the statements therein made are otherwise supported by the record.

(f) *Modification of participation provisions.* The Commission or the hearing officer may, by order, modify the provisions of this section which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

201.220 Answer to allegations.

(a) *When required.* In its order instituting proceedings, the Commission may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party 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 party required to file an answer as provided in paragraph (a) of this section shall do so within 20 days after service upon the party of the order instituting proceedings. Persons granted leave to participate on a limited basis in the proceeding pursuant to § 201.210(c) may file an answer within a reasonable time, as determined by the Commission or the hearing officer. If the order instituting proceedings is amended, the Commission or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) *Contents; effect of failure to deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

(d) *Motion for more definite statement.* A party 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 party 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 party respondent fails to file an answer required by this section within the time provided, such person 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).

201.221 Prehearing conferences.

(a) *Purposes of conferences.* The purposes of prehearing conferences include, but are not limited to:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control of the proceeding by the hearing officer; and

(3) Improving the quality of the hearing through more thorough preparation.

(b) *Procedure.* On his or her own motion or at the request of a party, the hearing officer may, in his or her discretion, direct counsel or any party to meet for an initial, final or other prehearing conference. Such conferences may be held with or without the hearing officer present as the hearing officer deems appropriate. Where such a conference is held outside the presence of the hearing officer, the hearing officer shall be advised promptly by the parties of any agreements reached. Such conferences also may be held with one or more persons participating by telephone or other remote means.

(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) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(4) Matters of which official notice may be taken;

(5) The schedule for exchanging prehearing motions or briefs, if any;

(6) The method of service for papers other than Commission orders;

(7) Summary disposition of any or all issues;

(8) Settlement of any or all issues;

(9) Determination of hearing dates;

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

(11) 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;

(12) Specification of procedures as set forth in § 201.202; and

(13) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Required prehearing conferences.* Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, both an initial and a final prehearing conference should be held. Unless ordered otherwise, an initial prehearing conference shall be held within 14 days of the service of an answer, or if no answer is required, within 14 days of service of the order instituting proceedings. A final conference shall be held as close to the start of the hearing as reasonable under the circumstances.

(e) *Prehearing orders.* At or following the conclusion of any conference held pursuant to this section, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

(f) *Failure to appear: default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through a representative, at a prehearing conference of which he or she has been duly notified 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).

§ 201.222 Prehearing submissions.

(a) *Submissions generally.* The hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate, including any or all of the following:

(1) An outline or narrative summary of its case or defense;

(2) The legal theories upon which it will rely;

(3) Copies and a list of documents that it intends to introduce at the hearing; and

(4) A list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(b) *Expert witnesses.* 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, and a list of publications authored or co-authored by the expert.

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

For purposes of this section, the term *documents* shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:

(i) Each subpoena issued;

(ii) Every other written request to persons not employed by the Commission to provide documents or to be interviewed;

(iii) The documents turned over in response to any such subpoenas or other written requests;

(iv) All transcripts and transcript exhibits;

(v) Any other documents obtained from persons not employed by the Commission; and

(vi) Any final examination or inspection reports prepared by the Division of Market Regulation or the Division of Investment Management.

(2) Nothing in this paragraph (a) shall limit the right of the Division to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(b) *Documents that may be withheld.* (1) The Division of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this section, or is otherwise attorney work product and will not be offered in evidence;

(iii) The document would disclose the identity of a confidential source; or

(iv) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

(c) *Withheld document list.* The hearing officer may require the Division of Enforcement to submit for review a list of documents withheld pursuant to paragraphs (b)(1) through (b)(4) of this section or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the Commission or the hearing officer, the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than 14 days after the respondent files an answer. In a proceeding in which a temporary cease-and-desist order is sought pursuant to § 201.510 or a temporary suspension of registration is sought pursuant to § 201.520, documents shall be made available no later than the day after service of the decision as to whether to issue a temporary cease-and-desist order or temporary suspension order.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this section other than by written agreement of the Division of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at the rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies. The respondent shall be given access to the documents at the Commission's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Issuance of investigatory subpoenas after institution of proceedings.* The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation (''formal order'') under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not harmless error.

§ 201.231 Enforcement and disciplinary proceedings: production of witness statements.

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be

made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

§ 201.232 Subpoenas.

(a) *Availability; procedure.* In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses 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.

(1) *Unavailability of hearing officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance from the first available of the following persons: the Chief Administrative Law Judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner.

(2) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

(b) *Standards for issuance.* Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the person requested to issue the subpoena determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(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 hearings.

(d) *Tender of fees required.* When a subpoena compelling 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 is directed or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena 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, request that the subpoena 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 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 was issued by another person.

(2) *Standards governing application to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive or unduly burdensome, the hearing officer or the Commission shall quash or modify the subpoena, or may order return of the subpoena 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.

(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.

§ 201.233 Depositions upon oral examination.

(a) *Procedure.* Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

(b) *Required finding when ordering a deposition.* In the discretion of the Commission or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, and that the taking of a deposition will serve the interests of justice.

(c) *Contents of order.* An order for deposition shall designate by name a deposition officer. The designated officer may be the hearing officer or any other person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. An order for deposition also shall state:

(1) The name of the witness whose deposition is to be taken;

(2) The scope of the testimony to be taken;

(3) The time and place of the deposition;

(4) The manner of recording, preserving and filing the deposition; and

(5) The number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

(d) *Procedure at depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or

her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(e) *Objections to questions or evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(f) *Filing of depositions.* The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(g) *Payment.* The cost of the transcript shall be paid by the party requesting the deposition.

§ 201.234 Depositions upon written questions.

(a) *Availability.* Depositions may be taken and submitted on written questions upon motion of any party. The motion shall include the information specified in § 201.233(a). A decision on the motion shall be governed by the provisions of § 201.233(b).

(b) *Procedure.* Written questions shall be filed with the motion. Within 10 days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken pursuant to this section no persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, shall be present at the examination of the witness. No party shall be present or represented unless otherwise permitted by order. The deposition officer shall propound the questions and cross-questions to the witness in the order submitted.

(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 (g) of § 201.233, except that no cross-examination shall be made.

§ 201.235 Introducing prior sworn statements of witnesses into the record.

(a) At a hearing, any person wishing to introduce a prior, sworn statement 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 is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement 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 may be granted if:

(1) The witness is dead;

(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;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the prior sworn statement 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 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 in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

§ 201.240 Settlement.

(a) *Availability.* Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement shall state that it is made pursuant to this section; shall recite or incorporate as a part of the offer the provisions of paragraphs (c) (4) and (5) of this section; shall be signed by the person making the offer, not by counsel; and shall be submitted to the interested division.

(c) *Consideration of offers of settlement.* (1) Offers of settlement shall be considered by the interested division when time, the nature of the proceedings, and the public interest permit.

(2) Where a hearing officer is assigned to a proceeding, the interested division and the party submitting the offer may request that the hearing officer express his or her views regarding the appropriateness of the offer of settlement. A request for the hearing officer to express his or her views on an offer of settlement or otherwise to participate in a settlement conference constitutes a waiver by the persons making the request of any right to claim bias or prejudgment by the hearing officer based on the views expressed.

(3) The interested division shall present the offer of settlement to the Commission with its recommendation, except that, if the division's recommendation is unfavorable, the offer shall not be presented to the Commission unless the person making the offer so requests.

(4) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and an initial decision by, a hearing officer;

(iv) All post-hearing procedures; and

(v) Judicial review by any court.

(5) By submitting an offer of settlement the person further waives:

(i) Such provisions of the Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any 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.

(6) If the Commission rejects the offer of settlement, the person making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(5) of this section with respect to any discussions concerning the rejected offer of settlement.

(7) Final acceptance of any offer of settlement will occur only upon the

issuance of findings and an order by the Commission.

§ 201.250 Motion for summary disposition.

(a) After a respondent's answer has been filed and, in an enforcement or a disciplinary proceeding, documents have been made available to that respondent for inspection and copying pursuant to § 201.230, the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent. If the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. 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 § 201.323.

(b) The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. If it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion. A hearing officer's decision to deny leave to file a motion for summary disposition is not subject to interlocutory appeal.

(c) The motion for summary disposition, supporting memorandum of points and authorities, and any declarations, affidavits or attachments shall not exceed 35 pages in length.

Rules Regarding Hearings

§ 201.300 Hearings.

Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

§ 201.301 Hearings to be public.

All hearings, except hearings on applications for confidential treatment filed pursuant to § 201.190, hearings held to consider a motion for a protective order pursuant to § 201.322, and hearings on *ex parte* application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

§ 201.302 Record of hearings.

(a) *Recordation.* Unless ordered otherwise by the hearing officer or the Commission, all hearings shall be recorded and a written transcript thereof shall be prepared.

(b) *Availability of a transcript.* Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings, and transcripts subject to a protective order pursuant to § 201.322, shall be available for purchase only by parties; provided, however, that any person compelled to submit data or evidence in a hearing may purchase a copy of his or her own testimony.

(c) *Transcript correction.* Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as directed by the Commission or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation pursuant to § 201.324, or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

§ 201.310 Failure to appear at hearings: default.

Any person named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default pursuant to § 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

§ 201.320 Evidence: admissibility.

The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

§ 201.321 Evidence: objections and offers of proof.

(a) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Commission, however, unless raised:

(1) Pursuant to interlocutory review in accordance with § 201.400;

(2) In a proposed finding or conclusion filed pursuant to § 201.340; or

(3) In a petition for Commission review of an initial decision filed in accordance with § 201.410.

(b) *Offers of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to § 201.350(b).

§ 201.322 Evidence: confidential information, protective orders.

(a) *Procedure.* In any proceeding as defined in § 201.101(a), a party, any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence, or any witness who testifies at a hearing may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents without revealing confidential details. If the movant seeks a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties. Unless the documents are unavailable, the movant shall file for *in camera* inspection a sealed copy of the documents as to which the order is sought.

(b) *Basis for issuance.* Documents and testimony introduced in a public hearing are presumed to be public. A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

(c) *Requests for additional information supporting confidentiality.* A movant under paragraph (a) of this section may be required to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(d) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under

seal and shall be disclosed only in accordance with orders of the Commission or the hearing officer. Any order issued in connection with a motion under this section shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

§ 201.323 Evidence: official notice.

Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

§ 201.324 Evidence: stipulations.

The parties may, by stipulation, at any stage of the proceeding agree upon any pertinent facts in the proceeding. A stipulation may be received in evidence and, when received, shall be binding on the parties to the stipulation.

§ 201.325 Evidence: presentation under oath or affirmation.

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

§ 201.326 Evidence: presentation, rebuttal and cross-examination.

In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.

§ 201.340 Proposed findings, conclusions and supporting briefs.

(a) *Opportunity to file.* Before an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.

(b) *Procedure.* Proposed findings of fact must be supported by citations to specific portions of the record. If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs, and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate those paragraphs of the proposals already filed as to which there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

(c) *Time for filing.* In any proceeding in which an initial decision is to be issued:

(1) At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed. The party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary.

(2) The total period within which all such proposed findings and conclusions and supporting briefs and any counter statements of proposed findings and conclusions and reply briefs are to be filed shall be no longer than 90 days after the close of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in an order the reasons why the different period is necessary.

§ 201.350 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record shall consist of:

(1) The order instituting proceedings, each notice of hearing and any amendments;

(2) Each application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony and document or other item admitted into evidence;

(4) Each written communication accepted by the hearing officer pursuant to § 201.210;

(5) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 201.112, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(6) All motions, briefs and other papers filed on interlocutory appeal;

(7) All proposed findings and conclusions;

(8) Each written order issued by the hearing officer or Commission; and

(9) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any such documents until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

§ 201.351 Transmittal of documents to Secretary; record index; certification.

(a) *Transmittal from hearing officer to Secretary of partial record index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with an index of such documents. The hearing officer, may, by order, require the interested division or other persons to assist in promptly transporting such documents from the hearing location to the Office of the Secretary.

(b) *Preparation, certification of record index.* Promptly after the close of the hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised

record index. If an initial decision is to be issued, the initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(c) *Final transmittal of record items to the Secretary.* After the close of the hearing, the hearing officer shall transmit to the Secretary originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, or if no initial decision is to be issued, within 60 days of the close of the hearing, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

§ 201.360 Initial decision of hearing officer.

(a) *When required.* 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 § 201.202.

(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:

(1) The initial decision shall become the final decision of the Commission as to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) If a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(c) *Filing, service and publication.* The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the *SEC News Digest.* 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.

(d) *When final.*

(1) Unless a party or an aggrieved person entitled to review files a petition for review in accordance with the time limit specified in the initial decision, or unless the Commission on its own initiative orders review pursuant to § 201.411, an initial decision shall become the final decision of the Commission.

(2) If a petition for review is timely filed by a party or an aggrieved person entitled to review, or if the Commission upon its own initiative has ordered review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(e) *Order of finality.* In the event that the initial decision becomes the final decision of the Commission with respect to a party, the Commission shall issue an order that the decision has become final as to that party. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC News Digest* and the *SEC Docket.*

Appeal to the Commission and Commission Review

§ 201.400 Interlocutory review.

(a) *Availability.* The Commission will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Commission may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this section if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) *Expedited consideration.* Interlocutory review of a hearing officer's ruling shall be expedited in every way, consistent with the Commission's other responsibilities.

(c) *Certification process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer and shall specify the material relevant to the ruling involved. The hearing officer shall not certify a ruling unless:

(1) His or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody; or

(2) Upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the order may materially advance the completion of the proceeding.

(d) *Proceedings not stayed.* The filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order. The Commission will not consider the motion for a stay unless the motion shall have first been made to the hearing officer.

§ 201.401 Issuance of stays.

(a) *Procedure.* A request for a stay shall be made by written motion, filed pursuant to § 201.154, and served on all parties pursuant to § 201.150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) *Scope of relief.* The Commission may grant a stay in whole or in part, and may condition relief under this section upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) *Stay of a Commission order.* A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) *Stay of an action by a self-regulatory organization.*

(1) *Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to § 201.420, may be made by any person aggrieved thereby.

(2) *Summary entry.* A stay may be entered summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission, by written order, shall specify a different period.

§ 201.410 Appeal of initial decisions by hearing officers.

(a) *Petition for review; when available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(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). The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to § 201.340, may, at the discretion of the Commission, be deemed to have been waived by the petitioner.

(c) *Financial disclosure statement requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in § 201.630(b).

(d) *Opposition to review.* A party may seek leave to file a brief in opposition to a petition for review within five days of the filing of the petition. The Commission will grant leave, or order the filing of an opposition on its own motion, only if it determines that briefing will significantly aid the decisional process. A brief in opposition shall identify those issues which do not warrant consideration by the Commission and shall state succinctly the reasons therefore.

(e) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

§ 201.411 Commission consideration of initial decisions by hearing officers.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for granting review pursuant to a petition for review.*

(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) Denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78*l*(d);

(ii) Suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78l(k); or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any initial decision, or a portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to § 201.410(b) or any brief in opposition to a petition for review permitted pursuant to § 201.410(d). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to § 201.450(a). 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.

(e) *Summary affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

(f) *Failure to obtain a majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

§ 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 self-regulatory organization determination 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). Such determinations include 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.

(b) *Procedure.* An application for review may be filed with the Commission pursuant to § 201.151 within 30 days after notice of the determination was filed with the Commission pursuant to Section

19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1), and received by the aggrieved person applying for review. The application shall be served by the applicant on the self-regulatory organization. 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 with the record index. The application shall be accompanied by the notice of appearance required by § 201.102(d).

(c) *Determination not stayed.* Filing an application for review with the Commission pursuant to paragraph (b) of this section shall not operate as a stay of the complained of determination made by the self-regulatory organization unless the Commission otherwise orders either pursuant to a motion filed in accordance with § 201.401 or on its own motion.

(d) *Certification of the record; service of the index.* Fourteen days after receipt of an application for review or a Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record upon which the action complained of was taken, and shall file with the Commission three copies of an index to such record, and shall serve upon each party one copy of the index.

§ 201.421 Commission consideration of determinations by self-regulatory organizations.

(a) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any determination by a self-regulatory organization that could be subject to an application for review pursuant to § 201.420(a) within 40 days after notice thereof was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1).

(b) *Supplemental briefing.* The Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. Notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties shall be given where the Commission believes that such briefing would significantly aid the decisional process.

§ 201.430 Appeal of actions made pursuant to delegated authority.

(a) *Scope of rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30–1 through 200.30–17 of this chapter may seek review of the action pursuant to paragraph (b) of this section.

(b) *Procedure.*

(1) *Notice of intention to petition for review.* A party or any person aggrieved by an action made pursuant to delegated authority may seek Commission review of the action by filing a written notice of intention to petition for review within five days after actual notice to the party of the action or service of notice of the action pursuant to § 201.141(b), whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to § 201.102(d).

(2) *Petition for review.* Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (b)(1) of this section, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form.

(c) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an action made by authority delegated in §§ 200.30–1 through 200.30–17 of this chapter is a prerequisite to the seeking of judicial review of a final order entered pursuant to such an action.

§ 201.431 Commission consideration of actions made pursuant to delegated authority.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in §§ 200.30–1 through 200.30–17 of this chapter.

(b) *Standards for granting review pursuant to a petition for review.*

(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any action that it would be required to review pursuant to § 201.411(b)(1) if the action was made as the initial decision of a hearing officer.

(2) *Discretionary review.* The Commission may decline to review any other action. In determining whether to grant review, the Commission shall consider the factors set forth in § 201.411(b)(2).

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any action made pursuant to delegated authority at any time, provided, however, that where there are one or more parties to the matter, such review shall not be ordered more than ten days after the action. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Required items in an order for review.* In an order granting a petition for review or directing review on the Commission's own initiative, the Commission shall set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority and shall state whether a stay shall be granted, if none is in effect, or shall be continued, if in effect pursuant to paragraph (e) of this section.

(e) *Automatic stay of delegated action.* An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon filing with the Commission of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Commissioner that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise, provided, however, there shall be no automatic stay of an action:

(1) To grant a stay of action by the Commission or a self-regulatory organization as authorized by 17 CFR 200.30–14(g) (5)–(6); or

(2) To commence a subpoena enforcement proceeding as authorized by 17 CFR 200.30–4(a)(10).

(f) *Effectiveness of stay or of Commission decision to modify or reverse a delegated action.* As against any person who shall have acted in reliance upon any action at a delegated level, any stay or any modification or reversal by the Commission of such action shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

§ 201.450 Briefs filed with the Commission.

(a) *Briefing schedule order.* Other than review ordered pursuant to § 201.431, if review of a determination is mandated by statute, rule, or judicial order or the Commission determines to grant review as a matter of discretion, the Commission shall issue a briefing schedule order directing the party or parties to file opening briefs and

specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission. The briefing schedule order shall be issued:

(1) At the time the Commission orders review on its own initiative pursuant to §§ 201.411 or 201.421, or orders interlocutory review on its own motion pursuant to § 201.400(a); or

(2) Within 21 days, or such longer time as provided by the Commission, after:

(i) The last day permitted for filing a petition for review pursuant to § 201.410(b) or a brief in opposition to a petition for review pursuant to § 201.410(d);

(ii) Receipt by the Commission of an index to the record of a determination of a self-regulatory organization filed pursuant to § 201.420(d);

(iii) Receipt by the Commission of the mandate of a court of appeals with respect to a judicial remand; or

(iv) Certification of a ruling for interlocutory review pursuant to § 201.400(c).

(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, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) *Length limitation.* Opening and opposition briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Commission.

§ 201.451 Oral argument before the Commission.

(a) *Availability.* The Commission, on its own motion or the motion of a party or any other aggrieved person entitled to Commission review, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) *Procedure.* Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) *Time allowed.* Unless the Commission orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Commission may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

(d) *Participation of Commissioners.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

§ 201.452 Additional evidence.

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

§ 201.460 Record before the Commission.

The Commission shall determine each matter on the basis of the record.

(a) *Contents of the record.*

(1) In proceedings for final decision before the Commission other than those reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) All items part of the record below in accordance with § 201.350;

(ii) Any petitions for review, cross-petitions or oppositions; and

(iii) All briefs, motions, submissions and other papers filed on appeal or review.

(2) In a proceeding for final decision before the Commission reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) The record certified pursuant to § 201.420(d) by the self-regulatory organization;

(ii) Any application for review; and

(iii) Any submissions, moving papers, and briefs filed on appeal or review.

(b) *Transmittal of record to Commission.* Within 14 days after the last date set for filing briefs or such later date as the Commission directs, the Secretary shall transmit the record to the Commission.

(c) *Review of documents not admitted.* Any document offered in evidence but excluded by the hearing officer or the Commission and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Commission on appeal but shall be transmitted to the Commission by the Secretary if so requested by the Commission. In the event that the Commission does not request the document, the Secretary shall retain the document not admitted into the record until the later of:

(1) The date upon which the Commission's order becomes final, or

(2) The conclusion of any judicial review of that order.

§ 201.470 Reconsideration.

(a) *Scope of rule.* A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission.

(b) *Procedure.* A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Commission may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Commission, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Commission.

§ 201.490 Receipt of petitions for judicial review pursuant to 28 U.S.C. 2112(a)(1).

The Commission officer and office designated pursuant to 28 U.S.C. 2112(a)(1) to receive copies of petitions for review of Commission orders from the persons instituting review in a court of appeals, are the Secretary and the Office of the Secretary at the Commission's Headquarters. Ten copies of each petition shall be submitted. Each copy shall state on its face that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the person or persons who filed the petition in the court of appeals.

Rules Relating to Temporary Orders and Suspensions

§ 201.500 Expedited consideration of proceedings.

Consistent with the Commission's or the hearing officer's other responsibilities, every hearing shall be held and every decision shall be rendered at the earliest possible time in connection with:

(a) An application for a temporary sanction, as defined in § 201.101(a), or a proceeding to determine whether a temporary sanction should be made permanent;

(b) A motion or application to review an order suspending temporarily the effectiveness of an exemption from registration pursuant to Regulations A, B, E or F under the Securities Act, §§ 230.258, 230.336, 230.610 or 230.656 of this chapter; or,

(c) A motion to or petition to review an order suspending temporarily the privilege of appearing before the Commission under § 201.102(e)(3), or a sanction under § 201.180(a)(1).

§ 201.510 Temporary cease-and-desist orders: application process.

(a) *Procedure.* A request for entry of a temporary cease-and-desist order shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated; the temporary relief sought against each respondent, including whether the respondent would be required to take action to prevent the dissipation or conversion of assets; and whether the relief is sought *ex parte.*

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary relief sought, and, unless relief is sought *ex parte,* a proposed notice of hearing and order to show cause whether the temporary relief should be imposed. If a proceeding for a permanent cease-and-desist order has not already been commenced, a proposed order instituting proceedings to determine whether a permanent cease-and-desist order should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of proceedings.* Hearings, including *ex parte* presentations made by the Division of Enforcement pursuant to § 201.513, shall be recorded or transcribed pursuant to § 201.302.

§ 201.511 Temporary cease-and-desist orders: notice; procedures for hearing.

(a) *Notice: how given.* Notice of an application for a temporary cease-and-desist order shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing. If an application is made *ex parte,* pursuant to § 201.513, no notice to a respondent need be given prior to the Commission's consideration of the application.

(b) *Hearing before the Commission.* Except as provided in paragraph (d) of this section, hearings on an application for a temporary cease-and-desist order shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or of counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion, or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made by such a hearing officer.

§ 201.512 Temporary cease-and-desist orders: issuance after notice and opportunity for hearing.

(a) *Basis for issuance.* A temporary cease-and-desist order shall be issued only if the Commission determines that the alleged violation or threatened violation specified in an order instituting proceedings whether to enter a permanent cease-and-desist order pursuant to Securities Act Section 8A(a), 15 U.S.C. 77h–1(a), Exchange Act Section 21C(a), 15 U.S.C. 78u–3(a), Investment Company Act Section 9(f)(1), 15 U.S.C. 80a–9(f)(1), or Investment Advisers Act Section 203(k)(1), 15 U.S.C. 80b–3(k)(1), or the continuation thereof, is likely to result

in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of proceedings on the permanent cease-and-desist order.

(b) *Content, scope and form of order.* Every temporary cease-and-desist order granted shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* A temporary cease-and-desist order is effective upon service upon the respondent.

(d) *Service: how made.* Service of a temporary cease-and-desist order shall be made pursuant to § 201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) C*ommission review.* At any time after the respondent has been served with a temporary cease-and-desist order, the respondent may apply to the Commission to have the order set aside, limited or suspended. The application shall set forth with specificity the facts that support the request.

§ 201.513 Temporary cease-and-desist orders: issuance without prior notice and opportunity for hearing.

In addition to the requirements for issuance of a temporary cease-and-desist order set forth in § 201.512, the following requirements shall apply if a temporary cease-and-desist order is to be entered without prior notice and opportunity for hearing:

(a) *Basis for issuance without prior notice and opportunity for hearing.* A temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, from specific facts in the record of the proceeding, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

(b) *Content of the order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

(c) *Hearing before the Commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on the respondent's application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. The Commission shall render a decision on the application within five calendar days of its filing, provided, however, that the Commission, by order, for good cause shown, may extend the time within which a decision may be rendered for a single period of five calendar days, or such longer time as consented to by the applicant. If the Commission does not render its decision within 10 days of the respondent's application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

(d) *Presiding officer, procedure at hearing.* Procedures with respect to the selection of a presiding officer and the conduct of the hearing shall be in accordance with § 201.511.

§ 201.514 Temporary cease-and-desist orders: judicial review; duration.

(a) *Availability of judicial review.* Judicial review of a temporary cease-and-desist order shall be available as provided in Section 8A(d)(2) of the Securities Act, 15 U.S.C. 77h–1(d)(2), Section 21C(d)(2) of the Exchange Act, 15 U.S.C. 78u–3(d)(2), Section 9(f)(4)(B) of the Investment Company Act, 15 U.S.C. 80a–9(f)(4)(B), or Section 203(k)(4)(B) of the Investment Advisers Act, 15 U.S.C. 80b–3(k)(4)(B).

(b) *Duration.* Unless set aside, limited, or suspended, either by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to § 201.531, or by operation of § 201.513, a temporary cease-and-desist order shall remain effective and enforceable until the earlier of:

(1) The completion of the proceedings whether a permanent order shall be entered; or

(2) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to § 201.540(b), if an initial decision whether a permanent order should be entered is appealed.

§ 201.520 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: application.

(a) *Procedure.* A request for suspension of a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending a final determination whether the registration shall be revoked shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated and the temporary suspension sought as to each respondent.

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary suspension of registration sought, and a proposed notice of hearing and order to show cause whether the temporary suspension of registration should be imposed. If a proceeding to determine whether to revoke the registration permanently has not already been commenced, a proposed order instituting proceedings to determine whether a permanent sanction should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of hearings.* All hearings shall be recorded or transcribed pursuant to § 201.302.

§ 201.521 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: notice and opportunity for hearing on application.

(a) *How given.* Notice of an application to suspend a registration pursuant to § 201.520 shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing.

(b) *Hearing: before whom held.* Except as provided in paragraph (d) of this section, hearings on an application to

suspend a registration pursuant to § 201.520 shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made.

§ 201.522 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: issuance and review of order.

(a) *Basis for issuance.* An order suspending a registration, pending final determination as to whether the registration shall be revoked shall be issued only if the Commission finds that the suspension is necessary or appropriate in the public interest or for the protection of investors.

(b) *Content, scope and form of order.* Each order suspending a registration shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* An order suspending a registration is effective upon service upon the respondent.

(d) *Service: how made.* Service of an order suspending a registration shall be made pursuant to § 201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission review.* At any time after the respondent has been served with an order suspending a registration, the respondent may apply to the Commission or the hearing officer to have the order set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request.

§ 201.523 [Reserved].

§ 201.524 Suspension of registrations: duration.

Unless set aside, limited or suspended by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to § 201.531, an order suspending a registration shall remain effective and enforceable until the earlier of:

(a) The completion of the proceedings whether the registration shall be permanently revoked; or

(b) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to § 201.540(b), if an initial decision whether the registration shall be permanently revoked is appealed.

§ 201.530 Initial decision on permanent order: timing for submitting proposed findings and preparation of decision.

Unless otherwise ordered by the Commission or hearing officer, if a temporary cease-and-desist order or suspension of registration order is in effect, the following time limits shall apply to preparation of an initial decision as to whether such order should be made permanent:

(a) Proposed findings and conclusions and briefs in support thereof shall be filed 30 days after the close of the hearing;

(b) The record in the proceedings shall be served by the Secretary upon the hearing officer three days after the date for the filing of the last brief called for by the hearing officer; and

(c) The initial decision shall be filed with the Secretary at the earliest possible time, but in no event more than 30 days after service of the record, unless the hearing officer, by order, shall extend the time for good cause shown for a period not to exceed 30 days.

§ 201.531 Initial decision on permanent order: effect on temporary order.

(a) *Specification of permanent sanction.* If, at the time an initial decision is issued, a temporary sanction is in effect as to any respondent, the initial decision shall specify:

(1) Which terms or conditions of a temporary cease-and-desist order, if any, shall become permanent; and

(2) Whether a temporary suspension of a respondent's registration, if any, shall be made a permanent revocation of registration.

(b) *Modification of temporary order.* If any temporary sanction shall not become permanent under the terms of the initial decision, the hearing officer shall issue a separate order setting aside, limiting or suspending the temporary sanction then in effect in accordance with the terms of the initial decision. The hearing officer shall decline to suspend a term or condition of a temporary cease-and-desist order if it is found that the continued effectiveness of such term or condition is necessary to effectuate any term of the relief ordered in the initial decision, including the payment of disgorgement, interest or penalties. An order modifying temporary sanctions shall be effective 14 days after service. Within one week of service of the order modifying temporary sanctions any party may seek a stay or modification of the order from the Commission pursuant to § 201.401.

§ 201.540 Appeal and Commission review of initial decision making a temporary order permanent.

(a) *Petition for review.* Any person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to § 201.410, provided,

however, that the petition must be filed within 10 days after service of the initial decision.

(b) *Review procedure.* If the Commission determines to grant or order review, it shall issue a briefing schedule order pursuant to § 201.450. Unless otherwise ordered by the Commission, opening briefs shall be filed within 21 days of the order granting or ordering review, and opposition briefs shall be filed within 14 days after opening briefs are filed. Reply briefs shall be filed within seven days after opposition briefs are filed. Oral argument, if granted by the Commission, shall be held within 90 days of the issuance of the briefing schedule order.

§ 201.550 Summary suspensions pursuant to Exchange Act Section 12(k)(1)(A).

(a) *Petition for termination of suspension.* Any person adversely affected by a suspension pursuant to Section 12(k)(1)(A) of the Exchange Act, 15 U.S.C. 78*l*(k)(1)(A), who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated. The petition shall set forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies.

(b) *Commission consideration of a petition.* The Commission, in its discretion, may schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission. If the petitioner fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission, such conduct shall be grounds to deny the petition.

Rules Regarding Disgorgement and Penalty Payments

§ 201.600 Interest on sums disgorged.

(a) *Interest required.* Prejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement. The disgorgement order shall specify each violation that forms the basis for the disgorgement ordered; the date which, for purposes of calculating disgorgement, each such violation was deemed to have occurred; the amount to be disgorged for each such violation; and the total sum to be disgorged. Prejudgment interest shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made. The order shall state the amount of prejudgment interest owed as of the date of the disgorgement order and that interest shall continue to accrue on all funds owed until they are paid.

(b) *Rate of interest.* Interest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly. The Commission or the hearing officer may, by order, specify a lower rate of prejudgment interest as to any funds which the respondent has placed in an escrow or otherwise guaranteed for payment of disgorgement upon a final determination of the respondent's liability. Escrow and other guarantee arrangements must be approved by the Commission or the hearing officer prior to entry of the disgorgement order.

§ 201.601 Prompt payment of disgorgement, interest and penalties.

(a) *Timing of payments.* Unless otherwise provided, funds due pursuant to an order by the Commission requiring the payment of disgorgement, interest or penalties shall be paid no later than 21 days after service of the order, and funds due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to § 201.360.

(b) *Stays.* A stay of any order requiring the payment of disgorgement, interest or penalties may be sought at any time pursuant to § 201.401.

§ 201.610 Submission of proposed plan of disgorgement.

The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of disgorgement funds. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after funds or other assets have been turned over by the respondent pursuant to a Commission disgorgement order and any appeals of the disgorgement order have been waived or completed, or appeal is no longer available.

§ 201.611 Contents of plan of disgorgement; provisions for payment.

(a) *Required plan elements.* Unless otherwise ordered, a plan for the administration of a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of an account where funds will be held and the instruments in which the funds may be invested;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedure for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns and, subject to the approval of the Commission, make distributions from the fund to investors; and

(7) Such other provisions as the Commission or the hearing officer may require.

(b) *Payment to registry of the court or court-appointed receiver.* Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan of disgorgement may provide for payment of disgorgement funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(c) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the funds shall be paid directly to the general fund of the United States Treasury.

§ 201.612 Notice of proposed plan of disgorgement and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement shall be published in the *SEC News Digest,* in the *SEC Docket,* and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed

plan may submit their views, in writing, to the Commission.

§ 201.613 Order approving, modifying or disapproving proposed plan of disgorgement.

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer or the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission or the hearing officer, a proposed plan of disgorgement that is substantially modified prior to adoption may be republished for an additional comment period pursuant to § 201.612. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

§ 201.614 Administration of plan of disgorgement.

(a) *Appointment and removal of administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission or the hearing officer deem appropriate to ensure the proper distribution of funds. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Administrator to post bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(c) *Administrator's fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, he or she may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(d) *Source of funds.* Unless otherwise ordered, fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(f) *Amendment.* A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion.

§ 201.620 Right to challenge order of disgorgement.

Other than in connection with the opportunity to submit comments as provided in § 201.612, no person shall be granted leave to intervene or to participate in a proceeding or otherwise to appear to challenge an order of disgorgement; or an order approving, approving with modifications, or disapproving a plan of disgorgement; or any determination relating to a plan of disgorgement based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

§ 201.630 Inability to pay disgorgement, interest or penalties.

(a) *Generally.* In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. The Commission may, in its discretion, or the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.

(b) *Financial disclosure statement.* Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed. By order, the Commission or the hearing officer may prescribe the use of the Disclosure of Assets and Financial Information Form (*see* Form D–A at § 209.1 of this chapter) or any other form, may specify other time periods for which disclosure is required, and may require such other information as deemed necessary to evaluate a claim of inability to pay.

(c) *Confidentiality.* Any respondent submitting financial information pursuant to this section or § 201.410(c) may make a motion, pursuant to § 201.322, for the issuance of a protective order against disclosure of the information submitted to the public or to any parties other than the Division of Enforcement. Prior to a ruling on the motion, no party receiving information as to which a motion for a protective order has been made may transfer or convey the information to any other person without the prior permission of the Commission or the hearing officer.

(d) *Service required.* Notwithstanding any provision of § 201.322, a copy of the financial disclosure statement shall be served on the Division of Enforcement.

(e) *Failure to file required financial information: sanction.* Any respondent who, after making a claim of inability to pay either disgorgement, interest or a penalty, fails to file a financial disclosure statement when such a filing has been ordered or is required by rule may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay. No sanction pursuant to §§ 201.155 or 201.180 shall be imposed for a failure to file such a statement.

Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings

§ 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, to the extent possible:

(i) An administrative law judge's initial decision should be filed with the Secretary within 10 months of issuance of the order instituting proceedings.

(ii) 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.

(iii) 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.

(iv) 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 a remand of a prior Commission decision by a court of appeals should be issued within 11 months from the date the petition for review, application for review, or mandate of the court is filed.

(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, a proceeding at either the hearing stage or on review by the Commission may require additional time because it is unusually complex or because the record is exceptionally long. In addition, fairness is enhanced if the Commission's deliberative process is not constrained by an inflexible schedule. In some proceedings, deliberation may be delayed by the need to consider more urgent matters, to permit the preparation of dissenting opinions, or for other good cause. The guidelines will be used by the Commission as one of several criteria in monitoring and evaluating its adjudicatory program. The guidelines will be examined periodically, and, if necessary, readjusted in light of changes in the pending caseload and the available level of staff resources.

(b) *Reports to the Commission on pending cases.* The administrative law judges, the Secretary and the General Counsel have each been delegated authority to issue certain orders or adjudicate certain proceedings. *See* 17 CFR 200.30–1, *et seq.* Proceedings are also assigned to the General Counsel for the preparation of a proposed order or opinion which will then be recommended to the Commission for consideration. In order to improve accountability by and to the Commission for management of the docket, the Commission has directed that confidential status reports with respect to all filed adjudicatory proceedings shall be made periodically to the Commission. These reports will be made through the Secretary, with a minimum frequency established by the Commission. In connection with these periodic reports, if a proceeding assigned to an administrative law judge or pending before the Commission has not been concluded within 30 days of the guidelines established in paragraph (a) of this section, the Chief Administrative Law Judge or the General Counsel, respectively, 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 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 *SEC Docket* 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 and the number of cases decided within the guidelines for the timely completion of adjudicatory proceedings.

Table I to Subpart D—Adversary Adjudications Conducted by the Commission under 5 U.S.C. 554

Securities Exchange Act of 1934

Section 11A(b)(6), 15 U.S.C. 78k–1(b)(6) (suspension or revocation of registration, or censure of a securities information processor).

Section 11A(c)(3)(A), 15 U.S.C. 78k–1(c)(3)(A) (prohibition of transactions by brokers and dealers in registered securities other than on a national securities exchange).

Section 12(j), 15 U.S.C. 78*l*(j) (suspensions of effective date or revocation of registration of a security).

Section 15(b)(4), 15 U.S.C. 78*o*(b)(4) (suspension or revocation of registration, or censure of a broker or dealer).

Section 15(b)(6)(A), 15 U.S.C. 78*o*(b)(6)(A) (censure, suspension or bar an associate of a broker or a dealer).

Section 15B(c)(2), 15 U.S.C. 78*o*–4(c)(2) (suspension or revocation of registration, or censure of a municipal securities dealer).

Section 15B(c)(4), 15 U.S.C. 78*o*–4(c)(4) (censure, suspension or bar of an associate of a municipal securities broker or dealer).

Section 15B(c)(8), 15 U.S.C. 78*o*–4(c)(8) (removal or censure of member of the Municipal Securities Rulemaking Board).

Section 15C(c)(1)(A), 15 U.S.C. 78*o*–5(c)(1)(A) (suspension or revocation of registration, or censure of a government securities broker or dealer).

Section 15C(c)(1)(C), 15 U.S.C. 78*o*–5(c)(1)(C) (censure, suspension or bar of an associate of a government securities broker or dealer).

Section 17A(c)(3), 15 U.S.C. 78q–1(c)(3) (deny registration, censure, place limitation on, suspend, or revoke registration of a transfer agent).

Section 17A(c)(4)(C), 15 U.S.C. 78q–1(c)(4)(C) (censure, place limitations on, suspend or bar certain persons associated or seeking to associate with a transfer agent).

Section 19(h)(1), 15 U.S.C. 78s(h)(1) (suspension or revocation of registration, or censure of a self-regulatory organization).

Section 19(h)(2), 15 U.S.C. 78s(h)(2) (suspension or expulsion of a member of a self-regulatory organization).

Section 19(h)(3), 15 U.S.C. 78s(h)(3) (suspension or bar of a person from being associated with a national securities exchange or registered securities association).

Section 19(h)(4), 15 U.S.C. 78s(h)(4) (removal or censure of a director or officer of a self-regulatory organization).

Section 21B(a), 15 U.S.C. 78u–2(a) (imposition of civil penalties against any person for violation of the federal securities laws).

Ivestment Company Act of 1940

Section 9(d)(1), 15 U.S.C. 80a–9(d)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

Investment Advisers Act of 1940

Section 203(e), 15 U.S.C. 80b–3(e) (suspension or revocation of registration, or censure of an investment adviser).

Section 203(f), 15 U.S.C. 80b–3(f) (censure, suspension, or bar of an associate of an investment adviser).

Section 203(i)(1), 15 U.S.C. 80b–3(i)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

TABLE II TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1995 WITH FORMER RULES OF PRACTICE, RELATED RULES, AND STATUTORY PROVISIONS

New rules (17 CFR 201)	Former rules/Act §
100	1.
101	none.
102	2.
102(d)(4)	none.
103(a)–(c)	none.
104	5.
110	11(b).
111	11(d)–(e), 16(g).
112	11(c).
120	5 U.S.C. 554(d).
121	5 U.S.C. 554(d).
140(a)	22(h).
140(b)–(c)	22(k).
141(a)	6(a), (b), (f).
141(b)	23(d).
150(a)	23(a).
150(b)	2(d), (h).
150(c)	23(b).
150(d)	23(c).
151	12(b), 22(a).
152(a)–(e)	22(a)–(h).
152(f)	20(d).
153	7(f).
154	11(e).
155	12(d).
160	22(j), 23(b).

TABLE II TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1995 WITH FORMER RULES OF PRACTICE, RELATED RULES, AND STATUTORY PROVISIONS—Continued

New rules (17 CFR 201)	Former rules/Act §
161	13.
180(a)	2(f).
180(b)–(c)	none.
190	25.
191	27, 28.
192	4.
193	29.
200(a)(1)	6(a), (b).
200(a)(2)	6(f).
200(b), (c)	6(a), (b).
200(d)	6(d).
200(e)	6(c).
201	10.
202	8(b), (c).
210	9.
220	7(a)–(e).
221(a)–(c), (e)	8(d)
221(d)	none.
221(f)	6(e).
222(a)	8(d).
222(b)	none.
230	none.
231(a)	11–1.
231(b)	none.
232(a)–(d)	14(b).
232(e)–(f)	14(b)(2), (c).
233	15(a)–(e).
234	15(g).
235	15(f).
240	8(a).
250	11(e).
300	11(a)–(b).
301	11(b).
302(a)	11(f).
302(b)	25(d).
302(c)	20(c).
310	6(e).
320	14(a).
321(a)	11(e).
321(b)	none.
322	none.
323	14(d).
324	none.
325	14(a).
326	14(a).
340	16(d)–(e).
350	20(a)–(b).
351	20(a)(4).
360(a)	16(b).
360(b)	16(a).
360(c)	16(f).
360(d), (e)	17(f).
400	12(a).
401	12(c).
401(d)(2)	15 U.S.C. 78s(d)(2).
410(a)	17(a).
410(b)	17(b).
410(c)	none.
410(d)	none.
410(e)	17(h).
411(a)	17(g)(2).
411(b)	17(d).
411(c)	17(c).
411(d)	17(g)(1).

TABLE II TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1995 WITH FORMER RULES OF PRACTICE, RELATED RULES, AND STATUTORY PROVISIONS—Continued

New rules (17 CFR 201)	Former rules/Act §
411(e)	17(d).
411(f)	17(g)(3).
420(a), (b), (d)	17 CFR 240.19d–3(b).
420(c)	15 U.S.C. 78s(d)(2).
420(d)	58.
421(a)	15 U.S.C. 78s(e)–(f).
421(b)–(c)	none.
430	26(a), (c).
431(a)	none.
431(b)	26(b).
431(c)	26(d).
431(d)–(f)	26(e).
450(a)	17(e).
450(b)	18, 17 CFR 240.19d–3(c)–(g).
450(c)	22(d).
451	21.
452	21(d).
460	20, 21(c).
470	21(e).
490	23(e).
500	none.
510	none.
511	none.
512	none.
513	none.
514	none.
520	none.
521	none.
522	none.
524	none.
530	19.
531	none.
540	none.
550	17 CFR 202.8.
600	none.
601	none.
610	none.
611	none.
612	none.
613	none.
614	none.
620	none.
630	none.
900	none.

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995

Former rules	New rules (17 CFR 201)
1	100.
2	102.
2(d), (h)	150(b).
2(f)	180(a).
3 [reserved]	n/a.

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995—Continued

Former rules	New rules (17 CFR 201)
4	192.
5	104.
6(a)	200(b).
6(a),(b),(f)	141(a).
6(a), (b)	200(a)(1).
6(b)	200(c).
6(c), (d)	200(d), (e).
6(e)	221(f), 310.
6(f)	200(a)(2).
7(a)–(e)	220.
7(f)	153.
8(a)	240.
8(b)–(c)	202.
8(d)	221, 222(a).
9	210.
10	201.
11(a)–(b)	300.
11(b)	110, 301.
11(c)	112.
11(d), (e)	111.
11(e)	154, 250, 321(a).
11(f)	302(a).
11–1	231(a).
12(a)	400.
12(b)	151(c).
12(c)	401.
12(d)	155.
13	161.
14(a)	320, 325, 326.
14(b)	232(a)–(d).
14(b)(2), (c)	232(e)–(f).
14(d)	323.
15(a)–(e)	233.
15(f)	235.
15(g)	234.
16(a)	360(b).
16(b)	360(a).
16(c) [reserved]	n/a.
16(d)–(e)	340.
16(f)	351, 360(c).
16(g)	111.
17(a)	410(a).
17(b)	410(b).
17(c)	411(c).
17(d)	411(b), (e).
17(e)	450(a), (d).
17(f)	360(d), (e).
17(g)	411(d), (a), (f).
17(h)	410(e).
18	450(b).
19	530.
20(a)–(b)	350, 351, 460.
20(c)	302(c).
20(d)	152(f).
21	451.
21(c)	460.
21(d)	452.
21(e)	470.
22(a)	151(a)–(c), 152.
22(b) [reserved]	n/a.
22(c)	152(d).
22(d)	152(e), 450(c).
22(e)–(g)	152(a)–(c).
22(h)	140(a).
22(i)	none.

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995—Continued

Former rules	New rules (17 CFR 201)
22(j), (k)	160, 140(c).
22(k)	140(b).
23(a)	150(a).
23(b)	150(c), 160.
23(c)	150(d).
23(d)	141(b).
23(e)	490.
24	17 CFR 228.10(f), 17 CFR 229.10(d).
25	190.
25(d)	302(b).
26(a), (c)	430.
26(b)	431(b).
26(d)	431(c).
26(e)	431(d)–(f).
27	191.
28	191.
29	193.
17 CFR 202.8	550.
17 CFR 240.19d–2	401(a)–(b), (d).
17 CFR 240.19d–3(a)	420,421.
17 CFR 240.19d–3(b)	420(a), (b), (d).
17 CFR 240.19d–3(c)–(d).	450, 180(c).
17 CFR 240.19d–3(e)	452.
17 CFR 240.19d–3(f)	451.
17 CFR 240.19d–3(g)	100.

PART 202—INFORMAL AND OTHER PROCEDURES

40. The authority citation for Part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 78d–1, 78u, 78w, 78*ll*(d), 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, and 80b–11, unless otherwise noted.

* * * * *

§ 202.8 [Removed and reserved]

41. Section 202.8 is removed and reserved:

PART 203—RULES RELATING TO INVESTIGATIONS

42. The authority citation for Part 203 continues to read as follows:

Authority: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

§ 203.3 [Amended]

43. In § 203.3, remove the words ''§ 201.2(e) of this chapter (Rule 2(e)'', and, in their place, add the words ''§ 201.102(e) of this chapter (Rule 102(e)''.

§ 203.7 [Amended]

44. In § 203.7(b), remove the words ''§ 201.2(b) of this chapter (Rule 2(b)'', and, in their place, add the words ''§ 201.101(a) of this chapter (Rule 101(a)''.

§ 203.8 [Amended]

45. In § 203.8, remove the words ''§ 201.14(b) of this chapter (Rule 14(b) of the Commission's rules of practice)'', and, in their place, add the words ''Rule 232(c) of the Commission's Rules of Practice, § 201.232(c) of this chapter''.

46. Part 209 is added to read as follows:

PART 209—FORMS PRESCRIBED UNDER THE COMMISSION'S RULES OF PRACTICE

Sec.

209.0–1 Availability of forms.

209.1 Form D–A: Disclosure of assets and financial information.

Authority: 15 U.S.C. 77h–1, 77u, 78u–2, 78u–3, 78v, 78w, 80a–9, 80a–37, 80a–38, 80a39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, and 80b–12, unless otherwise noted.

§ 209.0–1 Availability of forms.

(a) This part identifies and describes the forms for use under the Securities and Exchange Commission's Rules of Practice, part 201 of this chapter.

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Any person may inspect the forms at this address and at the Commission's regional and district offices. (See § 200.11 of this chapter for the addresses of the SEC regional and district offices.)

§ 209.1 Form D–A: Disclosure of assets and financial information.

(a) Rules 410 and 630 of the Rules of Practice (17 CFR 201.410 and 201.630) provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement, interest or penalties may be required to disclose certain financial information. Unless otherwise ordered, this form may be used by individuals required to supply such information.

(b) The respondent filing Form D–A is required promptly to notify the Commission of any material change in the answer to any question on this form.

(c) Form D–A may not be withheld from the interested division. A respondent making financial information disclosures on this form after the institution of proceedings may make a motion, pursuant to Rule 322 of the Commission's Rules of Practice (17 CFR 201.322), for the issuance of a protective order to limit disclosure to the public or parties other than the interested division of the information submitted on Form D–A. A request for a protective order allows the requester an opportunity to justify the need for

confidentiality. The making of a motion for a protective order, however, does not guarantee that disclosure will be limited.

(d) No party receiving information for which a motion for a protective order has been made may transfer or convey the information to any other person prior to a ruling on the motion without the prior permission of the Commission or a hearing officer.

(e) A person making financial information disclosures on Form D–A prior to the institution of proceedings, in connection with an offer of settlement or otherwise, may request confidential treatment of the information pursuant to the Freedom of Information Act. *See* the Commission's Freedom of Information Act (''FOIA'') regulations, 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to substantiate the need for confidentiality. No determination as to the validity of any request for confidential treatment will be made until a request for disclosure of the information under FOIA is received.

Editorial Note: The text of Form D–A appears in the appendix to this document and will not appear in the Code of Federal Regulations.

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

47. The authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78*o*, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

48. By amending § 228.10 by adding paragraph (f) to read as follows:

§ 228.10 (Item 10) General.

* * * * *

(f) *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

49. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78*o*, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

50. By amending § 229.10 by adding paragraph (d) to read as follows:

§ 229.10 General.

* * * * *

(d) *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

51. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78*o*, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

§ 230.406 [Amended]

52. In § 230.406 paragraphs (e), (g), (h)(1) and (h)(2), remove the words ''§ 201.26'', and, in their place, add the words ''§ 201.431''.

§ 230.411 [Amended]

53. In §§ 230.411(b)(4), remove the words ''Rule 24 of the Commission's Rules of Practice (§ 201.24 of this chapter)'' and in paragraph (c) remove the words ''Rule 24 of the Commission's Rules of Practice'' and add, in their place, the words ''§ 228.10(f) and § 229.10(d) of this chapter''.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

54. The authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78*o*(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30 and 80a–37.

§ 232.101 [Amended]

55. In § 232.101(c)(13), remove the words ''Rules of Practice (§§ 201.1–201.29 of this chapter)'', and add, in their place, the words ''Subpart D of Part 201 of this chapter''.

§ 232.102 [Amended]

56. In § 232.102(a), remove the words ''Rule 24 of the Commission's Rules of Practice (§ 201.24 of this chapter)'', and add, in their place, the words ''§ 228.10(f) and § 229.10(d) of this chapter''.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

57. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78*o*, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

§ 240.12b–23 [Amended]

58. In § 240.12b–23(b), remove the words ''Rule 24 of the Commission's Rules of Practice (§ 201.24 of this chapter)'' and add, in their place, the words ''§ 228.10(f) and § 229.10(d) of this chapter''.

§ 240.12b–32 [Amended]

59. In § 240.12b–32(a), remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

§ 240.14a–101 [Amended]

60. In § 240.14a–101 NOTE D 1, remove the words ''Rule 24 of the Commission's Rules of Practice (§ 201.24 of this chapter)'' and add, in their place, the words ''§ 228.10(f) and § 229.10(d) of this chapter''.

61. Sections 240.19d–2 and 19d–3 are revised to read as follows:

§ 240.19d–2 Applications for stays of disciplinary sanctions or summary suspensions by a self-regulatory organization.

If any self-regulatory organization imposes any final disciplinary sanction 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), pursuant to Section 6(b)(6), 15A(b)(7) or 17A(b)(3)(G) of the Act (15 U.S.C. 78f(b)(6), 78*o*–3(b)(7) or 78q–1(b)(3)(G)), or summarily suspends or limits or prohibits access pursuant to Section 6(d)(3), 15A(h)(3) or 17A(b)(5)(C) of the Act (15 U.S.C. 78f(d)(3), 78*o*–3(h)(3) or 78q–1(b)(5)(C)), any person aggrieved thereby for which the Commission is the appropriate regulatory agency may file with the Commission a written motion for a stay of imposition of such action pursuant to Rule 401 of the Commission's Rules of Practice, § 201.401 of this chapter.

§ 240.19d–3 Applications for review of final disciplinary sanctions, denials of membership, participation or association, or prohibitions or limitations of access to services imposed by self-regulatory organizations.

Applications to the Commission for review of any final disciplinary sanction, denial or conditioning of membership, participation, bar from association, or prohibition or limitation with respect to access to services offered by a self-regulatory organization or a member thereof by any such organization shall be made pursuant to Rule 420 of the Commission's Rules of Practice, § 201.420 of this chapter.

§ 240.24b–2 [Amended]

62. In § 240.24b–2 paragraphs (d)(2), (e)(1), and (e)(2), remove the words ''17 CFR 201.26'', and, in their place, add the words ''§ 201.431 of this chapter''.

PART 250—GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

63. The authority citation for part 250 continues to read as follows:

Authority: 15 U.S.C. 79c, 79f(b), 79i(c)(3), 79t, unless otherwise noted.

§ 250.22 [Amended]

64. In § 250.22(b)(1), remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

PART 260—GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

65. The authority citation for part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78*ll*(d); 80b–3, 80b–4, and 80b–11.

§ 260.7a–29 [Amended]

66. In § 260.7a–29(a), remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

67. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39 unless otherwise noted.

* * * * *

§ 270.0–4 [Amended]

68. In § 270.0–4(a), remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

§ 270.8b–32 [Amended]

69. In § 270.8b–32(a), remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

70. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–3, 80b–4, 80b–6A, 80b–11, unless otherwise noted.

* * * * *

§ 275.0–6 [Amended]

71. In § 275.0–6 paragraph (a) and the NOTE at the end of the section, remove the words ''§ 201.24 of this chapter'' and add, in their place, ''§ 228.10(f) and § 229.10(d) of this chapter''.

By the Commission.

Dated: June 9, 1995.

Margaret H. McFarland,

Deputy Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Form D–A

BILLING CODE 8010–01–P

Form D-A

Model Disclosure of Assets and Financial Information Form

Instructions: The Commission's Rules of Practice provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement, interest or penalties may be required to disclose certain financial information. See Rules 410 and 630. Unless otherwise ordered, this form may be used by individuals required to supply such information. Partnerships, corporations or other entities should submit a financial statement, including an income statement, balance sheet and federal tax returns for each year from the year of the earliest violation alleged against the entity in the order instituting proceedings to the present.

The respondent filing this form is required promptly to notify the Commission of any material change in the answer to any question on this form.

A respondent making financial information disclosures on this form or in another manner pursuant to the requirements of Rule 410 or Rule 630 may submit the form with a motion for a protective order pursuant to Rule 322 of the Commission's Rules of Practice. Any other person submitting this form may request that the Commission afford the information submitted confidential treatment under the Freedom of Information Act under the Commission's Freedom of Information Act ("FOIA") regulations, see 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to justify the need for confidentiality. A request for confidential treatment does not, however, guarantee confidentiality.

Notwithstanding any request for a protective order or for confidential treatment, copies of the financial disclosure statement shall be served on the interested division and will be included in the record of the proceeding. See Rule 630(d). If confidential treatment is sought, notice that a financial disclosure statement and request for confidential treatment have been filed shall be served on all other parties.

No party receiving information for which confidential treatment has been requested may transfer or convey the information to any person or entity not a party to the proceeding without the prior permission of the Commission or a hearing officer.

United States of America
Before the
Securities and Exchange Commission

In the Matter of _____	)	Administrative Proceeding File No. 3-_____

Part I: Summary Financial Disclosure Statement

Full Name: _____
Last First Middle

A. Net Worth

1. Assets: (from Part II.B.) _____
2. Liabilities: (from Part II.C.) _____
3. Net Worth: (from Part II.D.) _____

B. Income and Payments Received

1. Gross income reported on most recent federal tax filing: _____
2. Last 12 calendar months (from Part II.E.): _____*

* If this amount, divided by 12, does not equal your current monthly income, please explain the discrepancy on an attached sheet.

C. Expenses

1. Last 12 calendar months (from Part II.F.): _____*

* If this amount, divided by 12, does not equal your current monthly expenses, please explain the discrepancy on an attached sheet.

United States of America
Before the
Securities and Exchange Commission

In the Matter of _____	)	Administrative Proceeding File No. 3-_____

Part II: Detailed Financial Disclosure Information

Full Name: _____
Last First Middle

If this form is filled out by a respondent requesting a protective order pursuant to Rule of Practice 322 (17 CFR 201.322), please check the box below.

☐ PROTECTIVE ORDER REQUESTED. Disclosure of this document is prohibited unless specifically authorized below. This document should be placed in a nonpublic file.

For Use Only by the Secretary of the Commission:

☐ By order of _____ (date), the Commission authorized this form to be placed in a public file.

_____
(Signature of Secretary)

Last Name: _____

A. Scope of Information Requested:

Requests for information about you include a request for the same information about your spouse (unless you are legally separated and living apart), minor children and any other dependents.

B. Assets:

List all assets owned by you, directly or indirectly, and all assets that are subject to your enjoyment or control, regardless of whether legal title or ownership is held in your name.

1. Cash _____
2. Listed Securities _____
3. Surrender Value of Insurance _____
4. Loans, Notes, Accounts Receivable Due to You _____
5. Real Estate _____
6. Furniture _____
7. Jewelry, Art, Rugs, Silver Collectibles, Other Valuables _____
8. Automobiles _____
9. Unlisted Securities _____
10. Partnership Interests (non-securities) _____
11. Net Value of Ownership Interest in Business _____
12. IRA, Keogh, 401(k), Annuity or Pension Accounts _____
13. Other (Itemize):

    _____ _____

    _____ _____

14. **Total Assets** _____

C. Liabilities:

List all your liabilities including, but not limited to, the items listed below.

1. Mortgages _____
2. Auto Loans _____
3. Credit Card Debt _____
4. Margin Loans _____
5. Insurance Policy Loans _____
6. Installment Loans _____
7. Other Loans, Notes or Accounts Payable _____
8. Accrued Real Estate Taxes _____
9. Judgments/Settlements Owed _____
10. Other (Itemize):

    _____ _____

    _____ _____

11. **Total Liabilities** _____

Last Name: _____

D. Net Worth
(Assets Less Liabilities) _____

E. Income/Payments Received

List all income or other payments received from any source in the last 12 months by you, or by any other person or entity if you have any right, power or authority to control or enjoy the use of the money or property received by such other person or entity. Identify the source, the recipient and the amount of payment, including but not limited to the items listed below.

Description/Purpose	Source	Amount
1. Salary/Wages		
2. Commissions/Advances		
3. Bonuses		
4. Dividends		
5. Interest		
6. Distributions of Capital		
7. Annuity, Pension Payments		
8. Rents/Royalties (net)		
9. Sales of Assets (net)		
10. Repayment of Loans		
11. Alimony/Child Support		
12. Gifts over $1,000		
13. Payments by Others on Your Behalf (see section I below)		
14. Other (itemize):		
15. Total Income/Receipts		

16. If you anticipate unusual income in the coming 12 months, please explain.

Last Name: _____

F. Expenses/Disbursements

List all your expenditures for the past 12 months, including but not limited to the items listed below. Identify the purpose and the amount of each expenditure.

Description	Amount
1. Mortgage/Rent	_____
2. Food	_____
3. Utilities	_____
4. Payments on Loans	_____
5. Real Estate Taxes	_____
6. Insurance Premiums	_____
7. Medical Expenses	_____
8. Automobile Expenses	_____
9. Alimony/Child Support	_____
10. Income Taxes (federal, state and local)	_____
11. Other Expenses (itemize):	
_____	_____
_____	_____
_____	_____
_____	_____
12. **Total Expenses/Disbursements**	_____

13. If you anticipate unusual expenses in the coming 12 months, please describe them.

G. Asset Schedules

1. For each asset or class of assets included in Section II.B(5-13) with a fair market value greater than $2,000, describe the asset(s), state the form of ownership (e.g., individual, joint, beneficial interest), provide a fair market value, and explain how fair market value was determined (e.g., appraisal, comparison, estimate, etc.).

2. List all securities or commodities brokerage accounts and accounts at banks or other financial institutions in your name, under your control, in which you have or had a beneficial interest, or to

Last Name: _____

which you are or were a signatory since the date of the first violation alleged against you. For each account, specify the location of the account, account number, balance and balance date. Please identify all accounts, regardless of their location.

3. List all 401(k) plans, pension plans, Keogh plans, individual retirement accounts, profit sharing plans, thrift plans, life insurance policies or annuities in which you have an interest, vested or otherwise. For each account, specify the account name, the location of the account, account number, balance and balance date. For each account state whether you are permitted to borrow against or make withdrawals from the account.

4. Identify the location and account number of all your safe deposit boxes. Include any boxes in which you have property or papers, whether or not you are the account holder.

5. Identify all patents, trademarks, service marks, royalty agreements, licenses, or other general intangibles in which you have an interest.

H. Liability Schedules

1. For each liability greater than $2,000 listed in Section II.C., indicate the creditor, the account number, if any; the date incurred; the original amount of the liability; the length of the obligation; the interest rate; the collateral or security, if any; the outstanding balance; and the name(s) and address(es) of any other obligee(s). State whether you are related to or have a personal or social relationship with the creditor, its management or owners.

2. List all credit cards and lines of credit in your name or to which you are a signatory, including the name of the credit issuer, account number, credit limit, and amount of indebtedness.

3. List all contingent liabilities. Include any notes on which you are a co-maker, guarantor or endorser and all pending lawsuits in which you are named as a defendant.

I. Schedules of Income, Receipts and Disbursements

1. Disbursements by Others on Your Behalf. List any payments or disbursements having a value of $1,000 or greater made by any other person or entity to a third party on your behalf since the date of the first violation alleged against you. Include the amount of the disbursement and the name and address of the person or entity who made the disbursement. If no such disbursements have been made, please so state.

2. Fringe Benefits. List any fringe benefits, such as the lease of an automobile, currently provided by your employer.

3. Asset Transfers by You. List any assets or property with a cost or fair market value of $2,000 or more that you transferred or otherwise disposed of since the date of the first violation alleged against you. State the value of the asset, the consideration received, and your relationship with the transferee. If no such transfers have been made, please so state.

4. Additional Deposits by You. Identify any financial institution accounts (other than those identified in section G.2. above) in which you have deposited more than $2,000 since the date of the first violation alleged against you. If no such deposits have been made, please so state.

Last Name: _____

5. Trusts and Inheritances Already Vested. Describe any vested interest in a trust or will pursuant to which you are receiving or will receive a devise, bequest, other inheritance or distribution.

6. Current and Prior Business Relations. List any sole proprietorships, joint ventures, corporations or other business enterprises in which you are now or have been a principal, holder of 10 percent or more of the issued stock, officer, director, manager or chief operating officer at any time since the date of the first violation alleged against you.

J. Personal Information

Current residence: _____
street unit

_____
city state zip code

Current phone number(s): home: (___) ___-____
business: (___) ___-____
car: (___) ___-____
other: (___) ___-____

Social security number: ___-___-____

List any other names (including a maiden name) you have used.

If currently married, please state your spouse's name, age and social security number, whether or not he or she resides with you, and the date of your marriage.

If you have previously been married, please state the name of your former spouse(s) and the date of your marriage(s). If the date of a marriage was after the date of the first violation alleged against you, include your former spouse's social security number and last known address.

Identify all dependents. For each, please state his or her age, social security number, and whether or not he or she resides with you.

Identify any other members of your household. For each, please state his or her age and relationship to you.

K. Attachments:

1. Attach any federal tax returns filed by you (including personal, trust, or business returns) for the year of the first violation alleged against you and all subsequent years.

2. Attach any federal gift tax returns filed by you for the year of the first violation alleged against you and all subsequent years.

3. Attach any financial statement that you prepared for any purpose (e.g., a financial statement provided to a bank to secure a loan) in the year of the first violation alleged against you and all subsequent years.

Last Name: _____

4. If you are a trustee, executor or administrator, attach a copy of the instrument appointing you as such.

5. List of Attachments Submitted With This Form:

Please list all financial statements, tax returns and other materials submitted with this form. Do not submit originals. Make sure all copies are legible. Illegible copies do not satisfy the requirements for filing your financial disclosure information.

L. Declarations and Signature

I, _____, hereby declare under penalty of perjury that I have examined the information given in this statement and attached hereto and, to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I have no assets, owned either directly or indirectly, or income of any nature other than as shown in, or attached to, this statement. I understand that any material misstatements or omissions made by me herein, or in any attachments hereto, may constitute criminal violations, punishable under 18 U.S.C. 1001 or other statutes.

The Securities and Exchange Commission and any of its staff are authorized to obtain any such information from credit bureaus, financial institutions or any other source as may be needed to verify the statements made on this form.

The statements herein and attached hereto represent my financial condition as of _____ (date).

_____ (signature) _____ (date)

Sworn before me this ____ day of _____, 199__.

[Seal]

_____
Notary Public

My commission expires on _____(date)

[FR Doc. 95–14750 Filed 6–22–95; 8:45 am]
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