

unable to attend because of age, sickness, infirmity, imprisonment or other disability, (4) if the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand, or (5) if, in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In granting a motion to introduce a prior sworn statement, a hearing officer has the discretion, under Rule 5426T, to require that all relevant portions of the statement be included or to exclude portions of the statement not relevant to the proceeding.

Rule 5440T—Record of Hearings

Rule 5440T describes procedures related to the creation, correction, and availability of hearing transcripts.

Rule 5441T—Evidence: Admissibility

Rule 5441T provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. The standard in Rule 5441T is based on the Administrative Procedures Act.² In addition, the same standard is used in the SEC's Rules of Practice.³ By using this phrase in Rule 5441T, the Board intends for evidentiary issues in PCAOB hearings to be addressed in a generally similar manner to SEC administrative hearings, and the administrative hearings of most other administrative agencies. Rule 5441T is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility.⁴ In particular, the three bases in the rule—irrelevance, immateriality, and undue repetition—are not the only permissible bases on which a hearing officer may exclude evidence under administrative practice. Nor does the standard in Rule 5441T preclude a hearing officer from referring to principles from the Federal Rules of Evidence or other authoritative sources in exercising his or her discretion to resolve evidentiary issues.⁵

Rule 5442T—Evidence: Objections and Offers of Proof

Rule 5442T(a) provides that any objections must be made on the record and must be in short form, stating the grounds relied upon. Under Rule 5442T(a) any exception to a hearing officer's ruling on an objection need not be noted at the time of the ruling but will be deemed waived on appeal to the Board unless the exception was raised (1) on interlocutory review under Rule 5461T, (2) in a proposed finding or conclusion filed under Rule 5445T, or (3) in a petition for Board review of an initial decision filed under Rule 5460T. Rule 5442T(b) provides that when evidence is excluded from the record, the party offering the evidence may make an offer of proof which shall be included in the record. The excluded material itself would be retained under Rule 5202T(b).

Rule 5443T—Evidence: Presentation Under Oath or Affirmation

Rule 5443T provides that witnesses at a hearing shall testify under oath or affirmation.

Rule 5444T—Evidence: Rebuttal and Cross-Examination

Rule 5444T provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall determine the scope and form of evidence, rebuttal evidence, and cross-examination in any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

Rule 5445T—Post-Hearing Briefs and Other Submissions

Rule 5445T provides procedures relating to the submission of post-hearing briefs and other submissions.

Rule 5460T—Board Review of Determinations of Hearing Officers

Rule 5460T concerns Board review of initial decisions. Under Rule 5460T, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 30 days of an initial decision in proceedings on disapproval of a registration application. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

Also under Rule 5460T(a), if one party submits a timely petition for review, any other party then has an additional ten days to submit its own petition for review, even if its petition raises different issues than those raised by the first party to submit a petition. The purpose of this rule is to avoid the unnecessary expenditure of Board resources in cases where no party would appeal if it knew that the other party would not appeal, but in which one or more parties nevertheless appeal because of a concern that failing to appeal will deprive it of the opportunity to raise its issues in any appeal lodged by another party. Under Rule 5460T(a), no party need guess about the other party's intentions, and no party sacrifices anything by waiting to see whether another party files a timely petition for review.

Rule 5460T(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204T(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460T(c)–(e) set out procedural matters related to Board review.

Rule 5461T—Interlocutory Review

Rule 5461T concerns Board interlocutory review of hearing officer rulings. Under Rule 5461T(a), the Board will not grant interlocutory review absent extraordinary circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461T(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461T(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. 1292(b).

² 5 U.S.C. 556(c)(3) and (d).

³ See SEC Rule of Practice 320, 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.").

⁴ See, e.g., Commission Opinion: Wheat, First Securities, Inc.; Rel. No. 34-48378, (August 20, 2003) (holding that hearsay is admissible in an SEC administrative hearing, but noting that the "record shows the probative and reliable nature of this evidence").

⁵ See *id.* (explaining that same result would have been reached had the administrative law judge applied the Federal Rules of Evidence).