

or any determination relating to a plan based solely upon the person's eligibility or potential eligibility to participate in a fund or based on a private right of action. Under the proposed Rule, as is the case under the existing disgorgement Rule, such person's participation would be limited to submitting comments in accordance with proposed Rule 1103.

C. Other Proposed Amendments

In 1995, the Commission substantially amended its Rules of Practice. After several years of experience with these Rules, the Commission believes that certain changes to the Rules would make practice under those Rules easier and more efficient. The Commission invites comments with respect to these proposed modifications.

1. The existing Rules do not make explicit the Commission's authority to order a variation from the rules governing proceedings before it. The Commission is proposing to include in Rule 100 a new paragraph (c) that would specify that the Commission may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary, upon its determination that to do so would serve the interests of justice and not result in prejudice to any party to the proceeding.

2. Under section 11A of the Exchange Act and the rules thereunder, the Commission is authorized to adjudicate certain disputes involving registered securities information processors, national market system plans, or transaction reporting plans.¹⁷ In addition to the inclusion of review of Board disciplinary sanctions discussed above, the Commission proposes to amend Rule 101(a)(9) to expand the definition of "proceedings" to make clear that the Rules of Practice are applicable to such adjudications.¹⁸

¹⁷ See Exchange Act section 11A(b)(5) (requiring Commission to review prohibitions or limitations of access to services offered by registered securities information processors); Exchange Act Rule 11Aa3-2(e) (giving Commission discretion to entertain appeals from actions under national market system plans); Exchange Act Rule 11Aa3-1(f) (giving Commission discretion to entertain appeals in connection with implementation or operation of transaction reporting plans).

¹⁸ Because the current Rules of Practice do not specify a particular procedure for proceedings under Exchange Act section 11A, the Commission has been required to specify by order the procedural rules that are to be employed in section 11A review proceedings. See, e.g., *The Cincinnati Stock Exchange*, Exchange Act Rel. No. 43316 (Sept. 21, 2000), 73 SEC Docket 1006 (Order Accepting Jurisdiction, Establishing Procedures, and Ordering Briefs).

Proposed Rule 101(a)(12) would also define the term "Board" to refer to the Public Company Accounting Oversight Board.

3. The Commission currently requires counsel to file a motion to withdraw as counsel. Many agencies instead permit counsel to file a notice of withdrawal, which does not require agency action but informs the agency and parties of counsel's withdrawal. The Commission believes that a notice would preserve the intended benefits of the existing requirement by providing timely notice to both the Commission and the parties of the withdrawal. It would also eliminate the need for the Commission or the hearing officer to rule on a motion for withdrawal.

The proposed amendment of Rule 102(d)(4) would require any person seeking to withdraw his or her appearance in a representative capacity to file a notice of withdrawal with the Commission or the hearing officer, stating the name, address, and telephone number of the withdrawing representative; the name, address, and telephone number of the person for whom the appearance was made; and the effective date of the withdrawal. If the person seeking to withdraw knows the name, address, and telephone number of the new representative, or knows that the person for whom the appearance was made intends to represent him- or herself, that information would also have to be included in the notice. The amended Rule would require that notice be served on the parties in accordance with Rule 150, and that the notice be filed at least five days before the proposed effective date of the withdrawal.

4. The Commission is considering a proposed amendment that would specifically recognize the authority of hearing officers to correct manifest errors of fact in initial decisions. The Commission has found that some appeals to it could be streamlined if certain issues were addressed first to the hearing officer. The proposed amendment would add to the enumeration of powers of hearing officers in Rule 111 the authority to consider and rule upon a motion to correct a manifest error of fact, provided that such a motion is filed within ten days of the initial decision.

5. Currently, Rule 141(a)(3) requires the Secretary to "place in the record of the proceeding a certificate of service" of orders instituting proceedings. The proposed amendment of the Rule would delete this requirement, substituting a requirement that the Secretary "maintain a record of service on parties." The amendment would allow the Secretary to maintain computerized rather than hard copy records of service.

6. Current Rule 141(a)(3) also requires that, if service is effected by mail, the

certificate "shall be accompanied by a confirmation of receipt or of attempted delivery," which is also to be maintained in the record of the proceeding. The proposed amendment of Rule 141(a)(3) would delete the requirement that such documents be retained in the record of the proceeding, allowing the Secretary to retain all the confirmation or records of attempted delivery in a single file. The Commission believes that this form of recordkeeping will permit easier retrieval of these documents.

7. Current Rule 141(b) provides for the service of written orders or decisions by the Commission or a hearing officer, other than an order instituting proceedings, to be served by any method of service authorized under Rule 141(a) or Rule 150(c). The proposed amendment of Rule 150(c) discussed below would, among other things, eliminate the requirement that parties seeking to serve each other by facsimile transmission agree to do so in writing. The Commission proposes to retain the requirement of a written agreement as a precondition to service of orders and decisions by facsimile. The proposed amendment of Rule 141(b) would replace the reference to Rule 150(c) with a reference to Rules 150(c)(1)-(3).

8. Consistent with Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure, existing Rule 150(c)(4), which governs service of documents on parties by facsimile transmission, requires parties who choose to serve each other by facsimile to agree to do so in a signed writing. The existing Rule also requires that receipt of each document served by facsimile be confirmed by a manually signed receipt. The proposed amendment would delete both of these requirements. It would, however, allow a party to decline to receive service by facsimile. Such a declination would have to be made in writing and served in accordance with Rule 150. The proposed Rule would also require that facsimile transmissions be made at a time that results in their receipt during the Commission's business hours as defined in Rule 104.

The Commission's experience shows that in many instances parties are serving one another by facsimile but are not entering into the agreements or confirming by manually signed receipt. Under the new Rule, parties who choose service by facsimile would be required to provide the Commission and the parties with notice of the facsimile machine telephone number to be used and the hours of facsimile machine operation.