

witness will be absent from the United States. Since depositions can be used only to preserve testimony of a witness who is unlikely to attend the hearing, the proposed revision of Rule 233 would allow the taking of a deposition of a witness currently within the United States who is expected to be outside the United States so long as the deposition will serve the interests of justice and it appears that the party requesting the deposition did not procure the witness's absence.

18. Rule 350(b) currently requires the Secretary to retain documents that are marked for identification but not offered into evidence. There does not seem to be any reason to keep documents that the party did not seek to introduce, and the proposed amendment would delete that requirement. The Secretary would continue to retain documents offered into evidence but excluded from the record so that, in the event of an objection, the Commission could consider any arguments that the documents should be admitted.

19. Proposed Rule 351(a) deletes a reference to a practice abandoned several years ago whereby the interested division took custody of the exhibits after a hearing and was responsible for having them sent to the Secretary. Currently the court reporter takes custody of exhibits.

20. Current Rule 360(d)(1) provides that an initial decision of a hearing officer becomes the final decision of the Commission unless a party or aggrieved person entitled to review files a petition for review, or the Commission orders review on its own initiative. Current Rule 360(e) further provides that, if an initial decision becomes the final decision of the Commission as to a party, the Commission shall issue an order that the decision has become final as to that party. The interplay of these Rules appears to have engendered confusion as to when a decision is final and enforceable. The proposed amendments would renumber paragraph 360(d)(2) as (d)(1) and combine paragraphs (d)(1) and (e) as (d)(2), clarifying that a decision becomes final upon the issuance of a finality order by the Commission.

21. Current Rule 400 provides for the Commission to grant interlocutory review only in "extraordinary circumstances." The proposed amendment would instruct the parties that petitions for interlocutory review are "disfavored," making clear that such petitions rarely would be granted. The proposed amendment would recognize, however, that the Commission retains discretion to undertake such review on its own motion at any time.

22. A proposed amendment to Rules 400 and 430 would provide that certain matters are subject to interlocutory review under Rule 400, not Rule 430. Rule 430 permits review of matters delegated to the staff. Under 17 CFR 200.30-9 and 30-10, certain functions are delegated to the administrative law judges and the chief administrative law judge. As the Rules are currently drafted, such determinations arguably might be reviewable under Rule 430 although the determination would not merit interlocutory review under Rule 400. The amendment would make clear that Rule 400 is the sole route for interlocutory review of determinations by a hearing officer.

23. Current Rule 401(d)(1) provides that any person aggrieved by an action by a self-regulatory organization for which the Commission is the appropriate review agency, for which action review may be sought pursuant to Rule 420, may seek a stay of that action. The proposed amendment would clarify that a stay can be sought only at the time an application for review is filed or thereafter. Filing an application for review brings the action before the Commission. Since the proposed amendment of Rule 420(c) reduces the content requirements for an application for review, the requirement that an application be filed when or before a stay is sought would not impose a significant delay.

24. The Commission requests comment on the proposed amendment of Rule 410(b), which would permit an opposing party to file a cross-petition for review within ten days from the filing of a petition for review, making it unnecessary for parties to file protective defensive petitions for review.

Another proposed amendment would delete Rule 410(d), thus abolishing the opposition to the petition for review. The Commission requests comment on the proposal to abolish the petition for review. In the Commission's experience, the utility of such oppositions has been quite limited, given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision. Moreover, the Commission believes that a motion for summary affirmance would permit the Commission to dispose of matters suited to more abbreviated review.

25. The proposed amendment of Rule 411(e) would provide a 21-day time limit for filing a motion for summary affirmance. The proposed amendment would also set forth standards both for granting and for denying summary affirmance. Summary affirmance would

be granted if the Commission finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. Summary affirmance would be denied upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

26. Section 19(d) of the Exchange Act requires a person who appeals from self-regulatory organization disciplinary action to do so within 30 days "or within such longer period as" the Commission "may determine." The proposed amendment to Rule 420(b) would make clear that an appeal from self-regulatory organization action must be filed within 30 days, absent a showing of extraordinary circumstances, and will not be extended by the Commission under Rule 161. This standard is consistent with prior Commission precedent.²¹

Current Rule 420 contains language that might suggest that the applicant's address be used to serve only the record index. The proposed amendment would provide that the applicant identify where he or she may be served for all purposes.

27. Rule 450(c), which sets limits on the page length of briefs, would be amended to limit instead the number of words in briefs. The proposed word limits—14,000 for principal briefs and 7,000 for any reply brief—are based on Rule 32 of the Federal Rules of Appellate Procedure. The proposed amendment would also state that motions to file oversized briefs are disfavored. In exceptional cases, however, where more pages may be needed to address the issues—for example, where the Division of Enforcement must address arguments by multiple respondents—the Commission may, upon motion, allow longer filings.

Except when a principal brief does not exceed 30 pages in length, or a reply brief does not exceed 15 pages in length, the proposed amendment would require the attorney filing the brief (or an unrepresented party) to certify that the brief complies with the length limitation and to state the number of words in the brief. The proposed amendment would permit the party certifying the length of the brief to rely on the word count of the word processing system used to prepare the brief.

²¹ See, e.g., *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1998) (Commission will not authorize late filing of appeals by self-regulatory organizations absent extraordinary circumstances).