

The Commission has received briefs which sought to incorporate by reference briefs filed before the hearing officer in the proceeding on appeal. Such incorporation by reference, if allowed, would erode the page-limit requirements of Rule 450(c). The proposed amendment provides that pleadings incorporated by reference will be included in determining the word count of briefs. The amendment is intended to promote adherence to the length limitations of Rule 450(c) and to encourage parties to exercise judgment in selecting the arguments that best advance their positions rather than simply repeating previously formulated contentions.

28. The current Rules make no provision for the use of visual aids at oral argument. The proposed amendment of Rule 451(b) would prohibit the use of visual aids unless copies are provided to the Commission and all parties at least five business days before the argument is to be held.²² The Commission requests comment as to whether five business days provides sufficient time for the parties to prepare adequate responses to proposed visual aids.

29. Current Rule 360(a)(2) directs the hearing officer to issue an initial decision within the time period specified in the order instituting proceedings. To address the hearing officer's inability to comply with this directive where a proceeding is stayed by order of the hearing officer or the Commission under Rule 210(c)(3) because a criminal investigation or prosecution is pending, the proposed amendment of Rule 360(a)(2) would specify that, if a proceeding is stayed under the authority of Rule 210(c)(3), the specified time period for issuance of the initial decision, as well as any other time limits established in orders issued by the hearing officer under Rule 360(a)(2), will be automatically tolled during the period in which the stay is in effect.

30. Rule 360(d)(2) provides that the initial decision shall not become final as to a party or person if a timely petition for review is filed by that party or person. The proposed amendment would add the timely filing, by a party or an aggrieved person entitled to review, of a motion to correct an initial decision to the hearing officer as an event that prevents the initial decision from becoming the final decision of the Commission as to that party or person

until the hearing officer has decided the motion. The proposed amendment would also make conforming changes to Rule 360(b), which specifies that an initial decision shall include a statement reflecting the provisions of Rule 360(d).

A proposed amendment of Rule 410(b) would provide that the time to file a petition for review is stayed until 21 days after resolution of any motion to correct an initial decision filed before the hearing officer so that, while a motion to correct is pending, a party need not file a petition for review to preserve its appeal rights.

Current Rule 470 specifies a 15-page limit for a motion for reconsideration, rather than the ten pages permitted for other motions. There does not seem to be any reason for treating motions for reconsideration differently from other motions. The amendment proposes to limit the party seeking reconsideration to the same number of pages and the same format used for other motions under the Rules of Practice. The Commission requests comment as to whether motions for reconsideration should be subject to different requirements from other motions, and if so, what differences would be appropriate.

31. The proposed amendment of Rule 601 would codify existing practice for payment of disgorgement, interest, and penalties. The proposal standardizes the language currently used by hearing officers in initial decisions and the Commission in its orders, as follows:

(c) *Method of making payment.* Payment shall be made by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission. The payment shall be mailed or delivered to the Office of Financial Management of the Commission. Payment shall be accompanied by a letter that identifies the name and number of the case and the name of the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement.

II. Request for Public Comments

We request and encourage any interested person to submit comments regarding: (1) The proposed changes that are the subject of this release, (2) additional or different changes, or (3) other matters that may have an effect on the proposals contained in this release.

III. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with section 533(b)(3)(A) of the

Administrative Procedure Act,²³ that this revision relates solely to agency organization, procedure, or practice. It is therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act²⁴ therefore does not apply. Similarly, because these rules relate to "agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties," the Commission is not soliciting comment for purposes of the Small Business Regulatory Enforcement Fairness Act.²⁵ Nonetheless, the Commission has determined that it would be useful to publish these proposed rules for notice and comment, before adoption.²⁶

These rules do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.²⁷

IV. Costs and Benefits of the Proposed Rules and Amendments

The Sarbanes-Oxley Act of 2002 authorizes the Commission to review disciplinary actions by the Public Company Accounting Oversight Board as well as actions resulting in disapproval of registration of public accounting firms. In response, the Commission proposes to revise certain of its rules in order to enhance the transparency and facilitate parties' understanding of the applicability of the review process to Board proceedings. The Sarbanes-Oxley Act also provides that where the Commission or a hearing officer in a Commission administrative proceeding enters an order requiring disgorgement and a civil money penalty, the Commission may create a "Fair Fund" combining the disgorgement and the civil money penalty to be disbursed for the benefit of the victims of the securities law violations at issue in the proceeding. In response, the Commission proposes regulatory provisions for the submission and administration of Fair Fund plans and disgorgement plans. The Commission also proposes to take this opportunity to amend other provisions of the rules.

Taken as a whole, the Commission's Rules of Practice ("Rules") create governmental review and remedial processes. That is, they are procedural and administrative in nature. The benefits to the parties are the familiar benefits of due process: notice,

²³ 5 U.S.C. 553(b)(3)(A).

²⁴ 5 U.S.C. 601 *et seq.*

²⁵ 5 U.S.C. 804(3)(C).

²⁶ See 5 U.S.C. 603.

²⁷ 44 U.S.C. 3501 *et seq.*

²² A further proposed amendment would conform the language of Rule 451(b) to reflect Commission practice not to issue the order setting oral argument in a Commission administrative proceeding until the date for argument is set.