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Part III

Securities and Exchange Commission

**17 CFR Part 201
Rules of Practice; Proposed Rule**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

[Release Nos. 33-8190; 34-47355; 35-27650; 39-2405; IA-2109; IC-25933; File No. S7-04-03]

Rules of Practice

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing for comment amendments to its Rules of Practice to formalize new policies designed to improve the timeliness of its administrative proceedings. The proposed changes include specifying in all orders instituting proceedings a maximum time period for completion by an administrative law judge of the initial decision in the proceeding, establishing policies disfavoring requests that would delay proceedings once instituted, and creating time limits for the negotiation and submission of offers of settlement to the Commission. If these proposed changes are adopted, the Commission intends to take additional steps to reduce delay in its internal deliberations on appeals from hearing officers' initial decisions and from final determinations of self-regulatory organizations and, accordingly, proposes to amend current guidelines for issuance of Commission opinions.

DATES: Comments should be received on or before March 21, 2003.

ADDRESSES: To help us process and review your comments efficiently, comments should be sent by hard copy or by e-mail, but not by both methods.

Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Alternatively, comments may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-04-03; this file number should be included on the subject line if e-mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comments will be posted on the Commission's Internet Web site (<http://www.sec.gov>). The Commission does not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Interested

persons submitting comments should only submit information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

Margaret H. McFarland, Deputy Secretary, or J. Lynn Taylor, Assistant Secretary, at (202) 942-7070, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rules 161, 360, 450, and 900 of its Rules of Practice [17 CFR 201.161, 201.360, 201.450, and 201.900].

I. Discussion

The Commission adopted, after notice and comment, comprehensive revisions to its Rules of Practice that became effective on July 24, 1995. These revisions were the result of an approximately two-and-a-half year study by the Commission's Task Force on Administrative Proceedings that culminated in a comprehensive report. The Task Force found that the fundamental structure of the Commission's administrative process was sound and successfully protected the essential interests of respondents, investors, and the public, but that some changes were necessary. The Task Force recommended changes to the Rules of Practice in an effort to set forth applicable procedural requirements more completely, in a format easier to use, and to streamline procedures that had become burdensome.

Promoting the timely adjudication and disposition of administrative proceedings was one of the principal goals of this project. While many of the rule amendments were designed to improve efficiency and timeliness, the Commission as part of this project did not impose firm deadlines for completion of the proceedings. Instead it included, as Rule 900, a series of non-binding goals for the completion of each step in the administrative process. Rule 900 included a ten month guideline for completion of the hearing and issuance of the initial decision by the administrative law judge and it contained an eleven month target for completion of deliberations by the Commission when it reviews appeals of administrative law judges' initial decisions and appeals of determinations of the securities self-regulatory organizations. In the seven years since the adoption of these non-binding targets, the Commission and its administrative law judges have generally failed to meet these goals.

Based upon this experience with non-binding completion dates, the

Commission has determined that timely completion of proceedings can be achieved only through the adoption of mandatory deadlines and procedures designed to meet these deadlines. Because there is a wide variation in the subject matter, complexity and urgency of administrative proceedings, the Commission believes that a "one-size-fits-all" approach to timely disposition is not feasible. Instead the Commission is considering adoption of a procedure in which it would specify, in the order instituting proceedings, a deadline for completion of the hearings process and the issuance of an initial decision. In every non-settled administrative proceeding, the Commission's Order Instituting Proceedings would specify the maximum time for completion of the hearing and issuance of the initial decision. This deadline would be either 90, 180, or 270 days, in the Commission's discretion, after consideration of the type of proceeding, the complexity of the matter, and its urgency.

As provided in amended Rule 360, if during the proceeding the presiding hearing officer were to decide that the proceeding could not be concluded in the time specified, the hearing officer could request an extension of the stated deadline. To obtain an extension, the hearing officer would first consult with the Chief Administrative Law Judge. If the Chief ALJ concurs in the need for an extension, the Chief ALJ would file a motion with the Commission on behalf of the hearing officer explaining why circumstances require an extension and specifying the length of the extension. An extension could be granted by the Commission, in its discretion, on the basis of the motion filed by the Chief ALJ. Parties to the proceeding would be provided copies of the motion and could separately or jointly file in support of or in opposition to the request. Any such motion by the Chief ALJ would have to be filed no later than thirty days prior to the expiration of the time period specified in the Order Instituting Proceedings.

To complement this new procedure, the Commission is also proposing to amend Rule 161 to make explicit a policy of strongly disfavoring extensions, postponements or adjournments except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case. This proposed amendment to Rule 161 would effect a significant change in administrative cease and desist proceedings. Section 21C(b) of the Securities Exchange Act of 1934 (and parallel provisions in the

other Federal securities laws) requires that the notice instituting proceedings "shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served." Under current practice, parties routinely request extensions of the 60-day deadline, and the hearing officers routinely grant such requests. The proposed amendment would exempt these requests from the policy of strongly disfavoring such requests, absent a strong showing of substantial prejudice. Comment is requested on the impact of the proposed change on the scheduling of cease and desist proceeding hearings, in particular whether respondents will have adequate time to prepare for a hearing 60 days after service of the notice for the proceeding.

If these or substantially similar rules are adopted, the Commission intends to provide guidance to its staff that they should not seek or support extensions or stays not consistent with this standard. Similarly, staff would be instructed to adopt new procedures to ensure that settlement negotiations do not delay the hearing process. These proposed procedures are described in proposed Rule 161(d)(2).

Finally, the Commission recognizes that it too must shoulder responsibility for delays in its appellate review process. During the past year, the Commission has changed certain internal processes in an effort to reduce delay in its deliberations. Building upon these changes, if these rule proposals are adopted, Commission staff involved in the adjudicative process will be provided instructions designed to substantially reduce the time taken to complete its appellate review duties. Accordingly, the Commission is proposing an amendment to Rule 900 reducing the guideline for issuance of Commission opinions from eleven months to seven months from the date of an appeal.

As part of this initiative to expedite appellate review, the Commission is proposing to amend Rule 450 to provide that opening briefs must be filed within 30 days of the date of a briefing schedule order rather than the current 40 days.

II. Administrative Procedure Act and Regulatory Flexibility Act

The Commission finds, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A), that this revision relates solely to agency organization, procedures, 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 Act, 5 U.S.C. 601 *et seq.*, also does not apply. Nonetheless, the Commission has determined that it would be useful to publish these proposed rule changes for notice and comment, before adoption.

Following the expiration of the comment period, after consideration of all comments received, the Commission intends to take prompt action on this proposal.

III. Statutory Basis and Text of Proposed Amendment

These rule amendments are proposed pursuant to section 19 of the Securities Act, 15 U.S.C. 77s; section 23 of the Securities Exchange Act, 15 U.S.C. 78w; section 20 of the Public Utility Holding Company Act, 15 U.S.C. 79t; section 319 of the Trust Indenture Act, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a-37 and 80a-39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b-11.

List of Subjects in 17 CFR Part 201

Administrative practice and procedure.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 201—RULES OF PRACTICE

1. The authority citation for part 201, Subpart D, is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78d-1, 78d-2, 78l, 78m, 78n, 78o(d), 78o-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.

2. Section 201.161 is amended by:
 a. Removing paragraph (b)(1);
 b. Redesignating paragraph (b)(2) as paragraph (d)(1); and
 c. Adding paragraphs (c) and (d)(2).
 The additions read as follows:

§ 201.161 Extensions of time, postponements and adjournments.

* * * * *

(c)(1) *Considerations in determining whether to extend time limits or grant postponements, adjournments, and extensions.* In considering all motions or requests pursuant to paragraph (a) or (b) of this section, the Commission or the hearing officer should adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or

motion would substantially prejudice their case. In determining whether to grant any requests, the Commission or hearing officer shall consider, in addition to any other relevant 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;
- (iv) The impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and
- (v) Any other such matters as justice may require.

(2) This policy of strongly disfavoring requests for postponement will not apply to any request by a respondent to postpone commencement of a cease and desist proceeding hearing beyond the statutory 60 day period.

(d)(1) *Time limit.* * * *

(2) *Stay pending Commission consideration of offers of settlement.* If the Commission staff and one or more respondents in the proceeding file a joint motion notifying the hearing officer that they have agreed in principle to a settlement on all major terms, then the hearing officer shall stay the proceeding as to the settling respondent(s), or in the discretion of the hearing officer as to all respondents, pending completion of Commission consideration of the settlement offer. Any such stay will be contingent upon the settling respondent(s) submitting to the Commission staff, within fifteen business days of the stay, a signed offer of settlement in conformance with § 201.240, and within twenty business days of receipt of the signed offer, the staff submitting the settlement offer and accompanying recommendation to the Commission for consideration. If the parties fail to meet either of these deadlines or if the Commission rejects the offer of settlement, the hearing officer must be promptly notified and, upon notification of the hearing officer, the stay shall lapse and the proceeding will continue.

3. Section 201.360 is amended by:

- a. Redesignating paragraph (a) as paragraph (a)(1); and
 - b. Adding paragraph (a)(2).
- The addition reads as follows:

§ 201.360 Initial decision of hearing officer.

(a)(1) * * *

(2) *Time period for filing initial decision.* In the Order Instituting Proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary. In the

Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and, with due regard for the public interest and the protection of investors, this time period will be either 90, 180 or 270 days from the date of the Order. In the event that the hearing officer presiding over the proceeding determines that it will not be possible to issue the initial decision within the specified period of time, the hearing officer should consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision.

This motion must be filed no later than 30 days prior to the expiration of the time specified in the Order for issuance of an initial decision. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

* * * * *

§ 201.450 [Amended]

4. Section 201.450 is amended by revising the phrase "within 40 days" to

read "within 30 days" in the second sentence of paragraph (a).

§ 201.900 [Amended]

5. Section 201.900 is amended by:

- a. Removing paragraph (a)(1)(i);
- b. Redesignating paragraphs (a)(1)(ii) through (a)(1)(iv) as paragraphs (a)(1)(i) through (a)(1)(iii); and
- c. In newly redesignated paragraph (a)(1)(iii), revise the phrase "within 11 months" to read "within seven months".

By the Commission.

Dated: February 12, 2003.

Jonathan G. Katz,

Secretary.

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