

ruling involved. The hearing officer shall not certify a ruling unless:

(1) his or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(d) *Proceedings Not Stayed.* The filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order. The Commission will not consider the motion for a stay unless the motion shall have first been made to the hearing officer.

Comment: Rule 400 is based in part on rules governing interlocutory review of the decisions of a United States district court by a court of appeals. See 28 U.S.C. § 1292(b). In contrast to the practice in the federal judicial system, however, the Commission may take up a matter on its own motion at any time, even if a hearing officer does not certify it for interlocutory review.

The requirement in paragraph (b) that interlocutory review be "expedited in every way, consistent with the Commission's other responsibilities," conforms to the standard for review in Rules 102(e)(3) and 500. Interlocutory matters should be promptly resolved in order to allow for the timely completion of the entire proceeding.

Revision Comment: The structure of this rule has been significantly modified to break out each of the rule's substantive provisions and thereby improve its readability. Other changes in the rule are technical and are intended only to clarify its operation.

One commenter recommended that a hearing officer's decision with respect to a motion that he or she be disqualified be subject to interlocutory review and that the rule contain an express provision making immediately appealable any decision not to quash a subpoena as requested by a third-party recipient. The Commission has decided not to incorporate these recommendations. Either is subject to interlocutory review if the hearing officer determines that the decision meets the standards of paragraph (c). Moreover, the decision whether to subpoena a witness is best made by the

hearing officer who is most familiar with the details of the proceeding.

Rule 401. Issuance of Stays

(a) *Procedure.* A request for a stay shall be made by written motion, filed pursuant to Rule 154, and served on all parties pursuant to Rule 150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) *Scope of Relief.* The Commission may grant a stay in whole or in part, and may condition relief under this rule upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) *Stay of a Commission Order.* A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) *Stay of an Action by a Self-Regulatory Organization.*

(1) *Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to Rule 420, may be made by any person aggrieved thereby.

(2) *Summary Entry.* A stay may be entered summarily, without notice and opportunity for hearing.

(3) *Expedited Consideration.* Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission, by written order, shall specify a different period.

Comment: The Commission has stated that it "generally considers four factors"

when evaluating the appropriateness of a stay of its own orders:

(1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer irreparable injury; (3) whether there will be substantial harm to any person if the stay were granted; and (4) whether the issuance of a stay would likely serve the public interest.

Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 33870 (Apr. 7, 1994), 56 SEC Docket 1189, 1190-91 (Apr. 26, 1994). The evaluation of the factors enumerated by the Commission, according to the release, will vary with the "equities and circumstances" of the case before the Commission. *Id.* See also *In re Hibbard, Brown & Co. et al.*, Admin. Proc. File No. 3-8418, SEC Press Release No. 94-72 (Aug. 2, 1994) at 4.

The General Counsel has been delegated the authority to decide whether a stay should be granted. 17 CFR 200.30-14(g)(5), (6). Such decisions by the General Counsel are subject to review pursuant to Rule 430.

The Commission may condition the grant of a stay on such terms or upon the implementation of such procedures as it deems appropriate. For example, where a respondent seeks a stay of a disgorgement order, the Commission may require safeguards, such as establishment of an escrow, that would assure that funds will be available for payment at a later date if the disgorgement order is upheld.

Comment (c): Rule 401(c) requires that a motion for a stay of a Commission order pending review by a court be made to the Commission while the Commission retains jurisdiction over the proceeding. Other than a temporary cease-and-desist order, which is subject to judicial review in the first instance in a United States District Court, Commission orders are reviewable by a court of appeals. See, e.g., Exchange Act § 25, 15 U.S.C. 78y (governing judicial review of final orders of the Commission generally), Exchange Act § 21C(d)(2), 15 U.S.C. § 78u-3(d)(2) (governing judicial review of temporary cease-and-desist orders). The Commission loses jurisdiction to grant a stay of an order subject to review in a court of appeals only after the record is filed in a court of appeals. See, e.g., Exchange Act §§ 25(a)(3), (c)(2), 15 U.S.C. 78y(a)(3), (c)(2), and Fed. R. App. P. 18.