

*Comment (d):* This paragraph is based on Section 19(d) of the Exchange Act, 15 U.S.C. § 78s(d), and former Exchange Act Rule 19d-2, 17 CFR 240.19d-2 (1994).

The provision for expedited consideration in paragraph (d)(3) is based on the requirement of Section 19(d)(2) that the Commission establish an expedited procedure for consideration and determination of the question of a stay for "appropriate cases." The Commission has established a guideline for the timely determination of such requests. See 17 CFR 201.900 (Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings). A self-regulatory organization controls the effective date of the sanctions it imposes. If it desires additional time to address the issue of whether a stay should issue, it may consider delaying the effective date of its order. If the determination complained of has not taken effect, the time limits for the filing of opposing and reply briefs would be those set forth in Rule 154.

*Revision Comment:* A commenter suggested that the Commission amend the rule to include substantive standards under which a stay shall be granted or to identify the criteria the Commission applies in considering a request for a stay. As noted in the comment to Rule 401, earlier this year the Commission reiterated in a release the factors generally considered when evaluating the appropriateness of a stay under Section 25(c)(2) of the Exchange Act. Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 33870 (Apr. 7, 1994). The Commission believes that the long-standing enunciation of its policy with respect to such stays provides sufficient guidance.

A commenter suggested that the Commission reconsider its rule allowing motions for stays of a self-regulatory organization (SRO) determination, including a final SRO disciplinary action, to be made "at any time." The commenter proposed that a person seek a stay within 10 days of the filing of an SRO disciplinary decision pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. § 78s(d)(1). The Commission does not agree that respondents should be required to request a stay within such a limited period. Requiring a stay to be sought within a fixed time would place respondents who may have no reason to seek a stay immediately at a disadvantage, as they may be entitled to a stay or other relief as the result of changed circumstances at a later time. Cf. Rule 512(e).

Exchange Act Section 19(d)(2) requires that in "appropriate cases" the Commission establish an expedited procedure for consideration and determination of the question of a stay. Expedited consideration is appropriate when a sanction or other action complained of has already taken effect or will take effect prior to the time a decision could be made without expedited consideration.

#### Rule 410. Appeal of Initial Decisions by Hearing Officers

(a) *Petition for Review; When Available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to Rule 360(b). The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to Rule 340, may, at the discretion of the Commission, be deemed to have been waived by the petitioner.

(c) *Financial Disclosure Statement Requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b).

(d) *Opposition to Review.* A party may seek leave to file a brief in opposition to a petition for review within five days of the filing of the petition. The Commission will grant leave, or order the filing of an opposition on its own motion, only if it determines that briefing will significantly aid the decisional process. A brief in opposition shall identify those issues which do not warrant consideration by the Commission and shall state succinctly the reasons therefore.

(e) *Prerequisite to Judicial Review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a

prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

*Comment (a)-(b):* Pursuant to Section 557(c) of the Administrative Procedure Act, 5 U.S.C § 557(c), in adjudications required to be conducted "on the record after opportunity for agency hearing," a party is entitled to a reasonable opportunity to file exceptions to the initial decision and supporting reasons for the exceptions or proposed findings or conclusions. The Commission's practice, reflected in paragraph (a), is to provide an opportunity to file exceptions in all proceedings where an initial decision is to be made, not only those in "on-the-record" or "formal" adjudication. See Comments to Rules 100 and 191.

Except in limited cases as specified in Rule 411(b)(1) when the right of appeal is mandatory, the Commission, after considering a petition for review, may determine not to hear an appeal or to limit the issues on appeal. Administrative Procedure Act § 557(b), 5 U.S.C § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"). Cf. Section 4A(b) of the Exchange Act, 15 U.S.C. § 78d-1(b) (providing a right to appeal certain decisions to the Commission).

The standards for granting a petition for review are set forth in Rule 411. Under these standards, the Commission grants a petition for review in virtually all cases. The product of a consensus over many years, this result represents a Commission determination that there is a benefit to joint deliberation by the Commission when exception is taken to an initial decision.

*Comment (c):* In order to make a determination with respect to whether disgorgement, interest or a penalty is appropriate for a respondent who raises inability to pay as an issue, the Commission must have access to complete and current financial information. Although financial disclosure may have occurred during the course of a hearing, by the time an initial decision and petition for review are filed that information is not likely to be current. Accordingly, a current financial disclosure statement is required if a petition for review raises exceptions concerning inability to pay.

*Comment (d):* The Commission has rarely found grounds for denial of a petition for review under its long-standing standards for determining whether to grant review, now set forth in Rule 411(b). Therefore, routine opposition to a petition for review