

serves little purpose. Accordingly, leave from the Commission must be sought prior to filing an opposition to a petition for review. Where the Commission believes briefing would significantly assist its decisional process, it may grant leave to file an opposition or order such a filing. The Commission has delegated authority to the General Counsel to determine whether to grant requests for leave to file an opposition. See 17 CFR 200.30-14.

Revision Comments: Comment was requested as to (1) whether, notwithstanding the potential benefits of preparing a petition for review, the requirement for a petition should be eliminated where an appeal is provided as of right by Section 4A(b) of the Exchange Act; and (2) whether, in light of the Commission's longstanding practice of granting virtually all petitions for review, the requirement of filing a petition for review should be eliminated.

One commenter supported retaining the petition for review and suggested that the petition for review is a more appropriate mechanism for noticing an appeal because it helps clarify issues and provides more information than the notice of appeal used under the Federal Rules of Appellate Procedure.

The Commission grants virtually all petitions for review. Although Commission review in a particular case can be time consuming, it establishes authoritative precedent applicable to other cases and promotes accountability for, and confidence in, the Commission's adjudicatory process. Commission review of those cases in which review is sought has tended to encourage acceptance of hearing officers' decisions and to promote the settlement of cases even prior to hearing in similar cases, thereby reducing the overall adjudicatory workload.

The Commission has decided to retain the petition for review process for all cases including those where a right to appeal is statutorily required. The petition for review is a summary document and requires limited resources to prepare. Requiring the petition, however, enhances the efficiency of the appeals process for both the Commission and parties by focusing attention from an early point on those issues considered most significant by the petitioner. Thus, the petition for review offers substantial benefits both to the Commission and to petitioners.

As proposed, the rule would have allowed the filing of an opposition to review by any person opposing review. As noted by one commenter, given the Commission's practices with respect to

the grant of petitions for review, an opposition to review serves little benefit to either the Commission or the parties, except in those rare cases where there is a genuine issue as to the necessity or appropriateness of review. As revised, the rule allows a party to seek leave to file a brief in opposition to a petition for review. The Commission believes this mechanism will limit the unnecessary expenditure of time or resources in routine oppositions to petitions for review while allowing, in appropriate cases, for other parties to be heard in opposition. The Commission retains discretion to direct the filing of an opposition on its motion in any case.

Comment was requested as to whether, after the filing of a petition for review, a 10- or 15-day period would be more realistic for filing a brief in opposition to a petition for review or a petition for summary affirmance. As revised, the Rule provides a 10-day period for a person to seek leave to file an opposition. If leave is granted, the Commission will specify the time allowed for filing a brief. Provisions related specifically to the filing of a motion for summary affirmance have been deleted.

Rule 411. Commission Consideration of Initial Decisions by Hearing Officers

(a) *Scope of Review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for Granting Review Pursuant to a Petition for Review.*

(1) *Mandatory Review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h (a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78l(d);

(ii) suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78l(k); or

(iii) is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary Review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall

consider whether the petition for review makes a reasonable showing that:

(i) a prejudicial error was committed in the conduct of the proceeding; or

(ii) the decision embodies:

(A) a finding or conclusion of material fact that is clearly erroneous; or

(B) a conclusion of law that is erroneous; or

(C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission Review Other Than Pursuant to a Petition for Review.* The Commission may, on its own initiative, order review of any initial decision, or a portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to Rule 410(b) or any brief in opposition to a petition for review permitted pursuant to Rule 410(d). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on Matters Reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 450(a). On notice to all parties, however, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) *Summary Affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

(f) *Failure to Obtain a Majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

Comment (a): Section 557(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b), provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it