

would ordinarily accompany the application for a temporary cease-and-desist order. The proposed rule also provided that proceedings should be recorded or transcribed "or otherwise memorialized to the extent that circumstances permit." As the comments to the proposed rules stated, the possible waiver of requirements with respect to accompanying documents or the creation of a transcript was included in the proposed rule to address limited circumstances such as the need to hold a hearing in emergency circumstances at night, over a weekend, or when no Commissioners were present in Washington, and certain hearing formalities could not be observed. However, as noted by one commenter, the proposed rule was subject to interpretations which could have allowed the use of waivers more frequently than intended. In addition, consideration of a request for a waiver could raise collateral issues that would delay prompt, effective remedial action.

The Commission has authority under these rules, see, e.g., Rule 161 (extension of time to file documents) and Rule 302 (hearings to be recorded and transcribed except as otherwise ordered), and in its inherent powers as an adjudicative body to respond to truly exigent or emergency conditions. The Commission concluded that the extraordinary circumstances justifying the proposed waivers have been so rare that having separate provisions to account for them is unnecessary at this time.

Rule 511. Temporary Cease-and-Desist Orders: Notice; Procedures for Hearing

(a) *Notice: How Given.* Notice of an application for a temporary cease-and-desist order shall be made by serving a notice of hearing and order to show cause pursuant to Rule 141(b) or, where timely service of a notice of hearing pursuant to Rule 141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing. If an application is made *ex parte*, pursuant to Rule 513, no notice to a respondent need be given prior to the Commission's consideration of the application.

(b) *Hearing Before the Commission.* Except as provided in paragraph (d) of this rule, hearings on an application for a temporary cease-and-desist order shall be held before the Commission.

(c) *Presiding Officer: Designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable

at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at Hearing.*

(1) The presiding officer shall have all those powers of a hearing officer set forth in Rule 111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to: whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or of counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion, or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made by such a hearing officer.

Comment (a): If an order instituting proceedings has not been issued prior to the filing of an application for a temporary cease-and-desist order, an order instituting proceedings must be entered in conjunction with entry of a notice of hearing and order to show cause. See, e.g., Exchange Act § 21C(c)(1), 15 U.S.C. § 78u-3(c)(1). Provided that the respondent receives actual notice of the hearing, which may be made by telephone, formal service of the order instituting proceedings pursuant to Rule 141 is not required prior to the commencement of the hearing. Absent a waiver, as provided for in Rule 141(a)(4), furnishing a copy of the order by facsimile transmission

would not meet the service requirements of Rule 141. At or promptly after the hearing, however, the Secretary must serve a copy of the order instituting proceedings and the notice of hearing in accord with Rule 141 and the Division of Enforcement must serve its application and accompanying documents pursuant to Rule 150.

Comment (b): Rule 101(a) defines the term "Commission" to include the duty officer as provided for by 17 CFR 200.43. Pursuant to that section, the duty officer may preside at the taking of evidence.

Comment (d): Hearings held pursuant to the Commission's authority to impose a temporary cease-and-desist order are not required to be formal, "on the record" adjudications within the meaning of Sections 554, 556-557 of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556-57. See *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989) (no presumption that a statutory "hearing" requirement compels the agency to undertake a formal "hearing on the record"). A full, trial-type evidentiary hearing will not ordinarily be held because of the exigent nature of the proceedings, the temporary nature of any sanction, and the opportunity for immediate post-sanction review by a federal district court. See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.").

Rule 511(d) incorporates the statutory provision that the hearing does not have to be a formal, trial-type proceeding. The amount of process due will vary based on the facts and circumstances of each case. See *Boddie*, 401 U.S. at 378. The Commission may determine the form of evidence (for example, whether live or by affidavit), the duration of the hearing (for example, by restricting the time for argument) or the extent of post-hearing procedures (for example, whether to allow submissions of post-hearing briefs). Relevant factors in making these determinations may include, among others, the risk of harm to investors or the public, the nature of the alleged or threatened violations, the nature of the proposed sanction, the potential effect of a sanction on the respondent, and the likely duration of the sanction before opportunity for further hearings.

Ordinarily, the Commission expects that the hearing on an application for a temporary cease-and-desist order will proceed on the basis of affidavits and oral argument in similar fashion to a