

temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, from specific facts in the record of the proceeding, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

(b) *Content of the Order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

(c) *Hearing Before the Commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on such an application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. The Commission shall render a decision on the application within five calendar days of its filing, provided, however, that the Commission, by order, for good cause shown, may extend the time within which a decision may be rendered for a single period of five calendar days, or such longer time as consented to by the applicant. If the Commission does not render its decision within 10 days of the respondent's application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

(d) *Presiding Officer, Procedure at Hearing.* Procedures with respect to the selection of a presiding officer and the conduct of the hearing shall be in accordance with Rule 511.

*Comment (a):* The rule sets forth the statutory requirement for entry of a temporary cease-and-desist order without prior notice. See, e.g., Exchange Act § 21C(c)(1), 15 U.S.C. § 78u-3(c)(1). The requirement that the Commission's determination be based on "specific facts" is modeled on Rule 65(b) of the Federal Rules of Civil Procedure.

*Comment (b):* The requirement that an *ex parte* order state why it was issued without notice and hearing is modeled on Rule 65(b) of the Federal Rules of Civil Procedure which requires a similar statement of reasons if a temporary restraining order is issued without notice. A statement of the reasons why an order was entered *ex parte* aids the

Commission's decisional process by ensuring that the statutory criteria for *ex parte* action have been met and facilitates review of the order. See Rule 514 (*ex parte* order must be appealed to the Commission before seeking judicial review).

*Comment (c):* Rule 513(c) restates the statutory standards with respect to opportunity for a hearing after service of a temporary cease-and-desist order entered *ex parte*. See, e.g., Exchange Act § 21C(d)(1), 15 U.S.C. § 78u-3(d)(1). The requirement that a hearing be held and a decision rendered "at the earliest possible time" is not elaborated upon in the legislative history.

The Due Process Clause of the Fifth Amendment requires that if a person is subject to an *ex parte* deprivation of property, he or she shall be provided a "prompt" opportunity for hearing thereafter. *FDIC v. Mallen*, 486 U.S. 230, 241-42 (1988); *Barry v. Barchi*, 443 U.S. 55, 65-66 (1979) (hearing must be provided "at a meaningful time") (citation omitted). While the hearing must be held and a decision rendered promptly, judicial decisions should be made in a "considered and deliberate manner," and without excessive or undue haste. *Mallen*, 486 U.S. at 244. The Commission must allow an appropriate amount of time for each party to prepare its case prior to hearing and must allow time for each Commissioner to review all evidence or other submissions and, as necessary, to engage in joint deliberation. See *id.* at 243-244. What would be "possible" in terms of the earliest time for hearing or resolution of a case would depend, therefore, on the specific facts of each case and the Commission's other responsibilities.

When a temporary cease-and-desist order is entered *ex parte*, the respondent must, as a prerequisite to judicial review of the order, first apply to the Commission to have the order set aside, limited or suspended, and the Commission must then hold a hearing, if requested, and render a decision on the application. See, e.g., Exchange Act § 21C(d)(2), 15 U.S.C. § 78u-3(d)(2). While recognizing that some cases may demand more time than others, Rule 513(c) establishes a maximum time limit on the continuing effectiveness of an *ex parte* order pending its review by the Commission.

Under the rule, a hearing on the application to set aside a temporary cease-and-desist order will begin within two days of the filing of the application, unless the respondent requests a longer period or the Commission determines, by order, for good cause shown, that a longer time is necessary. A temporary

cease-and-desist order entered *ex parte* will be suspended, however, if the Commission does not hold the hearing and render a decision on an application to set aside, limit or suspend the order within 10 calendar days of the date of application, or such longer time as consented to by the respondent. While the Commission may take as long as needed to decide the application, after the 10-day period or such longer time as consented to by the respondent, the respondent does not remain bound by the temporary order pending the Commission's decision. If the Commission then upholds the temporary cease-and-desist order, the order will once again become binding and the respondent can seek judicial review.

The time limits set forth in Rule 513 are consistent with the statutory time limits established with respect to orders entered after notice and hearing. If an order is entered after notice and hearing, the respondent is allowed to seek judicial review within 10 days of service of the order. Under Rule 513, a respondent will not be subject to an *ex parte* order for any longer than 10 days prior to having the opportunity to seek judicial review.

The provisions of Rule 513(c) are similar to the provisions of Rule 65(b) of the Federal Rules of Civil Procedure, that a party subject to a temporary restraining order obtained without notice may, on two days notice to the adverse party, or such shorter time as permitted by the court, appear and move for dissolution of the temporary restraining order. Rule 65(b) does not require that a hearing be held or a decision on the motion be issued within the two-day period allowed for the making of a motion to dissolve the temporary restraining order. Rather, the rule requires the court to hear and determine the motion "as expeditiously as the ends of justice require." Such motions are ordinarily resolved within the initial 10-day duration of a temporary restraining order. Extension of an *ex parte* temporary restraining order for an additional ten days, though permitted by rule, is uncommon.

*Revision Comment (c):* By statute, a respondent given notice and opportunity to be heard prior to entry of a temporary cease-and-desist order may seek judicial review of the order within 10 days of service of the order. In contrast, under the proposed rules a respondent could be subject to a temporary order entered *ex parte* for an indefinite period of time without access to judicial review. Judicial review of an *ex parte* order is unavailable until the Commission acts on the respondent's