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five pages, exclusive of any table of contents, table of cases, index and appendix containing transcripts of testimony, exhibits, statutes, rules, regulations or similar materials.

§ 171.27 Limited participation by interested persons.

(a) Upon motion of any interested person or, on its own motion, the Commission may permit, or solicit, limited participation in the proceeding by such interested person. A motion for leave to participate in the proceeding shall be filed promptly, shall identify the interest of that person and shall show why participation in the proceeding by that person would serve the public interest. If the Commission determines that participation would serve the public interest, it shall by order establish a supplementary briefing schedule for the interested person and the parties to the proceeding.

(b) For purposes of this subsection, *interested person* shall include parties and any other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding.

§ 171.28 Participation by Commission staff.

The Division of Enforcement, the Division of Trading and Markets or the Division of Economic Analysis may participate in any proceeding by filing a notice of appearance. Such a notice shall be filed and served on or before the twentieth day following the date of service of its brief by the National Futures Association. The Commission shall by order establish a supplementary briefing schedule for the Commission staff and other parties to the proceeding. If it concludes that participation of the Commission staff will not serve the public interest, the Commission shall prohibit further participation.

17 CFR Ch. I (4-1-01 Edition)

Subpart C—Commission Review of Final Decisions in Disciplinary, Membership Denial and Registration Actions

§ 171.30 Scope of review.

On review, the Commission may, in its discretion and after appropriate consideration of the notice given to the parties, consider *sua sponte* any issues arising from the record before it and may base its determination thereon. The Commission may also limit its consideration to those issues specifically raised in the parties' briefs, treating all other issues as waived.

§ 171.31 Commission review in the absence of an appeal.

(a) *Request by Commission staff.* At any time prior to the effective date of a final decision of the National Futures Association in a disciplinary, membership denial or registration action, the Division of Enforcement, the Division of Trading and Markets or the Division of Economic Analysis may file and serve a memorandum requesting the Commission to institute review of the National Futures Association proceeding. The filing of such a memorandum shall stay the effective date of the decision at issue for twenty days.

(b) *Response by the National Futures Association.* The National Futures Association may file a response to the memorandum of the Commission staff within fifteen days of the service of the memorandum.

(c) *Commission determination of staff request.* To preserve the status quo while it determines whether review is appropriate, the Commission may extend the stay of the effective date of the decision at issue for an additional 30 days. If the Commission decides to take review, the effective date of the decision at issue shall be stayed pending the decision of the Commission, unless otherwise ordered. The Commission shall by order establish the procedure for submission of both the record of the proceeding and the briefs of the parties to the proceeding.

(d) *Commission review on its own motion.* At any time prior to the effective date of a final decision of the National

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Futures Association in a disciplinary, membership denial or registration action, the Commission may take review of a decision by issuing an appropriate order. If the Commission determines that it is appropriate to take review on its own motion, it shall by order establish the procedure for submission of both the record of the proceeding and the briefs of the parties.

§ 171.32 Oral argument.

(a) *On motion of Commission.* On its own motion, the Commission may, in its discretion, hear oral argument in a proceeding.

(b) *On request of party.* Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. A request under this paragraph must be filed concurrently with the party's brief.

(c) *Reporting and transcription.* Oral argument before the Commission will be recorded and transcribed unless the Commission directs otherwise. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument will proceed in accordance with the provisions of § 10.103(b) of this chapter.

§ 171.33 Final decision by the Commission.

(a) *Opinion and order.* Upon review, the Commission may affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the National Futures Association. The Commission's decision will be contained in its opinion and order which will be based upon the record before it, including the record of the registered futures association proceeding, briefs submitted to the Commission by the parties and any oral argument made in accordance with § 171.32. Except as provided in paragraph (b) of this section, the opinion and order will constitute the final decision of the Commission, effective upon service on the parties. In the event the Commission is equally divided as to its decision, the decision of the National Fu-

tures Association shall be affirmed without a Commission opinion.

(b) *Order of summary affirmance.* If the Commission finds that the result reached in the decision of the National Futures Association is substantially correct and that none of the arguments on appeal made by the appellant raise important questions of law or policy, the Commission may, by appropriate order, summarily affirm the decision without opinion. The decision of the National Futures Association shall constitute the Commission's final decision, effective upon service. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the rationale of the National Futures Association, and neither the order of summary affirmance nor the underlying order shall serve as Commission precedent in other proceedings.

§ 171.34 Standards of review.

(a) *Disciplinary actions.* In reviewing a final decision of the National Futures Association in a disciplinary action, the Commission shall affirm the order of the National Futures Association, unless the Commission finds that:

(1) The proceedings were not conducted in a manner consistent with fundamental fairness;

(2) The proceedings were not conducted in a manner consistent with the rules of the National Futures Association;

(3) The weight of the evidence does not support the findings of the National Futures Association concerning the relevant acts or practices engaged in or omitted;

(4) The determination that the acts or practices engaged in or omitted violated rules of the National Futures Association does not rest on a reasonable interpretation of the rules at issue;

(5) The National Futures Association's application of its rules is not consistent with the purposes of the Act;

(6) The National Futures Association's choice of sanction is excessive or oppressive in light of the violations found having due regard for the public interest.