

§ 171.32

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.

[55 FR 41068, Oct. 9, 1990, as amended at 67 FR 62353, Oct. 7, 2002]

§ 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-

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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.

(b) *Membership denial actions.* In reviewing a final decision of the National Futures Association in a membership denial 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 made or adopted in the final decision;

(4) The conclusion of the National Futures Association is not consistent with the purposes of the Act.

(c) *Registration actions.* In reviewing a decision of the National Futures Association in a registration 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 made or adopted in the final decision;

(4) The conclusion of the National Futures Association is not consistent with the purposes of the Act.

Subpart D—Commission Review of Decisions by the National Futures Association In Member Responsibility Actions

§ 171.40 Notice of the commencement of a member responsibility action.

The notice of a Member Responsibility Action provided by the National Futures Association pursuant to its rules shall advise the affected parties of their right to petition the Commission pursuant to § 171.41 to stay the effective date of the action pending a hearing before the National Futures Association on the factual issues relevant to the suspension, restriction or remedial action ordered.

§ 171.41 Petition for a stay of effective date of a member responsibility action pending a hearing by the National Futures Association.

(a) *Time to file.* Within ten days after the National Futures Association serves the notice required by § 171.40, any party aggrieved by the National Futures Association's determination that the member responsibility action should be effective prior to the opportunity for a hearing on the factual issues relevant to the suspension, restriction or remedial action imposed may petition the Commission to stay its effectiveness pending completion of further proceedings by the National Futures Association. The burden of persuasion shall rest with the party seeking the stay.

(b) *Content.* A petition for stay shall meet the content requirements set forth in § 171.22(b)(3).

(c) *Response.* A response may be filed by the National Futures Association in accordance with § 171.22(b)(4).

(d) *Standards for granting petition for stay.* In reviewing petitions to stay the effectiveness of the member responsibility action pending completion of further proceedings, the Commission shall consider:

(1) Whether, in the circumstances presented, the notice and opportunity for a hearing provided by the National Futures Association are consistent with principles of fundamental fairness; and

(2) The likelihood that the denial of the petition would result in irreparable harm to petitioner; and

(3) The effect a grant of the petition would have on the interests of the National Futures Association; and

(4) The effect a grant or denial of the petition would have on the public interest.

(e) If the suspension, restriction or remedial action imposed by the National Futures Association in a member responsibility action is effective at the time a petition for a stay is filed with the Commission, the Commission shall not delay its decision on the petition to await the receipt of the National Futures Association's response. If the action is not effective at the time the petition is filed, the Commission will not act upon the petition prior to the