

§ 171.42

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receipt of a response from the National Futures Association unless, in its view, expedited action on the petition is necessary to protect petitioner's right to a meaningful determination of the right to a stay. If the Commission grants the petition prior to the receipt of the response of the National Futures Association, the association may seek reconsideration of the Commission's action within seven days of service of the decision.

(f) *Proceedings following Commission disposition.* If the petition for a stay is denied, the National Futures Association shall continue its action in accordance with the applicable rules of the association. If the petition for a stay is granted, the action shall be remanded to the National Futures Association for further proceedings as provided in the Commission's decision. Unless otherwise ordered by the Commission, a stay issued pursuant to this section shall not deprive the National Futures Association of the authority, after conducting a hearing under the appropriate rules of the association, to make the suspension, restriction or remedial action ordered in the member responsibility action immediately effective at the time a final decision is issued.

**§ 171.42 Notice of a final decision of the National Futures Association in a member responsibility action.**

(a) *When required.* The National Futures Association shall promptly serve all parties, as well as the Proceeding Clerk and Secretary of the Commission, with a written notice of any final decision in a member responsibility action. The notice may be contained in the written decision issued by the National Futures Association. If the National Futures Association determines that the decision shall be effective upon issuance, in addition to serving a written notice, it shall also contact the parties and the Proceedings Clerk by telephone to inform them of its determination.

(b) *Contents of the written notice.* At a minimum, the notice shall provide the following information:

(1) The name of the parties to the proceeding;

(2) The date the notice was served and the effective date of the decision;

(3) A statement informing the parties of their right to appeal the decision to the Commission pursuant to § 171.44 as well as their right to seek a stay of the decision pending Commission consideration of their appeal pursuant to § 171.43;

(4) A description of the action taken and the reasons for the action;

(5) Findings of fact and conclusions of law on all issues relevant to its decision;

(6) A determination of the appropriate relief based on the findings and conclusions.

**§ 171.43 Petition for a stay of the effective date of a final decision of the National Futures Association in a member responsibility action.**

(a) *Filing the petition.* Within ten days of the service of the notice described in § 171.42, any aggrieved party may seek from the Commission a stay of the effective date of the decision of the National Futures Association pending consideration of the merits of an appeal by filing and serving an appropriate petition. The mere filing of such a petition shall not stay the effective date of the decision. The burden of persuasion shall rest with the party seeking the stay.

(b) *Contents.* A petition for a stay shall be in writing. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(c) *Response.* Within five days of the service of the petition, the National Futures Association may file an opposition to the petition. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(d) *Standards for determining petitions for a stay.* In reviewing petitions filed under this section, the Commission shall consider:

(1) The likelihood that petitioner's challenge to the merits of the decision will be successful; and

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

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

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

(e) *Expedited consideration.* 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 decision is not effective at the time the petition is filed, the Commission will not act upon the petition prior to the receipt of a response from the National Futures Association unless, in its view, expedited action on the petition is necessary to protect petitioner's right to a meaningful determination of the right to a stay. If the Commission grants the petition prior to the receipt of the response of the National Futures Association, the association may seek reconsideration of the Commission's action within seven days of service of the decision.

### § 171.44 Notice of appeal.

(a) *Time to file.* Any party aggrieved by a final decision of the National Futures Association in a member responsibility action may, within thirty days of the service of the notice described in §171.42, file with the Proceedings Clerk and serve on the National Futures Association a notice of appeal. The filing of such a notice shall not stay the effective date of the decision.

(b) *Contents.* The notice of appeal shall meet the content requirements of §171.23(b).

(c) *Filing fee.* Each notice of appeal must be accompanied by a nonrefundable filing fee of \$100. This amount may be paid by check, bank draft or money order, payable to the Commodity Futures Trading Commission.

(d) *Defective notices of appeal.* Notices of appeal that are untimely or not accompanied by the filing fee shall not be accepted by the Proceedings Clerk absent a showing, by motion, of excusable neglect.

### § 171.45 General procedures.

The following procedural rules applicable to review of decisions of the National Futures Association in disciplinary, membership denial and registration actions shall also apply to the review of decisions of the National Futures Association in member responsibility actions:

(a) Section 171.24 Submission of the Record.

(b) Section 171.25 Appeal Brief.

(c) Section 171.26 Answering Brief.

(d) Section 171.27 Limited Participation By Interested Persons.

(e) Section 171.28 Participation By Commission Staff.

(f) Section 171.30 Scope of Review.

(g) Section 171.31 Commission Review In the Absence of An Appeal.

(h) Section 171.32 Oral Argument.

(i) Section 171.33 Final Decision By the Commission.

### § 171.46 Standards of review.

In reviewing the decision of the National Futures Association in a member responsibility action, the Commission shall consider whether:

(a) The proceedings were conducted in a manner consistent with fundamental fairness;

(b) The proceedings were conducted in a manner consistent with the rules of the National Futures Association;

(c) The weight of the evidence supports the findings of the National Futures Association concerning the reasons for the action;

(d) The determination that summary action is necessary to protect the commodity futures markets, customers, or members of the National Futures Association rests on a reasonable interpretation of the NFA rules at issue;

(e) The National Futures Association's application of its rules is consistent with the purposes of the Act;

(f) In light of the findings of the National Futures Association concerning the reasons for the action and the public interest, the suspension, restriction or remedial action imposed by the National Futures Association is not excessive, oppressive or an abuse of discretion.