

recipient and NRC. NRC will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

**§ 4.337 Hearings, decisions, post-termination proceedings.**

Certain NRC procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to NRC enforcement of these regulations. They are §§ 4.61 through 4.64 and §§ 4.71 through 4.75.

**§ 4.338 Remedial and affirmative action by recipients.**

(a) Where NRC finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that NRC may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, NRC may require both recipients to take remedial action.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient, operating a program that serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

**§ 4.339 Alternate funds disbursement procedure.**

(a) When NRC withholds funds from a recipient under these regulations, the Commission, or designee, may disburse the withheld funds directly to an alternate recipient, any public or nonprofit private organization or agency, or State or political subdivision of the State.

(b) Any alternative recipient will be required to demonstrate—

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or activity.

**§ 4.340 Exhaustion of administrative remedies.**

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if—

(1) 180 days have elapsed since the complainant filed the complaint and

NRC has made no finding with regard to the complaint; or

(2) NRC issues any finding in favor of the recipient.

(b) If NRC fails to make a finding within 180 days or issues a finding in favor of the recipient, NRC will—

(1) Promptly advise the complainant; and

(2) Advise the complainant of his or her right to bring a civil action under section 305(e) of the Act of injunctive relief that will effect the purposes of the Act; and

(3) Inform the complainant that—

(i) The complainant may bring a civil action only in a United States District Court for the district in which the recipient is found or transacts business;

(ii) A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) That before commencing the action, the complainant shall give 30 days notice by registered mail to the Commission, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) The notice must state the relief requested, the court in which the complainant is bringing the action, and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) The complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of pending action in any court of the United States.

**§ 4.341 Reports.**

The NRC shall submit to the Secretary of Health and Human Services, not later than December 31 of each year, a report which—

(a) Describes in detail the steps taken during the preceding fiscal year to carry out the Act; and

(b) Contains data on the frequency, type, and resolution of complaints and on any compliance reviews, sufficient to permit analysis of the agency's progress in reducing age discrimination in programs receiving Federal financial assistance from NRC; and

(c) Contains data directly relevant to the extent of any pattern or practice of age discrimination which NRC has identified in any programs receiving Federal financial assistance from NRC and to progress toward eliminating it; and

(d) Contains evaluative or interpretative information which NRC determines is useful in analyzing agency

progress in reducing age discrimination in programs receiving Federal financial assistance from NRC; and

(e) Contains whatever other data the Secretary of HHS may require.

6. Paragraph (e) of Appendix A is revised to read as follows:

**Appendix A—Federal Assistance to which this Part Applies**

\* \* \* \* \*

(e) *Research Support.* Agreements for the financial support of basic and applied scientific research and for the exchange of scientific information.

Dated at Bethesda, MD, this 22nd day of June 1987.

For the Nuclear Regulatory Commission,  
Victor Stello, Jr.

*Executive Director for Operations.*

[FR Doc. 87-15369 Filed 7-6-87; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 87-ASW-19, Amdt. 39-5659]

**Airworthiness Directives; Boeing Vertol Model 234 Series Helicopters**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action publishes in the Federal Register and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of certain Boeing Vertol Model 234 series helicopters by individual telegrams. The AD requires replacement of the spiral bevel ring gear and the first stage sun gear and associated parts in the forward and aft transmissions. The AD is needed to prevent possible failure of the spiral bevel ring gear which could result in desynchronization of the main rotor blades and loss of control of the helicopter.

**EFFECTIVE DATES:** July 20, 1987, as to all persons except those to whom it was made immediately effective by individual telegrams issued November 14, 1986, which contained this amendment.

Compliance: As indicated in body of AD.

**FOR FURTHER INFORMATION CONTACT:** P. Perrotta or M. Schoenberger, Propulsion Branch, ANE-174, New York Aircraft Certification Office, Aircraft Certification Division, New England

Region, Federal Aviation Administration, Room 202, 181 South Franklin Avenue, Valley Stream, New York 11581, telephone number (516) 791-7421.

**SUPPLEMENTARY INFORMATION:** On November 14, 1986, telegraphic AD T86-23-51 was issued and made effective immediately as to all known U.S. owners and operators of certain Boeing Vertol Model 234 series helicopters. This AD was prompted by a failure of the forward transmission spiral bevel ring gear which resulted in loss of control of the helicopter and an accident. The failure of the ring gear may have been associated with modifications to the ring gear, an adjacent sun gear, and the shim installed between these gears prescribed by Boeing Vertol Service Bulletin No. 234-63-1014. Accordingly this AD requires removal of these modified parts and installation of similar but unmodified parts of known reliability. The telegraphic AD required all replacement parts to be new; however, subsequent review has established that the sun gear was not involved in the failure mode. Thus, the replacement part prescribed by this AD need not be new but only in serviceable condition.

Since it was found that immediate corrective action was required, notice and public procedure thereon were impracticable and contrary to public interest, and good cause existed to make the AD effective immediately by individual telegrams, issued November 14, 1986, as to all known U.S. owners and operators of certain Boeing Vertol Model 234 series helicopters. These conditions still exist, and the AD is hereby published in the *Federal Register* as an amendment to § 39.13 of Part 39 of the Federal Aviation Regulations to make it effective as to all persons.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required). A copy of it, when filed, may be obtained by contacting the

person identified under the caption "**FOR FURTHER INFORMATION CONTACT.**"

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive (AD):

**Boeing Vertol:** Applies to Boeing Vertol Model 234 series helicopters certificated in any category, equipped with forward rotor transmission P/N's 234D1200-2, -3, -4, -5, and -6 and/or aft rotor transmission P/N's 234D2200-3, -4, and -5.

Compliance is required as indicated, unless already accomplished.

To prevent failure of the spiral bevel ring gear/sun gear bolted joint, accomplish the following before further flight.

(a) For both forward and aft transmissions, remove all spiral bevel ring gears, P/N's 114D1244-5 and -6 and 114D2254-5 and -6; first stage sun gears, P/N's 234D1243-1 and -2 and 234D2250-1 and -2; and spacer shim, P/N's 114D2257-1 and -2, with more than zero hour's time in service. Spiral bevel ring gears, P/N's 114D1244-6 and 114D2254-6; first stage sun gears, P/N's 234D1243-2 and 234D2250-2; and spacer shim, P/N 114D2257-2, are not eligible for further service.

(b) Install the following parts, which must be new, except for the first stage sun gear (item (b)(2) below), which must be at least serviceable:

- (1) Spiral bevel ring gear, P/N 114D1244-5 or 114D2254-5;
  - (2) First stage sun gear, P/N 234D1243-1 or 234D2250-1;
  - (3) Spacer shim, P/N 114D2257-1; and
  - (4) Associated hardware as follows:
    - (i) Bolt, P/N BACB30MT6T12;
    - (ii) Washer, P/N BACW10BP6P; and
    - (iii) Nut, P/N BACN10TW6.
- (c) An alternate method of compliance which provides an equivalent level of safety with this AD may be used when approved by the Manager, New York Aircraft Certification Office, 181 South Franklin Avenue, Rm. 202, Valley Stream, NY 11581.

This amendment becomes effective July 20, 1987, as to all persons except those persons to whom it was made immediately effective by individual telegrams issued November 14, 1986, which contained this amendment.

Issued in Fort Worth, Texas, on June 18, 1987.

Don P. Watson,

Acting Director, Southwest Region.

[FR Doc. 87-15297 Filed 7-6-87; 8:45 am]

BILLING CODE 4910-13-M

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 9

#### Review of Exchange Disciplinary, Access Denial Or Other Adverse Actions

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission") has adopted final rules amending the Commission's Part 9 rules. These amendments effect changes in the existing procedures and standards governing review of exchange disciplinary, access denial and other adverse actions in order to streamline and simplify the entire review process.

**DATES:** Effective August 6, 1987 this Part will apply in its entirety to all appeals, and all matters relating thereto, filed on and after August 6, 1987. This Part will not apply to notices of appeal, or petitions for stay, filed before August 6, 1987, except that parties to any Part 9 proceeding pending on August 6, 1987, may, within 30 days after August 6, 1987, elect to have the matter governed by this Part.

**FOR FURTHER INFORMATION CONTACT:** Philip V. McGuire, Esq., Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Telephone (202) 254-8955.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On February 9, 1987, the Commission published proposed revisions to the Commission's Part 9 rules governing review of exchange disciplinary, access denial and other adverse actions in which it requested public comment on the rules as proposed, and suggestions for any other changes that would simplify and expedite the review process. 52 FR 4021. As stated by the Commission, the revisions are intended to streamline and clarify the procedures and standards governing the disposition of notices of appeal filed with the Commission.

In response to this request for public comment, the Commission received

letters from six exchanges: The Chicago Board of Trade; the Chicago Mercantile Exchange; the Coffee, Sugar & Cocoa Exchange, Inc.; the Commodity Exchange, Inc.; the New York Cotton Exchange; and the New York Mercantile Exchange. All the commenters generally were supportive of the proposed rules.

The Commission has considered the comments in these letters and has determined to adopt final rules which amend, in their entirety, the formerly existing Part 9 Rules Relating to Review of Exchange Disciplinary, Access Denial or Other Adverse Actions.

## II. Summary of Changes to Proposed Rules Adopted in Final Rules

In its final rules the Commission has adopted numerous changes to its proposed rules which incorporate and respond to comments received from the public and which should improve or expedite the review process. In addition, the Commission has narrowed the scope and applicability of the Part 9 procedures by narrowing the definitions of "access denial actions" and "other adverse actions."

The Commission also has expanded the scope of § 9.21(b) to provide that an exchange may file a motion to deny review of certain matters that the exchange contends are not within the scope of part 9. Further, the Commission has established standards and procedures governing *ex parte* stays. These revisions, among others, and the comments are discussed in more detail below.

### A. Scope of Rules

The term "access denial action" was defined in proposed § 9.2(a) to mean "any proceeding other than a disciplinary action<sup>1</sup> by an exchange that denies or limits the privileges of membership." Commenters stated that, without some limitation, the definition would encompass certain exchange actions denying or limiting such privileges as, for example, the ability to vote, to hold office or to run for office in a particular membership category. The Commission agrees that such matters which are generally limitations on a member's ability to participate in an exchange's corporate affairs are not appropriate for Part 9 review.<sup>2</sup>

<sup>1</sup> Final § 9.2(d) defines "disciplinary action" to mean "any suspension, expulsion or other penalty (as defined in § 8.03(i) of this chapter,) imposed on a member of an exchange by that exchange for violation of rules of the exchange, including summary actions."

<sup>2</sup> Nonetheless, in certain instances, the specific application of an exchange rule that limits the membership privileges of an individual, or a group or class, could constitute an "access denial action"

Therefore, the Commission has amended the definition of "access denial action" to exclude expressly "any exchange action that solely limits a member's ability to participate in the internal corporate affairs of the exchange."

Conversely, certain exchange actions clearly fall within the definition of access denial action and are appropriately subject to review and the notification requirements of Part 9, particularly those instances where (1) a non-member is denied exchange membership, (2) a suspended or expelled member is denied reinstatement of membership privileges, or (3) an explicit limitation is imposed upon the membership rights of a specific exchange member or group of members. Finally, such matters as the acquisition of floor trader status or the prescription of terms of floor access for members relate directly to an exchange's function as a contract market and, therefore, should not be excluded from the definition of access denial action.

The term "other adverse action" was defined in proposed § 9.2(g) to include "any exchange action, other than an access denial action or disciplinary action that adversely affects any person whether or not a member of an exchange." The Commission agrees with commenters who similarly argued against the extension of this definition into strictly internal corporate affairs of an exchange. Therefore, the proposed definition of "other adverse action" similarly has been amended to exclude "any exchange action that solely involves the internal corporate affairs of the exchange." By excluding such matters, the Commission intends to limit "other adverse actions" to those exchange actions that relate directly to an exchange's function as a contract market. For example, exchange actions affecting rights in connection with floor space allocations, communication line installations, exchange personnel decisions, or contract disputes between an exchange and its clearing service contractor normally would not be deemed "other adverse actions."

The commenters also asserted that issues involving property rights, such as matrimonial or estate disputes, or, more importantly, claims against an exchange member's assets, are subject to state law, but not to the provisions of the Act. The Commission agrees that such disputes may be remote from the Commission's regulatory concerns. Therefore, in response to any notice of

or "other adverse action" appropriate for Part 9 review.

appeal relating to an other adverse action that "solely involves the internal corporate affairs to the exchange," the Commission will entertain a motion to deny Commission review. See final §§ 9.1(B) and 9.21(b). In deciding such a motion, the Commission will determine whether such factors are intertwined or related to matters in which the Commission otherwise has a juridical interest.

Other commenters stated that certain matters relating directly to an exchange's function as a contract market should not be subject to Commission review. The commenters included among these matters: Certification of weighmasters and depositories, denials of hedge exemptions, restrictions on capital-based position limits, emergency margin impositions, net capital requirements or adjustments, findings of *force majeure* in a delivery context, and decisions regarding warehouse licensing or grading of physical commodities. The Commission believes that in certain circumstances such matters may implicate important policy issues and, therefore, these matters should not be excluded from the scope of Part 9.

The inclusion of "other adverse actions" within the scope of Part 9 is based upon the express language of section 8c(2) of the Act which provides that, in addition to reviewing exchange disciplinary actions and access denial actions, the Commission may review "any other exchange action" upon application by the person "adversely affected" by that exchange action. Thus, section 8c(2) is not limited in scope to disciplinary and access denial actions. Nonetheless, the Commission reiterates that certain provisions of the new Part 9 do not apply to other adverse actions. Specifically, §§ 9.11-9.13 governing notice and the effective date of disciplinary and access denial actions, § 9.24 governing petitions for stay, and § 9.32 governing Commission review on its own motion do not apply to other adverse actions.

As originally proposed, § 9.21(b) provided that an exchange could file a motion to postpone the filing of the record in conjunction with a motion requesting that the Commission decline to accept a notice of appeal of any matter that the exchange contends is excluded by proposed § 9.1(b). Commenters expressed concern that proposed § 9.21(b) failed to provide for dismissal of appeals of matters that clearly or appropriately were outside the scope of Part 9.

Section 9.21(b), as amended, provides that an exchange, in addition to

challenging a notice of appeal as expressly excluded from the scope of Part 9 by § 9.1(b), may challenge a notice of appeal as excluded by operation of the definitional exclusions in § 9.2(a) or § 9.2(g). Section 9.21(b) also now provides that the submission of a motion to deny review pursuant to that rule, accompanied by an affidavit averring facts in support of the motion, will operate to stay the filing of the record and subsequent submissions.

#### B. Commission Review Procedures

In its proposed rules, the Commission intended to modify its rules by which parties could obtain Commission review of exchange disciplinary, access denial or other adverse actions. Under the former Part 9 rules, parties disciplined, denied access or adversely affected by exchange actions were not granted the right to appeal an exchange decision, but instead were entitled only to apply for review under a *certiorari* procedure. Under that procedure, the party seeking review was required to submit an application for review outlining those factual or legal elements of the exchange decision with which the applicant disagreed. In passing upon the application, the Commission necessarily considered the exchange decision and portions or all of the underlying record in addition to the issues raised. In the event review was granted, the parties filed full briefs, and the Commission again considered the case in full. This two-tiered review procedure required the Commission to perform duplicative functions by first considering the application for review and answer thereto (which often resembled briefs) and, if review was granted, considering the briefs (which often restated the issues raised in the application and answer).

The Commission has rejected this duplicative *certiorari* procedure for a one-step appeal procedure. Under the new Part 9, an appeal is initiated by filing a notice of appeal. After the notice of appeal is filed, the record of the exchange proceeding and the briefs must be filed with the Commission prior to institution of Commission review. The new appeal procedure will relieve the burden imposed on the parties by the former rules that required the parties to file detailed and time-consuming applications for review and answers followed by, if review was granted, briefs in support of the issues in the application for review. Under the final rules, as adopted, the parties need only file a single brief. The change of appellate review rules from a *certiorari* procedure to an appeal procedure also will be more efficient and expeditious

because it will afford aggrieved parties the opportunity to appeal as a matter of right, and will spare the Commission from considering the merits of the exchange action and the application for review separately before determining whether to review the issues on appeal and render its own decision on the merits.

As was the case under the former rules, if no party files an appeal, the Commission may review an exchange disciplinary or access denial action by taking review on its own motion within 180 days after the Commission has received the notice of the exchange action prescribed in § 9.11.<sup>9</sup> In any case, at the conclusion of the Commission's consideration of the issues on appeal, the Commission may render an order of summary affirmance, or a more expansive opinion, either of which will constitute the final decision of the Commission effective upon service.

One commenter criticized the efficacy and efficiency of taking review of all adverse exchange actions regardless of whether they raise important questions of law or policy, and proposed that the Commission retain the present *certiorari* procedure as it applies to other adverse actions. The Commission has rejected this proposal, because to juxtapose a *certiorari* procedure for other adverse actions next to an appeals procedure for disciplinary and access denial actions would adversely affect the efficiencies sought to be achieved by the revised procedure and could create confusion and inconsistent treatment of matters appealed to the Commission. To the extent that this proposal was motivated by concerns that the revised rules would invite appeals of matters outside the scope of Part 9, the Commission again notes the availability of the § 9.21(b) motion.

#### C. Summary Affirmances

Proposed § 9.33(b) provided that the terms of an order of summary affirmance could state that the summary affirmance was not to be construed as expressing the Commission's views on a particular matter. One commenter expressed concern that this provision could potentially cause confusion over whether a particular summary affirmance was or was not "on the merits" for purposes of judicial review. In order to avoid this confusion, the Commission has revised § 9.33(b) to read:

If the Commission finds that the result reached in the decision of the exchange 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 of the exchange without opinion, which will constitute the Commission's final decision. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the exchange final decision, including any rationale contained therein, as its opinion and order, and neither the exchange's final decision nor the Commission's order of summary affirmance will serve as a Commission precedent in other proceedings.

Unless the Commission indicates otherwise, an order of summary affirmance is strictly an affirmance of the result reached by the exchange and does not reflect a determination to adopt the exchange's findings of fact or rationale as its own. Under this provision, the Commission may summarily affirm an exchange disciplinary, access denial or other adverse action where it agrees that the result reached by the exchange is substantially correct and that the underlying factual findings made by the exchange are supported by substantial evidence.

The Commission also notes that in particular cases, legal issues may be raised that neither implicate issues arising under the Act nor would affect the Commission's determination that a decision of an exchange is substantially correct. In such limited instances, the Commission, in its discretion, may identify particular issues not arising under the Act and the Commission's rules and indicate that the Commission is not addressing those issues. In such instances, the Commission intends no collateral estoppel effect as to the non-Act issues, although *res judicata* should attach to those claims arising under the Act.

#### D. Ex Parte Stays

Proposed § 9.24(d) provided that the Commission, in its discretion, could issue a stay order without awaiting an exchange reply. This provision was substantially similar to the provision in former rule § 9.22(b). However, one commenter expressed concern with a procedure that lacked certain safeguards limiting the circumstances where such relief would be granted, and proposed that the Commission adopt an additional provision similar to Rule 65(b) of the Federal Rules of Civil Procedure governing temporary restraining orders.

The Commission finds merit in this proposal and has revised § 9.24 to provide that the Commission may grant

<sup>9</sup> See section 8c(2) of the Act.

an *ex parte* stay only where the petitioner (1) expressly requests an *ex parte* stay, (2) files a proof of service and (3) clearly establishes by affidavit that immediate and irreparable harm will result in the absence of a stay. The Commission considers an *ex parte* stay to be an extraordinary remedy that may only appropriately be considered where an exchange disciplinary action is to become effective before the five-day period for filing the exchange response expires. See § 9.12(a)(1). Of course, since proof of service on the exchange is required, the exchange immediately could respond to the petition for stay.<sup>4</sup> In most instances the Commission will review an exchange's reply before determining whether to grant a stay.

#### E. Scope of Review

Rule § 9.30, which provides that the Commission may consider *sua sponte* any issues arising from the record before it and may base its determination on those issues, has been revised to provide that where the Commission determines to consider any issue *sua sponte* the Commission may so notify the parties and provide them an opportunity to address the issue to be considered *sua sponte* by the Commission.

#### F. Record of the Exchange Proceeding

Proposed § 9.2(i) defined "record of the exchange proceeding" to include, among other things, "all documents, minutes, or other exchange records serving as a basis for or reflecting the deliberations concerning the disciplinary action, access denial action or other adverse action taken by an exchange." One commenter criticized this portion of the definition, noting that it could have been construed to include informal notes or other products of an exchange committee's deliberative process. In order to minimize any inhibiting influence on an exchange committee's deliberations, the Commission has revised § 9.2(i) to define the "record of the exchange proceeding" to mean:

all testimony, exhibits, papers and records produced at or filed in an exchange disciplinary or access denial proceeding or served on a party to that proceeding; all documents, minutes or other exchange records serving as a basis for or reflecting the findings, rationale and conclusions concerning the adverse action taken by an exchange; a transcript of any proceeding before any body of the exchange in connection with the exchange proceeding;

<sup>4</sup> The Commission also has revised § 9.9(b)(1)(iii) by expanding from two to four days the period governing temporary stays.

and a copy of all exchange rules which form the basis for the exchange proceeding.

The Commission believes that this definition adequately balances the commenter's concerns with the Commission's need for sufficient documentation of the legal and factual basis for the exchange action.<sup>5</sup>

The Commission has revised § 9.2(i) to require expressly that the record filed with the Commission must include a transcript of the exchange proceeding. This is consistent with the provisions of Commission Rule § 8.17(a)(10) which provides that a substantially verbatim record of the exchange proceeding must be made and must be capable of being transcribed accurately. Commission Rule § 8.17(a)(10) further provides that the exchange need not transcribe the record unless the decision is appealed to an exchange board of appeals or appealed to the Commission pursuant to this Part.

In reviewing an exchange disciplinary, access denial, or other adverse action, the Commission carefully will review the record, with deference to the exchange as a trier of fact, particularly where an exchange bases a finding on the credibility of a witness and the consistency of that witness' testimony with the documentary and other evidence reviewed by the exchange committee. The Commission's role is not to re-weigh the evidence *de novo* or otherwise substitute its judgment for the exchange's. Notwithstanding this deferential standard of review, the Commission may consider the relevant factual circumstances that form the basis for the exchange action and rule on the sufficiency of the evidence used by the exchange in making its findings.

#### G. Commission Review of Exchange-Sponsored Arbitrations

Rule § 9.1(b)(1) codifies Commission practice by providing that the Commission will not accept notices of appeal (or petitions for stay) of any arbitration proceeding. In discussing proposed § 9.1(b)(1), the Commission emphasized that proposed § 9.1(b)(1) codified its well-established policy that the term "other adverse action" does not encompass an action in which an exchange has no substantial interest as

<sup>5</sup> In order to minimize copying costs for an exchange, § 9.2(b)(6) has been revised to provide that where the appellant already possesses documents which constitute a portion of the record, the appellant should request those portions of the record not in the appellant's possession. In addition to providing these portions of the record, the exchange should provide the appellant with an index of the record.

an exchange.<sup>6</sup> Therefore, in the past, where an exchange has not had a substantial interest in the outcome of the arbitration proceeding, the Commission has not exercised its discretion to review that exchange-sponsored arbitration proceeding. Nonetheless, as stated previously,<sup>7</sup> the Commission retains the authority to examine an exchange's conduct of arbitration proceedings by means of waiving the no-review provision in § 9.1(b) or through its normal oversight program.

One commenter expressed concern that the potential for Commission review of an arbitration proceeding, however remote, represented a change in the Commission's general no-review policy regarding exchange-sponsored arbitrations. The Commission does not intend a change in this no-review policy. However, to the extent that the Commission provides a forum for review of exchange actions that adversely affect members and non-members, its standards for initiating review under this part (*i.e.*, waiving the general no-review provision of § 9.1(b)(1)) will be similar to those applied by other forums. Under these standards, Commission action would be very narrow, commensurate with procedures which, under certain circumstances, permit an arbitration award to be vacated by a court. In such a case the Commission may vacate an arbitration award where by means of affidavit or other documentary evidence it is established, that, among other things: The award was procured by fraud or corruption; the arbitrators were partial or corrupt; the arbitrators unduly prejudiced a party by failing to give due regard for the procedural rights of parties; or the arbitrators exceeded their jurisdiction.<sup>8</sup>

The commenter also opined that the Commission should refrain from conducting oversight reviews of an exchange's conduct of arbitration proceedings. The Commission notes that it historically has evaluated arbitration programs through its oversight authority and will continue to do so.<sup>9</sup>

<sup>6</sup> 52 FR 4021, 4023. See, e.g., *Friedman v. Caruso* (September 9, 1985); *In re Chicago Board of Trade and Pitts* (July 9, 1985); *Jeffrey v. Refco* (April 17, 1985); *Burke v. ContiCommodity Services* (April 17, 1985); *In re Chicago Mercantile Exchange and Stein* (December 19, 1979); *In re Chicago Board of Trade and Tamari* (December 14, 1978).

<sup>7</sup> 52 FR 4021, 4028 n.19.

<sup>8</sup> See 9 U.S.C. 10.

<sup>9</sup> See pp. 85-92, Report to Congress under section 237 of the Futures Trading Act of 1982 (December 1985).

### H. Time to File Notice of Appeal

The Commission has amended § 9.20(a) by expanding the time to file a notice of appeal from fifteen to thirty days after notice of the disciplinary or access denial action has been delivered to the person disciplined or denied access.<sup>10</sup> This has been done for purposes of administrative convenience in order to bring the relevant timeframes in this part in line with section 17(h) (2) of the Act governing Commission review of National Futures Association disciplinary actions.<sup>11</sup>

### I. Settlements

Rule 9.7 has been revised to provide that, upon submission of a stipulation for dismissal based on a settlement agreement, the Commission may, in its discretion, issue an order terminating the proceeding. This differs from former rule § 9.5 and proposed § 9.7 which provided that the Commission automatically would dismiss the proceeding upon submission of the stipulation for dismissal. The Commission encourages early settlement of disputes and, therefore, will decline to dismiss a proceeding based on a settlement only in limited circumstances. In determining whether to accept a stipulation for dismissal, the Commission generally will consider: (1) Any previous efforts to reach settlement; (2) the timing of the request, *i.e.*, whether the briefs have been submitted and whether any effort has been expended by the Commission for appellate review; and (3) whether either party has abused the Commission's procedures for delay or other purposes.

### III. Related Matters

#### A. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information

<sup>10</sup> § 9.24(a) governing stays was not revised and provides that a petition for stay must be filed within ten days after delivery of the "9.11 notice" to the person disciplined or denied access. § 9.12(a) was not revised and provides that generally an exchange disciplinary or access denial action may become effective fifteen days after delivery of the "9.11 notice" to the person disciplined or denied access. A significant exception to the 15-day rule is provided by § 9.12(a) (1) concerning member responsibility actions. § 9.12(a) (1) provides that an exchange may cause a disciplinary action to become effective prior to the expiration of the fifteen-day period if the exchange reasonably believes that immediate action is necessary to protect the best interests of the marketplace.

<sup>11</sup> The time to file the record of the exchange proceeding similarly has been expanded from fifteen to thirty days after service of the notice of appeal. § 9.21(a).

as defined by the Paperwork Reduction Act. In compliance with that Act, the Commission previously submitted this rule in proposed form and its associated information collection requirements to the Office of Management and Budget. The Office of Management and Budget approved the collection of information associated with this rule on April 7, 1987, and assigned OMB control 3038-0022 to the rule. Copies of the OMB approved information collection package associated with the rule may be obtained from Robert Neal, OMB, Room 3228, NEOB, Washington, DC 20503. Telephone: (202) 395-7340.

#### B. The Regulatory Flexibility Act

With respect to persons seeking Commission review, the proposed Part 9 rules would impose no additional regulatory burden since Commission review of exchange disciplinary, access denial and other adverse actions is already provided for by the provisions of former Part 9 of the Commission's rules. Also, the Commission previously has noted that the proposed revisions would ease the regulatory burden by reducing the number of submissions and by providing greater certainty as to the standards and procedures governing such review. The Commission previously has determined that contract markets are not "small entities" within the Regulatory Flexibility Act ("REA"), 5 U.S.C. 601 *et seq.* and, accordingly, the requirements of the RFA do not apply to those entities. 47 FR 18618 (April 30, 1982). Accordingly, pursuant to section 3(a) of the RFA, 5 U.S.C. 605(b), the Chairman of the Commission hereby certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities.

#### C. Effective Date

Effective August 6, 1987 this Part will apply in its entirety to all appeals, and all matters relating thereto, filed on and after August 6, 1987. This Part will not apply to notices of appeal, or petitions for stay, filed before August 6, 1987 except that parties to any Part 9 proceeding pending on August 6, 1987, may, within 30 days after August 6, 1987 elect to have the matter governed by this Part.

#### List of Subjects in 17 CFR Part 9

Administrative practice and procedure, commodity exchanges, commodity futures.

17 CFR Part 9 is revised to read as follows:

## PART 9—RULES RELATING TO REVIEW OF EXCHANGE DISCIPLINARY, ACCESS DENIAL OR OTHER ADVERSE ACTIONS

### Subpart A—General Provisions

#### Sec.

- 9.1 Scope of rules.
- 9.2 Definitions.
- 9.3 Provisions referenced.
- 9.4 Filing and service; official docket.
- 9.5 Motions.
- 9.6 Sanctions for noncompliance.
- 9.7 Settlement.
- 9.8 Practice before the Commission.
- 9.9 Waiver of rules; delegation of authority.

### Subpart B—Notice and Effective Date of Disciplinary Action or Access Denial Action

- 9.10 [Reserved]
- 9.11 Form, contents and delivery of notice of disciplinary or access denial action.
- 9.12 Effective date of disciplinary or access denial action.
- 9.13 Publication of notice.
- 9.14-9.19 [Reserved]

### Subpart C—Initial Procedure With Respect to Appeals

- 9.20 Notice of appeal.
- 9.21 Record of exchange proceeding.
- 9.22 Appeal brief.
- 9.23 Answering brief.
- 9.24 Petition for stay pending review.
- 9.25 Limited participation of interested persons.
- 9.26 Participation of Commission staff.
- 9.27-9.29 [Reserved]

### Subpart D—Commission Review of Disciplinary, Access Denial or Other Adverse Action

- 9.30 Scope of review.
- 9.31 Commission review of disciplinary or access denial action on its own motion.
- 9.32 Oral argument.
- 9.33 Final decision by the Commission.

Authority: 7 U.S.C. 4a, 6c, 7a, 12a, 12c, 15a.

### Subpart A—General Provisions

#### § 9.1 Scope of rules.

(a) *Matters included.* This part governs the review by the Commission, pursuant to section 8c of the Act, as amended, of any suspension, expulsion, disciplinary or access denial action, or other adverse action by an exchange.

(b) *Matters excluded.* This part does not apply to and the Commission will not accept notices of appeal, or petitions for stay pending review, of:

(1) Any arbitration proceeding, regardless of whether the proceeding was conducted pursuant to the provisions of section 5a(11) of the Act or involved a controversy between members of an exchange;

(2) Except as provided in §§ 9.11(a), 9.11(b)(1)-(5), 9.11(c), 9.12(a) and 9.13 (concerning the notice, effective date and publication of a disciplinary or

access denial action), any summary action authorized under the provisions of § 8.27 of this chapter imposing a minor penalty for the violation of exchange rules relating to decorum or attire, or relating to the timely submission of accurate records required for clearing or verifying each day's transactions or other similar activities; and

(3) Any exchange action arising from a claim, grievance, or dispute involving cash market transactions which are not a part of, or directly connected with, any transaction for the purchase, sale, delivery or exercise of a commodity for future delivery or a commodity option.

The Commission will, upon its own motion or upon motion filed pursuant to § 9.21(b), promptly notify the appellant and the exchange that it will not accept the notice of appeal or petition for stay of matters specified in this paragraph. The determination to decline to accept a notice of appeal will be without prejudice to the appellant's right to seek alternate forms of relief that may be available in any other forum.

(c) *Applicability of these Part 9 Rules.* Unless otherwise ordered, these rules will apply in their entirety to all appeals, and matters relating thereto filed on or after August 6, 1987. Any Part 9 proceeding pending before the Commission on August 6, 1987 will continue to be governed by the Commission's former Part 9 Rules, 17 CFR Part 9 (1987), except that the parties to any part 9 proceeding pending on August 6, 1987 may, within 30 days after August 6, 1987 by written stipulation executed by all parties, and filed with the Proceedings Clerk before the Commission's final decision is rendered, elect to have the matter governed by the provisions of this Part 9, as amended.

#### § 9.2 Definitions.

For purposes of this part:

(a) "Access denial action" means any proceeding other than a disciplinary action by an exchange that denies or limits the privileges of membership, but excludes any exchange action that solely limits the ability of a member of an exchange to participate in the internal corporate affairs of the exchange.

(b) "Disciplinary action" means any suspension, expulsion or other penalty (as defined in § 8.03(i) of this chapter) imposed on a member of an exchange by that exchange for violations of rules of the exchange, including summary actions.

(c) "Exchange" means any board of trade which has been designated as a contract market.

(d) "Exchange proceeding" means any formal or informal proceeding by an exchange which results in a disciplinary action, access denial action or other adverse action.

(e) "Mail" means properly addressed and postpaid first class mail, and includes overnight delivery service.

(f) "Member of an exchange" means any person who is admitted to membership or has been granted membership privileges on an exchange, any employee, officer, partner, director or affiliate of such member or person with membership privileges including any associated person, and any other person under the supervision or control of such member or person with membership privileges.

(g) "Other adverse action" and "adverse action" include any exchange action, other than an access denial action or disciplinary action, that adversely affects any person, whether or not a member of the exchange, but exclude any exchange action that solely involves the internal corporate affairs of the exchange.

(h) "Party" includes the person filing a notice of appeal or petition for stay who has been the subject of a disciplinary, access denial or other adverse action by an exchange; that exchange; any person participating in a proceeding under this part pursuant to § 9.25; and the Division of Trading and Markets when participating in a proceeding under this part pursuant to § 9.26.

(i) "Record of the exchange proceeding" means all testimony, exhibits, papers and records produced at or filed in an exchange disciplinary or access denial proceeding or served on a party to that proceeding; all documents, minutes or other exchange records serving as a basis for or reflecting the findings, rationale and conclusions concerning the adverse action taken by an exchange; a transcript of any proceeding before any body of the exchange in connection with the exchange proceeding; and a copy of all exchange rules which form the basis for the exchange proceeding.

(j) "Rules of the exchange" means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, or written and publicly available interpretation or stated policy of the exchange, or instrument corresponding thereto.

(k) "Summary action" means a disciplinary action resulting in the imposition of a penalty on a member of an exchange for violation of rules of the exchange authorized under the provisions of § 8.17(b) (penalty for impeding progress of hearing), § 8.25 (member responsibility action) or § 8.27

(penalty for violation of rules relating to decorum, attire, submission of records or similar activities) of this chapter.

#### § 9.3 Provisions referenced.

Except as otherwise provided in this part, the following provisions of the Commission's Rules Relating to Reparations contained in Part 12 of this chapter apply to this part: § 12.3 (Business Address; Hours); § 12.5 (Computation of Time); § 12.6 (Extensions of Time; Adjournments; Postponements); § 12.7 (Ex Parte Communications); and § 12.12 (Signature).

#### § 9.4 Filing and service; official docket.

(a) *Filing with the Proceedings Clerk; proof of filing; proof of service.* Any document that is required by this part to be filed with the Proceedings Clerk must be filed by delivering it in person or by mail to: Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. To be timely filed under this part, a document must be delivered or mailed to the Proceedings Clerk within the time prescribed for filing. A party must use a means of filing which is at least as expeditious as that used in serving that document upon the other parties. Proof of filing must be made by attaching to the document for filing an affidavit of filing executed by any person 18 years of age or older or a proof of filing executed by an attorney-at-law qualified to practice before the Commission. The proof of filing must certify that the attached document was deposited in the mail, with first-class postage prepaid, addressed to the Proceedings Clerk, Office of Proceedings, 2033 K Street, NW., Washington, DC 20581, on the date specified in the affidavit. Proof of service of a document must be made by filing with the Proceedings Clerk, simultaneously with the filing of the required document, an affidavit of service executed by any person 18 years of age or older or a certification of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service must identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

(b) *Formalities of filing—(1) Number of copies.* Unless otherwise specifically provided, an original and two conformed copies of all documents filed with the Commission in accordance with the provisions of this part must be filed with the Proceedings Clerk.

(2) *Title page.* All documents filed with the Proceedings Clerk must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the docket number (if one has been assigned by the Proceedings Clerk), the subject of the particular document and the name of the person on whose behalf the document is being filed.

(3) *Paper, spacing, type.* All documents filed with the Proceedings Clerk must be typewritten, must be on one grade of good white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 11½ inches long, and must be bound on the top only. They must be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced.

(4) *Signature.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(c) *Service—(1) General requirements.* All documents filed with the Proceedings Clerk must, at or before the time of filing, be served upon all parties. A party must use a means of service which is at least as expeditious as that used in filing that document with the Proceedings Clerk. One copy of all motions, petitions or applications made in the course of the proceeding, all notices of appeal, all briefs, and letters to the Commission or an employee thereof must be served by a party upon all other parties.

(2) *Manner of service.* Service may be either personal or by mail. Service by mail is complete upon deposit of the document in the mail. Where service is effected by mail, the time within which the person served may respond thereto will be increased by three days.

(3) *Designation of person to receive service.* The first document filed in a proceeding by or on behalf of any party must state on the first page the name and postal address of the person who is authorized to receive service for the party of all documents filed in the proceeding. Thereafter, service of documents must be made upon the person authorized unless service on a different authorized person or on the party himself is ordered by the Commission, or unless pursuant to § 9.8 the person authorized is changed by the party upon due notice to all other parties. Parties must file and serve notification of any changes in the information provided pursuant to this subparagraph as soon as practicable after the change occurs.

(4) *Service of orders and decisions.* A copy of all notices, rulings, opinions and orders of the Commission will be served

on each of the parties and will be deemed served upon deposit in the mail.

(d) *Official docket.* Upon receipt of a notice of appeal filed in accordance with § 9.20, or a petition for stay pending review filed in accordance with § 9.24, the Proceedings Clerk will establish and thereafter maintain the official docket of that proceeding and will assign a docket number to the proceeding.

#### § 9.5 Motions.

(a) *In general.* An application for a form of relief not otherwise specifically provided for in this part must be made by a written motion, filed with the Proceedings Clerk. The motion must state the relief sought and the basis for the relief and may set forth the authority relied upon.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten days after service of the motion, or within such longer or shorter period as established by these rules, or as the Commission may direct.

(c) *Motions for procedural orders.* Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of the action.

(d) *Dilatory motions.* Frivolous or repetitive motions dealing with the same subject matter will not be permitted and such motions will summarily be denied.

#### § 9.6 Sanctions for noncompliance.

In the event that any party fails to file any document or make any appearance which is required under this part, the Commission may, in its discretion, and upon its own motion or upon the motion of any party to the proceeding, dismiss the proceeding before it, or, based on the record before it, affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the exchange.

#### § 9.7 Settlement.

At any time before there has been a final determination by the Commission with respect to any notice of appeal filed in accordance with § 9.20, the parties may file a stipulation for dismissal based on a settlement agreement. Thereupon, the Commission may issue an order terminating the proceeding before the Commission as to the parties to the settlement agreement. The entry of such an order does not affect the Commission's authority under the Act.

#### § 9.8 Practice before the Commission.

(a) *Practice—(1) By non-attorneys.* An individual may appear *pro se* (on his own behalf); a general partner may represent the partnership; a *bona fide* officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of Part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Debarment of counsel or representative during the course of a proceeding.* Whenever, while a proceeding is pending before the Commission, the Commission finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Commission may order that such person be precluded from further acting as counsel or representative in the proceeding. The proceeding will not be delayed or suspended pending disposition of the appeal; *Provided*, That the Commission may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(c) *Withdrawal of representation.* Withdrawal from representation of a party will be only by leave of the Commission. Such leave to withdraw may be conditioned on the attorney's (or representative's) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit must include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed *pro se*, in which case, the statement must include the address where that party can thereafter be served.

#### § 9.9 Waiver of rules; delegation of authority.

(a) *Standards for waiver; notice to parties.* To prevent undue hardship on any party or for other good cause shown the Commission may waive any rule in this part in a particular case and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby and that the ends of justice will be served. Reasonable notice will be given to all parties of any action taken pursuant to this paragraph.



(b) *Delegation of authority.* (1) The Commission hereby delegates, until the Commission orders otherwise, to the Chief of the Opinions Section, or the Chief's designee, the authority:

(i) To waive or modify any of the requirements of §§ 9.20-9.25 and to waive or modify the requirements of the Commission's Rules Relating to Reparations incorporated by § 9.3 insofar as such requirements pertain to changes in time permitted for filing, and to the form, execution, service and filing of documents;

(ii) To enter orders under §§ 9.5, 9.6 and 9.7;

(iii) To decline to accept any notice of appeal, or petition for stay pending review, of matters excluded from this part by §§ 9.1(b), 9.2(a) and 9.2(b), and to so notify the appellant and the exchange;

(iv) To stay the effective date of a disciplinary action for a period of time, not to exceed four days, to enable the Commission to rule on a petition for stay filed under § 9.24;

(v) To decline to accept any document which has not been timely filed or perfected, as specified in these rules;

(vi) To order the filing of the record of the exchange proceeding notwithstanding the submission of a motion under § 9.21(b) that the Commission not accept a notice of appeal; and

(vii) To enter any order which will facilitate or expedite Commission review.

(2) Within seven days after service of a ruling issued pursuant to paragraph (b)(1) of this section, a party may file with the Proceedings Clerk a petition for Commission reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration will not operate to stay the effective date of such ruling.

(3) The Chief of the Opinions Section may submit to the Commission for its consideration any matter which has been delegated pursuant to paragraph (b)(1) of this section.

(4) Nothing in this section will be deemed to prohibit the Commission, at its election, from exercising the authority delegated to the Chief of the Opinions Section under this section.

#### Subpart B—Notice and Effective Date of Disciplinary Action or Access Denial Action

##### § 9.10 [Reserved]

##### § 9.11 Form, contents and delivery of notice of disciplinary or access denial action.

(a) *When required.* Whenever an exchange decision pursuant to which a

disciplinary action or access denial action is to be imposed has become final, the exchange must, within thirty days thereafter, provide written notice of such action to the person against whom the action was taken and to the Commission: *Provided*, That the exchange is not required to notify the Commission of any summary action, as authorized under the provisions of § 8.27 of this chapter, which results in the imposition of minor penalties for the violation of exchange rules relating to decorum or attire. No final disciplinary or access denial action may be made effective by the exchange except as provided in § 9.12.

(b) *Contents of notice.* For purposes of this part, the written notice of a disciplinary action or access denial action may be either a copy of a written decision which accords with §§ 8.16, 8.18, or 8.19(c) of this chapter (including copies of any materials incorporated by reference) or other written notice which must include:

(1) The name of the person against whom the disciplinary action or access denial action was taken;

(2) A statement of the reasons for the disciplinary action or access denial action together with a listing of any rules which the person who was the subject of the disciplinary action or access denial action was charged with having violated or which otherwise serve as the basis of the exchange action;

(3) A statement of the conclusions and findings made by the exchange with regard to each rule violation charged or, in the event of settlement, a statement specifying those rule violations which the exchange has reason to believe were committed;

(4) The terms of the disciplinary action or access denial action;

(5) The date on which the action was taken and the date the exchange intends to make the disciplinary or access denial action effective; and

(6) Except as otherwise provided in § 9.1(b), a statement informing the party subject to the disciplinary action or access denial action of the availability of Commission review of the exchange action pursuant to section 8c of the Act and this part.

(c) *Delivery and filing of the notice.* Delivery of the notice must be made either personally to the person who was the subject of the disciplinary action or access denial action or by mail to such person at that person's last known address. A copy of the notice must be filed on the same date with the Commission, either in person during normal business hours or by mail to: Contract Markets Section, Division of

Trading and Markets, Commodity Futures Trading Commission, 2033 K St., NW., Washington, DC 20581. The notice filed with the Commission must additionally include the date on which the notice was delivered to the person disciplined or denied access and state whether delivery was personal or by mail.

(d) *Effect of delivery and filing by mail.* Filing by mail to the Commission and delivery by mail to the person disciplined or denied access will be complete upon deposit in the mail of a properly addressed and postpaid document. Where delivery to the person disciplined or denied access is effected by such mail, the time within which a notice of appeal or petition for stay may be filed will be increased by three days.

(e) *Certification.* Copies of the notice and the submission of any additional information provided pursuant to this section must be certified as true and correct by a duly authorized officer, agent or employee of the exchange.

##### § 9.12 Effective date of disciplinary or access denial action.

(a) *Effective date.* Any disciplinary or access denial action taken by an exchange will not become effective until at least fifteen days after the written notice prescribed by § 9.11 is delivered to the person disciplined or denied access; *Provided, however*, That the exchange may cause a disciplinary action to become effective prior to that time if:

(1) As authorized by § 8.25 of this chapter, the exchange reasonably believes, and so states in its written decision, that immediate action is necessary to protect the best interests of the marketplace; or

(2) As authorized by § 8.17(b) of this chapter, the exchange determines, and so states in its written decision, that the actions of a person who is within the exchange's jurisdiction have impeded the progress of a disciplinary hearing; or

(3) As authorized by § 8.27 of this chapter, the exchange determines that a person has violated exchange rules relating to decorum or attire, or timely submission of accurate records required for clearing or verifying each day's transactions or other similar activities; or

(4) The person against whom the action is taken has consented to the penalty to be imposed and to the timing of its effectiveness.

(b) *Notice of early effective date.* If the exchange determines in accordance with paragraph (a)(1) of this section that a disciplinary action will become effective prior to the expiration of fifteen

days after written notice thereof, it must notify the person disciplined in writing, either personally or by telegram or other means of written telecommunication to the person's last known address, stating the reasons for the determination. The exchange must also be by telegram or other means of written telecommunication immediately notify the Commission (Attention: Contracts Markets Section, Division of Trading and Markets). Where notice is delivered by telegram or other means of written telecommunication, the time within which the person so notified may file a petition for stay pursuant to § 9.24(a)(2) will be increased by one day.

#### § 9.13 Publication of notice.

Whenever an exchange suspends, expels or otherwise disciplines, or denies any person access to the exchange, it must make public its findings by disclosing at least the information contained in the notice required by § 9.11(b). An exchange must make such findings public as soon as the disciplinary action or access denial action becomes effective in accordance with the provisions of § 9.12 by posting a notice in a conspicuous place on its premises to which its members and the public regularly have access for a period of five consecutive business days. Thereafter, the exchange must maintain and make available for public inspection a record of the information contained in the disciplinary or access denial notice.

#### §§ 9.14-9.19 [Reserved]

### Subpart C—Initial Procedure With Respect to Appeals

#### § 9.20 Notice of appeal.

(a) *Time to file.* Except as provided in § 9.1(b), any person who is the subject of disciplinary or access denial action by an exchange or any person who is otherwise adversely affected by any other action of an exchange may, at any time within thirty days after notice of the disciplinary or access denial action has been delivered to the person disciplined or denied access in accordance with § 9.11, or within thirty days after notice of an other adverse action, file a notice of appeal of such disciplinary, access denial or other adverse action. The Commission may dismiss any appeal for which a notice of appeal is not timely filed.

(b) *Contents.* The notice of appeal need consist only of a brief statement indicating that the party is requesting Commission review of the exchange action, and must include:

(1) The name and address of the appellant, and any duly authorized agent or officer of the appellant;

(2) The name and docket number of the exchange proceeding;

(3) The date on which the disciplinary, access denial or other adverse action was imposed by the exchange or the date on which the final exchange decision was rendered, and the dates upon which the exchange action has or will become final and effective;

(4) A copy of the notice provided to the appellant by the exchange in accordance with the provisions of § 9.11, in the case of a disciplinary or access denial action, or otherwise, in the case of any other adverse exchange action;

(5) The relief sought from the action of the exchange;

(6) The appellant's request for a copy of the record of the exchange proceeding, or portions of the record not in the appellant's possession, and a representation that the appellant agrees to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing that copy; and

(7) A nonrefundable fee of \$100 remitted by check, bank draft or money order, payable to the Commodity Futures Trading Commission.

#### § 9.21 Record of exchange proceeding.

(a) *Filing of record.* Within thirty days after service of the notice of appeal, the exchange must file two copies of the record of the exchange proceeding (as defined in § 9.2(i)) with the Proceedings Clerk, and serve a copy on the appellant and any other party to the proceeding, provided that such person has agreed to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing the copy. The record must be bound as a unit, must be chronologically indexed and tabbed, must be certified as correct by a duly authorized official, agent or employee of the exchange, and must contain a certificate of service on the appellant or any other party to the proceeding (or waiver of service for failure to pay costs pursuant to this rule).

(b) *Motion that the Commission not accept notice of appeal.* Within fifteen days after service of the notice of appeal, the exchange may file a motion that the Commission not accept a notice of appeal of any matter that the exchange contends is excluded from this part by §§ 9.1(b), 9.2(a) and 9.2(g). Such motion must be accompanied by an affidavit averring facts in support of the motion. The filing of such motion will operate to stay the filing of the record and subsequent submissions pending the Commission's ruling on such motion. The appellant may serve and file a written response to such motion within ten days after service of the motion.

#### § 9.22 Appeal brief.

(a) *Time to file.* Any person who has filed a notice of appeal in accordance with the provisions of § 9.20 must perfect the appeal by filing an appeal brief with the Proceedings Clerk within thirty days after service of the record of the exchange proceeding. The Commission may dismiss any appeal for which an appeal brief is not timely filed.

(b) *Contents.* Each appeal brief submitted to the Commission pursuant to this section must include, in the order indicated:

(1) A statement of the issues presented for review;

(2) *A statement of the case.* The statement must first indicate briefly the nature of the case and include a full description of the disciplinary, access denial or other adverse action. There must follow a clear and concise statement of all facts relevant to the consideration of the appeal, including, if known, each alleged act or omission forming the basis of the exchange action, with appropriate references to the record of the exchange proceeding;

(3) *An argument.* The argument may be preceded by a summary. The argument must contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, and citations to relevant authorities and to parts of the record of the exchange proceeding; and

(4) A conclusion stating the precise relief sought.

(c) *Length of appeal brief.* Without prior leave of the Commission, the appeal brief may not exceed thirty-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.

#### § 9.23 Answering brief.

(a) *Time for filing answering brief.* Within thirty days after service of the appeal brief, the exchange must file with the Commission an answering brief.

(b) *Contents of answering brief.* The answering brief generally must follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the exchange does not dispute the issues or the statement of the case contained in the appeal brief.

(c) *Length of answering brief.* Without prior leave of the Commission, the answering brief may not exceed thirty-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.

**§ 9.24 Petition for stay pending review.**

(a) *Time to file.* (1) Within ten days after the notice of the disciplinary or access denial action has been delivered in accordance with § 9.11 to a person disciplined or denied access, that person may petition the Commission to stay the disciplinary or access denial action pending consideration by the Commission of the notice of appeal and, if granted, the appeal underlying the notice of appeal. The petition for stay must be accompanied by the notice of appeal.

(2) Within ten days after a notice of summary action has been delivered in accordance with § 9.12(b) to a person who is the subject of a summary action authorized by § 8.25 of this chapter, that person may petition the Commission to stay the effectiveness of the summary action pending completion of the exchange proceeding conducted as authorized by § 8.26 of this chapter.

(3) The Commission may deny any petition for stay which is not timely filed or which is not otherwise in accord with these rules.

(b) *Contents of petition for stay.* A petition filed under this section must state the reasons that the stay is requested and the facts relied upon, as specified in § 9.20. Averments of the petition must be supported by affidavits, other sworn statements or copies thereof, or a stipulation as to those facts which are not in dispute. Based upon the petition, the Commission, in its discretion, may order a stay or the disciplinary action or access denial action.

(c) *Response to petition.* The exchange may serve and file a written response to any petition for a stay within five days after service of the petition.

(d) *Standards for granting petition for stay.* The Commission will promptly determine whether to grant or deny a petition for stay and may act upon a petition at any time, without waiting for a response thereto. In determining whether to grant or deny the petition for stay, the Commission will consider, among other things, whether the petitioner has established:

(1) Petitioner's likelihood of success on the merits; and

(2) That denial of the stay would cause irreparable harm to the petitioner; and

(3) That granting the stay would not endanger orderly trading or otherwise cause substantial harm to the exchange or market participants; and

(4) That granting the stay would not be contrary to the Act, and the rules, regulations and orders of the

Commission thereunder or otherwise contrary to the public interest.

(e) *Ex parte stays.* The Commission may act upon a petition for stay, without waiting for the exchange's response thereto only where petitioner:

(1) Expressly requests an *ex parte* stay;

(2) Files a proof of service; and

(3) Clearly establishes by affidavit that immediate and irreparable injury, loss or damage will result to the petitioner before the exchange can be heard in opposition.

Any order granting a stay prior to the filing of the exchange's reply will expire by its terms within such time after service of the Commission's ruling on the petition, not to exceed ten days, as the Commission fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the exchange consents that it may be extended for a longer period. In any case, the exchange may move for dissolution or modification of the stay, and the Commission will proceed to determine such motion as expeditiously as the ends of justice require.

**§ 9.25 Limited participation of interested persons.**

On its own motion or upon motion of any person asserting a direct and substantial interest in the outcome of a proceeding conducted under this part, the Commission, in its discretion, may permit the limited participation by such interested person in the proceeding. A motion for leave to participate in the proceeding must identify the interest of that person and must state the reasons why participation in the proceeding by that person is desirable, and must state whether that person requests a copy of the record of the exchange proceeding to the extent permitted by section 8c(1)(B) of the Act and that such person agrees to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing the copy.

**§ 9.26 Participation of Commission Staff.**

Within twenty days after the receipt by the Division of Trading and Markets of the answering brief, the Division of Trading and Markets may file with the Proceedings Clerk a notice of intention to participate in the proceedings as *amicus curiae*. Within thirty days after filing the notice of intention to participate, the Division may file a brief as *amicus curiae*. Without prior leave of the Commission, the brief may not exceed thirty-five pages. The brief must be filed and served on the appellant, exchange and any other parties to the proceeding in the manner specified by these rules. Within ten days after

service of the Division's brief, any party may file a reply to the Division's brief. After the filing of the notice of intent to participate, no employee of the Division of Trading and Markets may thereafter make any communication relating to the proceeding, other than on the record of the proceeding before the Commission, to any Commissioner or Commission decisional employee.

**§§ 9.27-9.29 [Reserved]****Subpart D—Commission Review of Disciplinary, Access Denial or Other Adverse Action****§ 9.30 Scope of review.**

On review, the Commission may, in its discretion, consider *sua sponte* any issues arising from the record before it and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived. If the Commission determines to consider any issue not raised by the parties, it may issue an order that notifies the parties of such determination and provides an opportunity for the parties to address any issue considered *sua sponte* by the Commission.

**§ 9.31 Commission review of disciplinary or access denial action on its own motion.**

(a) *Request for additional information.* Where a person disciplined or denied access has not appealed the exchange decision to the Commission, upon review of the notice specified in § 9.11, the Division of Trading and Markets may request that the exchange file with the Division the record of the exchange proceeding, or designated portions of the record, a brief statement of the evidence and testimony adduced to support the exchange's findings that a rule or rules of the exchange were violated and such recordings, transcripts and other documents applicable to the particular exchange proceeding as the Division may specify. The exchange must promptly advise the person who is the subject of the disciplinary or access denial action of the Division's request. Within thirty days after service of the Division's request, the exchange must file the information requested with the Division and, upon request, deliver that information to the person who is the subject of the disciplinary or access denial action. Delivery and filing must be in the manner prescribed by § 9.11(c). A person subject to the disciplinary action or access denial action requesting a copy of the information furnished to the Division must, if the exchange rules

so provide, agree to pay the exchange reasonable fees for printing the copy.

(b) *Review on motion of the Commission.* The Commission may institute review of an exchange disciplinary or access denial action on its own motion. Other than in extraordinary circumstances, such review will be initiated within 180 days after the Commission has received the notice of exchange action provided for in § 9.11. If the Commission should institute review on its own motion, it will issue an order permitting the person who is the subject of the disciplinary or access denial action an opportunity to file an appropriate submission, and the exchange an opportunity to file a reply thereto.

#### § 9.32 Oral argument.

(a) *On motion of Commission.* On its own motion, the Commission may, in its discretion, hear oral argument by the parties any time before the decision of the Commission is filed with the Proceedings Clerk.

(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) and (d) of this chapter.

#### § 9.33 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 exchange. 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 exchange proceeding, and any oral argument made in accordance with § 9.32. 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 Commission will affirm without opinion the decision of the exchange, which will constitute the Commission's final decision.

(b) *Order of summary affirmance.* If the Commission finds that the result

reached in the decision of the exchange 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 of the exchange without opinion, which will constitute the Commission's final decision. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the exchange final decision, including any rationale contained therein, as its opinion and order, and neither the exchange's final decision nor the Commission's order of summary affirmance will serve as a Commission precedent in other proceedings.

(c) *Standards of review.* In reviewing an exchange disciplinary, access denial or other adverse action, the Commission will consider whether:

(1) The exchange disciplinary, access denial or other adverse action was taken in accordance with the rules of the exchange;

(2) Fundamental fairness was observed in the conduct of the proceeding resulting in the disciplinary, access denial or other adverse action;

(3)(i) In the case of a disciplinary action, the record contains substantial evidence of a violation of the rules of the exchange, or (ii) in the case of an access denial or other adverse action, the record contains substantial evidence supporting the exchange action; and

(4) The disciplinary, access denial or other adverse action otherwise accords with the Act and the rules, regulations and orders of the Commission thereunder.

Issued in Washington, DC on June 30, 1987, by the Commission.

Lynn K. Gilbert,

Deputy Secretary of the Commission.

[FR Doc. 87-15299 Filed 7-6-87; 8:45 am]

BILLING CODE 6351-01

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 117

[CGD5-87-029]

#### Drawbridge Operation Regulations; Ship Channel, Great Egg Harbor Bay, Somers Point-Ocean City, NJ

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule with request for comments.

**SUMMARY:** This temporary rule is being issued to evaluate proposed regulations for the Route 52 drawbridge across Ship Channel, Great Egg Harbor Bay, at mile 0.5, between Somers Point and Ocean City, New Jersey. The notice of proposed rulemaking (CGD5 87-051) is published elsewhere in this issue of the Federal Register.

This temporary rule limits draw openings to the hour and half hour between 10:00 a.m. and 8:00 p.m. on Saturdays, Sundays, and Federal holidays from July 2, 1987 through August 30, 1987. The current regulations would remain in effect at all other times. This action should accommodate the needs of vehicular traffic, while providing for the reasonable needs of navigation.

**DATES:** This temporary rule becomes effective on July 2, 1987. It terminates on August 30, 1987. Comments must be received by September 4, 1987.

**ADDRESSES:** Comments should be mailed to Commander (ob), Fifth Coast Guard District, c/o CCGD1(obr), Bldg. 135A, Governors Island, NY 10004. The comments and other materials referenced in this notice will be available for inspection and copying at that address. Normal office hours are between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

**FOR FURTHER INFORMATION CONTACT:** William C. Heming, Chief, Bridge Branch, First Coast Guard District (212) 668-7994.

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking was not published for these regulations and it is being made effective in less than 30 days after Federal Register publication. Following normal rulemaking procedures would be impractical. Implementation of these temporary regulations is necessary to evaluate their effect during the summer months when both recreational boating and vehicular traffic are at their peak.

Persons affected by these temporary regulations are invited to comment on their feasibility and impact on both marine and vehicular traffic, including observed effects (beneficial and detrimental), and any suggestions for changes. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for support of or opposition to these temporary regulations. Persons desiring acknowledgment that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

A notice of proposed rulemaking (CGD5 87-051) that proposes to adopt these regulations on a permanent basis is also published in this edition of the **Federal Register**.

The Commander, Fifth Coast Guard District will evaluate all communications received and will determine a final course of action on both this temporary rule and the notice of proposed rulemaking. This temporary rule and the proposed regulations may be changed in light of comments received. Because this is a temporary regulation, the rule will not appear in the Code of Federal Regulations.

#### Drafting Information

The drafters of this notice are Luis B.G. de Armas, project manager, First Coast Guard District Bridge Branch, and CDR Robert J. Reining, project attorney, Fifth Coast Guard District Legal Staff.

#### Discussion

This temporary rule is being issued under 33 CFR 117.43 to evaluate the proposed drawbridge regulations for Route 52 drawbridge across Ship Channel, Great Egg Harbor Bay, at mile 0.5, between Somers Point and Ocean City, New Jersey. A discussion of that proposal is contained in the notice of proposed rulemaking.

The impact of the proposed regulations on highway and marine traffic during the remainder of the summer will be evaluated to determine if the proposed changes result in substantial improvements in vehicular traffic without unreasonably restricting marine traffic.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Temporary Regulations

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

#### PART 117—DRAWBRIDGE OPERATIONS REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-01(g.)

2. Section 117.753 is revised to read as follows:

#### § 117.753 Ship Channel, Great Egg Harbor Bay.

(a) The draw of the Route 52 (Ship Channel) bridge, mile 0.5, between Somers Point and Ocean City, shall open on signal:

(1) Except from Memorial Day through Labor Day from 10 a.m. to 8 p.m. on

Saturdays, Sundays, and Federal holidays, the draw must open only on the hour and half-hour;

(2) Except from 11:00 p.m. to 7:00 a.m., the draw must open only if at least 24 hours advance notice is given; and

(3) At any time for public vessels of the United States, vessels with another vessel in tow, and vessels in distress.

(b) This temporary rule is effective between July 2 and August 30, 1987.

Dated: June 29, 1987.

A.D. Breed,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 87-15403 Filed 7-6-87; 8:45 am]

BILLING CODE 4910-14-M

#### 33 CFR Part 117

[CGD5-87-028]

#### Drawbridge Operation Regulations; Beach Thorofare, Great Egg Harbor Bay, Intracoastal Waterway, Ocean City, NJ

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

**SUMMARY:** At the request of the New Jersey Department of Transportation, the Coast Guard is amending the regulations governing the Route 52 drawbridge over Beach Thorofare, Great Egg Harbor Bay, a part of the New Jersey Intracoastal Waterway at mile 80.4, in Ocean City, New Jersey, by limiting the number of openings for an additional four hours on Saturdays, Sundays, and holidays from Memorial Day through Labor day. This amendment is being made because periods of peak marine and vehicular traffic have increased. This action should accommodate the needs of vehicular traffic, while providing for the reasonable needs of navigation.

**EFFECTIVE DATE:** These regulations become effective on July 2, 1987.

**FOR FURTHER INFORMATION CONTACT:** William C. Heming, Chief, Bridge Branch, First Coast Guard District (212) 668-7994.

**SUPPLEMENTARY INFORMATION:** On February 24, 1987, the Coast Guard published the notice of proposed rulemaking in the **Federal Register** (52 FR 6991) as Third Coast Guard District Proposed Rule (CGD3-96-070), prior to disestablishment of the Third District. A separate Third District Public Notice was not issued through administrative oversight. Interested persons were given until April 20, 1987 to submit comments. No comments were received. Nor was there any objection or controversy to more stringent temporary regulations

that were implemented during the summers of 1985 and 1986. Therefore, this rule will be issued without publication of the separate public notice.

The Coast Guard finds that good cause exists to make this rule effective in less than 30 days after **Federal Register** publication, in order to implement it during the summer peak traffic periods. This action will also permit the Coast Guard to evaluate temporary regulations (CDG5-87-029) and a notice of proposed rulemaking (CGD5-87-051) for the Route 52 drawbridge across Ship Channel, Great Egg Harbor Bay, published elsewhere in this **Federal Register**.

#### Drafting Information

The drafters of this notice are Luis B.G. de Armas, project manager, First Coast Guard District Bridge Branch, and CDR Robert J. Reining, project attorney, Fifth Coast Guard District Legal Staff.

#### Discussion

This amendment is issued in an effort to relieve vehicular traffic congestion on Route 52 in Ocean City, New Jersey, from 10 a.m. to 8 p.m. on Saturdays, Sundays, and holidays from Memorial Day through Labor Day. Vehicle traffic is at its peak during this period. The present regulations restrict openings to the hour and half hour from 11 a.m. to 5 p.m. During the summers of 1985 and 1986, temporary regulations were implemented that restricted the bridge openings to the hour and half hour from 8 a.m. to 10 p.m. on Saturdays, Sundays, and holidays. Observations made during the 60 day temporary regulation periods indicated that very little savings in motorist time occurred between 8 and 10 a.m. and after 8 p.m. Therefore, those regulations were more restrictive on the mariners than needed.

During the past five years, the number of drawbridge openings has increased from a total of 1807 in 1980 to 2542 in 1984, 2372 in 1985, and 3001 in 1986. Similarly, the peak summer vehicular traffic hours have expanded from 11 a.m. to 5 p.m. in 1980 between 10 a.m. and 8 p.m. in 1985 and 1986.

#### Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation, and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this rule is expected to be so minimal that a full regulatory evaluation is unnecessary. The change in the regulations will