

difficult to meet the deadlines for submitting annual audits. The Agencies expect that immediate suspensions would only be issued in compelling situations. In the case where an Agency head imposed an immediate suspension, the Agency will make appropriate adjustments to the filing deadlines, if warranted, at the institution's request.

Another commenter expressed a variety of objections to the proposed procedures for contesting an immediate suspension. The commenter generally stated that the proposed procedures do not comport with due process and suggested that the Agencies modify the proposed procedures in a number of areas to follow more closely those procedures governing issuance of temporary cease-and-desist orders by the SEC. Except for the modifications explained below, the Agencies do not believe that the proposed procedures should be conformed to the procedures applicable to temporary cease-and-desist orders issued under the securities laws. With regard to the protection of the nation's banking system, judicial decisions have recognized that there is a compelling governmental interest that can justify regulatory action with abbreviated procedures when necessary.<sup>21</sup> The Agencies expect that the immediate suspension remedy would be used only in circumstances where serious harm to a depository institution, its depositors, or to the depository system as a whole would occur unless immediate enforcement action is taken.

The commenter also had more specific suggestions for revisions to the proposal. First, the commenter stated that the Agencies' proposed procedures should allow for a quicker agency decisionmaking process. The commenter noted that, under the time frames contained in the proposed rules, an accountant or a firm that petitions the Agency to stay a notice of immediate suspension may not receive a decision with respect to the petition until 70 days after the immediate suspension becomes effective. The commenter noted that, under the SEC Rules of Practice, a final agency decision on a challenge to a temporary cease-and-desist order issued by the SEC without a prior hearing is required within 20 days.<sup>22</sup>

The Agencies believe that the proposed maximum time period permitted for an Agency decision on a stay petition is consistent with due

process requirements. The Agencies note that the Supreme Court has approved a procedural framework allowing up to 90 days for a final decision by the Agencies on a challenge to an *ex parte* suspension order issued by the Agencies against an IAP of a depository institution who has been indicted for certain types of crimes. *FDIC v. Mallen*, 486 U.S. 230 (1988).

The maximum time limits in the proposed rules were designed by the Agencies to permit a sufficient period for the creation of a meaningful record with regard to a stay petition and for careful and deliberate review of that record by the Agency decision maker, consistent with the recognized necessity for prompt administrative action on such a petition. As with the post-deprivation Agency hearing at issue in the *Mallen* decision, a stay petition could necessitate resolution of factual disputes that would require at least some examination of relevant evidence.

The Agencies intend that an administrative decision on a stay petition under the rules should be made at the earliest practicable time. Thus, the time limits imposed in the rules are intended to establish only the maximum period allowable for issuing a decision and a decision is expected to be made more promptly whenever feasible. Nevertheless, in order to further minimize concerns about undue delay in the decision on a stay petition, the Agencies believe that the date by which a hearing on a petition to stay is ordered can be shortened without unduly impairing the administrative decisionmaking process. Accordingly, the final rules require that an Agency must order a hearing on a petition to stay to be held 10 days after receipt of the petition, rather than within 30 days as proposed.

As the commenter pointed out, the Supreme Court's approval of a 90-day agency decisionmaking period in the *Mallen* decision depended in part on the fact that, under the statutory framework at issue, the suspension of an IAP may be issued only after the individual involved has been indicted by an independent entity, like a grand jury. According to the Court, the indictment serves to reduce the likelihood that the banking agency suspension is unjustified. Under the proposed rules, an immediate suspension notice may be issued by an Agency without any similar action by a third party. In the Agencies' view, however, the lack of an independent triggering event by a third party for accountant suspensions does not mean that the maximum time limits in the final rules would result in the denial of a prompt and meaningful

hearing before the Agency on the propriety of the suspension. The Agencies intend that, under the final rules, an immediate suspension could be issued only where there is probative evidence that substantial harm to an insured depository institution, its depositors, or to the depository system as a whole is likely to occur prior to completion of the proceedings on a permanent order of removal, suspension, or debarment. In addition, under the final rules, the maximum time period permitted for a decision on a stay petition (50 days) is only slightly longer than half the maximum time limit approved in the *Mallen* case for an agency decision on an indictment-triggered suspension. In the Agencies' judgment, the maximum time for decision in the final rules represents the shortest realistic period necessary for adequate consideration of the suspended party's opposition to the suspension.<sup>23</sup> As the Supreme Court noted in *Mallen*, the public has a strong interest in seeing that the ultimate agency decision with respect to a suspension is made in a "considered and deliberate manner."<sup>24</sup>

The commenter's second objection to the procedures was to the proposed provisions under which the decision on a petition to stay an immediate suspension is made by a presiding officer designated by the Agency. According to the commenter, the stay petition should be decided by an administrative law judge, who by statute has some independence from the agency whose cases the judge hears.

The Agencies do not believe that an administrative law judge must be designated as the decisionmaking official with regard to a petition to stay the immediate suspension of an accountant or firm. The Agencies note that under their existing rules of practice, a similar type of decision on an interim order, namely the decision with respect to whether a suspension of an IAP who has been indicted should be lifted pending completion of the criminal trial, is made by a presiding officer, not by an administrative law judge.<sup>25</sup> A court decision that prescribed the minimum procedures required by due process for these suspensions did not suggest that the agency decision on lifting the suspension had to be made by

<sup>23</sup> The proposed and final rules permit a suspended accountant or firm to elect to seek review of the presiding officer's decision on a stay petition by the Agency. However, the appeal to the Agency is not mandatory.

<sup>24</sup> 486 U.S. at 244.

<sup>25</sup> 12 CFR 19.112(b) (OCC); 12 CFR 263.73(a) (Board); 12 CFR 308.164(b) (FDIC); and 12 CFR 508.6(a) (OTS).

<sup>21</sup> See, e.g., *Fahey v. Mallonee*, 322 U.S. 245 (1947).

<sup>22</sup> 17 CFR 201.513(c).