

an administrative law judge in order to meet constitutional requirements.²⁶

The Agencies recognize, however, that it may be useful to clarify that the presiding officer who decides a petition to stay an immediate suspension must be insulated from the Agency staff responsible for prosecuting the charges against the suspended accountant or firm. The provisions of the proposed rules relating to the hearing on a stay petition are therefore being modified to add a new sentence, which follows the requirements of the Administrative Procedure Act²⁷ for formal agency adjudications. The final rules explicitly state that an Agency employee engaged in investigative or prosecuting functions for the Agency in a particular action against an accountant or a firm, or in a factually related action, may not serve as the presiding officer or otherwise participate or advise in the decision with respect to a petition to stay the immediate suspension.

The commenter's third suggestion was that the proposed immediate suspension provisions be modified to make clear that, except in unusual cases, an accountant or firm should be suspended immediately only after prior notice and opportunity for the party involved to contest the suspension. In the Agencies' judgment, the modification to the proposed procedures advocated by the commenter is neither necessary nor appropriate. There is nothing in section 36 that requires prior notice and opportunity for hearing before a suspension under that provision may be issued. Moreover, the courts have long recognized that the strong governmental interest in protecting depositors and preserving confidence in the financial system can justify immediate action by the regulatory agencies prior to notice and the opportunity for hearing.²⁸

Fourth, the commenter asserted that, like the SEC Rules of Practice, the Agencies' procedures should require a showing that irreparable harm would result before authorizing an immediate suspension. Contrary to this comment, there is no requirement in section 36 that the Agencies show "irreparable harm." Nor are the agencies aware of any authority that requires a finding by the Government of irreparable harm in order to satisfy minimum constitutional standards of due process before immediate action can be taken. The Agencies further note that the suspension procedures in the proposed

rules and the finding that must be made by the Agencies to justify an immediate suspension are very similar to those prescribed in section 8(e)(3) of the FDIA, which govern the suspension of an IAP of an insured depository institution pending completion of administrative proceedings concerning a proposed permanent order of removal or prohibition.²⁹ Nevertheless, to better express the immediate suspension standard, the rule has been revised to require "immediate harm" to an insured depository institution, its depositors, or to the depository system as a whole.

The commenter's fifth criticism of the proposed rule was that it did not establish a procedure for judicial review of immediate suspensions imposed by the Agencies. However, section 36 contains no specific provision for review by the courts of any action taken by the Agencies under the authority of that provision. Administrative agencies have no authority to create a right to judicial review of agency action.³⁰ Any right to judicial review of an immediate suspension must be based on some statutory authority.

The commenter's sixth point concerned immediate suspensions of accounting firms. The commenter stated that the Agencies' authority under the proposal to immediately suspend a firm from providing audit services is too broad and subjective and any firm subject to an immediate suspension should have greater procedural protections than what is provided in the proposed rules.

The Agencies recognize that the immediate suspension of an entire firm could have a serious effect on the firm as well as on the insured depository institutions that may be relying on the firm for audit services. However, as explained above, the Agencies intend that the immediate suspension sanction would be applied to a firm only when clearly necessary to protect a depository institution or the depository system and when the factors specified in the rules for applying disciplinary action to a firm support such a regulatory response. Because the Agencies believe that these circumstances, though unusual, warrant disciplinary action against an entire accounting firm should they occur, the Agencies have retained that authority in the final rule. The procedural protections afforded an immediately suspended party in the final rules, whether an individual or a firm, represent an appropriate balance

between protecting the banking system and protecting the rights of affected parties.

Automatic Removal, Suspension, and Debarment. The proposed rule provided that accountants or firms subject to certain specified disciplinary actions would automatically be prohibited from providing audit services. No further proceedings or hearings by the Agency would be required in these instances. Under each Agency's proposed rule, the actions giving rise to such an automatic bar include: (1) A final order of removal, suspension, or debarment under section 36 (other than a limited scope order) issued by any of the other Agencies; (2) certain actions by the PCAOB (specifically, a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or debarment from further association with a registered public accounting firm); (3) certain actions by the SEC (specifically, an order of suspension or a denial of the privilege of appearing or practicing before the SEC); and (4) suspension or debarment for cause from practice as an accountant by the licensing authority of any state, possession, commonwealth, or the District of Columbia.

Under the proposed rules, disciplinary actions not giving rise to an automatic bar could still serve as grounds for an Agency to take action against an accountant or a firm. In this respect, grounds for Agency action set forth in the proposal specifically include removal, suspension, or debarment by any Federal or state agency regulating the banking, insurance, or securities industries. If such an action were grounds for an Agency proceeding, however, the full array of hearings and procedures in the proposed rules would be required.

One commenter objected to the proposed rules' approach to the automatic bar, contending that it was too broad in scope because the reasons for an action by the SEC, PCAOB, or a state might be irrelevant to the provision of audit services under the rules. The commenter argued that, to prevent an unwarranted automatic bar, an accountant or a firm should in all cases have the opportunity for a hearing before an Agency considering removal, suspension, or debarment, and that the Agency should be required to conduct an independent analysis. The commenter also asserted that the SEC's automatic suspension provisions are more limited and generally require license revocation, criminal conviction, or prior action by the SEC. Finally, the commenter urged the Agencies to include in the final rule an expedited

²⁶ *Feinberg v. FDIC*, 420 F. Supp. 109, 120 (D.D.C. 1976).

²⁷ 5 U.S.C. 554.

²⁸ See, e.g., *Fahey v. Mallonee*, 332 U.S. at 253; *Mallen*, 486 U.S. at 240–41; *Feinberg*, 420 F. Supp. at 119.

²⁹ 12 U.S.C. 1818(e)(3).

³⁰ Final agency action would, however, be reviewable by a court under the Administrative Procedures Act.