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Christine Neylon O'Brien

SEC REGULATION OF THE ACCOUNTING PROFESSION: Rule 2(e)

Christine Neylon O'Brien*†

I. INTRODUCTION

The Securities Exchange Commission (SEC) is authorized to make such rules and regulations as may be necessary to implement the statutes the agency administers. The Commission's Rules of Practice include Rule 2(e) which permits the Commission to

... deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder.¹

Time magazine reported recently that the SEC initiated 14 misconduct cases against accounting firms last year.² Most of the reported 2(e) proceedings involved failure to comply with Generally Accepted Accounting Principles (GAAP), Generally Accepted Auditing Standards (GAAS), and/or Accounting Principles Board Opinions.³ Using Rule 2(e) as an interpretive paradigm, this Arti-

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1. 17 C.F.R. § 201.2(e)(1)(ii) (1986).

2. G. Russell, *All Eyes on Accountants*, TIME, Apr. 21, 1986, at 61.

3. The litany of company wrongdoing and auditing failures included: Materially false and misleading financial statements which often overstated company assets via such practices as: receivables of uncertain collectability or interest expense included as an overhead cost used to value inventory; inventory valued at current production cost rather than through the first-in, first-out method represented; failure to examine and test a company's internal control system; carriage of money-losing investments in development of technology at historical cost rather than net realizable value; wrongful claims of large gains where the economic substance of the transaction resulted in no recognized income due to the lack of

cle sets forth a number of issues raised by Rule 2(e); issues that are likely to be raised in the context of any governmental attempt to pervasively regulate a profession. The thesis of this article is that the encroachment of external regulation that threatens to usurp the professional independence of the public accountant is not necessarily immune to effective legal challenge.

II. THE FEDERAL ADMINISTRATIVE/REGULATORY CONTEXT

In our modern society, most of the myriad of governmental norms that impact upon our day-to-day existence are not "laws" or "statutes" at all, in the sense of being "Acts of Congress." The proverbial "rules and regulations" that touch upon our lives at virtually every level of endeavor are mainly the products of the federal administrative agencies.⁴ In theory, these agencies are creatures of limited power. They owe their existence not to the direct will of the people, but to Congressional enactment. As creatures of statute, the rule-making powers of these federal agencies are limited to the subject areas specifically delegated to them in Congressional enabling legislation.⁵ This is not to say that administrative agencies do not make law. The Code of Federal Regulations containing the rules promulgated by the federal agencies constitutes an enormous *corpus juris*. Most significantly, administrative law represents a body of law that, to borrow Justice Frankfurter's phrase,

assurance of collection; failure to verify that a debt which the company claimed had been written-off by the creditor was in fact extinguished; reporting of nonexistent assets, income and profits to defraud the investors; improper recording of borrowings as sales; listing interest on a certificate of deposit as an asset when the company and the accountant knew that the c.d. had been foreclosed upon and liquidated to pay the loan it was pledged to secure; and aiding and abetting fraudulent investment schemes by inaccurate proxy disclosures. See generally CCH Fed. Sec. L. Rep. (1139-42) § 73,468-97 (1985).

4. Even the criminal law has not proved exempt from administrative intrusion. New York has transferred jurisdiction over traffic and environmental offenses from the courts to administrative tribunals. Not too long ago, administrative criminal jurisdiction would have been deemed violative of basic conceptions. Constitutional niceties have had to give way in the face of the growing inadequacies of the courts.

C. SCHWARTZ, ADMINISTRATIVE LAW 14 (1976).

5. "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). "Congress, of course, does delegate powers to agencies, setting standards to guide their determination." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

“continues to grow like Topsy.”⁶

A. *Rule 2(e) of the SEC Rules of Practice*

The Securities and Exchange Commission is the administrative agency created by the Securities Act of 1934.⁷ The Act empowers the Commission “to make such rules and regulations as may be necessary or appropriate to implement the provisions of [the Act] for which it is responsible or for the execution of the functions vested [in it] by [the Act].”⁸ The Commission promulgated regulation number section 201.2(e) as part of its body of rules governing the procedures, standards and practice of its proceedings.⁹

The first step in preparing an adversarial challenge to any enactment is to scrutinize the operative language. What are the ramifications and sources of its plain meaning? Does the language seem consistent with the enactment’s purpose? Does it sweep broadly? Does it lend itself to a narrow or a far-reaching construction? These initial inquiries give the advocate guidance in determining which direction to proceed in launching an effective attack.

Rule 2(e) appears to authorize the SEC to select its own “bar”; to subject professionals who practice before it to the standards enunciated by the Commission; to judge whether those accountants and lawyers “possess the requisite qualifications” or are “lacking in character or integrity.” Pursuant to Rule 2(e), the professional practicing before the SEC must not have engaged in “unethical or improper” conduct, or have “willfully violated” any federal securities law (or have assisted another in doing so).¹⁰

Before focusing on a challenge to Rule 2(e)’s substantive impact, it is necessary to first question the source of the SEC’s au-

6. F. Frankfurter, *Foreword*, 47 *YALE L. J.* 515, 517 (1938). As Professor Schwartz notes:

The volume of cases dealt with by administrative agencies is staggering. A regulatory agency like the Interstate Commerce Commission receives, analyzes, and files thousands of rate schedules and disposes of thousands of applications to be allowed to do or to be excused from doing various things, receives complaints, and conducts investigations. In the non-regulatory area, the volume is even greater.

Schwartz, *supra* note 4, at 27.

7. 15 U.S.C. § 77a-78kk (1934).

8. 15 U.S.C. § 78 w(a)(1) (1976).

9. See *supra* note 1.

10. See *supra* note 1.

thority to enact a rule that creates a professional bar along with the attendant power to regulate it. It is the issue of delegated authority or "ultra vires" which first must be examined.

B. *The Ultra Vires Question*

In *Ernst & Ernst v. Hochfelder*,¹¹ the Supreme Court of the United States reaffirmed the traditional and fundamental rule of administrative law that the rulemaking power delegated to an administrative agency is not the power to make law, per se, but merely to adopt regulations to carry into effect the will of Congress as expressed in the enabling legislation creating the agency.¹² This rule reflects the fundamental notion of the United States Constitution that Congress possesses primary legislative power, and that delegation of unrestrained rule-making power to a non-representative bureaucracy amounts to abdication of the legislative function.¹³

The essence of American lawmaking is that the legislative power exists as the result of a delegation. Even the national legislature is limited by the specific grant of power delegated to it by the Constitution. Likewise, without a statutory delegation, an administrative agency is without power to promulgate substantive rules and regulations. While express delegations of rule-making power have been broadly construed to include authority to promulgate any rule reasonably related to the purposes of the enabling legislation,¹⁴ the concept of *ultra vires* remains as a limit on agency rulemaking power.

The basic principle of *ultra vires* is that an agency action (in-

11. 425 U.S. 185 (1976).

12. "The rule-making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Id.* at 213-14 (quoting in part *Manhattan G.E. Co. v. Comm'r of Int. Rev.* 297 U.S. 129, 134 (1936)).

13. That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence, it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority. *Lockes Appeal*, 72 Pa. 491, 494 (1872).

14. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973).

cluding the promulgation of a rule) must fit within the contour of the power expressly delegated to it by the legislature:

As a corporation is to its charter, the administrative agency is to its enabling legislation. This means that the basic doctrine of administrative law, as of corporation law, is the doctrine of ultra vires. . . . If an agency act is within the statutory limits (or vires), its action is valid; if it is outside them (ultra vires), it is invalid.¹⁵

The SEC enabling legislation does not explicitly grant the SEC the power to regulate accountants.¹⁶ This raises the question of the requisite explicitness of the congressional authorization. In the case of *Touche Ross & Co. v. SEC*,¹⁷ plaintiff accounting firm and three of the firm's former partners brought an action seeking to enjoin the SEC from conducting the first public 2(e) proceeding. The firm argued the SEC lacked the statutory power to regulate and discipline the accounting profession. The Second Circuit upheld the SEC's authority to promulgate Rule 2(e) and found disciplinary proceedings pursuant to the Rule were a proper exercise of the Commission's power despite Congressional silence on the matter.¹⁸ Such reasoning, however, is not inevitable. In *SEC v. Sloan*,¹⁹ for example, the United States Supreme Court lent its weight to the view that congressional silence cannot be construed as an authorization of power. In holding that section 12(k) of the 1934 Act does not empower the Commission to suspend trading for a period exceeding the ten days specifically authorized in the Act, the Court noted that had Congress intended the Commission to have the power to summarily suspend trading for an indefinite period, it would have clearly authorized it to do so.²⁰ Thus the *Sloan* case

15. Schwartz, *supra* note 4, at 151. See also *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944).

16. See *supra* note 7.

17. 609 F.2d 570 (2d Cir. 1979).

18. "We reject appellant's assertion that the Commission acted without authority in promulgating Rule 2(e). Although there is no express statutory provision authorizing the Commission to discipline professionals appearing before it, Rule 2(e) . . . represents an attempt by the Commission to protect the integrity of its own processes." *Id.* at 582.

19. 436 U.S. 103 (1978).

20. The *Sloan* Court reasoned:

[H]ad Congress intended the Commission to have the power to summarily suspend trading . . . indefinitely, we expect that it could and would have authorized it more clearly than it did in § 12(k) The absence of any truly persuasive legislative history to support the Commission's view, and the entire statutory scheme suggesting that in fact the Commission is not so empowered, reinforce our

lends support to the argument that an agency action must be traceable to a clear Congressional authorization in order to survive an *ultra vires* challenge. At the least, *Sloan* stands for the proposition that congressional authorization cannot be inferred from mere silence.

What if Congress *has* expressly delegated a specific power in the enabling Act, but does not address the question of the applicability of that grant of power to the specific situation under review? The relevant canon of statutory interpretation is that the absence of authorization in one section of a law, when such authorization is given in another section of that law, must be interpreted to indicate that Congress did not intend to extend the power beyond the situations contemplated by the section in which the power was expressly provided.²¹ In section 15(b) (4) of the Act creating the SEC, the Commission is expressly granted the power to regulate *broker dealers*.²² However, the section makes no reference whatever to a power to regulate accountants, and no such references appear elsewhere in the Act. If congressional intent is to be tested in the light of the foregoing rule of interpretation, it would follow that Congress lacked the intent to authorize the SEC to discipline accountants. Thus, according to this standard of statutory interpretation, and the *Sloan* analysis, action under Rule 2(e) is *ultra vires*.

conclusion that . . . no such power exists.

Id. at 122. The facts in *Sloan* may be distinguished from an analysis of the Commission's authority to promulgate Rule 2(e) in that *Sloan* involved § 12(k) of the 1934 Act which section explicitly set a ten day time for suspension of trading by the Commission. Usual rules of statutory construction would not perceive a broader power implicit in a narrow authorization.

21. See Note, *Regulation of the Accounting Profession through Rule 2(e) of the SEC's Rules of Practice: Valid or Invalid Exercise of Power?* 46 BRKLN L. REV. 1159, 1180, n.3 (1980) (citing *Redington v. Touche Ross & Co.*, 592 F.2d 617 (2d Cir. 1978) *rev'd*, 99 S. Ct. 2469 (1979)); *Rico v. Commissioner*, 565 F.2d 1234 (2d Cir. 1977); *R.J. Saunders & Co. v. Vincent*, 309 F.2d 65 (2d Cir. 1962).

22. 15 U.S.C. § 15(b)(4) (1976) authorizes the Commission to "censure, place limitations on the . . . operations of . . . or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity, that such [action] is in the public interest."

III. PROCEDURAL DUE PROCESS

The fifth amendment to the United States Constitution provides that “[no]. . . person. . . [shall] be deprived of life, liberty or property, without due process of law.”²³ In practical terms, this means that where government power is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, the government’s action.²⁴ This tenet is central to individual liberty and is synonymous with the concept of fundamental fairness.²⁵ The procedure must be fundamentally fair to the individual in treating the factual and legal basis for government action that seeks to deprive him/her of life, liberty or property. While different situations may entail different types of procedures, there is always the general requirement that the government process be basically fair.

Therefore, while procedures may vary from situation to situation, depending upon the individual rights and the government interests involved, certain protections must be present in every case for due process to be satisfied. First, there must be a neutral and unbiased decisionmaker.²⁶ This requirement applies to agencies and government hearing officers as well as to judges, and has been strictly enforced by the Supreme Court.²⁷ While the requirement does not prevent an agency or hearing officer from serving in a dual capacity as investigator and adjudicator, it does serve to disqualify a decisionmaker having a personal interest in the outcome.

In addition to guaranteeing an impartial decisionmaker, due process always requires the government to give individuals adequate notice of government actions that would deprive them of a constitutionally protected interest in life, liberty or property. As the Supreme Court said in *Mullane v. Central Hanover Bank &*

23. U.S. CONST. amend. V.

24. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 526-28 (1983).

25. *Pinkerton v. Farr*, 220 S.E.2d 682, 687 (W. Va. 1975).

26. “The government *always* has the obligation of providing a neutral decisionmaker—one who is not inherently biased against the individual or who has personal interest in the outcome.” J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 527 (emphasis added).

27. “[A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge.” *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943). See also *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

Trust Co., “[an] elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁸

However, as the text of the Due Process Clause makes plain, it is only where an individual’s life, liberty or property is involved that a constitutional claim of due process protection can arise.²⁹ Thus, as a threshold matter in any due process analysis, it must be determined whether such an interest is present. In the context of the interests Rule 2(e) implicates, this article analyzes two candidates: “property” and “liberty.”

A. Defining “Property” in the Rule 2(e) Context

The United States Supreme Court has established that due process protection extends beyond such traditionally recognized property interests as real estate, money, and “hard,” tangible property.³⁰ Thus, intangible “entitlements” such as welfare benefits, a driver’s license, and the right to practice accounting, have been held protected by the Due Process Clause of the Constitution.³¹ Such “entitlements” arise when the government confers a right without retaining unrestricted discretion over future enjoyment of the right.³² Since the accountants’ right to practice before the SEC is derived from federal regulations that do not provide for unrestricted discretion on the part of the government (i.e., the SEC),

28. 339 U.S. 306, 314 (1950).

29. U.S. CONST. amend V.

30. The current standard for determining the existence, *vel non*, of a property interest was enunciated by the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972):

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

31. *Goldberg v. Kelly* 397 U.S. 254 (1970) (welfare benefits); *Bell v. Burson* 402 U.S. 535 (1971) (driver’s license); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (right to practice accounting).

32. *Doran v. Houle*, 721 F.2d 1182, 1185 (9th Cir. 1983) (citing *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976), *cert. denied*, 466 U.S. 950 (1984)).

the accountant clearly has a property interest in his/her right to practice before the Commission, which may not be extinguished by government action without due process of law.

B. Defining "Liberty" in the Rule 2(e) Context

As the case law of the United States Supreme Court demonstrates, "liberty" is one of those vague constitutional terms that defies precise definition.³³ It is nevertheless the concept of liberty which provides the primary limitation upon state action affecting individual rights. It is a concept which may encompass and protect any form of freedom of action or choice which is accorded constitutional recognition by the court.³⁴

It is well-settled that the liberty concept encompasses situations in which the government might deprive a person of his/her freedom of choice and action by making it impossible or illegal for the person to engage in certain types of activity, including the freedom to engage in a particular business activity.³⁵ Indeed, it is clear that if any agency with governmental authority seeks to remake an individual's professional status, it must afford that individual a hearing consistent with the requirements of due process.³⁶

While it is less clear to what extent a person's good name and reputation constitute a liberty interest significant enough to warrant constitutional protection, several lower court cases have recognized that a significant liberty interest is present where an individual has been "stigmatized" by government conduct and the stigmatization results in tangible loss.³⁷ Under such an analysis, even an SEC disciplinary action against an accountant short of actual disbarment, such as censure, could give rise to due process protection if the action resulted in a stigma that seriously damaged the accountant's employment opportunities.

33. See generally, Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411-16 (1977).

34. See Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism* 66 YALE L.J. 319 (1957).

35. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 24, at 533.

36. *In re Ruffalo*, 390 U.S. 544 (1968).

37. *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 489 (1st Cir. 1979), *cert. denied*, 444 U.S. 840 (1979); *Stanely v. Big Eight Conference*, 463 F. Supp. 920, 928 (W.D. Mo.1978); *Whitaker v. Bd. of Higher Educ.*; 461 F. Supp. 99, 105 (E.D. N.Y. 1978).

Thus it can be argued that a Rule 2(e) disciplinary proceeding can affect an accountant's liberty by resulting in a direct loss of employment opportunities through the sanction of total disbarment, or by resulting in an indirect loss of professional opportunities which stigmatizes the accountant in the eyes of the business community.

C. A Vagueness Challenge Under the Due Process Clause

A law or regulation which prescribes a norm in terms so vague that an individual of normal intelligence must necessarily guess as to its meaning and application, violates due process of law.³⁸ This "vagueness" limitation is rooted in the notion that before a person's rights are affected adversely by the government, he/she is entitled to some fair notice and warning. Laws that are too "vague" do not provide an individual of normal intelligence with a reasonable opportunity to learn what is in fact prohibited so that he/she may act accordingly. Such laws may also lend themselves to arbitrary and discriminatory enforcement.³⁹

While the vagueness limitation is usually implicated only in penal statutes, it has been held applicable in challenges to administrative regulations and to business license statutes.⁴⁰ Rule 2(e), as an administrative regulation that involves the potential suspension of an accountant's privilege to practice before the SEC, is similar to a business license statute. Indeed, since discipline pursuant to a Rule 2(e) proceeding may involve an affirmative disability sanction, it approaches punishment and could be viewed as "quasi criminal" in nature.⁴¹ In any event, because Rule 2(e) entails the possible loss or suspension of an accountant's privilege to practice his/her profession before the SEC, it should be subject to meaning-

38. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

39. See *Smith v. Goguen*, 415 U.S. 566, 574 (1974). As Professor Davis has noted: "Vagueness of enforcement policy . . . may be held unconstitutional because it permits arbitrary and discriminatory action; courts may accordingly require that the vagueness be corrected by guiding standards or rules." 2 K. DAVIS, *ADMINISTRATIVE LAW* § 7.26, at 131 (1979).

40. *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 290 (1982) (Court assumed without deciding that a vagueness analysis would apply to a business license statute); *Royce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (vagueness analysis applied to Interstate Commerce Commission regulation).

41. See *Kennedy v. Mendoza Martinez*, 372 U.S. 144, 168-69 (1963) (spelling out factors used to distinguish between "penal" and "regulatory" rules).

ful vagueness review.

The thrust of a void for vagueness challenge to Rule 2(e) concerns the meaning of the key normative phrase "improper professional conduct." To the extent that the accountant is left to "guess" at what this standard means, he/she is incapable of predicting the standard of behavior to which he/she may be held in a future proceeding, and is accordingly left with no guidance as to how to comply with such a standard in the course of his/her ongoing affairs.

The "improper professional conduct" standard yields no clue as to what is required for compliance, or what constitutes noncompliance. This is so because the "improper professional conduct" language does not define any clear-cut culpability standard. Certainly, the language does not imply that an accountant must have acted with a mental state embracing an intent to deceive ("scienter"). While the Supreme Court has said that when a vagueness examination is made, the presence of a scienter requirement in the challenged enactment may serve to mitigate vagueness problems,⁴² the SEC has imposed liability under the "improper professional conduct" standard absent a finding of scienter.⁴³ Nor does the language on its face give any assurance to the accountant who has acted free of negligence. It is not at all clear under Rule 2(e) whether an accountant who has acted reasonably and in compliance with Generally Accepted Accounting Principles may still be subject to discipline under the amorphous "improper professional conduct" standard. Clearly, it would seem the SEC cannot employ this standard to discipline an accountant who has acted reasonably without violating the vagueness doctrine. When the SEC, without warning, holds an accountant to a standard higher than professional negligence, notice is lacking and enforcement is being employed in an arbitrary manner. The "common intelligence test" is not satisfied when a standard is so vague that persons of common intelligence must necessarily guess as to its meaning and application. Such a standard violates due process.⁴⁴

42. *Village of Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 499 (1982).

43. *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979).

44. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926): "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essen-

D. *Due Process and Standard of Proof*

Due process of law requires that the standard of proof (i.e., the evidentiary burden that the government must bear in a given case to establish the truth of its allegations) must relate in proper proportion to the individual burden at stake in a given proceeding. At one end of the standard of proof continuum lies the full-scale criminal prosecution in which severe individual burdens are at stake, including loss of liberty, or even life itself. It is thus not surprising that the highest evidentiary burden—"proof beyond a reasonable doubt,"—is required in such cases by the due process clause.⁴⁶ At the other end lies the civil negligence case, involving not punitive penal sanction, but rather the mere transfer of compensation in the form of monetary wealth from a tortfeasor to a victim. The appropriate standard of proof in such cases is the more lenient "preponderance of the evidence," which requires only that the proponent prove liability on the part of the defendant exists "more probably than not."⁴⁶ In between these two extremes lies a comparatively gray area in which the courts have attempted to carve out some delineations.

In *Woodby v. INS*,⁴⁷ the United States Supreme Court held that where the ultimate individual burden at stake is deportation, a "preponderance of the evidence" standard is inadequate. While recognizing that deportation is not tantamount to a criminal sanction, the Court determined that the seriousness of the sanction—being "banished" from the country—required a higher burden of proof: "We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."⁴⁸

tial of due process of law."

45. *In re Winship*, 397 U.S. 358 (1970).

46. The most acceptable meaning to be given to the expression, proof by a preponderance seems to be proof which leads the judge to find that the existence of the contested fact is more probable than its nonexistence. Thus the preponderance of the evidence becomes the trier's belief in the preponderance of probability.

C. McCORMICK, *McCORMICK ON EVIDENCE* 947 (1984). See also, MORGAN, *SOME PROBLEMS OF PROOF* 84-85 (1956); Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 *VAND. L. REV.* 807 (1961).

47. 385 U.S. 276 (1966).

48. *Id.* at 285-86.

As to the general application of the *Woodby* standard, Charles Schwartz, an authority on administrative law and due process, writes:

In the ordinary case, the *Woodby* standard is not applicable. . . . But where the agency decision approaches the deportation order in its impact, the *Woodby* standard should govern. This should be true, for example, in license revocation cases, . . . [and] *disciplinary proceedings* . . . where an adverse decision can have a catastrophic effect on the individual concerned.⁴⁹

Numerous cases support this view as well.⁵⁰ Yet, notwithstanding the fact that the "heavy sanction" of disbarment is involved in Rule 2(e) disciplinary proceedings against accountants, it is the Commission's position that in such cases mere proof by a preponderance of the evidence is required.⁵¹ As the principles articulated above make clear, it is a standard that may be vulnerable to challenge on grounds of due process of law.

The United States Supreme Court ratified the SEC's use of the preponderance standard in *Steadman v. SEC*.⁵² *Steadman* involved a prosecution under § 9(b) of the Investor Company Act of 1940 and § 203(f) of the Investment Advisors Act of 1940. The defendant was charged with violations in connection with management of mutual funds which were subject to registration under the Acts. After a lengthy hearing before an Administrative Law Judge at which the "preponderance" standard of proof was applied, the defendant was permanently disbarred.⁵³

On appeal to the Fifth Circuit Court of Appeals, the defendant contended that in view of the severe sanctions imposed, and the nature of the evidence presented, the "clear and convincing" standard of proof should have been applied.⁵⁴ The court of appeals rejected the defendant's argument, holding that in a disciplinary proceeding before the SEC, violations of the antifraud provisions of the securities laws may be established by a preponderance of the

49. SCHWARTZ, *supra* note 4, at 350-51 (emphasis added).

50. See, e.g., *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978); *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 701 (D.C. Cir. 1978).

51. See *Touche Ross & Co. v. SEC*, 609 F.2d 570.

52. 450 U.S. 91 (1981).

53. *Id.* at 93.

54. *Id.* at 94.

evidence.⁵⁶

The Supreme Court took the *Steadman* case on *certiorari* to resolve a conflict within the District of Columbia Circuit.⁵⁶ After referring to the *Woodby* decision, the Court noted that where Congress has not specifically prescribed the burden of proof to be applied, the Court has felt at liberty to prescribe it, this being the type of question traditionally within the province of the courts.⁵⁷ Concluding that "Congress ha[d] spoken,"⁵⁸ the Court upheld the use of the preponderance standard. In doing so, the Court referred to section 7(c) of the Administrative Procedure Act,⁵⁹ which provides in pertinent part: "A sanction may not be imposed . . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." The Court construed this language as the enactment of a standard of proof.⁶⁰

The defendant's argument that this language created only a "qualitative," rather than a "quantitative" standard was rejected: "The word 'substantial' denotes quantity. The phrase 'in accordance with. . . substantial evidence' thus requires that a decision be based on a certain quantity of evidence. Petitioner's contention that the phrase 'reliable, probative, and substantial evidence' sets merely a standard of quality of evidence is, therefore, unpersuasive."⁶¹

The Court also noted that the legislative history of the Administrative Procedure Act made clear that Congress intended to enact a preponderance standard.⁶² This reasoning did not adequately account for the seriousness of the sanction involved, however, and the SEC's use of this standard remains flawed under the due process requirements.

55. *Steadman v. SEC*, 603 F.2d 1126, 1139 (1979).

56. 450 U.S. at 95.

57. *Id.*

58. *Id.* at 96.

59. 5 U.S.C. § 556.

60. 450 U.S. at 98.

61. *Id.*

62. *Id.* at 100.

IV. CONCLUSION

This article sets forth an agenda of plausible bases for launching an attack upon one regulation of the SEC which impacts negatively upon the professional autonomy of accountants.⁶³ Rule 2(e) is particularly vulnerable to assault because it has been converted from a rule at first "designed to serve the limited purpose of exercising disciplinary authority over the incompetent, unethical, or dishonest accounting practitioner to a rule which has effectively been utilized to pervasively regulate accounting firms and the profession as a whole."⁶⁴ Many commentators have criticized the Rule and its application by the SEC.⁶⁵ The standard of Rule 2(e) is too vague. Its lack of substance creates due process problems because due process requires fair notice and warning of what constitutes "improper professional conduct."⁶⁶

The discipline meted out by the Commission pursuant to the Rule goes beyond individual suspension or disbarment from practice before the SEC . . . the remedial power exercised by the SEC has included subjecting whole firms to continuous peer review by other firms and preventing firms from accepting new audit clients for periods of time.⁶⁷ Although no one would argue that the integrity of information made available to the investing public should be jeopardized by the negligence or fraud of accountants practicing

63. Rule 2(e) also impacts negatively upon lawyers, and a number of commentators have criticized its encroachment upon both professions. See generally, *infra* note 65.

64. Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 NOTRE DAME LAW. 774 (1979).

65. Sussman, *SEC Disciplinary Proceedings Against Accountants—A Study in Unbridled Discretion*, 27 AD. L. REV. 255 (1975); Siedel, *Rule 2(e) and Corporate Officers*, 39 BUS. LAW. 455 (1984); Kosek, *Professional Responsibility of Accountants and Lawyers Before the Securities and Exchange Commission*, 72 LAW LIB. J. 453 (1979); Gruenbaum & Steinberg, *Accountants's Liability and Responsibility: Securities, Criminal and Common Law*, 13 LOY. L.A. REV. 248 (1980); Gruenbaum, *The SEC's Use of Rule 2(e) to Discipline Accountants and Other Professionals*, 56 NOTRE DAME LAW. 820 (1981); Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 NOTRE DAME LAW. 774 (1979); Note, *Regulation of the Accounting Profession Through Rule 2(e) of the SEC's Rules of Practice: Valid or Invalid Exercise of Power?*, 46 BROOKLYN L. REV. 1159 (1980); Note, *Disciplinary Proceedings Against Accountants: The Need for a More Ascertainable Improper Professional Conduct Standard in the SEC's Rule 2(e)*, 53 FORDHAM L. REV. 351 (1984).

66. See *supra* note 1 for text of Rule 2(e).

67. See Gruenbaum & Steinberg, *supra* note 65, at 281-82 n.191. It is worthy of note that the American Institute of Certified Public Accountants (AICPA) instituted regular peer reviews as part of its self-regulatory program in its SEC Practice Section in 1977. See SKOUSEN, AN INTRODUCTION TO THE SEC 125 (4th ed. 1987).

before the SEC, Rule 2(e) as currently applied does not merely prevent fraud or negligence.

A clear negligence standard should be incorporated into the current Rule. Such a standard would at least inhibit the SEC from replacing the standards of the profession with its own standards *ex post facto*. If an accountant did not comply with GAAP, GAAS, the Professional Code of Ethics, or appropriate federal and state statutes, he/she would not be acting as a "reasonable accountant" and would be legitimately subjected to SEC discipline pursuant to a negligence standard. Until the appropriate changes are made, courts can "cue" Congress or the agency and encourage the necessary changes by refusing to uphold actions taken under the current flawed rule.