VIA ELECTRONIC SUBMISSION

March 16, 2020

Russell T. Vought
Acting Director
U.S. Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Re: Docket No. OMB-2019-0006, Improving and Reforming Regulatory Enforcement and Adjudication; Request for Information

Dear Mr. Vought:

Associated Builders and Contractors hereby submits the following comments to the U.S. Office of Management and Budget in response to the above-referenced request for information published in the *Federal Register* on Jan. 30, 2020, at 85 Fed. Reg. 5483.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On Oct. 9, 2019, President Trump signed Executive Order 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," which requires agencies to publish procedures for conducting civil administrative inspections to promote accountability and ensure fairness under the Administrative Procedures Act.[1]

[1] 84 Fed. Reg. 55239.

On Jan. 30, 2020, OMB published an RFI seeking feedback from the public to identify additional reforms that will ensure adequate due process in regulatory enforcement and adjudication.[2]

Summary of ABC's Comments on The Executive Order and the RFI

ABC applauds the President's Executive Order 13892 and its efforts to promote the rule of law through transparency and fairness in regulatory enforcement and adjudication. Far too often in previous administrations, agencies have imposed unfair and unnecessary burdens on businesses—particularly small businesses—through the investigatory and adjudicative process. Because the rules and regulations by which statutes are implemented in the 21st century have become so complex and convoluted, it is nearly impossible for business leaders to be fully aware of every regulatory requirement. There are also many secret rules lurking in the Federal Register, or guidance that is never published at all or changes without notice or public comment, resulting in potentially severe penalties for innocent mistakes. Even where businesses have done nothing wrong, investigations and adjudications of their business practices can take years to complete and often cost huge amounts of time and resources to defend, including attorney fees. Even where vindication is achieved, the damage to the business caused by the investigation itself can never be fully remedied.

ABC therefore welcomes this RFI, which responds appropriately to the mandate of the executive order. ABC hopes that this is the first step in fully implementing the order and reducing regulatory burdens imposed on the business community. ABC's main focus in its specific comments below is on investigations and adjudications by the labor agencies, *i.e.*, the Department of Labor (including the Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the National Labor Relations Board, and the Equal Employment Opportunity Commission. As a general overview, ABC favors modifications to the current investigatory and adjudicative processes of administrative law that achieve the following, consistent with EO 13892:

- No person should be subjected to a civil administrative enforcement action or adjudication without prior public notice of the agency's jurisdiction over the particular conduct and the legal standards that apply.
- All government agencies should foster greater private sector cooperation in enforcement, share information more transparently with regulated businesses, and reach predictable outcomes.
- Most importantly, all government agencies must safeguard regulated businesses against punitive measures that are imposed without fair warning and full notice of what types of conduct will be penalized, including but in fact exceeding constitutional due process rights.

[2] 85 Fed. Reg. 5483.

ABC's Specific Comments in Response to OMB's Request for Information

1. **Prior to the initiation of an adjudication, what would ensure a speedy and/or fair investigation? What reform(s) would avoid a prolonged investigation? Should investigated parties have an opportunity to require an agency to show cause to continue an investigation?**

ABC submits that this set of questions should be clarified to make clear that a speedier investigation is not always a fairer one, and a prolonged investigation is not always less fair. The problem that many ABC members have encountered is the hurry up and wait investigation/adjudication. An investigator suddenly appears with onerous and burdensome demands for documents, interviews, etc. The investigator demands rapid response from the business, imposing severe hardship on companies (both large and small) because such a short time is available to obtain legal counsel, determine what the issues are, retrieve the documents, provide the witnesses, and otherwise comply.[3] But after the tight deadline is met (sometimes with extensions), the business may be left waiting for months and even years for the agency to conclude its investigation. Even worse is the adjudication process, in which post-trial agency decision makers take months or years to decide the cases, during which time a cloud of uncertainty hangs over the business.

ABC agrees with the suggestion in the RFI that investigated parties should have an opportunity to require an agency to "show cause" to continue an investigation. Appropriate time targets should require presumptive termination of an investigation that has been unduly prolonged without finding sufficient evidence to justify continuing.

2. **When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies? What reforms would encourage agencies to adjudicate related conduct in a single proceeding before a single adjudicator?**

In the field of labor law, the most common agency overlap arises between the NLRB and collectively bargained arbitration. The NLRB had developed policies of deferral to arbitration that worked well prior to 2014, when the Obama NLRB reversed decades of precedent by weakening deferral standards in the case of *Babcock & Wilcox Construction Co., Inc.*[4] The current NLRB properly overturned *Babcock & Wilcox* on Dec. 23, 2019, in the case of *United Parcel Service Inc.*[5] Under the restored standard, the NLRB will defer to the arbitrator's decision where (1) the

[3] An example of this phenomenon is the DOL's WHD's "72-hour rule" derived from the WHD's regulations, 29 CFR 516.7. Though never enforced by a court, the WHD investigators routinely make demands that employers produce requested documents in this compressed timeframe, subject to negotiation at the whim of the investigator or regional officials.
[4] 361 NLRB 1127 (2014).
[5] 369 NLRB 1 (2019).

arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, (3) the arbitrator considered the unfair labor practice issue, and (4) the arbitrator's decision is not clearly repugnant to the National Labor Relations Act.

The NLRB has also recently taken appropriate steps to harmonize its interpretation of employee rights under Section 7 of the act with rulings of the EEOC in the context of workplace harassment investigations. In the case of *Banner Health*,[6] the Obama NLRB held that employers would be found to violate the act in most circumstances if they asked employees to preserve the confidentiality of workplace investigations, even though the EEOC has called for investigations of discrimination claims to be kept confidential in order to protect harassment complainants from coercion. On Dec. 16, 2019, the current Board overruled *Banner Health* in the case of *Apogee Retail LLC*,[7]declaring that workplace rules requiring confidentiality during investigations are lawful under the NLRA.

In order to prevent activist agencies from engaging in multiple overlapping investigations, the government should require each agency to heed the U.S. Supreme Court's longstanding mandate calling for each agency to accommodate other agencies' competing regulatory authority, so as to avoid imposing conflicting or overlapping requirements on businesses.[8]

It should also be noted that some labor agencies allow different investigators (within the same agency) in different parts of the country to investigate the same employer and demand duplicative documents. Safeguards should be added via executive order or agency rulemaking to prevent this type of occurrence.

3. Would applying the principle of res judicata in the regulatory context reduce duplicative proceedings? How would agencies effectively apply res judicata?

Agencies are already bound by the principle of res judicata.[9] ABC strongly believes res judicata should continue to apply to all administrative agencies. In addition, principles of collateral and double jeopardy should be enforced to preclude repetitive and/or vexatious investigations, regardless of whether a final adjudicative determination has been issued.

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[6] 362 NLRB 1108 (2015).
[7] 368 NLRB No. 144 (2019).
[8] *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).
[9] *See B&B Hardware, Inc. v. Hargis Ind.*, 575 U.S. 138, 148-49 (2015) (""[C]ourts have not hesitated to apply res judicata to enforce repose" as to administrative agencies); see also *Kremer v. Chemical Constr. Corp*., 456 U.S. 461, 484-85, n. 26 (1982) ("a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, … as a judgment of a court.").

4. **In the regulatory/civil context, when does an American have to prove an absence of legal liability? Put differently, need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability? To the extent permissible, should the Administration address burdens of persuasion and/or production in regulatory proceedings? Or should the scope of this reform focus strictly on an initial presumption of innocence?**

Regrettably, administrative labor and employment law is rife with shifting presumptions and burdens of proof which have the effect of requiring respondent businesses to, in effect, prove their innocence. To cite three of the best known examples, the NLRA, Title VII, and the Fair Labor Standards Act, complainants and administrative enforcement agencies need only establish a minimal *prima facie* case of misconduct under the applicable law in order to shift the burden of proof to the business employer.[10] To a significant extent, the burden shifting regime at the administrative agency level has been upheld by the courts only out of deference to rulings by the agencies decades ago. Given the increased number of decisions, rulings, and laws now burdening the business community, there is certainly reason to question the continuing validity of some of the previous burden-shifting rulings. The administration should consider all of its options in this regard.

5. **What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?**

Most administrative agencies apply relaxed evidentiary rules that permit more hearsay evidence in administrative hearings, as well as evidence that does not meet rigorous standards of reliability and relevance. There are tradeoffs with this approach. On the one hand, the relaxed evidentiary standards permit somewhat more economical hearings than is true of court proceedings. But this is not always the case. Recently publicized administrative law judge proceedings under the NLRA have resulted in hearings lasting many months, massive document demands and millions of dollars in legal fees. Moreover, even where the lower evidentiary threshold results in lower costs of trial, there is potential cost in terms of lack of fairness. Hearsay is excluded from civil court proceedings, with exceptions, because such evidence is deemed (correctly) to be unreliable. An argument can be made that the same standard should be applied to administrative proceedings, at least where the hearsay testimony or document is central to liability issue(s).

[10] *See Transportation Management v. NLRB*, 462 U.S. 393 (1983); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946).

6. **Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?**

ABC feels strongly that agencies should be required to produce all evidence favorable to the respondent, early in any investigation and certainly prior to trial.

7. **Do adjudicators sometimes lack independence from the enforcement arm of the agency? What reform(s) would adequately separate functions and guarantee an adjudicator's independence?**

In the 2016 case of *Williams v. Pennsylvania*,[11] the Supreme Court determined "that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[12] This holding should be applied to administrative agencies to prevent them from serving as both investigator and adjudicator. A prime example of agencies that continue to play such a dual role arises among Regional Directors of the NLRB. In the case of *NLRB v. Aaron Bros. Corp.*,[13] the Ninth Circuit relied on an earlier Supreme Court decision[14] to reject a due process challenge when the regional director of the NLRB exercised both investigative and adjudicative responsibilities in connection with the issuance and resolution of [an] unfair labor practice complaint. That issue should be revisited in light the Supreme Court's holding in *Williams*.[15]

8. **Do agencies provide enough transparency regarding penalties and fines? Are penalties generally fair and proportionate to the infractions for which they are assessed? What reform(s) would ensure consistency and transparency regarding regulatory penalties for a particular agency or the federal government as a whole?**

Many agencies do not provide enough transparency regarding penalties and fines. A case in point is the DOL's WHD which enforces the Davis-Bacon Act (along with the FLSA and other labor laws). Under Davis-Bacon, the WHD regularly prosecutes employers for misclassifying employees based upon unpublished and unknowable union area practices, with no fair notice or warning as to what the area practices are.[16] This practice is based on obsolete industry standards dating from the 1970s and has resulted in numerous "unfair surprises" imposed on small business contractors who had no way to know they were doing anything wrong.

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[11] 136 S. Ct. 1899 (2016).
[12] *Id*. at 1905.
[13] 563 F.2d 409, 413 (9th Cir. 1977).
[14] Withrow v. Larking, 421 U.S. 35 (1975).
[15] For a more extensive discussion of this point, *see* Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. Jnl. of Law Reform 103 (2018).
[16] *See Fry Brothers Corp.*, WAB Case No. 76-6 (1976).

The WHD has also adopted a practice in some regions of the country of never putting their findings in writing unless litigation is filed. The investigators refuse to disclose the basis for their findings of violation unless and until the employer agrees to comply and settle the case. This coercive practice puts employers in the impossible position of being unable to tell what they are committing to in terms of settlement, exacerbated by the refusals of many investigators to disclose their back pay calculations unless and until the employer agrees to settle.

Different offices of the WHD also take different positions with regard to assessing liquidated damages. A third year of back wages is available to WHD if it finds violations to be repeat or willful. Some regions require their investigators to seek three years of back pay in every case, obviously in order to coerce settlements. The secretary of labor should be directed to require the WHD to adopt a consistent and fair policy that forbids the unwarranted threat of liquidated damages as a tool to coerce settlements, in the absence of clear evidence of willful misconduct.

9. **When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements? What safeguards would systemically prevent unfair and/or coercive resolutions?**

The coercive impact of regulatory investigations and/or adjudications is widely recognized. As just one example, more than 90% of all unfair labor practice complaints at the NLRB are settled. This occurs because the risk and burdens imposed on employers by proceeding to trial usually exceed the benefit of "winning" the case. As discussed above, the WHD often uses the threat of liquidated damages as a tool to coerce settlements in wage hour investigations.

A significant safeguard against unfair and coercive investigations is increased outreach to the business community and partnering and incentives to achieve voluntary compliance. The DOL's WHD has taken a salutary step in that direction with its "Payroll Audit Independent Determination" program. But over the last 10 fiscal years, the WHD has completed an average of more than 29,000 investigations annually, compared to less than 2,800 outreach events. Reversing that ratio would increase compliance without needlessly coercing businesses to settle cases through oppressive investigations and adjudications.

10. **Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?**

Agencies and their staff are largely unaccountable to the public in their enforcement and adjudications. They are career employees of the government, and therefore do not need to concern themselves with the political impact of their enforcement decisions on the regulated community.

11. Are there certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others?

ABC has no information to provide in response to this request at the present time but will comment on any future proposals.

Conclusion

As the president has stated in EO 13892, "The rule of law requires transparency." ABC commends the OMB for undertaking this RFI in order to continue the process of regulatory reform. We look forward to commenting on future proposals to correct administrative agency abuse of the investigation and adjudication process.

Respectfully Submitted,

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