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VIA ELECTRONIC FILING

Mr. Russell T. Vought
Acting Director
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

**Re: Improving and Reforming Regulatory Enforcement and Adjudication
Docket No. OMB-2019-0006**

Dear Acting Director Vought:

Please accept the attached comments on behalf of the U.S. Chamber Institute for Legal Reform (ILR).

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Harold Kim', written in a cursive style.

Harold Kim
President
U.S. Chamber Institute for Legal Reform

Comments Submitted to the Office of Management and Budget Improving and Reforming Regulatory Enforcement and Adjudication

The U.S. Chamber Institute for Legal Reform (ILR) is pleased to submit this response to the Office of Management and Budget's (OMB) public notice seeking comments in furtherance of the policy on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Docket No. OMB-2019-0006. These comments reflected the views of ILR, which is an affiliate of the U.S. Chamber of Commerce, and input from various policy divisions of the U.S. Chamber.

ILR applauds OMB's interest in advancing a fair, speedy, accurate, and transparent administrative enforcement and adjudication system that is respectful of the rights of Americans. In response to OMB's request for information, ILR offers the following comments to ensure that every American enjoys adequate protections in regulatory enforcements and adjudications. ILR provides its comments in the order OMB's queries appeared in its request.

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

Requests by government agency staff for businesses to enter "tolling agreements" may needlessly prolong an investigation and coerce businesses to give up their rights.

This has occurred in the Securities and Exchange Commission's (SEC) enforcement of the Foreign Corrupt Practices Act (FCPA) and may occur in other contexts. SEC staff often request that targets of an FCPA investigation enter a tolling agreement. This is not really a request. If a business enters a tolling agreement, it will remain under a prolonged shadow of an investigation. On the other hand, when a business declines to enter an agreement, the implicit threat is that the government will bring a potentially unnecessary action without having conducted an adequate investigation. In addition, rejecting a request to enter a tolling agreement may jeopardize settlement negotiations between a business and the government.¹

Statutes of limitations exist for good reason. In the regulatory context, they ensure that the government brings enforcement actions promptly when the party accused of violating a regulation has records, witnesses, and institutional memory available to defend itself. They also prevent lengthy investigations during which the targeted company operates under a cloud of suspicion that may damage its reputation. For those reasons, agencies should not seek tolling agreements at the outset of an investigation. Nor should the government deem a business's

¹ See Mike Koehler, *Statute of Limitations Tolling in SEC Enforcement Actions Post-Kokesh – An Offer You Can Refuse*, FCPA Professor (blog), Dec. 21, 2017.

refusal to sacrifice its statutory right to a prompt investigation and adjudication as a factor when determining whether a party is cooperating with the government.

In addition to avoiding unfair tolling agreements, agencies should consider developing programs to resolve disputes through mediation or other alternative dispute resolution before moving into an adjudication. Taking this approach may foster early settlements, which should be the desired outcome of many enforcement actions.²

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 adjudication?

When companies respond to allegations of improper activities, the focus of management is diverted from the day-to-day running of the business. Responding to multiple regulators with respect to the same conduct or transaction should not become a regular attribute to doing business. It is counterproductive from a regulatory standpoint and it is damaging to businesses and to the economy.

The Administrative Conference of the United States (ACUS) has observed that there are areas of “shared regulatory space” that produce “redundancy, inefficiency, and gaps” in regulation and enforcement.³ To address this concern, the ACUS has recommended that the Executive Office of the President and agencies use tools such as Memoranda of Understanding (MOU) to coordinate enforcement. The 2012 study underlying this recommendation found that “there appears to be no generally applicable statutory or executive branch policy regarding the use of MOUs, leaving their content largely to the discretion of the agencies.”⁴ That continues to be the case today.

ILR recommends that the Administration require agencies to identify areas of overlapping jurisdiction and develop MOUs to reduce the potential for duplicative enforcement. For example, a positive example of the use of MOUs to avoid duplicative enforcement is in the areas of food, drug, medical devices, and cosmetic advertising. Since 1954, the U.S. Food & Drug Administration (FDA) and Federal Trade Commission (FTC) have followed an MOU directing that only one of the agencies, not both, will initiate enforcement actions where there is shared jurisdiction unless the public interest otherwise dictates.⁵ Another example is a longstanding MOU between the Occupational Safety & Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA) that requires the “fullest possible cooperation and coordination” between the agencies in their compliance and enforcement activities related to

² See Philip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 Vill. L. Rev. 1392, 1411-12 (1983).

³ See Administrative Conference of the United States, *Administrative Conference Recommendation 2012-5* (June 15, 2012).

⁴ Jody Freeman & Jim Rossi, Final Report, *Improving Coordination of Related Agency Responsibilities*, at 25 (May 30, 2012).

⁵ See Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, *MOU 225-71-8003* (Apr. 29, 1971) (updating 1954 agreement).

protection of workers, the public, and the environment at facilities subject to OSHA and EPA jurisdiction.⁶ To their credit, some agencies have worked hard to avoid overlapping probes, such as the FTC and DOJ's antitrust division, even when there is tension over overlapping jurisdiction.⁷

There are other opportunities for agencies to work together to avoid duplicative enforcement. For example, the SEC can enter MOUs with additional agencies (such as the Consumer Financial Protection Bureau), stand down where another enforcement authority has already taken action, and undertake efforts to reduce or eliminate the extensive duplication of efforts that occurs on the part of state and local enforcement authorities, among other actions.⁸

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

Yes, agencies should apply principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) in adjudications. These doctrines protect parties from the unfairness of having to re-litigate the same claims or issues already decided by an adjudicatory body. Applying these principles also prevents inconsistent decisions and encourages reliance on an adjudication. These principles should apply to a decision made earlier by the same agency or another agency where there is overlapping jurisdiction, so long as the agency acted within its statutory authority.

The Supreme Court's "longstanding view" is that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."⁹ Agencies should apply these principles based on well-established common law tests.¹⁰

⁶ [Memorandum of Understanding](#) between the U.S. Department of Labor Occupational Safety and Health Administration and the U.S. Environmental Protection Agency Office of Enforcement (Feb. 13, 1991).

⁷ See Lauren Feiner, [Here's Why the Top Two Antitrust Enforcers in the US are Squabbling Over Who Gets to Regulate Big Tech](#), CNBC, Sept. 18, 2019.

⁸ See, e.g., U.S. Chamber of Commerce, Center for Capital Markets, [Examining U.S. Securities and Exchange Commission Enforcement](#) 28-31 (July 2015).

⁹ *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148-49 (2015) (quoting *University of Tenn. v. Elliott*, 478 U.S. 788, 797-98 (1986) and *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

¹⁰ See *B&B Hardware*, 575 U.S. at 148 (finding agency decisions can provide the basis for issue preclusion in federal court and looking to the Restatement (Second) of Judgments for the necessary elements); Restatement (Second) of Judgments § 27 (1980) (providing the general rule is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim"); *id.* § 28 (recognizing exceptions such as whether there were "differences in the quality or extensiveness of the procedures followed").

4. In the regulatory/civil context, when does an American have to prove the 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?

Under no circumstances, should an American or an American company have to prove a negative, especially when defending against the government, be it an enforcement action or a prosecution. That is a basic principle of due process. While the evidentiary thresholds will differ from the criminal context, companies involved in an enforcement action should not have the burden to prove compliance with a regulatory obligation any more than a criminal defendant should have the burden to prove their innocence.

One example of where proving innocence is a standard part of the regulatory process is in the application of federal civil asset forfeiture laws.¹¹ Under these laws, agencies can confiscate an individual's or business's cash, property, or other materials that they suspect are associated with an illegal activity. If challenged, an agency needs only to present evidence that the property is more likely than not (a preponderance of the evidence standard) related to an illegal activity and can keep the property, sell, or destroy it even if the government never charges the person with a crime. To obtain the return of their property, the burden of proof falls on what may be an innocent individual or business to show that it did not violate the law. In some cases, agencies have enforced forfeitures laws to seize legitimately earned money from small businesses, such as farmers, restaurant owners, and food distributors.¹² While statutory reform may be helpful, federal agencies can also adopt policies that safeguard due process and avoid disproportionate penalties in civil forfeiture cases.

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

Yes, application of Rules of Evidence to regulatory proceedings, particularly the rule against hearsay, would create a fairer evidentiary framework. The Administrative Procedures Act (APA) incorporated some limits on the admission of evidence in administrative proceedings, such as relevance and materiality, but did not require following the Rules of Evidence.

Administrative adjudications today are often functionally equivalent to civil nonjury trials, where the rules of evidence apply. In administrative proceedings, however, administrative law judges can rely on hearsay when reaching decisions. Hearsay is defined as an out-of-court

¹¹ For a compilation of these statutes, *see* Charles Doyle, Congressional Research Service, No. 97-139, [Crime and Forfeiture](#) (Jan. 22, 2015).

¹² *See* John Malcom, [Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform](#) (Heritage Found. 2015) (documenting examples of civil forfeiture under a federal law that prohibits structuring a transaction in a manner that avoids the Bank Secrecy Act's requirement of reporting any transaction of more than \$10,000).

statement, made in court, to prove the truth of the matter asserted. The purpose of the rule that generally prohibits admission of hearsay in court is to prevent the use of second-hand statements or documents from being used as evidence at trial given their potential unreliability and the inability to question the speaker or author.

Hearsay evidence should not be *per se* admissible in administrative adjudications regardless of the circumstances of the statement or document. Rather, adjudicators should require proponents of hearsay evidence to show that the evidence falls within a common law or statutory exception to hearsay inadmissibility or offer an independent foundation of the accuracy of the evidence.

Taking this approach would result in decision-making based on more reliable evidence, greater efficiency in adjudication by limiting questionable evidence, and promote the truth-finding function of adjudication. In addition, applying the hearsay rule would help address concerns regarding the independence of adjudicators within an agency and preserve the integrity of the administrative process.¹³

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?

Yes, agencies should be required to produce all evidence favorable to the respondent. Unlike court proceedings, the generous discovery rules of the Federal Rules of Civil Procedure do not apply in agency adjudications. Regulators can compel parties to produce documents and submit to inspections. Agencies are not required to provide parties with any information, unless otherwise provided in their rules of procedure. This asymmetry of information poses a problem of fundamental fairness to regulated entities.

At minimum, agencies should disclose evidence that is “material to the guilt or punishment” of the regulated party, including exculpatory evidence, in any formal adjudicatory proceedings with the potential for fines or penalties.¹⁴ This standard (known as the *Brady* rule) is applied in Article III criminal proceedings and is an essential element of due process. Agencies should incorporate the *Brady* rule into their procedures for formal adjudication. To their credit, several agencies have done so. Other agencies, however, have refused to disclose exculpatory evidence to individuals and businesses defending themselves in adjudications.¹⁵

Sharing evidence gathered in an investigation before bringing an enforcement action against a party, both supporting the government’s case and exculpatory in nature, is not only a matter of due process, it is sound public policy. Disclosure of the evidence helps defense counsel make a reasonable assessment of a matter so that he or she can advise a client on whether to seek a proposed settlement. For example, though not universally followed, staff within the SEC

¹³ See Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 Neb. L. Rev. 135 (1999).

¹⁴ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁵ See Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 Minn. L. Rev. 1424, 1433-38 (2011).

Enforcement Division provides a “reverse proffer,” in which it lays out the evidence supporting the charges. This has proven to be a constructive and useful means of expediting resolution of the matter.¹⁶ Formalizing and uniformly applying this process in the SEC and other agencies should be considered.

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?

Yes, adjudicators sometimes lack independence from the enforcement arm of the agency. Even with statutory protections in place intended to provide independence to administrative law judges (ALJs), there is sometimes an inherent bias favoring the agency. For example, ALJ decisions are appealed to agency heads.

Some former ALJs have candidly revealed that they felt pressured to rule in favor of the agency. For example, former SEC Judge Lillian McEwen came under fire from the SEC’s Chief Judge for finding too often in favor of defendants. Ms. McEwen also said SEC judges were expected to work on the assumption that “the burden was on the people who were accused to show that they didn’t do what the agency said they did.”¹⁷

A *Wall Street Journal* analysis found that the SEC won against 90% of defendants in contested cases in its own courts from October 2010 through March 2015—significantly higher than the agency’s 69% win rate in federal court.¹⁸ One SEC ALJ, over the course of four years and 28 cases, found defendants liable in every case.¹⁹ Not coincidentally, as the law provides the choice to the SEC as to whether to decide cases inside the agency or in federal court, the SEC has increasingly opted to decide cases in house.²⁰ Ronald J. Riccio, former dean of the Seton Hall Law School and a professor of constitutional law, has recognized the inherent conflict in internal agency adjudication. “If you get caught up in the web of an agency investigation, you’re investigated, prosecuted and judged by agency personnel,” he observed.²¹ “Even if it doesn’t create actual bias, it doesn’t look good.”²²

The potential for bias is even greater when an administrative judge (AJ), rather than an ALJ, presides over an adjudication. While these adjudicatory officers have a similar title, there are key distinctions between an AJ and an ALJ. AJs do not have the same statutory protections as ALJs. Unlike ALJs, AJs are appointed directly by the agency, can be rewarded with bonuses

¹⁶ See U.S. Chamber of Commerce, Center for Capital Markets, [Examining U.S. Securities and Exchange Commission Enforcement](#) 24-25 (July 2015).

¹⁷ Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J., May 6, 2015.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Gretchen Mongenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y Times, Oct. 5, 2013 (quoting Professor Riccio).

²² *Id.*

based on their performance, and lack protection against being arbitrary discipline or removal,²³ raising additional concern that they are influenced by the agency. AJs can even communicate ex parte with agency officials during and about their hearings.²⁴ Unsurprisingly, agencies, which have significant discretion over whether to use AJs or ALJs outside of formal adjudications, often choose AJs.²⁵

In addition to the Administration considering developing and supporting statutory reforms,²⁶ the President should consider use of an executive order to encourage agencies to rely on ALJs, rather than AJs, for adjudication or afford AJs some of the same protections that statutes afford ALJs.²⁷ The Administration might also consider measures to enhance the independence of ALJs.

8. Do agencies provide enough transparency regarding penalties and fines? Are penalties 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?

Generally, no, agencies do not provide enough transparency regarding penalties and fines, which can be unpredictable and disproportionate to the infractions for which they are assessed.

Congress has authorized agencies to impose civil penalties at multimillion-dollar levels, sometimes in response to violations of vague standards. These fines may be imposed “per violation.” Agencies’ broad discretion in defining a “violation” for purposes of computing a penalty may allow them to choose a method where the potential liability reaches extraordinary levels. For example, an agency may compute fines per product made or sold, prescription filled, television commercial aired, or sales letter mailed when assessing a penalty for a single statement viewed as misleading or a failure to file a required report. Computing fines in this

²³ See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 Mo. L. Rev. 1023, 1024-27 (2016).

²⁴ See Ken Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1668 (2016).

²⁵ See *id.* at 1662-66.

²⁶ For example, the APA could be amended to move to a system where independent bodies hear appeals of the adjudicatory decisions of federal agencies. These ALJs could have special expertise to hear particular appeals, such as a background in economics, medicine, or science. See Michael Rappaport, *A Stronger Separation of Powers for Administrative Agencies*, Regulatory Review, Dec. 18, 2019. About half of states have replaced internal administrative adjudicators with an independent corps of judges assigned to preside over a wide variety of agency matters. See Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y Times, Oct. 5, 2013; see also Malcolm C. Rich & Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. of the Nat’l Ass’n of Admin. L. Jud. 1, 72 (2019) (urging states to adopt a “central panel” system for under which ALJs are not employed by the agencies whose cases they hear, but by a distinct central panel agency created solely to manage them and observing that this system has increased efficiency, cost effectiveness, enhanced public trust and perceived impartiality, greater transparency, and increased ability to attract high-quality attorneys to serve as ALJs).

²⁷ See Kent Barnett, *Due Process vs. Administrative Law*, Wall St. J., Nov. 15, 2015 (recommending that ALJs, or AJs with substantially similar independence, preside over all agency hearings).

fashion can result in excessive, duplicative penalties that are disproportionate to the alleged wrongdoing.

For example, statutory penalties for violation of the False Claims Act (FCA) are imposed in addition to treble damages.²⁸ Penalties range from about \$11,000 to \$22,000 in 2020, when adjusted for inflation.²⁹ Because these statutory penalties apply per claim, a single allegedly false statement may result in thousands or even millions of separate “claims” that multiply the mandatory minimum penalties to levels that are literally absurd in many cases. The potential for ruinous mandatory penalties may compel settlement of any claim that can survive a motion to dismiss, however unfounded.³⁰ This problem is exacerbated by the ability of private relators to bring FCA actions that entitle them to a significant portion of the fines imposed.

In addition, administrative agencies may provide little or no guidance on the method used to calculate civil penalties. In some cases, agencies may merely make generic references to statutory considerations but provide no further guidance.³¹ This leads to unpredictability and inconsistency in punishment.

Agencies should adopt civil penalty factors to guide and place rational bounds on their discretion to impose civil penalties and fines. This would help avoid arbitrary punishment, facilitate consistent and fair treatment, and advance agency legitimacy. These factors should be developed through notice-and-comment rulemaking in advance of applying them to particular facts.³² When imposing civil penalties, agencies should also share information about the facts and factors that entered into its evaluation, which would allow the regulated community to better understand the agency’s rationale.

There are constructive examples of programs that are creating fairness in the imposition of fines and penalties that other agencies should consider adopting. Policies—such as at DOJ—that reduce penalties for effective compliance programs, voluntary disclosure, cooperation, and remediation should be encouraged across the federal government.³³ Similarly, the DOJ’s policy

²⁸ See 31 U.S.C. § 3729(a).

²⁹ 28 C.F.R. § 85.5.

³⁰ See, e.g., Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. Ann. Surv. Am. L. 241, 275 (2004) (healthcare providers may have “little choice but to settle, even if they might well prevail at trial” given “the potential for astronomical liability”); John T. Boese & Beth C. McClain, *Why Thompson is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999) (observing that “the potential for high recoveries . . . places great pressure on defendants to settle even meritless suits”).

³¹ See Max Minzner, *Should Agencies Enforce*, 99 Minn. L. Rev. 2113, 2130 (2015).

³² See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 555 (2003).

³³ See generally U.S. Dep’t of Justice, [Principles of Federal Prosecution of Business Entities](#), Justice Manual § 9-28.000; Factors to be Considered § 9-28.300 (Nov. 2018); see also U.S. Dep’t of Justice, [FCPA Corporate Enforcement Policy](#), Justice Manual § 9-47.120 (Nov. 2019); U.S. Dep’t of Justice, Antitrust Division, [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) (July 2019); U.S. Dep’t of Justice, [Guidelines for Taking Disclosure, Cooperation, and Remediation Into Account In False Claims Act Matters](#), Justice Manual § 4-4.112 (May 2019).

of not “piling on” with duplicative fines should be looked to as a model.³⁴ These policies are working. For example, last year, Cognizant Technology Solutions Corporation settled action with the SEC by promptly self-reporting an FCPA violation related to a construction project in India, identifying employees connected to bribery payments, and paying \$16.4 million in disgorgement, \$2.8 million in interest, and \$6 million in civil penalties. As a result, the DOJ declined to prosecute the company and, after independently investigating the allegations, instead charged the individuals involved.³⁵

In addition, ILR commends the DOJ for reminding its attorneys that settlement agreements are intended to compensate victims, redress harm, and deter unlawful conduct.³⁶ Individuals or businesses should not be pressured to donate money to third-party organizations as a condition of the federal government ending an enforcement action, lawsuit, or prosecution. This sound policy prevents the potential for government officials to give away public funds and avoids the potential for them to direct settlement money to organizations based on personal or political favoritism.³⁷ It should remain in place.

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

Due process should, at the very minimum, require an agency to provide every person accused of violating the law with an opportunity to request a hearing before the government can command a person to act or impose a penalty. In some contexts, however, agencies impose legal obligations without a hearing. For example, the Environmental Protection Agency adjudicates issues under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) through issuing “unilateral administrative orders.” The agency can simply order individuals or businesses to clean up their land regardless of fault.³⁸ The Administration should ensure that regulated parties are entitled to a hearing before an agency can demand action, prohibit conduct, or impose fines.

³⁴ U.S. Dep’t of Justice, [Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct](#), Justice Manual § 1-12.100 (May 2018); *see also* Jonathan S. Abernethy et al., *The Department of Justice’s New ‘Piling On’ Policy*, Int’l Bar Ass’n, Crim. L. & Bus. Crime Newsletter (Oct. 2018); U.S. Dep’t of Justice, Assistant Attorney General Leslie R. Caldwell, [Remarks at the Securities Enforcement Forum West Conference](#) (May 12, 2016) (“As to companies, we hear your concerns about regulatory ‘piling on.’ We agree that there can be significant unfairness when a company is asked by different regulators to pay for the same misconduct over and over again.”).

³⁵ *See* Jennifer Kennedy Park et al., [DOJ Issues Twelfth Declination Letter Under FCPA Cooperation Policy](#), Cleary Enforcement Watch (blog), Feb. 19, 2019.

³⁶ U.S. Dep’t of Justice, [Settlement Payments to Third Parties](#), Justice Manual, § 1-17.000 (Apr. 2018); *see also* Office of the Attorney General, Memorandum for all Component Heads and United States Attorneys, [Prohibition on Settlement Payments to Third Parties](#), June 5, 2017.

³⁷ *See generally* Paul J. Larkin Jr., Op-ed, [Justice Department Giving Away the Public’s Money to Third-Party Interests](#), Washington Times, Mar. 9, 2015.

³⁸ *See* Philip Hamburger, [How Government Agencies Usurp Our Rights](#), City Journal, Winter 2017.

In addition, agencies can pressure businesses into settlements through issuing adverse publicity. An informal statement from an agency can cause a company's stock price to dramatically fall. Yet, despite a recommendation from the ACUS nearly half a century ago, most agencies have not adopted standards for issuing adverse publicity.³⁹ The internet and social media have raised the importance of this issue. Adverse publicity no longer is limited to an agency press release but can take the form of Twitter post announcing an investigation. Informal warning letters may be posted on an agency's website. In the previous Administration, for example, OSHA engaged in a practice of "regulation by shaming."⁴⁰ At minimum, agencies should articulate written standards for issuing different forms of adverse publicity, including the content of announcements, internal procedures for issuing publicity, and a means for private parties to request corrections or retractions.⁴¹ Inflammatory pre-adjudication press releases and statements should be disallowed.

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?

No, agencies and staff are not sufficiently accountable to the public in the context of enforcement and adjudications, however, the Administration is making progress to address this concern. For example, President Trump signed two Executive Orders (EOs) on October 9, 2019 that bar agencies from using guidance documents to impose new duties on private parties and required transparency in the issuance and maintenance of guidance documents.⁴² Among its directives, EO 13891 requires agencies to "establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component" within 120 days of OMB's issuance of an implementing memorandum, which occurred on October 31, 2019.⁴³ By February 28, 2020, all agencies should have had this information online. Agency compliance with these EOs should be closely monitored and enforced.

Some agencies continue to irrationally interpret or enforce laws. For example, the DOL's Office of Federal Contract Compliance Programs (OFCCP) enforces its Compensation

³⁹ See Administrative Conference of the United States, Conference Recommendation No. 73-1 (June 8, 1973).

⁴⁰ See Nancy Grover, *Experts: OSHA Wants to Shame Employers Into Compliance*, Risk & Insurance, July 20, 2015 (attributing the origination of the policy in 2010 to Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health); Michael Rubin, *OSHA Ups the Ante in U.S. Workplaces*, Buffalo Bus. J., Dec. 4, 2015 (discussing OSHA's use of salacious "hard-hitting" press releases even before efforts to resolve or adjudicate OSHA citations).

⁴¹ See Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 NYU L. Rev. 1371, 1429-39 (2011).

⁴² See [Promoting the Rule of Law Through Improved Agency Guidance Documents](#), Exec. Order 13891, 84 Fed. Reg. 55,235 (Oct. 15, 2019); [Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication](#), Exec. Order No. 12892, 84 Fed. Reg. 55,239 (Oct. 15, 2019).

⁴³ Office of Management & Budget, [Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions](#), M-20-02, Oct. 31, 2019.

Directives by using broad classifications to compare the pay of all employees with the same job title—classifications that were not established through a formal rulemaking process. For example, under the OFCCP’s standards, an “engineer” could include people who do highly technical work and people who do less technical work. According to the OFCCP, those distinctions do not matter. As long as the job title is the same, the pay should be the same.⁴⁴ This can result in government demands to pay heavy fines for pay inequities when there are legitimate educational and training reasons justifying why some employees are compensated more than others. The OFCCP is among agencies that should follow the recent EO directives to reform its practices and improve its credibility with the companies that are subject to its authority.

In addition, the Administration should encourage agencies to adopt a “see something, say something” approach modeled on Department of Labor Wage and Hour Division Administrator Cheryl Stanton’s call for attorneys to report investigators who are not properly applying the law.⁴⁵

* * *

ILR respectfully offers these thoughts and recommendations on how OMB can advance reforms that will better safeguard due process in regulation and adjudication. ILR welcomes the opportunity to engage with OMB and other interested parties on these topics.

Sincerely,



Harold Kim

⁴⁴ See U.S. Chamber Inst. for Legal Reform, *Will New Executive Orders Close OFCCP's Highway to Enforcement Hell?*, Nov. 7, 2019.

⁴⁵ See Ben Penn, *Trump Wage Chief Urges Public to Report Aggressive Investigators*, Bloomberg, Oct. 16, 2019.