



Billing Code 3110-01

OFFICE OF MANAGEMENT AND BUDGET

Improving and Reforming Regulatory Enforcement and Adjudication

AGENCY: Office of Management and Budget (OMB), Executive Office of the President.

ACTION: Request for information: improving and/or reforming regulatory enforcement and adjudication.

SUMMARY: In furtherance of the policy *on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, the Office of Management and Budget invites the public to identify additional reforms that will ensure adequate due process in regulatory enforcement and adjudication.

DATES: Comments are due on or before [INSERT 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties should submit comments, identified by docket number OMB-2019-0006, before the comment closing date to www.regulations.gov.

SUPPLEMENTARY INFORMATION: Protecting Americans against the unjust or arbitrary exercise of government power forms a cornerstone of the United States' constitutional structure. The presumption of innocence, adjudication by a neutral arbiter, fair and speedy proceedings, and the prohibition of double jeopardy, are some of the time-honored protections that constitute the rule of law in America.

The growth of administrative enforcement and adjudication over the last several decades has not always been accompanied by commensurate growth of protections to ensure just and reasonable process.

Because many citizens' sole or principal interaction with the federal government is with a federal

agency, it is of the utmost importance that administrative enforcement and adjudication operate subject to requirements that ensure they are fair, speedy, accurate, transparent, and respectful of the rights of Americans.

This Administration continues to evaluate a full range of options to make significant reforms in the context of administrative enforcement and adjudication. OMB invites public comment to promote an informed consideration of additional reforms. In particular, OMB solicits input on regulatory reforms that will better safeguard due process in the regulatory enforcement and adjudication settings (i.e., non-Article III adjudications).

The Administration recognizes that procedural protections vary considerably by Department and/or agency, sub-agency, etc. Adjudications pursuant to the Administrative Procedure Act's section 554 (i.e., "formal" adjudications) require more robust procedural protections. *See* 5 U.S.C 554, 556, and 557. Other adjudications (i.e., "informal" adjudications) tend to enjoy more procedural flexibility. No matter the diversity of protections and/or types of proceedings, the Administration maintains an interest in overarching procedural reform. Put differently, the Administration requests public input on procedural reforms to both formal and informal adjudications and pre-adjudication enforcement protection(s). This request for information seeks ideas that will ensure each and every American enjoys adequate protections in regulatory enforcements and adjudications.

Among the topics of interest, OMB invites feedback on the following queries:

- 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?

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

- When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements? What safeguards would systemically prevent unfair and/or coercive resolutions?
- Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?
- Are there certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others?

For each of the above queries, OMB requests specific, concrete examples of current due process shortfalls and concrete reform proposals to ensure adequate due process. Abstract, general principles will do little to advance actionable reform.

INSTRUCTIONS FOR WRITTEN RESPONSES

Interested parties should provide written responses to the questions outlined in the supplementary information section of this **Federal Register** document. Submissions are due 45 days from publication of this document through www.regulations.gov and should be identified by docket number OMB-2019-0006.

Please include the below in your response, *limiting this portion of your response to one page*:

- The name of the individual(s) and/or organization responding. Anonymous responses will also be accepted.

- A brief description of the responding individual(s) or organization's mission and/or areas of expertise, if the responder feels appropriate.
- A contact for questions or other follow-up on your response if desired.

Comments submitted in response to this document are subject to FOIA. OMB may also make all comments available to the public. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

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