



March 16, 2020

Submitted Via Regulations.gov

Russell T. Vought
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: OMB-2019-0006: Improving or Reforming Regulatory Enforcement or Adjudication

Dear Acting Director Vought:

I write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels.¹ AFPF appreciates the opportunity to comment on the Office of Management and Budget (“OMB”) Request for Information: Improving and/or Reforming Regulatory Enforcement or Adjudication (the “RFI”).

AFPF applauds the President for issuing Executive Order 13,892, titled “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.” This Executive Order is an important first step in protecting ordinary Americans and small businesses from abusive and unconstitutional administrative prosecutions and investigations. AFPF commends OMB for seeking to build on the Administration’s laudable efforts to protect the public from agency overreach by soliciting public input on additional reforms to ensure adequate due process in administrative investigations and adjudications. And AFPF applauds the President for his effort to rein in agency abuse and protect the federal Constitution and the American public from administrative overreach. We respectfully urge the Administration to issue Executive Orders requiring federal agencies to honor due process and treat businesses fairly and with respect.

Summary of Recommendations

1. The Administration should adopt government-wide reforms to limit opportunities for agency misuse of civil investigative demands (“CIDs”). Federal agencies should be required to specifically and narrowly articulate the purpose and scope of their investigation.
2. Agencies should be required to provide easy-to-understand descriptions of the CID process that are accessible to the public. The complexity of instructions and requirements for

¹ See AMERICANS FOR PROSPERITY FOUNDATION, <https://americansforprosperityfoundation.org/>.

production of electronically stored information (“ESI”) should be substantially reduced, particularly for small businesses.

3. The Administration should require federal agencies to provide cost sharing when agency demands for ESI impose undue burden or expense, as is done in federal court.
4. The Administration should require federal agencies to fully advise CID recipients of their rights under the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).
5. The Administration should make clear the Administrative Procedure Act (“APA”) and due process categorically foreclose agencies from reversing the burdens of production and persuasion.
6. The Administration should require federal agencies to adopt Federal Rule of Evidence 802, under which hearsay is inadmissible, subject to limited exceptions.
7. The Administration should ensure experts in agency adjudications meet the *Daubert* standard and the requirements of Federal Rule of Evidence 702.
8. The *Brady* rule should apply in all formal agency adjudications and be sufficiently robust to place an affirmative duty on agencies to disclose exculpatory and impeachment material.
9. The Administration should adopt reforms to minimize agencies’ ability to coerce targets into unfair settlements. Reforms that result from this RFI should apply equally to agency investigations and enforcement actions relating to existing consent orders.
10. The Administration should direct all federal agencies to publicly set forth in policy statements the schedule of fines and penalties, detailing why those fines and penalties are fair and proportionate to the alleged infractions. Fines and penalties should be tied to actual harm to identifiable individuals caused by the alleged infractions.

Particular attention should be paid to the well-reasoned Comments of Andrew N. Vollmer² with respect to Security and Exchange Commission’s (“SEC”) investitive and administrative enforcement process, as well as the Comments of South Pacific Tuna Corporation³ detailing issues relating to the National Oceanic and Atmospheric Administration Office of Law Enforcement.⁴ AFPP echoes some of the themes identified in those comments with a particular focus on the Federal Trade Commission’s (“FTC”) investigative and administrative enforcement process. AFPP believes extra-Article III administrative enforcement actions—where the agency wears multiple hats and acts as both prosecutor and judge—as well as burdensome multi-year agency investigations involving administrative subpoenas known as CIDs are not only fundamentally

² Available at <https://www.regulations.gov/document?D=OMB-2019-0006-0404>.

³ Available at <https://www.regulations.gov/document?D=OMB-2019-0006-0153>.

⁴ AFPP believes experience-based comments describing current due-process shortfalls should be given weight.

unfair to companies and the American people but also raise grave due-process and separation-of-powers concerns.

Although AFPP recognizes the vast majority of federal officials are well-intentioned public servants, we respectfully submit that government-wide reforms to federal agency investigative and adjudicative processes are necessary to limit the potential for agency abuse and overreach.⁵ We are aware of all-too-many real-world instances where abusive agency investigations and enforcement actions have decimated economic prosperity for hard-working Americans and small businesses.⁶

I. Agencies Should Not Be Permitted to Destroy Businesses and Coerce Settlement Through Burdensome, Cost-Prohibitive, Multi-Year Fishing Expeditions.

Agencies often conduct multi-year investigations, refuse to provide the target an opportunity to “cure” whatever allegedly problematic practices the agency perceives, and then bring an enforcement action blaming the target for the supposed problems that it was not alerted to until the agency files a complaint. Agencies should not be allowed to selectively bring enforcement actions based on stale information years after the alleged violations allegedly occurred.⁷ This form of agency sandbagging should be prohibited.

How does this happen? Many federal agencies currently have the authority to issue agency administrative subpoenas, known as CIDs, which are prone to agency abuse.⁸ This constitutionally dubious administrative power has been, to date, broadly interpreted by the federal courts. The root of the problem is a line of judicial decisions providing federal agencies with carte blanche to investigate companies. For example, agencies have weaponized dicta in *Morton Salt* to the effect that agencies may “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”⁹ Agencies use this dicta to launch burdensome, cost-prohibitive agency fishing expeditions. As one court put it, “[p]ursuant to their ‘power of

⁵ AFPP notes that well-meaning federal officials may not, at times, be aware of the practical consequences of their investigative and enforcement activities on equally well-meaning businesses and individuals.

⁶ For particularly compelling examples of real-world victims of agency investigative and enforcement abuse, see Rhea Lana Riner, *Franz Kafka in Footie Pajamas: My Consignment Company For Secondhand Children’s Cloths Has Somehow Run Afoul of Federal Regulators*, WALL STREET JOURNAL (Oct. 30, 2015), <https://on.wsj.com/338dFLC>; Dune Lawrence, *A Leak Wounded This Company. Fighting the Feds Finished It Off*, BLOOMBERG BUSINESSWEEK (Apr. 25, 2016), <https://bloom.bg/3aMLfJS>; Jon Hill, *CFPB Won’t Ditch Another Doc Demand Over Constitutionality*, LAW360 (Feb. 21, 2020), <https://www.law360.com/articles/1243155>.

⁷ We believe that cases like *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891 (4th Cir. 2020), were wrongly decided and provide agencies an ability to tactically extend the five-year limitations period under 28 U.S.C. § 2462 indefinitely. The Administration should as a matter of policy interpret 28 U.S.C. § 2462 such that agencies’ claims first accrue when the alleged acts occur.

⁸ “The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute.” *Peters v. United States*, 853 F.2d 692, 696 (9th Cir. 1988). But it is unclear whether the federal Constitution authorizes such administrative subpoenas.

⁹ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). *But see Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 691 (D.C. Cir. 2017).

inquisition,’ agencies may use subpoenas to ‘investigate merely on suspicion that the law is being violated, or even just because [they] want[] assurance that it is not.’”¹⁰

Judicial review of agency CIDs is limited and deferential, and agency use of compulsory process is subject to limited oversight by Article III courts:

Courts play a limited role in subpoena enforcement proceedings. In determining whether to enforce a CID, courts consider only whether (1) the inquiry is within the authority of the agency, (2) the demand is not too indefinite and (3) the information sought is reasonably relevant. Courts must also ensure that subpoenas are not unduly burdensome or unreasonably broad. Courts generally defer to an agency’s interpretation of the scope of its own investigation. Thus, when the information sought falls within the purview of the regulatory agency’s authority, judicial review of an administrative subpoena typically results in enforcement.¹¹

Courts have also often assumed an all-too-limited role in cases where a CID is challenged on the ground that the agency lacks jurisdiction to investigate in the first place.¹² Indeed, courts “have held that enforcement of an agency’s investigatory subpoena will be denied only when there is a patent lack of jurisdiction in an agency to regulate or to investigate.”¹³ To be sure, “[a]gencies are also not afforded unfettered authority to cast about for potential wrongdoing” and “courts will not enforce a CID when the investigation’s subject matter is outside the agency’s jurisdiction” or “where there is too much indefiniteness or breadth in the items requested.”¹⁴ But, as a practical matter, CID recipients only have a limited ability to challenge them. Not only must a target exhaust administrative remedies¹⁵—which can be complex, expensive, labor-intensive, and often futile¹⁶—but they must then meet a high standard to resist an agency petition to enforce a CID.

¹⁰ *Accrediting Council*, 854 F.3d at 688 (quoting *Morton Salt*, 338 U.S. at 642-43).

¹¹ *Id.* at 688-89; see also *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (finding agency accorded “extreme breadth” in conducting investigations).

¹² See, e.g., *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) (“It can no longer be disputed that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute. The initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena.”) (cleaned up).

¹³ *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (cleaned up).

¹⁴ *Accrediting Council*, 854 F.3d at 689 (cleaned up).

¹⁵ With respect to FTC CIDs, if a target or third party fails to timely file a petition to quash or limit under 16 C.F.R. § 2.51, a court may deem it to have waived its objections for failure to exhaust administrative remedies. See, e.g., *FTC v. Tracers Info. Specialists, Inc.*, No. 16-MC-18TGW, 2016 U.S. Dist. LEXIS 96048, at *11 (M.D. Fla. June 10, 2016) (“Tracers’ failure to comply with the administrative procedure provided by the statute and the implementing regulations bars its assertion of substantive objections to the CID in court.”). Even large multinational companies who can afford sophisticated counsel may have difficulties properly preserving subpoena objections. See, e.g., *NLRB v. Uber Techs.*, 216 F. Supp. 3d 1004, 1011 (N.D. Cal. 2016) (finding “Uber’s failure to exhaust its administrative remedies by filing a petition to revoke precludes it from raising challenges to the subpoenas[.]”).

¹⁶ “Although a company can file a petition to quash or limit a CID, these petitions are made public—which imposes considerable reputational costs on a company—and are rarely granted.” Am. Bar Ass’n Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement, 28 (Jan. 2017) [hereinafter “ABA Presidential Transition Report”], available at <http://bit.ly/2Q82vBf>.

This creates the potential for agency abuse of this process, which imposes very real time and monetary compliance costs, particularly on small businesses that are ill equipped to bear such costs. As Justice Murphy presciently warned long ago in his dissenting opinion in *Oklahoma Press Publishing v. Walling*, “[t]o allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power,” and “[o]nly by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty.”¹⁷ Experience has confirmed Justice Murphy’s practical concerns with extraconstitutional administrative subpoenas. As the ABA has explained:

[T]here has been a trend in recent years toward generic and overly-broad CIDs that are not tailored to the nature of the business or the practices at issue. The result in many cases has been that companies have incurred astronomical costs in responding. While the agency staff is willing to some extent to negotiate narrower terms and/or extend production deadlines, small companies and individuals in particular may end up facing resource demands they cannot afford. Just the legal fees alone that targets incur in negotiating the terms of the CID and making the production can be prohibitive. This problem has been exacerbated by the FTC’s and CFPB’s adoption of specific electronic submission standards that require formats that frequently are different from those used by the company in the ordinary course of business. As a result, the company may be forced to hire third-party contractors—at substantial cost—to transfer the records into the required format.

...

One manifestation of the burden of contesting FTC investigations is in the consent orders that the FTC imposes on alleged violators. Resource-constrained companies and individuals without a realistic recourse to litigation may have to accept orders that impose burdens unnecessary to achieve legitimate remedial purposes. The burdens can be unduly harsh, raising competitors’ costs and even threatening companies’ existence. Moreover, they can acquire the mantle of precedent over time, making it very difficult for a company to argue for treatment different from that accorded to others.¹⁸

To remedy these problems, the Administration should adopt government-wide reforms to limit opportunities for this type of agency misuse of CIDs, as well as the costs and burdens associated with compliance, particularly for small entities. Federal agencies should be required to specifically and narrowly articulate the purpose and scope of the investigation in sufficient detail to facilitate judicial review of whether requests for information are reasonable and within the agency’s statutory authority.¹⁹ That reform would prevent agencies from conducting discovery

¹⁷ 327 U.S. 186, 218-19 (1946) (Murphy, J., dissenting). As Justice Murphy explained: “[A]ttending this growth [of administrative law] should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man’s instinct for liberty but will eventually undo the administrative processes themselves. . . . A people’s desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.” *Id.*

¹⁸ ABA Presidential Transition Report at 28.

¹⁹ One move is to consider what an administrative subpoena is in the context of delegation and the separation of powers. If an administrative subpoena is not a law enforcement subpoena and is justified under a power of inquest,

into matters that are not relevant to their statutory mandate and limit opportunities for fishing expeditions.

Other practical reforms have been suggested by the FTC's former Acting Chair Maureen Ohlhausen, which should be adopted and extended to all federal agencies.²⁰ Agencies should be required to provide simple, easy-to-understand descriptions of the CID process (and the recipients' rights) that are accessible to the public. Agencies should also be required to provide detailed descriptions of the scope and purpose of investigations, to allow companies to better understand what specific information the agency is seeking and why. The relevant time periods for document requests and interrogatories should be limited to minimize compliance burdens. And the scope of the requests should be proportional to the needs of the investigation and the resources of the target or third party. The length and complexity of CID instructions for producing ESI should be substantially reduced, particularly for small businesses.²¹ Furthermore, targets of investigations should be apprised of the status of the investigation on a regular (at least biannual) basis.

One major problem is that many agencies insist the target or third party produce vast amounts of ESI in very specific expensive formats on very short deadlines. This practice is particularly problematic for small businesses who lack sufficient personnel or monetary resources. At some point, the discovery costs and management distractions become prohibitively high, in extreme instances leading to the destruction of the business. The Administration should require federal agencies to provide for cost sharing when agency demands for ESI impose undue burden or expense, thereby forcing the agency to pay its fair share of the target or third party's costs of producing the requested information, as is done in federal courts.²² Forcing the requesting party (here, the agency issuing the CID or otherwise pursuing discovery in a non-Article III forum²³) to share the cost of discovery would not only reduce the burdens on companies but also incentivize

then it is similar to a core concept of administrative law: delegated legislative power. In fact, the "power of inquest" has been used to describe congressional subpoenas, which are not part of law enforcement but incidental to a legislative purpose. To call a spade a spade, the Administration should clarify that the CIDs and administrative subpoenas issued by quasi-legislative, quasi-judicial agencies and officers are inquiries antecedent to the crafting of rules with the force of law, otherwise known as rulemaking. As the Supreme Court, on the eve of the Administrative Procedure Act, established in *Oklahoma Press Publishing v. Walling*, 327 U.S. 186 (1946), administrative subpoenas are simply delegations of Congress's own power to investigate in aid of the legislative function. These administrative subpoenas therefore cannot be used as a device to support purported "law enforcement" actions based on the target's alleged past conduct. *Cf. Marshall v. Gordon*, 243 U.S. 521, 543-45 (1917).

²⁰ See Acting FTC Chairman Ohlhausen Announces Internal Process Reforms: Reducing Burdens and Improving Transparency in Agency Investigations (July 17, 2017), available at <http://bit.ly/3aN6lru>.

²¹ Many agency CIDs have standard template instructions, which are used for companies of all sizes. While large companies may be able to comply with such instructions without undue burden, small businesses often cannot.

²² Cost-shifting is authorized under Federal Rule of Civil Procedure 26(c) and relevant case law. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) ("[C]ourts have devised creative solutions for balancing the broad scope of discovery prescribed in Rule 26(b)(1) with the cost-consciousness of Rule 26(b)(2). By and large, the solution has been to consider cost-shifting: forcing the requesting party, rather than the answering party, to bear the cost of discovery.").

²³ We are not suggesting that the Administration should adopt such fee-shifting in federal court actions brought by the Department of Justice; rather, our suggestion is limited to agencies like the FTC and CFPB, with a track record of issuing unduly burdensome and expensive demands for ESI to small entities.

agencies to carefully consider whether they actually need the information they are requesting.²⁴ Agencies should also be required to provide targets and third parties with realistic compliance deadlines (*i.e.*, at least a month).

Finally, the Administration should require federal agencies to fully advise recipients of CIDs of their rights under the SBREFA²⁵ to file a confidential complaint with the Small Business Administration's ("SBA") Office of the National Ombudsman, if the CID is excessive or otherwise unfair. Agencies should also be required to clearly and conspicuously set forth on their websites in easily accessible terms businesses' rights under SBREFA, including the ability of an affected business to work with the SBA Office of the National Ombudsman and the relevant agency's Inspector General.²⁶ The Administration should also build on Section 2(b) of Executive Order 13,892 and further explore the extent to which, as a matter of policy and fairness, the Paperwork Reduction Act, including the petition rights under 44 U.S.C. § 3517(b), should be extended to agency investigations and enforcement actions.²⁷

II. Agencies Must Bear the Burdens of Proof and Persuasion.

Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."²⁸ Generally, this means the agency has both the burden of proof and the burden of persuasion by at the least preponderant evidence. But in practice federal agencies try to muddy the waters on this point. For example, the FTC has, by policy statement, *reversed* the burden of proof in "deception" cases brought under Section 5 of the FTC Act. To prove "deception," the FTC must identify (1) a representation; that is (2) "likely to mislead consumers acting reasonably under the circumstances"; and (3) "material."²⁹ Notably, however, the FTC's "deception" policy statement states that certain types of statements, such as "express" claims, are presumed to be "material," thereby relieving the agency of its burden of proving this critical element, which also has the practical effect of relieving the agency of any burden to prove the challenged practices and statements actually harmed anyone.³⁰ In effect, this places both the

²⁴ "[I]n conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order: 1. The extent to which the request is specifically tailored to discover relevant information; 2. The availability of such information from other sources; 3. The total cost of production, compared to the amount in controversy; 4. The total cost of production, compared to the resources available to each party; 5. The relative ability of each party to control costs and its incentive to do so; 6. The importance of the issues at stake in the litigation; and 7. The relative benefits to the parties of obtaining the information." *Zubulake*, 217 F.R.D. at 316.

²⁵ Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of Title 5.).

²⁶ Under SBREFA, IGs can be required to investigate comments by small business concerns about overzealous or improper conduct by agency employees.

²⁷ In the past, agencies have sought to avoid the PRA's procedural protections by sending information demands to nine (instead of ten) individuals or companies, to tactically avoid triggering its requirements. However, Section 2(b) of Executive Order 13,892 closed the loophole.

²⁸ 5 U.S.C. § 556(d).

²⁹ *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). See generally FTC Policy Statement on Deception (appended to *Cliffdale Assocs.*, 103 F.T.C. 110, 1984 FTC LEXIS 71, *167, *170-71, *188 (1984)).

³⁰ See generally Dissenting Statement of Commissioner Joshua D. Wright, *In re Nomi Technologies, Inc.*, at 3-4 (Apr. 23, 2015) (explaining why the wrongful presumption of materiality is no substitute for facts or evidence), available at <http://bit.ly/336ZdUe>.

burden of production and the burden of persuasion on the *respondent* to disprove “materiality” for express claims.

The Administration should make clear that 5 U.S.C. § 556(d), and due process, categorically foreclose agencies from using policy statements or similar devices to reverse the burdens of production and persuasion. Companies should not be forced to prove their innocence. The APA and due process require the opposite, and agencies must be held to their burden to prove, with evidence (as opposed to some form of expert speculation), each element of the alleged violations.

III. The Federal Rules of Evidence and Civil Procedure Should Apply in Agency Adjudications.

Agency rules of practice often stack the deck against the respondent, who faces severe procedural disadvantages. These rules fall into three general categories: (a) “relaxed” evidentiary standards that enable the agency to find liability based on hearsay and unreliable documents—as opposed to “live” fact witness testimony—and expert testimony based on dubious science; (b) rules of practice that sharply limit respondents’ ability to obtain discovery while, at the same time, providing the agency with unlimited discovery; and (c) rules of practice that transfer to the agency heads what are supposed to be ALJ powers, such as ruling on dispositive motions, managing discovery, and granting stays and continuances.

A. Relaxed Evidentiary Standards

The relaxed evidentiary standards that exist in many agency adjudications leave respondents at a severe disadvantage and effectively relieve the agency of any meaningful burden of proof. Consider the FTC, which specifically allows for the use of so-called “reliable” hearsay, including from “investigational hearings” that a respondent may not have been represented at or even known of.³¹ By contrast, with respect to hearsay, the APA itself demands that “[a] sanction may not be imposed or rule or order issued except [as] . . . supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). Toward that end, a respondent is, among other things, “entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.” *Id.* Cross-examination is vital to the integrity of the factfinding process. As the Supreme Court has explained, “[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”³² Agency rules of practice that broadly allow the use of hearsay detract from the accuracy of the administrative process. The Administration should also carefully consider Justice Douglas’s dissent in *Richardson v. Perales*,³³ which powerfully explains the dangers of allowing unfettered use of hearsay in administrative proceedings. “Uncorroborated hearsay untested by cross-examination does not by itself constitute ‘substantial evidence.’”³⁴ As Justice Douglas noted,

³¹ See 16 C.F.R. § 3.43. The FTC appears to have an aversion to live fact witness testimony in its administrative process, preferring instead expert testimony and sterile “business records.”

³² *Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (quoting 5 J. Wigmore, *Evidence* § 1367 (J. Chadbourn rev. 1974)).

³³ 402 U.S. 389, 411-14 (1971) (Douglas, J., dissenting).

³⁴ *Id.* at 413.

allowing hearsay “is the cutting of corners—a practice in which certainly the Government should not indulge.”³⁵ Accordingly, the Administration should require federal agencies to adopt Federal Rule of Evidence 802, under which “[h]earsay is not admissible,” subject to limited exceptions.

Furthermore, the Administration should adopt reforms that ensure expert witnesses in agency adjudications meet the *Daubert* standard and the requirements of Federal Rule of Evidence 702, to limit the use of junk science in agency proceedings.³⁶ “Junk science’ has no . . . place in administrative proceedings[.]”³⁷ And, at the least, “[t]he spirit of *Daubert* . . . does apply to administrative proceedings.”³⁸ As in Article III courts, in agency adjudications expert evidence should only be given weight if the methodology is sound and based on more than speculation divorced from the facts of a case.³⁹ For these reasons, the Administration should, at the least, require agencies to adopt the Federal Rules of Evidence governing the admissibility of hearsay and expert evidence, including *Daubert*.

B. Unfair Discovery Imbalance and Other Procedural Disadvantages

Discovery should also be fair and balanced, and agency regulations should provide the respondent with the same discovery rights as the government in administrative adjudications. In federal court, “[t]he Government and its agencies are subject to the same discovery rules as private litigants[.]”⁴⁰ “Litigants are permitted to learn the facts underlying their opponent’s claims and defenses[.]”⁴¹ As in federal court, an administrative agency should not be “entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an

³⁵ *Id.* at 414.

³⁶ Under Federal Rule of Evidence 702, courts may consider expert testimony if “[1] the testimony is based upon sufficient facts or data, [2] the testimony is the product of reliable principles and methods, and [3] the expert has reliably applied the principles and methods to the facts of the case.” Courts must ensure that proposed expert testimony is not only relevant but also reliable. They must analyze whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be properly applied to the facts at issue. *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. at 592-93 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156-57 (1999). To be admissible, proposed expert testimony must “logically advance[] a material aspect of the proposing party’s case” to satisfy *Daubert*’s “fit” requirement. *Daubert v. Merrell Dow Pharm II.*, 43 F.3d 1311, 1315 (9th Cir. 1995). “Expert testimony which does not relate to any issue in the case is not relevant[.]” *Daubert*, 509 U.S. at 591 (citations and quotation marks omitted). In addition, the expert’s methodology must also be reliable. The *Daubert* gatekeeping obligation applies to all (not just “scientific”) expert testimony. *Kumho Tire*, 526 U.S. at 147. The *Daubert* factors for assessing reliability “are: (1) whether the method has been tested; (2) whether the method ‘has been subjected to peer review and publication; (3) the known or potential rate of error; (4) whether there are standards controlling the technique’s operation; and (5) the general acceptance of the method within the relevant community.” *U.S. v. Johnson*, 875 F.3d 1265, 1280 n.10 (9th Cir. 2017) (quoting *Daubert*, 509 U.S. at 592-95).

³⁷ *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005); *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1158-63 (2019) (Gorsuch, J., dissenting).

³⁸ *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004); *see Paul S. Miller & Bert W. Rein, “Gatekeeping” Agency Reliance on Scientific and Technical Materials After Daubert: Ensuring Relevance and Reliability in the Administrative Process*, 17 *TOURO L. REV.* 297 (2000).

³⁹ *Cf.* 16 C.F.R. § 3.43(b)(1) (unreliable and immaterial evidence should be excluded).

⁴⁰ *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012).

⁴¹ *Id.*

action,”⁴² merely because it chooses to proceed through its in-house administrative process. Respondents should be permitted to depose agency employees who participated in the agency investigation and fact-gathering and fully explore the facts and circumstances of the pre-complaint investigation.⁴³ Federal agencies should not be allowed to avoid producing documents and responding to interrogatories and requests for admissions regarding the basic facts about the agency’s pre-complaint investigation, the evidence the agency intends to rely on at trial, and the agency’s basic legal contentions by asserting boilerplate claims of “deliberative process” or “work product” or similarly frivolous objections. In addition, administrative discovery should be proportional to the needs of the case, consistent with Federal Rule of Civil Procedure 26(b)(1). The agency should not presumptively be allowed to conduct an unlimited number of depositions (including “re-depositions” of a witness who was previously deposed during the pre-complaint investigation).⁴⁴ A motion to dismiss a complaint should toll the time period for the filing of an answer.⁴⁵ And discovery should not commence until after a motion to dismiss has been ruled upon.⁴⁶

For these reasons, the Administration should require agencies to adopt the Federal Rules of Civil Procedure governing discovery in federal district courts. The Administration should also direct agencies to adopt procedures specifically intended to ensure that discovery is proportional to the needs of the case, and the respondent’s resources. And the Administration should direct agencies to provide respondents with equal discovery rights.

C. Wrongful Transfer of ALJ Powers to Agency “Head”

We are also concerned that, at times, agency “heads” seek to minimize the powers of independent ALJs, arrogating such powers to themselves instead. Take, for example, the FTC. In 1977, the D.C. Circuit observed that FTC’s Rules of Practice “make the FTC adjudicatory process

⁴² *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). *But see* 16 C.F.R. § 3.36 (establishing a special procedure respondents must follow to seek discovery from a wide swath of government personnel and agencies).

⁴³ Currently, the FTC Rules of Practice and in-house precedent generally forbid inquiry into such matters. FTC precedent bars inquiry into the circumstances of the pre-complaint investigation and reasons why a complaint is issued, *see In re Exxon Corp.*, No. 8934, 83 F.T.C. 1759, 1974 FTC LEXIS 226, at *2-3 (June 4, 1974), stating these matters “will not be reviewed by courts,” *see id.* This limitation on the scope of discovery, *see also* 16 C.F.R. § 3.31(c)(1), prevents respondents from obtaining evidence necessary to substantiate meritorious defenses. *See also* Order Denying Respondent’s Motion for Rule 3.36 Subpoena, *In re LabMD*, No. 9357, 2014 FTC LEXIS 35, *9 (Feb. 21, 2014) (“[T]he Commission’s decision making in issuing a complaint is outside the scope of discovery in the ensuing administrative litigation[.]”).

⁴⁴ FTC Rule of Practice 3.33(a), 16 C.F.R. § 3.12(a), allows FTC Complaint Counsel to take an unlimited number of depositions, so long as the deposition is “reasonably expected to yield information within the scope of discovery under § 3.31(c)(1)[.]” In stark contrast, in recognition of the burden and expense of depositions for private litigants that, unlike large federal agencies, do not have unlimited resources, in federal court, leave of court is (quite sensibly) required if a party wishes to take more than ten depositions. Fed. R. Civ. P. 30(a)(2)(A)(i). In federal court, leave of court would also be required to “re-depose” a witness who was already deposed during the pre-complaint investigation. Fed. R. Civ. P. 30(a)(2)(A)(ii).

⁴⁵ Unfortunately, under FTC Rule of Practice 3.12(a), 16 C.F.R. § 3.12(a), a respondent must file an answer within fourteen days of being served with the complaint.

⁴⁶ Unlike the Federal Rules of Civil Procedure, the Commission’s Rules of Practice do not allow Respondents to avoid the burden and expense of discovery while threshold legal sufficiency questions are being resolved.

as fair to each side in every respect as in a federal court.”⁴⁷ In that case, the court criticized FTC’s attempt to “undercut” the ALJ, which “would subvert completely the essential separation of the adjudicatory and investigatory functions.”⁴⁸ However, when the FTC radically restructured its Rules of Practice in 2008 to arrogate to the Commission powers previously reserved to the independent FTC Chief Administrative Law Judge, it did just that.⁴⁹ All commenters, including the ABA Section of Antitrust Law, opposed FTC’s power-grab amendments, and most argued that they violated due process.⁵⁰ The commenters’ themes—FTC’s power-grab undermined the integrity and accuracy of the administrative process, compromised the ALJ’s independence, and deprived FTC adjudications of even the appearance of fairness—resonate here.

As the ABA Section of Antitrust Law and others explained when the FTC proposed taking for itself the power to rule on dispositive motions in the first instance, such a change “could raise concerns about the impartiality and fairness” of the proceeding “by permitting the Commission to adjudicate dispositive issues, including motions to dismiss challenging the facial sufficiency of a complaint, shortly after the Commission has voted out the complaint finding that it has ‘reason to believe’ there was a law violation, without the benefit of an opinion by an independent ALJ.”⁵¹ Commenters also pointed out Amended Rule 3.22 would “compromise the independence of the ALJ” because he “will not write his initial decision on a ‘clean slate,’ but will be unduly influenced by the ‘entirely transparent views of the Commission delivered on less than a full record,’ and will lose his ability to effectively manage discovery.”⁵² As FTC’s Chief ALJ explained:

The Commission amended Rule 3.22 of its Rules of Practice in 2009 to allow “the Commission to decide legal questions and articulate applicable law when the parties raise purely legal issues.” “[C]ommenters (including the [Section of Antitrust Law of the American Bar Association . . .], criticized the [Commission’s] proposed Rule change as unfairly invading the province of the independent ALJ and compromising the Commission’s dual roles as prosecutor and adjudicator.” . . . A joint comment from former FTC Chairman Robert Pitofsky and Michael N. Sohn “similarly argued that the proposed rules, including Rule 3.22, would arguably infringe on the fairness of the Part 3 proceeding if the Commission more frequently ‘invades what has heretofore been the province of an independent ALJ.’” Dismissing these objections, the Commission amended its Rules of Practice to give to itself the authority to decide “[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision[.]”⁵³

⁴⁷ *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 104 (D.C. Cir. 1977).

⁴⁸ *Id.* at 103-04.

⁴⁹ *See* 73 Fed. Reg. 58,832 (Oct. 7, 2008).

⁵⁰ The ABA opposed these rules when the FTC first proposed them. *See* Comments of the ABA Section of Antitrust Law in Response to the Federal Trade Commission’s Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rulemaking, at 3 (Nov. 6, 2008), available at <http://bit.ly/2M4WWQa>.

⁵⁰ 74 Fed. Reg. 1,804, 1,809 (Jan. 13, 2009).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Initial Decision, *In re LabMD, Inc.*, F.T.C. Docket No. 9357, 2015 FTC LEXIS 272, at *6 n.1 (Nov. 13, 2015) (citations omitted). The FTC Chief Administrative Law Judge previously advised counsel for respondent: “[L]et me

This state of affairs flagrantly violates due process. The same Commissioners who vote out an administrative complaint should not be allowed to rule on motions to dismiss the complaint (or, for that matter, rule on liability). As the Supreme Court has held, “an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.”⁵⁴ Such is the case here. At the very least, the Commission should not be allowed to review *de novo* the ALJ’s factual findings, particularly those based on credibility determinations, as it is allowed to do now.⁵⁵ The Administration should, therefore, pursue reforms that would categorically prohibit the same agency officials who vote to authorize the enforcement action—based on *ex parte* communications from agency staff—from adjudicating liability. At the very least, the Administration should clarify that, as FTC itself has previously stated, “it is the [Chief ALJ], as trier of the facts, who has lived with the case, and who has had the opportunity to closely scrutinize witnesses’ overall demeanor and to judge their credibility. Accordingly, absent a clear abuse of discretion, the Commission will not disturb on appeal the [Chief] ALJ’s conclusions as to credibility.”⁵⁶

IV. Agencies Should Be Required to Produce All Favorable Evidence to the Respondent, Even in the Absence of a Request, at the Agency’s Expense.

Agency adjudications should be fair and impartial and seek the truth. The agency’s goal should be to reach a fair and just outcome, not to “win” at all costs. Toward that end, agency staff should want to voluntarily provide respondents with exculpatory and impeachment evidence in their possession, even without being asked to do so. Agency efforts to conceal those materials from respondents, however, are all too commonplace.

Under *Brady*⁵⁷ and its progeny,⁵⁸ the government must provide to the accused exculpatory, or potentially exculpatory, evidence material to guilt or punishment, including impeachment evidence. The obligations apply even absent a request from the defendant and should be self-executing. At present, some federal agencies have already adopted some form the *Brady* rule as part of their rules of practice; other agencies have actively resisted.⁵⁹ This should change, as there is no legitimate reason why agencies should withhold favorable evidence from accused companies.

talk about dispositive motions. ... There is a rule that covers that, if you intend to file a summary judgment, and if you don’t know, I’ll tell you. Summary judgments will be ruled on by the Commission, the same body that voted to issue the complaint in this case. With respect to motion to dismiss or other substantive motion, the rules provide that if they are filed before the start of the evidentiary hearing, they will be ruled on by that same Commission[.]” Initial Pretrial Conference Transcript, *In the Matter of LabMD, Inc.*, Dkt. No. 9357, 8:7-18 (Sept. 25, 2013)

⁵⁴ *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

⁵⁵ See 16 C.F.R. § 3.54(a). *But cf. Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005) (“We may, however, examine the FTC’s findings more closely where they differ from those of the ALJ.”).

⁵⁶ *In re Gemtronics, Inc.*, FTC No. 9330, 2009 FTC LEXIS 196, at *88 (Sept. 26, 2009), *aff’d*, 151 FTC 132, 2011 FTC LEXIS 68 (Feb. 11, 2011) (quoting *In re Horizon Corp.*, No. 9017, 97 F.T.C. 464, 856 n.77 (F.T.C. May 15, 1981)).

⁵⁷ *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

⁵⁸ See, e.g., *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding *Brady* requires prosecutors to disclose evidence affecting the credibility of witnesses).

⁵⁹ See, e.g., *Amrep Corp.*, 102 F.T.C. 1362, 1371 (1983); *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969).

The *Brady* rule should apply in all formal agency adjudications and be sufficiently robust to place an affirmative duty on agencies to disclose exculpatory and impeachment material at their expense, even absent a request, early in the administrative process and on a continuing basis.⁶⁰ The Jencks Act also should be imported into the administrative adjudication process on a government-wide basis, requiring agencies to produce statements and reports of government witnesses, such as memoranda and notes relating to the subject matter of the agency witness's testimony. Agency violations of *Brady/Giglio* and Jencks Act requirements should be subject to automatic sanctions, including dismissal of the enforcement proceedings in cases of willful or otherwise egregious violations. Furthermore, federal agencies should be required to search for and produce to respondent the full investigative record immediately upon the filing of any administrative or federal court complaint, with the search conducted using the procedures and scope established by the Freedom of Information Act.

V. Agencies Abuse Their Investigative Authority, Rules of Practice, and the Discovery Process to Make the Cost of Fighting Prohibitively Expensive and Viewed as Futile to Thereby Coerce Settlements.

Federal agencies have a tremendous ability to strong-arm businesses—especially small businesses—into entering into consent orders on unfair terms, rather than litigating, due to the tremendous expense and resources required to put the agency to its burden of proof. Most companies simply cannot afford this. This is particularly true with respect to administrative enforcement actions, where the agency has undue process advantages and the target knows that its chance of prevailing on the merits is slim. Coupled with agency practice of publicly announcing the target's "guilt" and damaging their reputation, financial and time pressures are often more than a company can bear. The problems caused by this state of affairs are exacerbated by the fact that many of the laws enforced by these agencies are so broad and vague that the agencies have vast discretion to claim that conduct is unlawful (and companies have limited fair notice of what conduct the agency believes the law to forbid or to require).

As a practical matter, targets of agency investigations are coerced to enter into unfair settlements with agencies due to several factors operating together: (a) the perception and reality that resort to the agency administrative adjudication process is likely futile because the game is rigged and the chips are stacked against the respondent; (b) the business-crushing reputational, time, and monetary costs that a respondent must incur to contest the agency's charges; and (c) the vague and uncertain nature of the laws respondents are alleged to have violated. As the ABA Section of Antitrust Law explained: "Government investigations and enforcement actions are inherently different from private disputes. They are not contests between equals—federal agencies have enormous advantages in terms of resources and power. Businesses, especially smaller companies and their principals, simply cannot afford in many cases to take on the risks and costs of defending themselves during an investigation or when confronted with a complaint and order."⁶¹ This puts enormous pressure on targets to settle.

⁶⁰ 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 (2011).

⁶¹ ABA Presidential Transition Report at 29.

As former FTC Commissioner Joshua Wright suggested, the FTC’s Rules of Practice operates in conjunction with the Section 5 of the FTC Act, a vague and amorphous statute that it enforces, to coerce companies into settlement:

Consider the following empirical observation. The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff and found liability. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed. This is a strong sign of an unhealthy and biased institutional process. . . . Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC.

. . .

Significantly, the combination of institutional and procedural advantages with the vague nature of the Commission’s Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not be anticompetitive. This is because firms typically will prefer to settle a Section 5 claim rather than to go through lengthy and costly litigation in which they are both shooting at a moving target and have the chips stacked against them.⁶²

A federal judge recently echoed this sentiment with respect to the FTC’s data-security and privacy “consent order” regime: “the title of these orders, i.e., ‘consent orders,’ is telling. Entry of such orders, which are submitted jointly by the parties with the request that they be approved, should not have given the FTC confidence that either its legal position or the terms it was imposing on companies were reasonable. Instead, it is reasonable to assume that the private parties to these consent orders signed them to avoid the type of long and protracted legal battle that played out here.”⁶³ In other words, companies often settle with agencies even if the allegations and legal theories are meritless and unsupported by evidence, simply because contesting the allegations is viewed as prohibitively expensive and futile. The process is the punishment. And it should not be allowed to continue.

Measures designed to restore a perception of fairness to administrative adjudications, as well as reducing the costs of responding to agency investigations and discovery requests, would be a positive step in reducing the rate at which agencies are able to coerce businesses into settling on unfair terms. For example, if the Administration were to take steps to reduce the time and monetary costs associated with responding to agency investigations and CIDs and level the playing field in administrative adjudications,⁶⁴ this would remove some of the disincentives for contesting meritless agency investigations and enforcement actions.

⁶² Joshua D. Wright, Commissioner, Federal Trade Commission, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, 6-7 (Feb. 26, 2015), available at <http://bit.ly/2c3FSYZ>.

⁶³ *LabMD, Inc. v. FTC*, No. 1:19-mi-00071-WEJ, at 25 (N.D. Ga. Oct. 1, 2019), available at <http://bit.ly/2wLcpSw>.

⁶⁴ As discussed above, requiring federal agencies to establish cost-shifting procedures for excessive discovery demands, particularly those involving ESI, would ameliorate one of the deterrents to contesting meritless agency

VI. Agency Penalties and Fines Should Be Proportionate to the Alleged Harm Proven with Evidence, and Agencies Should Be Required to Offer Fair and Reasonable Settlement Terms.

In many instances, agency penalties and fines are disproportional to the actual harm alleged, let alone proven. As the ABA explained:

[T]he FTC demands monetary relief in virtually all cases, even where the violations were unintentional and marginal and the injury slight or nonexistent. Moreover, staff in consent negotiations commonly seek the maximum possible relief regardless of the facts of the case or any mitigating circumstances, and without consideration of litigation risk. For example, in recent civil penalty cases, staff have pursued the defendant's gross revenues without consideration of the statutorily imposed civil penalty factors that take into account, among other things, the defendant's degree of culpability and the nature and seriousness of the violations.⁶⁵

The Administration should direct all federal agencies to publicly set forth in policy statements the schedule of fines and penalties, explaining in detail why said fines and penalties are fair and proportionate to the alleged infractions, as well as any actual harm to identifiable individuals caused by the alleged infractions. The Administration should further direct agencies to minimize penalties and fines, to the extent practical, in circumstances where the alleged infraction caused minimal or no monetary harm to anyone that can be established with evidence. Agency fines and fees must be proportional and consistent with the Eighth Amendment to the federal Constitution.⁶⁶ AFPP also strongly agrees with NFIB's comment⁶⁷ that the Administration should prohibit agencies from seeking or imposing fines or other penalties against small businesses, unless the agency can prove that the violation was willful.

In addition, the Administration should require federal agencies to review their standard "boilerplate" order provisions, including monitoring and compliance reporting provisions, to ensure that these provisions are proportional to the needs of each specific case, and no more burdensome than necessary. As the ABA has suggested, in many instances these provisions unnecessarily impose severe hardships on legitimate companies, opening the door to potentially abusive agency monitoring activities.⁶⁸ Agencies should be discouraged from seeking mandatory injunctive relief to the extent feasible, including "compliance monitoring" and "compliance reporting" provisions and various "certification" requirements.

The Administration should to prohibit agencies from requesting that courts enter, or that targets agree to, vague and ambiguous order provisions that prevent companies from knowing with certainty what they must do to comply and also provide an opportunity for

charges—the astronomical time and monetary costs imposed by agency discovery requests. Agencies should not be allowed to weaponize CIDs and discovery demands to inflict sufficient pain on companies to coerce settlement.

⁶⁵ ABA Presidential Transition Report at 32.

⁶⁶ See generally *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019).

⁶⁷ Available at <https://www.regulations.gov/document?D=OMB-2019-0006-0007>.

⁶⁸ See ABA Presidential Transition Report at 3, 30-31.

the agency to creatively interpret the requirements of the order in an attempt to impose ever-changing compliance obligations. Toward that end, the Administration should make clear that federal agencies have an affirmative obligation to ensure that proposed order provisions comply with the specificity requirements of Rule 65(d) of the Federal Rules of Civil Procedure, as well as require the agency “head” to review Staff proposals for compliance with this requirement.⁶⁹

Furthermore, agency consent orders should “sunset” after a period of no more than five years (as opposed to twenty years or longer). It is of critical importance to the multitude of businesses already subject to agency consent orders, many of which are on unfair and unduly burdensome terms, that the Administration’s much-needed process and transparency reforms are made applicable to such pre-existing orders.

Thank you very much for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact me via email at mpepson@afphq.org or telephone (202) 603-1678.

Respectfully submitted,

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⁶⁹ See *LabMD, Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018).