



VIA ELECTRONIC SUBMISSION

March 16, 2020

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

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

Dear Mr. Vought:

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

**About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based4(omp)-m0 g0 G[(Ma)3(n

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

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**on The Executive Order and the RFI**

Order 13892 and its efforts to promote the rule of law through transparency and fairness in regulatory enforcement and adjudication. Far too often in previous administrations, agencies have imposed unfair and unnecessary burdens on businesses particularly small businesses through the investigatory and adjudicative process. Because the rules and regulations by which statutes are implemented in the 21<sup>st</sup> century have become so complex and convoluted, it is nearly impossible for business leaders to be fully aware of every regulatory requirement. There are also many secret rules lurking in the Federal Register, or

## **Specific**

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

ABC submits that this set of questions should be clarified to make clear that a speedier investigation is not always a fairer one, and a prolonged investigation is not always less fair. The problem that many ABC members have encountered is the hurry up and wait investigation/adjudication. An investigator suddenly appears with onerous and burdensome demands for documents, interviews, etc. The investigator demands rapid response from the business, imposing severe hardship on companies (both large and small) because such a short time is available to obtain legal counsel, determine what the issues are, retrieve the documents, provide the witnesses, and otherwise comply.<sup>3</sup> But after the tight deadline is met (sometimes with

arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound,  
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**6. Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?**

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

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

In the 2016 case of *Williams v. Pennsylvania*,<sup>11</sup>

unconstitutional potential for bias exists when the same person serves as both accuser and

<sup>12</sup> This holding should be applied to administrative agencies to prevent them from serving as both investigator and adjudicator. A prime example of agencies that continue to play such a dual role arises among Regional Directors of the NLRB. In the case of *NLRB v. Aaron Bros. Corp.*,<sup>13</sup> the Ninth Circuit relied on an earlier Supreme Court decision<sup>14</sup> to reject a due process challenge when the regional director of the NLRB exercised both investigative and adjudicative responsibilities in connection with the issuance and resolution of [an] unfair labor

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*Williams*.<sup>15</sup>

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

Many agencies do not provide enough transparency regarding penalties and fines. A case in point is the \_\_\_\_\_ which enforces the Davis-Bacon Act (along with the FLSA and other labor laws). Under Davis-Bacon, the WHD regularly prosecutes employers for misclassifying employees based upon unpublished and unknowable union area practices, with no fair notice or warning as to what the area practices are.<sup>16</sup> This practice is based on obsolete industry standards

contractors who had no way to know they were doing anything wrong.

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<sup>11</sup> 136 S. Ct. 1899 (2016).

<sup>12</sup> *Id.* at 1905.

<sup>13</sup> 563 F.2d 409, 413 (9<sup>th</sup> Cir. 1977).

<sup>14</sup> *Withrow v. Larking*, 421 U.S. 35 (1975).

<sup>15</sup> For a more extensive discussion of this point, see Vollmer, *Accusers as Adjudicators in Agency*

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

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

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

**Conclusion**

As the president has stated in EO the OMB for undertaking this RFI in order to continue the process of regulatory reform. We look forward to commenting on future proposals to correct administrative agency abuse of the investigation and adjudication process.

Respectfully Submitted,



Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs

Of Counsel:

Maurice Baskin  
Littler Mendelson, P.C.  
815 Connecticut Ave., N.W.  
Washington, DC 20006