

**COMMENTS OF ATTORNEYS GENERAL OF CALIFORNIA, ILLINOIS, NEW
JERSEY, NEW YORK AND OREGON**

March 16, 2020

Via e-filing at www.regulations.gov

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

**RE: Comments Responding to the Office of Management and Budget’s Request for
Information: Improving and/or Reforming Regulatory Enforcement and
Adjudication
Docket Identification Number: OMB-2019-0006**

Dear Mr. Vought:

The Attorneys General of California,¹ Illinois, New Jersey, New York and Oregon (“States”), submit these comments in response to the request for information issued by the Office of Management and Budget (“OMB”) regarding “improving or reforming the due process requirements of regulatory enforcement and adjudication.” 85 Fed. Reg. 5483 (Jan. 30, 2020) (“Request”). In the Request, OMB expresses concern that 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.” *Id.* We reject the notion, without evidence, that current federal administrative enforcement and adjudication procedures are not ensuring just and reasonable process, and we object to OMB soliciting proposals that threaten to hamstring federal agencies’ ability to fulfill their duties to enforce and adjudicate violations of a wide range of federal laws that protect the public health and welfare. Such a request is particularly disturbing given this Administration’s dismal record on enforcement of environmental, civil rights, and consumer protection laws. The States have a keen interest in this issue given that when federal enforcement decreases, we may need to pick up the slack to ensure our residents and natural resources are adequately protected.

Tellingly, the Request offers little explanation as to why existing procedural requirements are inadequate, nor does it provide any examples of instances where due process has not been provided to citizens, much less evidence of a pattern requiring wholesale changes. Moreover, the Request appears designed to seek responses that confirm OMB’s pre-determined belief that

¹ The California Attorney General submits these comments pursuant to his independent power and duty to protect the interests of California. *See* CAL. CONST., art. V, § 13; *D’Amico. v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).

due process reform is needed, rather than provide additional information on whether existing procedures are in fact, inadequate. The lack of factual context and the outcome-seeking nature of the Request, are highly concerning. As a result, the States write to urge OMB to shelve this exercise. However, if OMB or this Administration does insist on proceeding with future regulatory action on this issue, it must ensure that any proposed rule is supported by reasoned analysis and narrowly tailored to the agency's stated concerns as required by the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 551 *et seq.* As OMB's inquiry stands thus far, the Request fails to provide such analysis.

I. The APA Imposes Existing Procedural Requirements to Ensure Due Process Protections

The APA provides robust procedural protections for parties involved in regulatory adjudications governed by sections 554, 556 and 557 of the APA, referred to in the Request as "formal adjudications". 85 Fed. Reg. at 5483. These provisions specify numerous important protections for private parties, including, among others, the right to an agency hearing and timely notice of the hearing (5 U.S.C. § 554(a), (b)), the prohibition of prosecutors or investigators from involvement in the adjudication of the matter they prosecuted or investigated (*Id.* at § 554(d)), the requirement that the burden of proof fall on the agency issuing the rule or order (*Id.* at § 556(d)), the right of private parties to present evidence in their defense and to conduct cross examination (*Id.*), and the prohibition of unlawful *ex parte* communications (*Id.* at § 557(d)).

Parties participating in informal agency adjudications not governed by the formal adjudication provisions of the APA are also provided with important protections. These protections include the right to appear at agency proceedings, the right to counsel, the right to a conclusion of an adjudicative matter in a reasonable time, and the right to receive timely notice of any denial of an application or petition, as well as the reasons for the denial. 5 U.S.C. § 555(b), (d). Further, the APA protects citizens who are the subject of administrative investigations, including entitling private parties to issue subpoenas to the same extent as agency representatives, and mandating that all investigations be authorized by statute. *Id.* at § 555(c), (d). APA section 558 also sets out a variety of protections specific to private parties involved in licensing adjudications with agencies. *Id.* at § 558.

Despite these existing due process protections, the Request provides almost no discussion of these APA requirements. Moreover, OMB fails to explain why these existing requirements fall short of providing adequate due process protections for the public, particularly when many of them address the very concerns that the Request poses, such as concerns regarding the burden of proof falling on citizens and the independence of adjudicators. At a minimum, OMB should examine federal agencies compliance with these important provisions of the APA before it considers proposing potentially unnecessary and burdensome reforms.

II. OMB's Request Assumes, Without Explanation, that Procedures for Administrative Enforcement and Adjudication are Inadequate to Protect Private Parties

Under the APA, courts have long held that an agency undergoing rulemaking must provide “a rational basis between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [hereafter *State Farm*] (citing *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)). Moreover, courts have emphasized that mere “conclusory statements” are not sufficient to provide the reasoned explanation the APA requires. *Amerijet Int'l., Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (“At bottom, an agency must explain why it chose to do what it did.”) [hereafter *Amerijet*] [citation omitted].

The Request is premised on OMB's contention that the procedural processes for administrative adjudication and enforcement are in need of reform. 85 Fed. Reg. at 5483. However, OMB provides no evidence or examples of how administrative processes are actually failing to safeguard citizens' due process rights. If OMB or the Administration moves forward with a proposed rule purporting to correct flaws with federal regulatory enforcement and adjudication, the rule must describe these flaws with specificity and provide evidence to support them in order to comply with the APA. *Amerijet*, 753 F.3d at 1350. Only then could OMB narrowly tailor a rule to any procedural flaws it is able to identify and establish support for, rather than broadly implementing a proposal that could hinder effective and efficient agency enforcement, with little benefit. *State Farm*, 463 U.S. at 47-51 (holding that the failure of an agency to consider a more narrow alternative that the record demonstrated addressed the agency's concerns but did not carry the potential harms of the chosen action was arbitrary). The States also note that many recent court cases have faulted federal agencies for not complying with these important APA provisions. *See generally, California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019); *State v. U.S. Bureau of Land Mgmt.*, 277 F.Supp. 3d 1106 (N.D. Cal. 2017).

Additionally, OMB cannot rely on President Trump's *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* to justify a proposed rule on regulatory enforcement and adjudication. Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 9, 2019). Courts have been clear that executive orders alone, without additional support, cannot provide the reasoned explanation required by the APA. *See California v. U.S. Dep't of the Interior*, 381 F.Supp.3d 1153 (N.D. Cal. 2019) (finding that an agency's compliance with an executive order requiring agencies to rescind regulations that would burden energy development, without evidence to support its findings of those burdens, violated the APA); *In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013) (“[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of a policy disagreement with Congress.”) Thus, OMB or the Administration must provide adequate support for its contention in any future rulemaking that existing requirements for administrative enforcement and adjudication procedures are inadequate.

III. OMB's Premise that Administrative Enforcement is Growing is Contradicted by Evidence of Declining Federal Enforcement Rates

OMB purportedly justifies the Request by contending that administrative enforcement and adjudication has grown in “the last several decades.” 85 Fed. Reg. at 5483. However, the Request offers no evidence to support its contention that administrative enforcement rates are rising. In fact, this assertion is directly contradicted by recent evidence of falling enforcement rates by federal agencies. For example, multiple reports, including analysis done by Cynthia Giles, the former head of enforcement at EPA, indicate that informal and formal administrative enforcement actions and inspections at EPA are down to their lowest levels in over a decade.² Other reports demonstrate that Occupational Safety and Health Administration (“OSHA”) worksite inspections in the last three years have dropped to levels below that of both the Bush and Obama administrations, and that the number of public enforcement actions announced by the Consumer Financial Protection Bureau dropped to an average rate of less than one case per month in 2018.³ Enforcement and investigation activities at the Food and Drug Administration, Federal Trade Commission and the Internal Revenue Service, are similarly declining.⁴

² See ENVIRONMENTAL DATA AND GOVERNANCE INITIATIVE, *A SHEEP IN THE CLOSET: THE EROSION OF ENFORCEMENT AT THE EPA* 42 (May 2019), <https://envirodatagov.org/publication/a-sheep-in-the-closet-the-erosion-of-enforcement-at-the-epa/>; see also David Schultz, *EPA's Ex-Top Cop Joins Criticism of Agency's Record on Polluters*, BLOOMBERG ENVIRONMENT, Jan. 25, 2019, <https://news.bloombergenvironment.com/environment-and-energy/epas-ex-top-cop-joins-criticism-of-agencys-record-on-polluters>; Brett Chase, *In Chicago and Across the Midwest, Trump's EPA Inspecting Polluters Less, Cutting Staff*, CHICAGO SUN TIMES, Nov. 15, 2019, <https://chicago.suntimes.com/2019/11/15/20966850/epa-environmental-protection-agency-chicago-cutbacks-polution-trump-chicago-midwest-sauget-veolia>.

³ NATIONAL EMPLOYMENT LAW PROJECT, *WORKPLACE SAFETY AND HEALTH ENFORCEMENT FALLS TO LOWEST LEVELS IN DECADES 1* (Dec. 2019), <https://www.nelp.org/publication/workplace-safety-health-enforcement-falls-lowest-levels-decades/>; CONSUMER FEDERATION OF AMERICA, *DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE* 16 (Christopher L. Peterson, Mar. 2019), <https://consumerfed.org/reports/dormant-the-consumer-financial-protection-bureaus-law-enforcement-program-in-decline/>.

⁴ See Charles Piller, *Exclusive: FDA Enforcement Actions Plummet under Trump*, SCIENCE, July 2, 2019, <https://www.sciencemag.org/news/2019/07/exclusive-fda-enforcement-actions-plummet-under-trump> (finding that “warning letters” sent by the FDA under the Trump administration have fallen by one-third); WASHINGTON CENTER FOR EQUITABLE GROWTH, *THE STATE OF U.S. FEDERAL ANTITRUST ENFORCEMENT 14-22* (Michael Kades, Sept. 2019), <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/>; Niv Elis, *IRS Audits Drop to Lowest Point in Decades*, THE HILL, Jan. 8, 2020, <https://thehill.com/regulation/finance/477354-irs-audits-drop-to-lowest-point-in-decades> (stating that the IRS audited “just .45 percent of individual filers last year, less than half the level from 10 years ago”).

Moreover, a report by the U.S. Commission on Civil Rights reflects that the number of complaints dismissed or administratively closed by the Department of Education's Office of Civil Rights more than doubled from 2016 to 2017.⁵

In light of these reports, the States strongly advise that OMB not consider any reforms that would impair administrative enforcement further. Moreover, should OMB or the Administration proceed with issuing a proposed rule reforming procedures for regulatory enforcement, that rule must provide a reasoned explanation for its conclusion that overall enforcement actions are increasing, despite the evidence to the contrary, as is required by the APA. *State Farm*, 463 U.S. at 42 (finding that agencies promulgating a rule must provide "a rational connection between the facts found and the choice made.").

CONCLUSION

Ultimately, the lack of evidentiary support in the Request and the outcome-driven nature of the questions OMB poses are greatly concerning to the States. Without strong and efficient federal administrative enforcement, the burdens of protecting the rights and well-being of our citizens, as well as our natural resources, will fall more heavily on the States. Given these concerns, we strongly urge OMB forgo the sweeping and unsupported reforms to administrative enforcement processes the Request envisions.

⁵ U.S. COMMISSION ON CIVIL RIGHTS, ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 175 (Nov. 2019), <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

Respectfully submitted,

Dated: March 16, 2020

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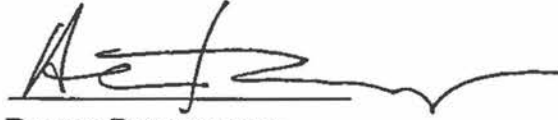


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