March 16, 2020

Via Electronic Link:

Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Office of Management and Budget (OMB) Request for Comments on Improving and Reforming Regulatory Enforcement and Adjudication; Docket No. OMB-2019-0006; 85 FR 5483 (January 30, 2020)

Dear Sir/Madam:

On behalf of the American Bar Association’s Judicial Division, I am pleased to submit the attached comments in response to OMB’s request for comments on Improving and Reforming Regulatory Enforcement and Adjudication referenced above.

Please note that these views are being presented only on behalf of the Judicial Division. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.¹

If you have any questions after reviewing this report, I will be happy to provide further comments.

Sincerely,

[Signature]

Justice Elizabeth Lang-Miers (Ret.)
Chair, Judicial Division

Attachment

¹ In addition to these comments expressing the Judicial Division's views, the ABA is also submitting a separate, more general comment letter to OMB in response to the Request for Information that expresses the views of the ABA.
The Judicial Division of the American Bar Association (ABA) files this response to the request for comments by the Office of Management and Budget regarding suggested improvements and reform of the regulatory process and administrative adjudication system. The views expressed herein are being presented on behalf of the Judicial Division. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.\(^1\)

The Judicial Division may be contacted at: Tori Jo Wible, Director and Chief Counsel, ABA Judicial Division, 321 N. Clark Street, 18th Floor, Chicago, IL 60654-7598, tel. no. (800) 238-2667, x-5687; tori.wible@americanbar.org.

The Judicial Division is an internal division of the ABA consisting of judges from virtually every court system in the nation, including federal and state appellate and trial courts, tribal courts, the administrative law judiciary, and other courts and tribunals. The JD also counts a substantial number of law professors and attorneys among its membership, many of whom practice in the area of administrative law. The Judicial Division’s purpose is to serve as the voice of the judiciary, support an accessible, fair and impartial justice system, and seek to improve public trust and understanding of the role of courts in upholding the rule of law.

Administrative adjudication lies squarely at the heart of the work of the Judicial Division - not only in terms of the 750,000+ cases adjudicated by administrative judges each year, but also because a significant portion of the cases on the dockets of the Article III courts involve administrative appeals and issues. We share the administration’s interest in protecting the rule of law in America. Administrative judges, administrative law judges, administrative appeals judges, immigration judges, board members, commission members, and thousands of administrative adjudicators are responsible for safeguarding the public interest every day, and take pride in adjudicating administrative cases fairly and impartially.

In this regard, the Judicial Division is in agreement with the Office of Management and Budget’s (OMB) observation that the administrative adjudication process has expanded exponentially over the years, and faces greater challenges now than those presented in 1946 when the Administrative Procedure Act (APA) was enacted. We also agree that “procedural safeguards vary considerably by Department and/or agency …” If we are to preserve public confidence in the fairness of the agency adjudication process, the system needs to be improved. The Judicial Division welcomes this opportunity to provide comments, and responds to OMB’s specific queries below:

\(^1\) In addition to these comments expressing the Judicial Division's views, the ABA is also submitting a separate, more general comment letter to OMB in response to the Request for Information that expresses the views of the ABA.
• Prior to the initiation of an adjudication, what would ensure a speedy and/or fair investigation? What reform(s) would avoid a prolonged investigation?

--Congress should consider imposition of a “statute of limitations” period to limit “stale” claims that make it more difficult for all parties to present evidence in support of their positions. This would also mitigate the burden of having the threat of investigation or potential claims (perhaps unfairly) hanging over members of the public, indefinitely.

--Fair notice is a key due process requirement, and should continue to be strongly enforced. Defective notice often results in hearings in absentia, motions to reopen, and repetitive resetting of hearing dates. Certification procedures to ensure that proper notice is sent to addresses that are ascertained in the exercise of due diligence should be part of standard operating procedure for all agencies where a right to a hearing exists.

--When appropriate, an opportunity to present evidence during the investigative process should also be afforded to petitioners. This practice can help mitigate the number of summary dismissals of initial claims with all the attendant time and costs that would be saved.

• Should investigated parties have an opportunity to require an agency to “show cause” to continue an investigation?

--Generally, in the Judicial Division’s experience, a “show cause” process is not needed. Discretion to investigate violations of law or agency policy should remain the sole discretion of the Executive. A “show cause” requirement may frustrate the legitimate enforcement efforts of the Government, and actually delay completion. Where abuses may occur, petitioners currently do and should have rights to seek redress in federal court. Although there does not seem to be any need for a government-wide requirement, agencies might wish to consider, after careful study, instituting such a procedure in selected contexts where abuses have been identified.

• When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies?

--This issue generally arises in fraud proceedings where both civil and criminal liability may arise, but it also arises in many other contexts, e.g., FDIC and SEC proceedings involving securities violations, HUD and EPA proceedings involving lead-based paint claims, etc. Our current system primarily relies upon defendants/petitioners to point out the existence of related proceedings. Administrative courts tend to defer to criminal courts or Bankruptcy Courts if the same conduct is at issue in both forums. However, since there is no explicit requirement to do so in most non-bankruptcy cases, the practice of deferring to other courts in related matters varies. Global settlements or releases may mitigate this issue. Otherwise, appropriate procedural coordination between the various courts continues to be the primary avenue for alleviating redundant court proceedings. Courts
could also routinely require the parties to notify the court of all pending proceedings in related matters.

--In debarment proceedings, imposition of a penalty by one agency automatically applies to that respondent \textit{viz}. all federal agencies. 2 CFR, part 180. This provision might be expanded in other types of proceedings.

- What reforms would encourage agencies to adjudicate related conduct in a single proceeding before a single adjudicator?

--It is not entirely clear that, in every case, respondents would prefer to adjudicate their claims in one single proceeding. Differing forms of relief may be available to respondents, depending upon the particular forum or statutory scheme involved. In many cases, the decision to request consolidation is best left with the respondent, as is currently the case.

- Would applying the principle of \textit{res judicata} in the regulatory context reduce duplicative proceedings?

--Since \textit{res judicata} only applies to the same parties who have previously litigated the identical claim, it is rarely relied upon as a basis for dismissal of claims. The doctrine of non-mutual collateral estoppel has also been followed infrequently in some courts.

- How would agencies effectively apply \textit{res judicata}?

--In cases where differing forms of relief require different legal proceedings, even though the same facts and legal issues are involved. It may also arise in the defensive context when respondents bring repetitive claims that have already been adjudicated.

- 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?

--Major reform is not required in this context, because the Government generally has the burden of proof to establish liability. Petitioners also have due process and statutory protections that provide an adequate framework for vindicating the rights of a respondent who is later found not to be liable in most administrative proceedings. \textit{See e.g., Equal Access to Justice Act, 28 U.S.C. § 2412.}

- To the extent permissible, should the Administration address burdens of persuasion and/or production in regulatory proceedings?

--The law is well-developed in this area and regulatory or legislative reform is not necessary. In some cases, the burden may shift from complainant to respondent, and ultimately back to complainant. The standard of proof in most administrative proceedings is preponderance of the evidence. The federal courts then provide an additional layer of judicial review.
• Or should the scope of this reform focus strictly on an initial presumption of innocence?

--Again, the law on burden-shifting, whether it involves burden of proof or burden of persuasion is already well-developed, and, for the most part, does not require legislative or regulatory reform.

• What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance?

--The APA generally provides that the hearing official has discretion to exclude “irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. §556(d). Where not expressly provided by statute or agency rules, the hearing official determines the due process to be followed, ad hoc, in an initial order specifying the process to be followed. The actual practice in most administrative proceedings is to argue due process based on constitutional standards and as generally called for under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Although these rules are not strictly applied in most administrative proceedings, they are often referred to as guidance by litigants and the administrative judges.

• Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?

--Possibly. In most enforcement actions, existing agency rules permit the parties and the hearing official to consider the Federal Rules of Evidence (and Civil Procedure) as general guidance. In the case of hearsay, the regulatory exceptions are often applied, and first-hand hearsay by a disinterested party may be considered reliable. Another example where a hearsay exception is typically relied on is when documents that have been produced in the regular course of business are offered into evidence (as opposed to ad hoc written statements, generally.) FRE 803(6) - (7).

--Some statutes require hearings in enforcement actions to follow the Federal Rules of Evidence. Example: The Fair Housing Act. The result is that more witnesses may be required to establish a violation, and the respondent often has the opportunity to cross-examine them. The hearing officer also has an opportunity to assess their credibility.

• 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?

--Within reason, yes. A blanket requirement to produce all documents per the strict requirements of the federal rules, would not be appropriate in most administrative proceedings, since they are designed to be stream-lined, and to be conducted in an efficient manner. Discovery can be unduly burdensome for some agencies depending upon their administrative or information technology infrastructure. Accordingly, administrative
judges should supervise the discovery process closely, enforcing reasonable deadlines for
discovery and imposing sanctions to compel production where necessary.

- Do adjudicators sometimes lack independence from the enforcement arm of the agency?

--In some cases, yes - particularly in smaller agencies. This is a critical issue for the public,
as well as the agency. Agencies place heavy reliance on the public perception that their
adjudication process is fair and impartial. Without a healthy public perception that its
judges are impartial, and preside over a fair process, more litigants would opt to have their
cases heard in the Article III courts. This would place a heavy economic and workload
burden on agencies having to try more cases in federal court, as well as the Article III
courts, whose processes are more time-consuming and costly. Some administrative law
judges have reported instances where they have felt undue influence over decision-making.

-- Agencies should seek to develop hiring processes that value objective judicial
qualifications rather than a candidate’s propensity to decide cases according to ideology or
political considerations. Agencies should endeavor to balance their appointment of
adjudicators so as to maintain a cadre of judges who have litigated both for and against
government agencies. Judicial law clerkship and administrative decision-writing
experience should be favored in the hiring process, since adjudication experience has been
found to be particularly valuable in deciding administrative cases. Actual litigation
experience or training in adversarial proceedings should also be favored in agencies that
conduct adversarial proceedings. Recent regulatory changes that allow for each agency to
hire ALJs according to their own established criteria, and without regard to the
independent screening process that was previously maintained by the Office of Personnel
Management (OPM) for many years, could result in less objective hiring criteria.

--Some administrative programs utilize "split-enforcement" schemes, in which
enforcement functions and adjudicative functions are performed by separate entities.
Examples include the division of responsibility between the Occupational Safety and
Health Administration and the Occupational Safety and Health Review Commission, and
similarly, between the Mine Safety and Health Administration and the Mine Safety and
Health Review Commission. In addition, some agencies have, by mutual agreement,
consolidated adjudicative functions within a single entity. For example, ALJs at the U.S.
Coast Guard hear cases originating at multiple agencies. The Judicial Division believes
that consideration should be given to extending these models to other regulatory contexts -
a step that might contribute to the reality or at least the appearance of independent
adjudicative decisionmaking at the agencies involved. See 5 U.S.C. §3344.

- What reform(s) would adequately separate functions and guarantee an adjudicator's
independence?

--The APA provides protections for ALJs that include: (1) no “trial” or probationary
employment period (immediate “permanent” status), 5 U.S.C. § 554 (d), § 3105; (2) pay
fixed by an outside agency (OPM), 5 U.S.C. § 5372; (3) no performance evaluations, 5
C.F.R. § 930.206(a); (4) no bonus pay or awards, 5 U.S.C. § 4502, 4503, 4504, and (5) ALJs
cannot be removed from their positions without a showing of “good cause,” as determined by the Merit Systems Protection Board. 5 U.S.C. § 7521.

--Because ALJs (and all other hearing officers) are now “excepted service” employees, another protection that should be considered in order to ensure impartial decision-making is to limit eligibility requirements for judicial candidates to those who have not previously litigated as counsel for that same agency within the previous 5 years.

--The ABA has joined other bar associations and interest groups in calling for structural reform in immigration cases and a recommendation that immigration courts be transferred into an independent court system established under Article I of the Constitution. See ABA Resolution 114F (2010), available at https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114f.pdf; see also ABA COI Report, Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, (March 2019), available at: https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf

• Do agencies provide enough transparency regarding penalties and fines?

--In the Judicial Division’s experience, there is generally enough transparency regarding penalties and fines, though efforts should always be made to make the process more transparent. See ACUS Rec. 79-3, ¶ 1 (“Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases.”); ¶ 3 (“Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements.”), https://www.acus.gov/recommendation/agency-assessment-and-mitigation-civil-money-penalties.

• Are penalties generally fair and proportionate to the infractions for which they are assessed?

--Judges are required to follow precedent in all decision-making. However, it is not possible to alleviate questions concerning disproportionate penalties or punishment in individual cases. The hearing official’s initial decision on damages, penalties, and injunctive relief can also be increased or decreased on appeal to the Department Head, who can overturn the judge on the factual findings, legal conclusions and penalties.

• What reform(s) would ensure consistency and transparency regarding regulatory penalties for a particular agency or the federal government as a whole?

--Case outcomes should be published and made easily accessible on agency websites. See also ACUS Rec. 79-3, ¶ 1

• When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements?
Primarily when the petitioner wishes to avoid paying costly attorney’s fees and negative publicity, or is seeking an expedient outcome. There could be a host of other motivations as well, such as wanting to continue to do business with the Government, the need to obtain a security clearance, etc.

- What safeguards would systemically prevent unfair and/or coercive resolutions?

--The right to proceed in federal court, or resort to other statutory alternatives to proceeding before an administrative judge. Example: Fair Housing complaints brought by the Department of Housing and Urban Development. The proceeding must be commenced before the ALJ, but if it is not settled by the parties, any party may opt out of the administrative hearing, and the agency may file their complaint in a U.S. District Court for trial (with or without jury).

--A robust and independent administrative adjudication process, as well as an independent Office of Inspector General that has the full confidence of litigants and the general public.

- Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?

--Agency executives need to hold themselves or others accountable for upholding the public interest according to the duly-promulgated laws, regulations, and policies of the agency.

--Whistleblower and Qui Tam actions have also been effective in providing public accountability for actions by agencies and agency staff.

--Many Article III courts utilize a peer review system. This can be an effective tool with administrative courts as well. This process is used under the judicial code of conduct applicable to federal judges, i.e., the Code of Conduct for United States Judges. https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

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

--Yes. Examples are enforcement and asset forfeiture cases in exigent circumstances involving FDIC bank closures and HUD Mortgagee Board suspension or revocation of FHA loan authorizations. In either case, the action may be taken with no notice (to prevent aggravation of damage or losses). However, the statutes compensate by providing for a prompt due-process hearing. Other examples are provided by the Department of Health and Human Services, which enforces regulations calling for the protection of children and vulnerable populations.