New Civil Liberties Alliance

March 16, 2020

VIA REGULATIONS.GOV

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

Re: *Improving and Reforming Regulatory Enforcement and Adjudication*, Docket Number OMB-2019-0006

Dear Acting Director Vought,

The New Civil Liberties Alliance (NCLA) submits the following comments in response to the Office of Management and Budget's (OMB) January 30, 2020 *Improving and Reforming Regulatory Enforcement and Adjudication* Notice. *See* Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483 (Jan. 30, 2020) (*OMB Request for Information*).

NCLA sincerely appreciates the agency's willingness to gather insights from parties impacted by government regulatory and enforcement regimes to support future reforms. NCLA's attorneys have decades of experience representing individuals and companies caught up in regulatory enforcement actions. We bring a unique perspective to the discussion, having navigated the Kafkaesque procedures that agencies often employ. We have found that such procedures are often used not to shed light on or to solve a problem, but to ensure that regardless of the ultimate outcome, the agency always wins and the American citizen or company always loses.

When defending against federal agency adjudicatory overreach, it is easy to come to the conclusion that "the process is the punishment." This adage has become especially apt in relation to those federal agencies that seek to expand their power, authority, jurisdiction, and budgets, and who recognize that pursuing "enforcement" actions may be an effective mechanism for doing so. When

one then considers the Courts' penchant for "deferring" to agency interpretations of statutes, regulations, and guidance documents pursuant to *Chevron*,[1] *Auer*,[2] *Brand X*[3] and the like, the capacity to do harm expands exponentially, with the targets of these investigations and actions becoming merely a casualty of "regulatory progress" as defined by the bureaucracy.

Of the eleven subjects of interest identified in the *OMB Request for Information*, NCLA provides specific comments on six topics. Where practicable and beneficial for each topic, NCLA proposes recommended language for future executive orders or regulations that are designed to improve and reform administrative enforcement and adjudications.

Thank you again for this opportunity to provide NCLA's view on the important topic of regulatory enforcement and adjudication reform. Should you have any questions, please contact Kara Rollins, Litigation Counsel, at kara.rollins@ncla.legal.

Kind regards,

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[1] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Auer v. Robbins*, 519 U.S. 452 (1997).
[3] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005).

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I. NCLA's Statement of Interest

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law (which includes fair notice of legal obligations), the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[4] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and with the Constitution.

II. Topic 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?

A. Investigatory purgatory, examples abound

We agree that investigatory reform is critically important to regulatory and administrative reform. Effective reform is only possible, however, if the administration is able to appreciate the scope of the problem. The following examples underscore the need for this action.

[4] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

1. *United States v. David L. Hamilton and Hamilton Properties*[5]

David Hamilton is an engineer by training and colorful by nature. He likes to build things and has spent his adult life creating successful natural gas processing companies and utilities in two states, as well as buying and improving farms around his hometown of Worland, Wyoming. He is an independent problem-solver and it would never occur to him that it would be necessary to ask the federal government for permission to reconstruct or maintain an irrigation ditch on his own private property.

Mr. Hamilton purchased a run-down and abused patch of farm ground on the east edge of Worland in 2005 and immediately began to clean up the mess left by decades of neglect. This property was split into two parcels by a draw locally referred to as "Slick Creek," named for "Slick Nard," an assassin who killed and robbed a traveling sheep herder in that particular gulch in 1895 (a person brought to justice pursuant to an early version of "tire-track forensic analysis," being identified by the hoof of his horse: "the imprint of which was plainly left in the gulch"). When Mr. Hamilton purchased the farm, Slick Creek was no longer a dry gulch, having been converted to an irrigation ditch and incorporated into the Hanover Irrigation District canal system in 1906 to regulate the flow of irrigation water to area farmers.

The Irrigation District had been using Slick Creek to manage irrigation water for almost 100 years by the time that Mr. Hamilton purchased this property, with such use having caused substantial erosion across the farm. His predecessors had tried to control the erosion with "poor-man's rip rap" including using abandoned farming equipment, cars, trucks, refrigerators, washing machines, and fencing materials to shore up the area and maintain some semblance of a defined channel for conveying irrigation water. Mr. Hamilton fixed all of that, removing and properly disposing of the abandoned equipment, surveying in and rebuilding the banks and floor of the ditch, restoring a beautiful and productive farm, creating an environmental paradise, and spending over $300,000 in the process.

The Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("COE") are tasked with implementing the Clean Water Act ("CWA"), including the 404-permitting program, which applies to "navigable waters of the United States."[6] The EPA is notorious for pushing the outer boundaries of jurisdiction under the Act, with the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006), noting the "immense expansion" of federal regulation of *land use* that has occurred under

[5] *United States v. David L. Hamilton and Hamilton Properties*, Case No. 10-cv-0231 (D. Wyo.).
[6] 33 U.S.C. § 1344.

the CWA in the last forty years "without any change in the governing statute." The EPA and COE have, for example, identified storm drains, roadside ditches, ripples of sand that may contain water once a year, and desert washes as "navigable waters of the United States" all in order to restrict private and public land use under the auspices of the CWA. They have used the 404-permitting process to either outright reject projects, to delay them indefinitely, or to make them so cost-prohibitive that they are no longer viable. The Supreme Court reported in *Rapanos* that the average applicant for a 404 permit spends 788 days and $271,596 in completing the process. They have also used "enforcement actions" throughout the Country, bringing ruinously-expensive lawsuits that have destroyed the utility of private property and the livelihoods of numerous farmers and ranchers.

Importantly, normal farming and ranching activities and the construction and maintenance of irrigation ditches are statutorily exempt from regulation under the CWA. Mr. Hamilton's project, in other words was not—by definition—covered by the Act. Those statutory constraints, however, did not stop the EPA and COE from springing into action once they decided that suing a farmer in northern Wyoming would provide yet another opportunity to expand the scope and jurisdiction of the CWA.

The investigation leading up to the EPA/COE's decision was especially egregious. The COE first received an anonymous complaint about Mr. Hamilton's project in May 2006 and, having done nothing in response, received another such anonymous complaint in February 2007. The COE finally inspected Mr. Hamilton's property in August 2007 (approximately two years after he completed the project). The investigator later reported that his GPS unit malfunctioned on site, he lost some of his photographs, and he did not have time to prepare a written report until the spring of 2008. Based upon a cursory review of the "National Wetlands Inventory" (unverified color infrared aerial photographs maintained by the National Forest Service), the investigator later concluded that Mr. Hamilton had also filled in 8 acres of "wetlands," and issued a "Jurisdictional Determination" to that effect. His determination in that regard was not supported by the facts on the ground, as most of those alleged "wetlands" were uphill from Mr. Hanilton's work. The investigator also altered an official COE document (the initial "Jurisdictional Determination") to try to shield it from disclosure pursuant to a Freedom of Information Act ("FOIA") request.

In April 2008 the COE notified Mr. Hamilton that his restoration work on the Slick Creek irrigation ditch violated the CWA. That notice was sent almost 3 years after the work was completed, 2 years after COE was first notified of the project, over 1 year after the second notification, and eight months after the inspection. COE gave Mr. Hamilton just 10 days to respond with his "intent to

cooperate" and to produce any information that he thought "would be relevant to resolving this case." COE also threatened Mr. Hamilton with both civil and criminal penalties.

Mr. Hamilton's attorney immediately contacted the agencies to obtain their investigatory materials so that they could determine the basis for the allegations. The agencies denied the attorney's request and instructed her to pursue a FOIA.

Mr. Hamilton fully cooperated with the EPA and COE investigators, taking them (and the Department of Justice attorneys) on several site visits, explaining what was done, and offering to make reasonable changes to the irrigation ditch to address environmental concerns. One exchange during those discussions stands out, as it was when the agency attorney admitted that Mr. Hamilton's project had substantially improved the environment and reduced sediment into the Big Horn River (an actual "navigable water of the United States").

Over two years later, and in the fall of 2010, the EPA filed a lawsuit against Mr. Hamilton claiming that he had violated the CWA by failing to obtain a 404 permit from the COE to construct and maintain the Slick Creek irrigation ditch across his property. The timing in that regard—just shy of five years after he completed the project—allowed the EPA to seek the maximum penalty ($37,500 per day) for the longest period, despite the fact that COE had learned of Mr. Hamilton's work in 2006. By the early Spring of 2013, Mr. Hamilton was facing penalties under the CWA of almost $62,000,000. The expert witnesses hired by the EPA to testify against Mr. Hamilton (former EPA/COE employees of course) eventually determined that he had disturbed a total of 2.1 acres of his own private property (equating to a potential penalty of $29,523,809 per linear acre).

The EPA refused to disclose to Mr. Hamilton until shortly before trial how much it was seeking in penalty. This approach was unfair and hindered Mr. Hamilton's ability to defend himself.

Mr. Hamilton knew that the Slick Creek irrigation ditch was not a "navigable water of the United States" and that he was entitled to construct and maintain the irrigation ditch across his property without obtaining a 404 permit. He chose to go to trial—to let a "jury of his peers" decide whether he had violated the CWA. Before he could present his case, however, the EPA had several more heavy-handed cards to play. It sought—*and received*—an order from the federal district court blocking evidence of the environmental benefits of his project (including reduced sedimentation, improved water quality and management, removal and proper disposal of old equipment/appliances, revegetated channel, erosion control, reduction in fertilizer demand, proper placement of stabilizing riprap, and improved wildlife habitat). The EPA fought all efforts to show the jury a photograph of the finished project—for which Mr. Hamilton had been sued and for which he was facing

bankruptcy—for fear that they would see the beauty of his work and the improvements made. Mr. Hamilton was prohibited from cross-examining the EPA official who made the decision to sue him. The EPA and COE made it impossible for Mr. Hamilton to call the original investigator as a witness so that he could expose the shoddiness of his work.

After a two-week trial the jury took less than two hours to conclude that Mr. Hamilton had not violated the CWA, that Slick Creek was an irrigation ditch, and that the area in question had been historically farmed and grazed as part of a "normal framing and ranching operation." The EPA never appealed that verdict, recognizing that the Tenth Circuit Court of Appeals would most likely affirm the jury's decision. The federal government's post-trial focus was on preventing Mr. Hamilton from recouping any portion of the $1,000,000 he had spent defending himself over the previous six years.

The Hamilton case is important for many reasons. First, it exposes how relentless federal agencies have become in expanding their jurisdiction despite unambiguous statutory constraints. Second, it is extremely difficult for the average person to defend against the federal government, with standard notions of due process being undermined by the court's willingness to "defer" to agency interpretation and arguments about what evidence should be considered "relevant." Third, it exposes the near absolute power that is inherent in granting agencies the authority to impose bone-crushing penalties against American citizens, forcing landowners to settle or risk bankruptcy. Finally, it shows that federalizing natural resource management creates absurd results, with protecting the environment becoming secondary, while agencies look to fill their coffers and force landowners to jump through hoops for no rational reason. We hope that the OMB recognizes the travesty associated with Mr. Hamilton's case, and that investigatory reform is necessary to ensure that it is not repeated.

2. *The Law Offices of Crystal Moroney, P.C., v. Bureau of Consumer Financial Protection*[7]

Currently pending in S.D.N.Y., this case is a perfect example of why investigated parties should have an opportunity to require an agency to "show cause" to continue an investigation.[8] The CFPB evaded judicial review of its own Petition to Enforce Civil Investigative Demand in order to avoid an adverse ruling from the court. Almost three years after the commencement of the CFPB's first investigation of the Law Offices of Crystal Moroney, P.C ("Ms. Moroney's Law Firm"), the investigated party continues to seek a legal determination regarding what information the CFPB is

[7] *The Law Offices of Crystal Moroney, P.C., v. Bureau of Consumer Financial Protection,* Case No. 7:19-cv-11594 (S.D.N.Y.). NCLA represents The Law Offices of Crystal Moroney in this case.

[8] *See Moroney v. CFPB*, NEW CIVIL LIBERTIES ALLIANCE, https://nclalegal.org/moroney-cfpb/(last accessed Mar. 11, 2020).

entitled to, and what documents and information are protected from disclosure by nondisclosure privileges and doctrines, including the attorney-client communication privilege.

The Law Offices of Crystal Moroney, P.C. received its first Civil Investigative Demand ("CID") from the CFPB on June 23, 2017.[9] The First CID sought three and a half years of documents, tangible things, written reports, and answers to questions. Ms. Moroney's Law Firm noted several objections to the First CID, including the demand's lack of proportionality, the onerous deadlines imposed, the extensive scope in time and materials requested, and the insufficient Notice of Purpose provided with the First CID. But these issues paled in comparison with Ms. Moroney's Law Firm's principal concern: CFPB's demand for documents and information protected from disclosure by nondisclosure privileges and doctrines, including the attorney-client communication privilege.

The parties were able to negotiate mutually acceptable solutions to most of these contentions, but it became clear in September 2018 that CFPB was intractable when it came to its demand for privileged material. To break the impasse, Ms. Moroney's Law Firm engaged ethics counsel for independent advice on the issue. Ultimately, Ms. Moroney concluded that it was her Rule 1.6 ethical duty under the New York and New Jersey Codes of Professional Conduct to protect the confidentiality of attorney-client privileged material. But, in yet another effort to accommodate CFPB, she asked her clients if each would waive the privilege. Despite that Ms. Moroney's Law Firm's clients (owners of the privilege) refused to waive it, CFPB insisted that she violate her legal ethics and turn over the privileged documents.

In the end, Ms. Moroney's Law Firm substantially complied with the First CID by providing written responses and producing thousands of pages of documents and data. The only documents she refused to produce were those protected by attorney-client nondisclosure principles or those where nonprivileged and privileged materials were inextricably intertwined. On January 9, 2018, CFPB informed Ms. Moroney's Law Firm that it intended to enforce the First CID unless she violated her Rule 1.6 duty of confidentiality. The Bureau waited more than a year to file its Petition to Enforce Civil Investigative Demand in the United States District Court for the Southern District of New York (the "CFPB Petition"). Then it waited an additional nine months before serving her with the CFPB Petition.

Objecting to the CFPB Petition, Ms. Moroney's Law Firm asserted (among other things) that she substantially complied with the First CID and, perhaps more importantly, she identified

[9] *Lunch and Law on CFPB's abuses of process with Crystal Moroney and attorney Ron Canter*, NEW CIVIL LIBERTIES ALLIANCE, https://www.youtube.com/watch?v=h32Ohzy_itI&feature=youtu.be (last visited Mar. 11, 2020).

constitutional defects in CFPB's enabling statute that rendered CFPB without legal authority to enforce the First CID. After seeking and receiving two Court-granted extensions—and just three days prior to the Judicial Review Hearing—CFPB filed a Notice of Petitioner's Withdrawal of the Civil Investigative Demand and Suggestion of Mootness ("Suggestion of Mootness"). The Suggestion of Mootness voluntarily quashed the First CID, although the CFPB maintains that the first CID was sufficient and satisfied the statutory requirements for notice of purpose. CFPB's "Suggestion of Mootness," however, was not as innocuous as its title might imply. The motion unabashedly asserted that its voluntary withdrawal of the First CID meant that "the Court *must* dismiss [the Judicial Review Hearing] for lack of subject-matter jurisdiction."[10]

Relying upon CFPB's representation that the claims and defenses before the Court no longer represented an ongoing controversy, the Court dismissed its scheduled Judicial Review Hearing, denied the enforcement action as moot, and closed the case on November 7, 2019. At the time, neither the Court nor Ms. Moroney's Law Firm could have known that the case before it was, in fact, decidedly *not* moot. Within hours of the Judicial Review Hearing's cancellation, CFPB announced its intention to serve another CID on Ms. Moroney's Law Firm (the "Second CID"), which Ms. Moroney's Law Firm received on November 18, 2019.

Upon receipt of the Second CID, Ms. Moroney's Law Firm filed a Request for a Pre-Motion Conference with Judge Román. Judge Román convened the conference to decide whether he should amend his order dismissing the matter. At the pre-motion conference, CFPB's counsel candidly admitted that the Second CID is "seeking largely the same information[,]" as the First CID.[11] Ultimately, Judge Román declined to reopen the matter.

It is worth emphasizing that the CFPB and Ms. Moroney agree that the Second CID seeks the same information, although the Second CID seeks information from a wider time period. Thus, the dispute over whether the CFPB is entitled to receive attorney-client privileged material from Ms. Moroney's Law Firm remains unresolved from the First CID. Shockingly, it appears that the CFPB manufactured mootness of the First CID because the United States Supreme Court issued a writ of certiorari in *Seila Law v. CFPB*. The CFPB has represented in federal court that it would have been a reasonable course for Judge Román to stay the case pending the decision in *Seila Law* at the time of their Petition to Enforce the First CID, but the CFPB did not want the case to be put on ice until

[10] Not. of Pet. Withdrawal of the Civil Investigative Demand & Suggestion of Mootness, *CFPB v. Law Offices of Crystal Moroney*, Case No.: 7:19-cv-01732-NSR, at 1 (Nov. 4, 2019) (emphasis added).

[11] Conf. Tr. at 7, *CFPB v. Law Offices of Crystal Moroney*, No. 19-CV-1732 (NSR) (Nov. 21, 2019).

June 2020, when the Supreme Court issues a decision.[12] Avoiding a stay pending a decision from the Supreme Court directly affecting the issues presented in a case so that the CFPB can continue its investigation is an appalling manipulation of agency power and judicial resources. If Ms. Moroney's Law Firm had the ability to move for a "show cause" hearing in an Article III court as proposed in this OMB Request for Information, a court could resolve her claims and she could fully comply with the CFPB's investigative demands without fear of violating her professional duties to keep privileged information confidential. Or perhaps she could finally be free of the CFPB's serial investigations looming over her.

Ms. Moroney's Law Firm has since met and conferred with CFPB regarding the Second CID. She filed a Petition to Set Aside the Second CID with CFPB to preserve her right to object to the substance of the CID, without waiving her right to challenge the constitutionality of CFPB's abuse of the CID process or the constitutionality of the Bureau itself.

After CFPB issued the Second CID, Ms. Moroney's Law Firm learned that CFPB had also issued CIDs to at least one of Ms. Moroney's Law Firm's clients. Worse, CFPB has issued CIDs to at least one of her firm's client's clients—organizations with whom the Plaintiff has no relationship. These CIDs demand the same information that was at issue and would have been resolved at the 2019 Judicial Review Hearing, had CFPB not manufactured mootness. Seeking relief from an Article III court, Ms. Moroney's Law Firm filed suit against the CFPB alleging the CFPB's serial investigations violate the due process rights of the Firm, that the manner in which the CFPB receives funding violates the nondelegation doctrine, and that the CFPB Director enjoys removal protections that violate the Appointments and Take Care Clauses of the Constitution.[13] Ms. Moroney's Law Firm also sought a preliminary injunction to prevent the systematic denial of her due process right to be heard and to receive a fair trial, which began at the time of the Judicial Review Hearing and CFPB's simultaneous announcement that it would reissue the nearly identical Second CID. Ms. Moroney's Law Firm argued a preliminary injunction was necessary precisely because CFPB refuses to enforce the Second CID; but if Ms. Moroney's Law Firm had the ability to make a motion to show cause in order to continue the CFPB's investigation, her lawsuit and motion for preliminary injunction would have been unnecessary.

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[12] Mot. for Prelim. Injunction Hearing Transcript, *The Law Offices of Crystal Moroney, P.C., v. Bureau of Consumer Financial Protection,* Case No. 7:19-cv-11594 (Feb. 27, 2019) (copy of transcript on file with author).

[13] Verified Compl. for Permanent Injunctive and Declaratory Relief, *Law Offices of Crystal Moroney, P.C.*, *v. Bureau of Consumer Financial Protection*, Case No. 7:19-cv-11594 (Dec. 18, 2019), No. 1 *available at* https://nclalegal.org/wp-content/uploads/2019/12/Verified-Complaint_Moroney-v-CFPB_NCLA.pdf.

Before the preliminary injunction hearing, but after the briefing was completed, CFPB Director Kraninger denied Ms. Moroney's Law Firm's Petition to Set Aside or Modify the CID. After a hearing, Judge Karas denied Ms. Moroney's Law Firm a preliminary injunction on February 28, 2020. Ms. Moroney's Law Firm is now left to the whims of the CFPB's investigative process, however long the CFPB decides it should take (there are no limitations on the length of CFPB investigations). While Ms. Moroney's Law Firm's lawsuit in federal court is still active, she is unable to resolve her dispute with the CFPB over her duty to keep confidential her client's privileged information *unless and until the CFPB decides it* would like to move the court to enforce its CID against her again. Until that point in time, the financial viability of Ms. Moroney's Law Firm hangs in the balance. CFPB has manipulated process to serve its own ends, not the ends of justice or even to serve its organizational mission, since no financial consumer has benefitted from CFPB's evasion of judicial scrutiny and its barefaced stall tactics. The only way to combat these affronts to due process is an additional vehicle by which regulated parties may insist upon judicial review of agency action—and inaction.

3. *FDRLST Media, LLC and Joel F.*[14]

Counterintuitively, an agency's failure to conduct appropriate investigations also places onerous burdens on businesses and individuals. In *FDRLST Media, LLC and Joel F.*, a random individual on Twitter filed an "unfair" labor practices charge against FDRLST Media, LLC ("FDRLST")—which publishes the online magazine, *The Federalist*—after seeing a satirical tweet made by Ben Domenech, a co-founder and publisher of FDRLST.[15] Under Section 160(b) of the National Labor Relations Act ("NLRA"), codified at 29 U.S.C. § 160(b), the National Labor Relations Board ("NLRB" or the "Board") is only authorized to investigate or prosecute alleged unfair labor practices when a person aggrieved by that alleged unfair labor practice files a charge with the Board. The NLRA and the NLRB's procedures require Board agents to undertake an investigation prior to filing a complaint.[16] As stated in the NLRB CASEHANDLING MANUAL, investigations should include interviews with the charging party and third-party witnesses who may have material information.[17] The

[14] *FDRLST Media, LLC and Joel F.*, Case 02-CA-243109 (N.L.R.B.). NCLA represents FDRLST Media, LLC in this matter.

[15] *See generally Joel F. v. FDRLST Media, LLC*, NEW CIVIL LIBERTIES ALLIANCE, https://nclalegal.org/joel-f-v-fdrlst-media-llc/ (last visited Mar. 11, 2020).

[16] *See* NLRB, NLRB CASEHANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS at Sect. 10050-70 (2020) *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/ulp-manual-january-2020.pdf ("NLRB CASEHANDLING MANUAL").

[17] *See* NLRB CASEHANDLING MANUAL AT 10054-54.3.

findings of the investigations are evaluated by the NLRB Regional Director, and sometimes NLRB attorneys at the Division of Advice in Washington, DC.[18]

To the best of NCLA's knowledge and belief, the NLRB did not undertake any evidentiary investigation or interviews before filing the complaint and commencing the action against FDRLST. Many of the issues in the ongoing action could have been resolved if the Board had endeavored to investigate and interview the FDRLST's employees about the charge. As a result of the Board's failure to investigate, FDRLST has been subjected to an onerous and completely unnecessary process that violates its constitutional right to the due process of law.

B. NCLA's recommendations

Protection of constitutional rights and ensuring fairness and transparency should be paramount when an agency undertakes to investigate an American citizen or company. It is patently unfair for an agency to take years to pursue an investigation of someone (with or without their knowledge) and then demand a response within 10 days after sending the notice of violation. It is also imperative that agencies "stay in their lane" and pragmatically address enforcement actions. At a minimum the OMB should require that the following standards be put in place:

- Absent extraordinary circumstances, any investigation of an alleged violation must commence within 90 days of receiving a complaint.
- Absent extraordinary circumstances, a written report summarizing observations, maps, drawings, photographs, and other appropriate information must be developed within 45 days of any on-site activities (such as initial site inspection, visit to manufacturing plant, etc.).
- Investigatory techniques and tools must be verifiable (*e.g.*, "ground truthed") before they are used as the basis for an enforcement action.
- Investigatory techniques and tools must be proportional to the type of harm alleged and take into consideration the cost of complying with agency enforcement requests.
- The agency must be prohibited from proceeding with a notice of violation if the investigative materials are lost or compromised and cannot be replaced or replicated.
- There must be a statute of limitations imposed on agency action. No agency should be allowed to pursue an "enforcement" action years after an alleged violation occurs.
- Agencies must be required to disclose their investigative materials within 30 days after sending a notice of violation to the target.
- Respondents must then have at least 30 days thereafter to respond to the agency, with additional time being appropriate depending on the circumstances and the nature of the allegations.

[18] *Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Mar. 11, 2020).

- Agencies should be prohibited from threatening citizens and businesses with ruinous penalties. Such agencies must instead calculate what would be a reasonable and supportable penalty using the appropriate expertise such as appraisers, real estate agents, accountants, etc.
- The potential penalty must be disclosed early in the investigation, not shortly before or during trial.
- Absent extraordinary circumstances, the investigators involved with a particular case must be made available to testify at trial. Cross-examination is the only way to hold them accountable for the quality and timeliness of the work that they do.
- There must be a substantial reduction in penalties for small projects and small business owners.
- Any former agency employees hired as investigators or expert witnesses must disclose how much money they have been paid by federal and state agencies in the previous 10 years.
- Consider a "cooling-off period" for certain covered employees, including enforcement counsel, from communicating with or appearing before agency adjudicators to stop the "revolving door" between regulators and the defense bar.
- Investigated parties should have an opportunity to require an agency to "show cause" to continue an investigation. At a minimum, no investigation should proceed beyond 2 years unless the agency can show "good cause" for its continuing. There may be circumstances where a shorter period is warranted.

III. Topic 2: When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies? What reforms would encourage agencies to adjudicate related conduct in a single proceeding before a single adjudicator?

A. Agencies should affirmatively disclose all joint-agency enforcement agreements and review such agreements for their encroachment on Constitutional rights

NCLA is aware that some agencies with shared or related enforcement powers, including state and local government entities, execute Memoranda of Understanding ("MOU") or similar agreements amongst themselves.[19] These joint-agency agreements often permit sharing investigatory and enforcement-related information and files, or delineate other roles, responsibilities, or hierarchies in enforcement practices.[20] While some agencies proactively publish their joint-agency agreements online, others do not. At a minimum, agencies should be required to affirmatively publish any executed MOUs or joint-agency agreements. The agencies should readily identify when the agreement

[19] *See, e.g.*, *State Enforcement and Outreach Coordination*, U.S. DEPT. OF LABOR, https://www.dol.gov/agencies/whd/about/state-coordination (last visited Mar. 11, 2020)

[20] *See, e.g.*, Memorandum of Understanding between the Consumer Fin. Protect. Bureau and the Fed. Trade Comm'n (Feb. 25, 2019) *available at* https://files.consumerfinance.gov/f/documents/cfpb_ftc_memo-of-understanding_2019-02.pdf.

was signed, which agencies executed the agreement, whether the agreement expires, and if it does expire, its expiration date.

These joint-agency agreements, whether formal or informal, can also raise due process concerns. For example, in January, Axon Enterprises, Inc.—which manufactures non-lethal policing equipment, like body-worn cameras—filed suit against the Federal Trade Commission ("FTC") to stop the FTC's 18-month long antitrust investigation into its acquisition of Vievu LLC.[21]

Both the FTC and the U.S. Department of Justice ("DOJ") enforce federal antitrust laws and can bring an action in federal district court. However, the FTC may also initiate enforcement actions in an administrative proceeding before an administrative law judge ("ALJ"), where the federal rules of procedure and evidence do not apply and the ALJ is employed by the Commission.[22] Which agency handles an antitrust matter is a wholly arbitrary decision, and is based on the agency's own perceived "expertise" in certain industries and markets—not Congressional delineation.[23] This determination is opaque[24] and subject to the whims of the FTC and DOJ.[25] due process demands more.

B. NCLA's recommendations

NCLA recommends inclusion of the following sections in a future executive order:

> SEC. ____. Ensuring Transparent Use of Joint-Agency Enforcement Agreements. (a) Within 120 days of this order, each agency or agency component, as appropriate, shall establish or maintain on its website a single, searchable, indexed database that contains or links to all Memoranda of Understanding, joint-agency agreements, partnership agreements, or the like in effect for such agency or component that permit the sharing of investigatory and enforcement-related information and files, or that delineate other roles, responsibilities, or hierarchies in regulatory enforcement

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[21] Compl. for Declaratory & Injunctive Relief, *Axon Enterprises, Inc. v. Fed. Trade Comm'n, et al.*, Case No. 2:20-cv-00014-DMF (D. Ariz. Jan. 3, 2020), ECF No. 1 ("Axon Compl.").

[22] *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Mar. 11, 2020); *see also* 16 C.F.R. pt. 3 (FTC's Rules of Practice for Adjudicative Proceedings). FTC administrative adjudications are stacked in favor of the Commission, which has an astounding 100 percent win rate on cases tried before its ALJs and appealed to the Commission. *See* Adi Dynar and John J. Vecchione, *Axon v. FTC Will Put the Administrative State on Trial*, NEW CIVIL LIBERTIES ALLIANCE (Feb. 13, 2020), https://nclalegal.org/2020/02/axon-v-ftc-will-put-the-administrative-state-on-trial/.

[23] *See* Fed. Trade Comm'n, *supra* note 21; *see also* Axon Compl. at ¶¶ 6, 29-30.

[24] In 2002, the FTC and DOJ executed an agreement that purportedly guides the antitrust clearance process. *See* Memorandum of Agreement between the Fed. Trade Comm'n and the Antitrust Div. of the United States Dept. of Justice Concerning Clearance Procedures for Investigations at ¶17-19, App. A, Dept. of Justice (Mar. 5, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf ("Antitrust Clearance Agreement"). But by the Antitrust Clearance Agreement's own terms, the agreement was subject to review in 2006. If that review ever occurred, or if the Antitrust Clearance Agreement remains in effect is not explicitly clear to the public.

[25] *See* John D. McKinnon and James V. Grimaldi, *Justice Department, FTC Skirmish Over Antitrust Turf*, WALL ST. J. (updated Aug. 5, 2019, 5:45 pm ET), https://www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402.

> practices among agencies. The database shall identify (i) the parties to the joint-agency agreement; (ii) date of execution of any joint-agency agreement; (iii) the date of expiration, or if no date of expiration is applicable a statement indicating such; and, (iv) authority on which the joint-agency agreement is entered.
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> (b) Within 120 days of this order, each agency shall review its joint-agency enforcement agreements and, consistent with applicable law, rescind those agreements that it determines should no longer be in effect. No agency shall retain in effect any agreement without including it in the relevant database referred to in subsection (a) of this section, nor shall any agency, in the future, enter into an agreement without including it in the relevant database.
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> SEC. ____. Ensuring Constitutional Use of Joint-Agency Enforcement Agreements. Within 120 days of this order, each agency or agency component, as appropriate, shall review its joint-agency enforcement agreements, and consistent with applicable law, identify agreements, or provisions thereof, that impinge Constitutional rights. Each agency shall provide an analysis to the Director of OMB (Director) stating why the identified joint-agency enforcement agreement, or provision, does not violate any Constitutional rights or interests. No agency shall retain in effect any joint-agency enforcement agreement, or provision, that is deemed to be in violation of the Constitution.

IV. Topic 5: What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?

A. Agencies should be required to apply the Federal Rules of Evidence in agency adjudications[26]

The Federal Rules of Evidence preserve basic fairness and consistency to "ascertain[] the truth and secur[e] a just determination."[27] Enacted in 1975, the Rules are a deliberate attempt by the Court and Congress to promote a system of justice that is both expedient and not unfairly prejudicial.

Depending on the controlling statute, the right to appeal an agency adjudication may be taken in either an appropriate federal District or Appellate Court. Regardless of where the appeal is taken,

[26] NCLA recommends that OMB seek additional comments regarding application of which Federal Rules of Civil Procedure should be applied to regulatory proceedings. Like the Rules of Evidence, the Federal Rules of Civil Procedure are aimed at securing just outcomes. *See* FED. R. CIV. P. 1. The Rules provide important protections for litigants including the right to certain disclosures (FED. R. CIV. P. 26), the ability to conduct discovery (FED. R. CIV. P. 26-37), limits on abusive discovery processes (FED. R. CIV. P. 30(a)(2)), and sanctions for behavior violating the Rules (FED. R. CIV. P. 11, 37).

[27] FED. R. EVID. 102.

the determinations of the agency, and to an extent the record on appeal, are subject to certain standards of review. An agency's factual findings are reviewed under the "substantial evidence" standard of review.[28] "At first glance, [the substantial evidence] standard makes sense—until one realizes that (if taken seriously) it preserves government decisions as long as they rest on at least some evidence, regardless of the weight of contrary evidence."[29] Similarly, ALJs' credibility determinations are also reviewed under heightened standards, such as "great deference."[30]

Under these heightened review standards, evidence that is typically precluded altogether under the Federal Rules of Evidence may remain in the record on appeal and may not be overturned or discounted by the appellate court on the basis that it does not meet the standards of the Federal Rules of Evidence, unjustly impacting the outcome of the appeal. For example, some agencies can pursue enforcement actions in either federal district court or an agency adjudication. The same defendant, charged with the same violation is afforded the protections of the Rules of Evidence in the federal court action, but would be denied the same protections before the agency. Such an outcome is manifestly unjust and may lead to greater use of agency adjudications.

B. NCLA's recommendations

NCLA recommends that agencies that conduct civil enforcement actions should be required to promulgate a final rule adopting the Federal Rules of Evidence in all formal agency adjudications.

V. Topic 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?

A. Agencies should be required to promulgate a binding rule that mandates the affirmative disclosure of material exculpatory evidence in agency enforcement actions and adjudications and provides for mandatory training of agency staff

In *Brady v. Maryland*, the Supreme Court first recognized that a defendant's due process rights are violated when a prosecutor fails to disclose material exculpatory evidence, evidence tending to show that a defendant is not guilty of a crime or punishment.[31] The *Brady* Court found that criminal

[28] *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150 (1999). The "substantial evidence" standard "originated as the measure for overturning jury verdicts" despite the fact that "an administrative agency is not a jury; indeed, it is usually one of the parties." Hamburger, *supra* note 4 at 311 n. h.

[29] Hamburger, *supra* note 4 at 311. The "substantial evidence" standard also "has the potential to provide another statutory avenue for deferential review." *Id.*

[30] *See, e.g.*, *Retlaw Broad. Co. v. N.L.R.B.*, 53 F.3d 1002, 1006 (9th Cir. 1995).

[31] *Brady v. Maryland*, 373 U.S.83 (1963).

defendants have a constitutional right to the disclosure of such evidence because "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[32] Since its adoption in 1963, the Court has modified the "*Brady* Rule" several times.[33] In its current construction, the Brady Rule places a constitutional duty on prosecutors and law enforcement agencies and officers to affirmatively disclose exculpatory evidence in the possession of the government, *i.e.*, *Brady* material.[34]

The *Brady* Court's premise that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair" is no less true when stated that "[s]ociety wins not only when the guilty are [found liable] but when [civil adjudications and trials] are fair."[35] The constitutional guarantees recognized by the *Brady* Court do not disappear because the process occurs in a criminal versus civil context. Moreover, as the Administrative State has grown, so too has use of civil enforcement by Executive Branch agencies. Civil enforcement actions can be just as coercive and abusive as criminal processes, particularly considering agencies' appetite to seek record judgments and fines. As Justice Gorsuch recently noted, "[o]urs is a world filled with more and more civil laws bearing more and more extravagant punishments. … Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies."[36]

In the era of multi-million,[37] and even billion,[38] dollar enforcement judgments, forfeiture provisions, and lifetime bars on an individual's ability to practice their chosen profession, the distinction between the consequences of criminal versus civil enforcement actions collapses.

Admittedly, some courts have found to the contrary and disallowed the *Brady* Rule in civil cases against the government. In those instances, the courts have mistakenly relied on the Federal Rules of Civil Procedure's broad discovery provisions to defeat the *Brady* Rule.[39] But as the Supreme

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[32] *Id.* at 87.

[33] *Brady Rule*, LEGAL INFORMATION INSTITUTE (last updated Oct. 2017), https://www.law.cornell.edu/wex/brady_rule.

[34] *See*, *e.g.*, U.S. Dept. of Justice, Justice Manual at 9-5.001 (Jan. 2020), *available at* https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings

[35] *Brady*, 373 U.S. at 87.

[36] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229, 200 L. Ed. 2d 549 (2018) (Gorsuch, J. concurring in part and concurring in judgment).

[37] Brief for New Civil Liberties Alliance as Amici Curiae Supporting Petitioners, *Liu, et al. v. Securities & Exchange Comm'n* at 4, No. 18-1501 (S. Ct. Dec. 23, 2019).

[38] Pet. for Writ of Cert. at 3, *AMG Capital Management, LLC v. Fed. Trade Comm'n*, No. 19-508 (S. Ct. Oct. 18, 2019).

[39] *See S.E.C. v. Pentagon Capital Mgmt. PLC*, No. 08 CIV. 3324, 2010 WL 4608681 (S.D.N.Y. Nov. 12, 2010) (denying motion to compel *Brady* and *Giglio* materials in SEC enforcement action "[i]n light of the right to conduct extensive

Court noted in *U.S. v. Bagley*, the *Brady* rule is one of disclosure, not one of discovery.[40] This point is further highlighted by the fact that the *Brady* Rule places an obligation on prosecutors to affirmatively disclose *Brady* materials regardless of whether a defendant requests such evidence. Additionally, because the *Brady* Rule applies to law enforcement broadly, and not just prosecutors themselves, prosecutors are required to look for exculpatory evidence in the possession of law enforcement. Without that obligation, civil enforcement attorneys may well never discover the exculpatory evidence in the first place.

On adopting the *Brady* Rule, Executive Branch agencies have a mixed record.[41] Only the U.S. Department of Transportation ("DOT") has adopted a final rule that wholly incorporates the *Brady* Rule.[42] Some agencies, like the FTC, Commodity Futures Trading Commission ("CFTC"), and the U.S. Department of Agriculture ("USDA") have rejected using the *Brady* Rule altogether.[43] Other agencies, like the FERC, have adopted official policies that implement the *Brady* Rule, but as policies, lack permanent and binding effect.[44]

The U.S. Securities and Exchange Commission ("SEC") provides a good example of the repercussions of agency refusal to adopt the *Brady* Rule because the SEC applies a variant of the *Brady* Rule in its administrative proceedings before the Commission.[45] The SEC is charged with enforcing federal securities laws. In carrying out its enforcement obligations, the SEC may bring a civil enforcement action in federal court or administrative proceedings before an ALJ. The SEC can also conduct joint investigations and enforcement with the DOJ. Under this scheme, an individual who

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pretrial discovery afforded defendants in SEC civil enforcement actions, and the extensive discovery that Defendants have been able to conduct in this proceeding"); *see also U.S. v. Sierra Pacific Industries*, 100 F.Supp.3d 948, 957-61 (reasoning that *Brady* is inapplicable when the civil action against the government is "strictly about money" and does not implicate "a potential loss of liberty" and noting that the Federal Rules of Civil Procedure provided a "constitutionally adequate process to mount an effective and meaningful defense").

[40] *U.S. v. Bagley*, 473 U.S. 667 (1985).

[41] Several agencies have voluntarily adopted variations of the Brady Rule in their civil enforcement actions. However, even in agencies that have adopted *Brady*-like rules and policies, they often fall short of the *Brady* Rule's constitutional guarantees.

[42] *See* 46 C.F.R. § 5.83.

[43] *See Allied Chemical Corp., et al.*, 75 F.T.C. 1055 (Jan. 30, 1969) (declining to apply *Brady* Rule in administrative proceedings); Commodity Futures Trading Commission Rule of Practice, 63 Fed. Reg. 5784, 55786 (Oct. 19, 1996) (declining to incorporate the *Brady* Rule into CFTC's Rules of Practice); *In Re: Miguel A. Machado & G. L. "Bud" Cozzi*, 42 Agric. Dec. 820 (U.S.D.A. June 24, 1983) (declining to apply the *Brady* Rule in administrative proceedings under the Packers and Stockyards Act).

[44] *See* Federal Energy Regulatory Commission, Policy Statement on Disclosure of Exculpatory Materials, 129 FERC ¶ 61,248 (Dec. 17, 2009) *available at* https://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf ("FERC Policy Statement").

[45] Rule 230 requires that, subject to certain limitations, a respondent has an automatic right to inspect and copy documents and precludes withholding "documents that contain material exculpatory evidence." *See* SEC RULES OF PRACTICE 230 (Sept. 2019).

violates federal securities laws is entitled to varying degrees of disclosure of *Brady* material by the government based on where the violation is litigated.

For example, if an individual has violated federal securities laws in a way that permits criminal or civil enforcement, and the government possesses material exculpatory evidence about that individual and their actions the disclosure of such information turns on the type of enforcement action taken. If the individual is facing criminal charges for the violation, the DOJ is required to affirmatively disclose *Brady* material under the Rule. If the individual is facing civil allegations in federal court for the violation, the SEC is not required to affirmatively disclose *Brady* material.[46] But if the individual is facing civil allegations in an SEC administrative proceeding for the violation, then, under its Rules of Practice, the SEC cannot withhold *Brady* material. But the SEC is not required to make an affirmative disclosure of such evidence either. The SEC is only required to make party documents available for copying and inspection—a cost paid by the defendant.

The FERC case against Powhatan Energy Fund, discussed *infra* at Section VI.A.1., also provides an example of how agency *Brady* Rule variants operate in enforcement proceedings. Pursuant to the FERC Policy Statement, counsel for Powhatan Energy Fund filed a request for *Brady* materials.[47] The Commission responded within a week of the request, and its response highlights the disparity between what a target of an agency investigation reasonably consider material exculpatory evidence and what the agency does. The FERC states that the request "misapprehend[s] the scope" of the FERC Policy Statement and that, upon the FERC's review, there are no materials required to be disclosed. [48] The agency then provided two subsequent responses to Powhatan Energy Fund's *Brady* request. In both responses, the FERC insists that the disclosures are not pursuant to the FERC Policy Statement but rather are consistent with "prior practice" and "appear to pertain to this matter." The first response authorized Powhatan Energy Fund to purchase deposition transcripts related to the investigation.[49] The second subsequent response included deposition exhibits, referrals to the FERC

[46] *See Pentagon Capital Mgmt.*, No. 08 CIV. 3324, 2010 WL 4608681, at *1 (S.D.N.Y. Nov. 12, 2010) ("In this district, the application of *Brady* to SEC enforcement actions has been flatly rejected.").

[47] Letter from William M. McSwain, Counsel for Powhatan Energy Fund LLC, et al. to Steven C. Tabackman, FERC Office of Enforcement, Division of Investigations (Aug. 27, 2014) *available at* http://ferclitigation.com/wp-content/uploads/8-27-14-correspondence-to-FERC-re-Brady-request-1.pdf (the request includes some eleven categories of documents).

[48] Letter from Steven C. Tabackman, FERC Office of Enforcement, Division of Investigations, et al. to William M. McSwain, Counsel for Powhatan Energy Fund LLC, et al. (Sept. 3, 2014) *available at* http://ferclitigation.com/wp-content/uploads/09.03.2014-ltr-to-08.27.2014-corresp-re-Brady.pdf (indicating that there are no *Brady* materials in the FERC's possession that require disclosure).

[49] Letter from Steven C. Tabackman, FERC Office of Enforcement, Division of Investigations, et al. to William M. McSwain, Counsel for Powhatan Energy Fund LLC, et al. (Sept. 5, 2014) *available at* http://ferclitigation.com/wp-content/uploads/Supplemental-Brady-Response-09-05-14.pdf.

Office of Enforcement, third-party discovery responses, and certain trade data.[50] It is unclear from public documents whether the information provided in the subsequent responses constitute *Brady* material or not. But it is clear from their descriptions that they were the types of documents that agency investigators should be affirmatively providing to targets of investigations so they can effectively respond to agency investigators and, if needed, mount a defense.[51]

B. Any reform or formal adoption of the *Brady* Rule should also require mandatory education and training for agency staff and ALJs

To ensure due process, it is not enough for agencies to adopt the *Brady* Rule. Agency personnel, including enforcement staff and ALJs, must also be trained on how to identify material exculpatory evidence, provide appropriate disclosures of such evidence, and determine appropriate remedies when *Brady* violations occur.

For example, in December 2019, during the discovery phase of an SEC administrative enforcement action—where the SEC's Rules of Practice preclude withholding material exculpatory evidence—NCLA litigation counsel questioned an SEC employee, who oversees the examination program for one of the SEC's regional offices, about their knowledge of and obligations under the *Brady* Rule.[52] The SEC employee did not understand that the SEC had adopted the *Brady* Rule.[53] Nor could the employee say with certainty whether the *Brady* Rule applied to them as an SEC examination employee.[54] The employee also was not aware of whether they had a disclosure obligation under the *Brady* Rule.[55] When asked whether the SEC employee received any training about his obligation under *Brady*, SEC counsel objected based on privilege and instructed the SEC employee not to answer the question.[56]

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[50] Letter from Steven C. Tabackman, FERC Office of Enforcement, Division of Investigations, et al. to William M. McSwain, Counsel for Powhatan Energy Fund LLC, et al. (Sept. 12, 2014) *available at* http://ferclitigation.com/wp-content/uploads/2014.09.12-Cover-Letter-PW.pdf.

[51] Later in the investigation, Powhatan Energy Fund was made aware of the fact that another trader had given FERC a phone recording that Powhatan Energy Fund believed included exculpatory evidence. *See* Expedited Mot. for a Two-Week Extension of Time (Jan. 27, 2015) *available at* http://ferclitigation.com/wp-content/uploads/20150127-503730096984-1-1.pdf. FERC denied that the call recording was exculpatory and disclosable under the FERC Policy Statement, but ultimately released the recording to Powhatan Energy Fund. *See* at 3-8, 10 (Jan. 29, 2015) *available at* http://ferclitigation.com/wp-content/uploads/FERC-OE-Answer-in-Opposition-to-Two-Week-Extension.pdf.

[52] Transcript of the Deposition of Bryan Mitchell Bennett, Volume I, *In the Matter of Raymond J. Lucia Cos., Inc., et al.* (SEC Admin. Proceeding No. 3-15006) (Dec. 5, 2019) (on file with author) (excerpt attached as Exhibit 1).

[53] *Id.* at 108:4–13

[54] *Id.*

[55] *Id.* at 108:14–17.

[56] *Id.* at 106:14–107:23

C. NCLA's recommendations

The due process owed to a defendant in civil enforcement actions should be guided by *Brady* and its progeny. It should not be subjected to the whims of agency enforcement staff. There is a clear need for a uniform rule requiring affirmative disclosure of material exculpatory evidence in civil enforcement actions because such a rule is necessary to safeguard due process. Agencies that conduct civil enforcement actions should be required to promulgate a final rule adopting the *Brady* Rule and mandating training for agency personnel to comply with the rule. The rule should also outline explicit consequences when an agency fails to follow *Brady* because nominally adopting a disclosure rule without consequences does not accomplish much. Such a rule would further the government's interest that justice be done and ensure additional protections for individuals subject to administrative enforcement actions.

NCLA recommends inclusion of the following section in a future executive order:

> SEC. ____. Ensuring Due Process and Adjudicatory Fairness through Affirmative Disclosure of Material Exculpatory Evidence. (a) Within 120 days of this order, each agency that conducts civil enforcement investigations or adjudications shall publish a rule of agency procedure governing the affirmative disclosure of material exculpatory evidence, as articulated in *Brady v. Maryland* and its progeny, in civil enforcement actions. At a minimum, the rule should (i) inform regulated entities of their right to the affirmative disclosure of material exculpatory evidence; (ii) inform regulated entities that they need not request such materials; (iii) require that such materials are disclosed as a matter of course; (iv) require that when such materials are disclosed, the agency must specifically identify that the documents being disclosed subject to the rule; and, (v) provide for appropriate remedies where a *Brady* violation has occurred.
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> (b) Once published, an agency must conduct enforcement investigations and adjudications in compliance with the rule.
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> (c) An agency that conducts civil enforcement investigations or adjudications shall provide training to agency staff, including enforcement personnel and administrative law judges ("ALJs"), regarding the agency's disclosure obligations under the rule.

VI. Topic 9: When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements? What safeguards would systemically prevent unfair and/or coercive resolutions?

A. In many instances, agency investigations and adjudications are inherently coercive

1. *Fed. Energy Reg. Comm'n v. Powhatan Energy Fund LLC, et al.*[57]

Powhatan Energy Fund, LLC is a private investment partnership that the Federal Energy Regulatory Commission ("FERC") alleges, along with a trader the company contracted, manipulated the energy market.[58] From FERC's first notice of investigation and document request to today, Powhatan Energy Fund has been under investigation or in active litigation with FERC for nearly 10 years.[59]

During this time, Kevin and Rich Gates, officers of Powhatan Energy Fund's managing member and identical twin brothers, did something remarkable for the target of an agency investigation—they published their own website and went public with information in an attempt to counter the harm that FERC caused to their business and personal relationships.[60] The Powhatan Energy Fund case is a good example of other damages, like personal and professional reputational harm or lost time and opportunities, that stem from agency investigations. These other harms can often be hard, if not impossible, to correct even when the investigatory target is ultimately found not liable. Similarly, there is little or no recompense for the harm caused by the agency's investigation.[61]

These harms are in addition to the actual costs of complying with and defending against agency investigations. The costs of defending oneself or one's company can be crippling, and the agencies know this. As Kevin Gates recounted to the *Wall Street Journal*, when his then-attorney conferred with FERC attorneys about possible resolution, his then-attorney "relate[d] what the FERC enforcement

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[57] *Fed. Energy Reg. Comm'n v. Powhatan Energy Fund LLC, et al.*, Case No. 3:15-cv-0452 (E.D. Va.).

[58] *Purpose of the Site*, FERC VS. POWHATAN ENERGY FUND, LLC, http://ferclitigation.com/ (last visited Mar. 11, 2020).

[59] Letter from W. Blair Hopkin, Attorney for FERC Office of Enforcement Division of Investigations to Lawrence S. Eiben, Sole Member of Managing Member Powhatan Energy Fund LLC (Aug. 18, 2010) *available at* http://ferclitigation.com/wp-content/uploads/0010-First-Data-Request-to-Powhatan-Energy-Fund-LLC.pdf ("Re: Document Preservation Directive and First Data Request to Powhatan Energy Fund LLC").

[60] FERC VS. POWHATAN ENERGY FUND, LLC, http://ferclitigation.com/ (last visited Mar. 11, 2020); *See also* Joseph Rago, *The Investors at War With Political Power*, WALL ST. J., (May 2, 2014, 6:45 pm ET), https://www.wsj.com/articles/the-weekend-interview-the-investors-at-war-with-political-power-1399061270?ns=prod/accounts-wsj.

[61] The Equal Access to Justice Act, 28 U.S.C. § 2412, and other federal provisions, provide some ability for parties to receive attorneys fees and costs if they substantially prevail.

team had proposed: 'Kevin's a businessman, isn't he? He knows it's cheaper to settle than it is to fight this investigation.'"[62]

In addition to tangible and intangible costs, agencies can also exert tremendous power and pressure on targets through their public relations mechanisms.[63] As stated before, "the process is the punishment." The agency in filing its Complaint and its allegations gets to pursue its narrative, while investigatory targets, like Powhatan Energy Fund LLC, must wait years to have the merits of their defenses determined by a neutral arbiter. In this instance, Powhatan Energy Fund decided it could not wait to get its story told and independently undertook an expansive strategy to counterbalance FERC's allegations.[64] Not every defendant can afford to do that. Moreover, targets of agency enforcement should not have to prove themselves innocent in the court of public opinion, while they wait for their rights to be vindicated by a neutral arbiter in an Article III court.

The Powhatan Energy Fund case provides ample evidence for the need to reform the coercive nature of the investigatory process.

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[62] *See* Rago, *supra* note 60.

[63] Like other agencies, including FERC, FTC routinely publishes press releases, Orders, and Judgments on its website that relate to their enforcement actions. Ostensibly, such information is provided to inform the public about the Commission's actions and consumer protection efforts. But if the purpose of putting out press releases and providing filings is about informing the public, the FTC has failed. For example, the U.S. Court of Appeals for the Seventh Circuit recently overturned the FTC's ability to seek restitution in certain enforcement actions. *See Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) (petitions for *writ of certiorari* at the U.S. Supreme Court have been filed and are pending (*see* Docket Nos. 19-825 and 19-914)). The FTC's Credit Bureau, LLC case page includes the District Court's Order and Judgment, a press release touting the FTC's District Court "win," and the Commission's Seventh Circuit and Supreme Court briefings. *See Credit Bureau Center, LLC (formerly known as MyScore LLC)*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/162-3120/credit-bureau-center-llc-formerly-known-myscore-llc (last visited Mar. 11, 2020). Curiously absent from the FTC's case page? The Seventh Circuit's opinion finding the FTC lacks the authority to seek equitable restitution and disgorgement.

[64] *See* Rago, *supra* note 60; *see also* Mat Kaiser, *If You have a FERC Problem, Maybe Don't Hire a FERC Lawyer*, ABOVE THE LAW (May 8, 2014, 10:15 am), https://abovethelaw.com/2014/05/if-you-have-a-ferc-problem-maybe-dont-hire-a-ferc-lawyer/?rf=1; *see also* Peter Kelly-Detwiler, *Not Going To Take It Anymore: Two Investors Battle Federal Energy Regulators in Public*, Forbes (May 20, 2014, 11:59 am), https://www.forbes.com/sites/peterdetwiler/2014/05/20/not-going-to-take-it-anymore-two-investors-battle-federal-energy-regulators-in-public/#630589664a3e. The Powhatan Energy Fund case also raises an interesting issue, familiar to administrative law attorneys, that is not necessarily obvious to the government or the public—the insular bar. The insular bar can best be described as the revolving door of agency enforcement attorneys into private practice where they then represent parties regulated by their former employer, and sometimes even return to a position with that same regulator. In Powhatan Energy Fund case, the Gates brothers had initially followed common wisdom and hired an attorney with extensive FERC experience. Dissatisfied with that attorney's services, the Gates brothers then hired an attorney who had little previous experience with FERC and helped created the more aggressive strategy of going public with the information about their case.

2. *The Law Offices of Crystal Moroney, P.C., v. Bureau of Consumer Financial Protection*[65]

CFPB has the capacity to use regulatory investigations to force businesses to the brink of insolvency, or otherwise to coerce Americans into resolutions or settlements, as the case of *The Law Offices of Crystal Moroney, P.C.*, discussed in Section II.A.2., illustrates.

Ms. Moroney's Law Firm is a small, woman-owned business employing fewer than 15 people. The costs of complying with and running a law firm under the CFPB's serial investigations is pushing her firm to the brink of insolvency. In addition to over $80,000 spent in fees and costs negotiating, complying with, and defending against the CFPB's serial investigations, Ms. Moroney has devoted large portions of her workday responding to the CFPB's initial investigation. Since the First CID, Ms. Moroney's Law Firm reduced staffing by 47%, and Ms. Moroney has reduced her own salary by over $50,000. The serial investigations have also hampered Ms. Moroney's Law Firm's ability to make real estate decisions (*e.g.*, after eight years under lease, the Firm now rents month-to-month at a higher cost to avoid a long-term commitment), capital investments (*e.g.*, replacing aging technology would be pointless if the practice is forced to close), or to develop new business. If the CFPB's serial investigations continue unabated, Ms. Moroney's Law Firm may be forced to close. Meanwhile, the firm works inefficiently.

B. NCLA's recommendations

The issues that arise in relation to Topic 1, regarding prolonged investigations, are inherently related to Topic 9, regarding the coercive nature of regulatory investigations and adjudications. To that end, NCLA highlights the examples above, but directs OMB to its recommendations in Section II.B. *supra* as responsive to the problems raised by Topic 9.

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

A. Agencies already afford too few process rights in adjudications

Agencies tasked with adjudicating a person's past and present rights and liabilities under the law must provide adequate notice and full procedural protections except when informal proceedings are allowed by law. Only in extraordinary circumstances will an exigency justify fewer procedural safeguards.

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[65] *See*, *supra* Section II.A.2. for further discussion of *The Law Offices of Crystal Moroney, P.C., v. Bureau of Consumer Financial Protection*, Case No. 7:19-cv-11594.

Several agencies[66] already afford too few procedural safeguards, in a departure from the original understanding of the APA's on-the-record hearing requirement.[67] We know from Supreme Court precedent predating the APA that a statute that requires an agency to hold a "full hearing" confers on participants "the privilege of introducing testimony" and requires the agency to base its decision on the facts adduced at the hearing.[68] A "full hearing" protects "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."[69] Providing fewer procedural safeguards would run counter to "the cherished judicial tradition embodying the basic concepts of fair play."[70] The APA then enumerated certain trial-like procedural safeguards that agencies must include "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[71]

A year after the APA's passage, then-Attorney General (soon-to-be-Justice) Tom Clark confirmed the public understanding that the APA required formal hearings in adjudications: "The legislative history [of the APA] makes clear" that an on-the-record hearing is required by statute when "Congress has [] specifically required a hearing to be held."[72] By contrast, a hearing may be informal—and need not be on the record—when the statutory authorization to hold a hearing is permissive.[73] For instance, a statute permitting "such hearings as may be deemed necessary" does not implicate the process requirements that attach in a formal adjudicatory proceeding.[74] But an order that requires "notice and full hearing" would require a formal adjudication.[75] Based on this legislative design and

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[66] *See, e.g.*, 29 C.F.R. § 6.1 *et seq.* (permitting informal enforcement adjudications in the Department of Labor under the Service Contract Act, Davis Bacon Act and related Prevailing Wage Statutes, the Copeland Act, and the Contract Work Hours and Safety Standards Act); *see also* Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,900 (May 15, 2000) (permitting informal adjudications by the Environmental Protection Agency when statute calls for a "public hearing"); Amendments to Streamline the NPDES Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,276 (Dec. 11, 1996) (same).

[67] 5 U.S.C. § 554.

[68] *ICC v. Louisville & Nash. Ry. Co.*, 227 U.S. 88, 91 (1913); *see also Londoner v. City & Cty. of Denver*, 210 U.S. 373, 386 (1908) (holding that, when a hearing is required in a proceeding for taxation, due process of law required "the right to support [] allegations by argument, however brief" – not merely "an opportunity . . . to submit in writing all objections to and complaints of the tax to the board").

[69] *Morgan v. U.S.*, 304 U.S. 1, 19 (1938).

[70] *Id.* at 22.

[71] *See* 5 U.S.C. § 554; *see also* 5 U.S.C. § 551(7) (defining adjudication as an "agency process for the formulation of an order").

[72] *Attorney General's Manual on the Administrative Procedures Act*, at 41 (1947).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 42. The words "on the record" need not appear in the statute to make such a hearing mandatory. For instance, an agency's authority to deny or revoke a license "after notice and opportunity for hearing" must be done through a formal adjudicatory hearing regardless of whether the statute includes the words "on the record" because "such a requirement is clearly implied in the provision for judicial review of these orders in the circuit courts of appeal." *Id.* at 41. *See also Steadman v. S.E.C.*, 450 U.S. 91, 96 n.13 (1981) (reasoning that on-the-record hearing was required implicitly by provision subjecting the agency's decision to substantial-evidence review; "[o]therwise effective review by the Court of

the Attorney General's pronouncements, the original public understanding would have been that the APA created a presumption that an agency's adjudicatory orders must be based on the evidentiary record adduced at a formal hearing.[76]

In a seminal case interpreting the APA, the Supreme Court applied this understanding and ruled that the APA required formal processes in any adjudicatory hearing "held by compulsion."[77] The Court reasoned that language limiting such hearings to those "required by statute" exempted "only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation[.]"[78] This reading of the APA was consistent with the judiciary's "plain duty" to construe the APA "to eliminate, so far as its text permits, the practices it condemns"—a lack of procedural uniformity and the consolidation of prosecutorial and judicial powers.[79] Accordingly, the APA's formal-hearing mandate applies whenever constitutional due-process rights so require—even when the statute at issue does not explicitly require a hearing.[80] Moreover, the Due Process Clause may require a formal hearing even absent a statute requiring a formal hearing.[81]

Despite this precedent and historical understanding, agencies have continuously chipped away at the protection rights due to participants in adjudications.[82] This should come as no surprise: "administrative agencies work through formal proceedings where they must, but always seek

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Appeals would have been frustrated."); *Marathon Oil Co. v. E.P.A.*, 564 F.2d 1253, 1261 (9th Cir. 1977) ("[W]hether the formal adjudicatory hearing provisions of the APA apply to specific administrative processes does not rest on the presence or absence of the magical phrase 'on the record.' Absent congressional intent to the contrary, it rests on the substantive character of the proceedings involved.").

[76] *Id.* "[I]t is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing." *Id.* (citing the congressional record). But the language, context, or history of a specific statute may "indicate[] a contrary congressional intent." *Id.* at 42-43.

[77] *Yang Sun v. McGrath*, 339 U.S. 33, 50 (1950). Shortly after the Court's decision in *Yang Sung*, Congress passed legislation superseding the Court's decision insofar as it held that the APA applied to deportation proceedings. *See Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (recognizing that, following *Yang Sung*, Congress expressly exempted immigration proceedings from the APA).

[78] *Yang Sun v. McGrath*, 339 U.S. 33, 50 (1950).

[79] *Id.* at 41-45.

[80] *Id.* at 49.

[81] *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 936 (9th Cir. 1998) (formal hearing required by Due Process Clause in absence of statute requiring formal hearing); *Greene v. Babbitt*, 64 F.3d 1266, 1275 (9th Cir. 1995) (holding that due-process rights required the Department of Interior to provide "far more procedural protections than the informal procedures used by the Department of Interior in denying [] tribal recognition"); *see also Yang Sun*, 339 U.S. at 49 ("The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.").

[82] *See, e.g.*, *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.2d 12 (1st Cir. 2006) (applying *Brand X* deference to an agency's position that informal hearings were sufficient despite circuit precedent to the contrary), *abrogating Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978) ("We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record. The legislative history of the APA and its treatment in the courts bears us out.").

loopholes, and find informal adjudication easier."[83] For instance, the Federal Communications Commission ("FCC") is currently considering a rule that would forgo the formal hearings required by statute in several circumstances.[84] NCLA has filed a comment with FCC urging the agency protect the process rights due to the participants in those hearings.[85]

Given that agencies are willing to eschew formal hearings in the name of expediency on their own initiative, an executive order permitting agencies to do so in "exigent" circumstances must be crafted carefully to avoid being seen by agencies as permission to further deplete the process rights due in agency adjudications.[86] The courts will tolerate diminished process rights "only in 'extraordinary situations where some valid governmental interest is at stake that justified postponing the hearing until after the event.'"[87] Examples of these extraordinary situations include protecting against the immediate risk of serious bodily harm[88] and circumstances in which notice and the opportunity for a full hearing might frustrate the purpose of the hearing.[89]

Agencies should apply the balancing approach that the Supreme Court developed to determine whether a particular exigency justifies diminishing the process rights otherwise due, by weighing the private interests affected by the agency's action; the increased risk that the diminished procedural safeguards will lead to erroneous deprivation of the private interests; and "the Government's interest, including the administrative burden that additional procedural requirements would impose."[90] The increased risk of erroneous deprivation is particularly stark in the agency context given the inherent biases when an agency is both the prosecutor and adjudicator.[91]

To ensure against the arbitrary deprivation of liberty or property, this balancing should be done on a case-by-case basis—not a generally applicable rulemaking—and subject to judicial review.

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[83] Hamburger, *supra* note 4 at 256.

[84] *Procedural Streamlining of Administrative Hearings*, 84 Fed. Reg. 53355 (FCC Doc. No. 2019-20568).

[85] NCLA Comments in Response to FCC's Proposed Regulation: Procedural Streamlining of Administrative Hearings (filed Nov. 6, 2019), *available at* https://nclalegal.org/wp-content/uploads/2020/03/2019-11-06-FCC-Hearing-Streamlining-Public-Comment-NCLA.pdf

[86] *U.S. v. Good*, 510 U.S. 43, 80-81 (1993) (Thomas, J., concurring in part) (explaining that the Court's due-process ruling in *Good* was motivated by a "distrust of the Government's aggressive use of broad civil forfeiture statutes" that don't afford due-process rights).

[87] *Good*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)).

[88] *Grayden v. Rhodes*, 345 F.3d 1225, 1237 (11th Cir. 2003); *Flatford v. City of Monroe*, 17 F.3d 162, 167 (6th Cir. 1994).

[89] *See, e.g.*, *Good*, 510 U.S. at 52-53 (reasoning that a yacht is the type of property that the owner could abscond with if given advanced notice of a hearing).

[90] *Good*, 510 U.S. at 44 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[91] Hamburger, *supra* note 4 at 256 ("Informal adjudications … are utterly summary, without even the pretense of dispassionate adjudicators and proceedings."). *Cf. Good*, 510 U.S. at 55 (reasoning that the lacking procedural safeguards in *ex parte* seizure procedures "creates an unacceptable risk of error" given that "the Government has a direct pecuniary interest in the outcome of the proceeding").

And the government must bear the burden of that the exigency exists and warrants fewer procedural protections.[92] Further, when an exigency does justify diminished process, the agency should still provide notice prior to an informal hearing[93] and promptly hold a full hearing once the exigent circumstance has passed.[94]

B. NCLA's recommendations

NCLA recommends the inclusion of the following section in an executive order relating to the procedural protections that agencies must afford:

> SEC. ____. Ensuring Due Process in Adjudicatory Hearings. (a) Within 120 days of this order, each agency that is required by statute to hold adjudicatory hearings shall publish a rule of agency procedure that requires the agency to hold a formal hearing with the full panoply of due-process rights unless Congress has explicitly permitted the agency to hold an informal hearing and holding an informal hearing would not violate the Due Process Clause.
>
> (b) If exigency warrants fewer procedural safeguards in a particular circumstance, the Government must prove the existence of such circumstances and the necessity for an informal hearing on a case-by-case basis, subject to post-deprivation judicial review. (i) For the purposes of this subsection, the quasi-judicial officer should balance: (A) the private interest affected by the official outcome; (B) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and, (C) the Government's interest, including the administrative burden that additional procedural requirements would impose.
>
> (c) Once an exigency has passed, if one was found to exist, the agency must provide full process rights.

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[92] *See, e.g.*, *U.S. v. 429 S. Main St.*, 52 F.3d 1416, 1421 (6th Cir. 1995).

[93] *See, e.g.*, *Batten v. Gomez*, 324 F.3d 288, 295 (4th Cir. 2003).

[94] *See, e.g.*, *Romero v. Brown*, 937 F.3d 514, 522 (5th Cir. 2019); *Spinelli v. City of N.Y.*, 579 F.3d 160, 175 (2d Cir. 2009).

Exhibit 1

Respondent's Exhibit 9 was produced to the respondents?

A. That's my belief, yes.

Q. And it was not previously disclosed to the respondents?

MR. BLAU: Objection. Lack of foundation. You can answer if you know.

A. Not that I know of.

Q. Okay. You understand that as an employee of the Securities and Exchange Commission, you have an obligation under a case called Brady versus Maryland; is that right?

MR. BLAU: Objection. I'm very confused about all this because we're dealing with examination staff here not enforcement staff.

Q. You are an employee of the Securities and Exchange Commission; is that right?

A. Yes.

Q. You are familiar with your obligations under a case called Brady versus Maryland; is that correct?

A. As a lawyer, I'm generally aware of Brady rights, but as my roles being employee of the SEC generally doesn't come up in the examination context.

Q. This isn't something you've discussed as a member of the SEC or as an employee of the SEC?

MR. BLAU: I'm going to object on grounds of privilege and instruct you not to answer.

Q. Is this something that you have discussed not in your capacity as a client of the Division of Enforcement, but as your capacity as an employee of the SEC?

MR. BLAU: I'm going to object. Same objection.

MR. KRUCKENBERG: Are you instructing your witness not to answer the question?

MR. BLAU: Correct.

BY MR. KRUCKENBERG:

Q. Have you ever received training on your obligations under Brady versus Maryland?

MR. BLAU: Again, I'm going to object. Same instruction.

MR. KRUCKENBERG: So your position, Mr. Blau, is that he is not allowed to say whether he's been trained on his obligations to disclose exculpatory evidence to respondents?

MR. BLAU: This is -- yeah. That is correct in that we're not dealing with exculpatory evidence here and --

MR. KRUCKENBERG: I'm not asking you to -- I'm

not asking you to explain.

MR. BLAU: And the deponent --

MR. KRUCKENBERG: I'm just asking you --

MR. BLAU: Well, I'm stating the basis. The deponent is a member of the examination staff not the enforcement staff. He was not involved in an enforcement action or in a litigation, in terms of -- he wasn't involved in conducting a litigation. And so, these questions are irrelevant. And to the extent that you're asking him for legal advice that he has received from the commission and its attorneys, then that is privileged.

MR. KRUCKENBERG: I'm not asking you to tell me any legal advice you've received. Have you been trained in your status as an employee of Securities and Exchange Commission on your obligation under Brady versus Maryland?

MR. BLAU: I'm objecting. Same instruction not to answer.

BY MR. KRUCKENBERG:

Q. And you are refusing to answer that question?

A. Per instruction from Counsel, yes.

Q. Okay. You understand that the Securities and Exchange Commission has adopted the standard of

Brady versus Maryland for commission staff; is that right?

A. Can you repeat that?

Q. You understand that the Securities and Exchange Commission has adopted the standard announced in Brady versus Maryland, as being applicable to Securities and Exchange Commission staff; is that right?

A. I'm not sure I can honestly say that. It just does not come up in examination context.

Q. Are you aware one way or the other whether that is applicable to you?

A. With certainty, no.

Q. So, as we sit here today, you do not know if you have an obligation under Brady versus Maryland; is that true?

A. True.

Q. Okay. You understand as based on your training as a lawyer, that standard in Brady versus Maryland requires certain people to disclose exculpatory evidence to criminal defendants, right?

A. Right.

Q. And that is evidence that tends to negate an element of a criminal case against someone, right?