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Administrative Enforcement Reforms Continue

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The current Administration has focused on reforming federal administrative agency enforcement by emphasizing transparency, due process, and fair notice. The concepts of due process and fair notice are well-established legal precepts, and they are critical to the regulated community. For a variety of reasons, however, administrative agencies may not be consistently adhering to these obligations in practice. Efforts that began with Executive Orders last year continue in 2020 with a recent Office of Management and Budget (OMB) **request for comments** on improving enforcement processes. Oil and gas industry trade groups and individual operators should take advantage of the OMB's request for comments to improve enforcement processes at many federal agencies, including the Pipeline and Hazardous Materials Safety Administration (PHMSA). Comments are due by March 16, 2020.

On January 30, 2020, the OMB, a component of the Executive Office of the President, issued a **request for comments** titled, "*Improving and Reforming Regulatory Enforcement and Adjudication*." OMB's fundamental concern is due process for the targets of agency investigations and enforcement actions, and that concern is reflected in the wide variety of topics on which OMB is requesting comment. This new effort from OMB builds on the **recent Executive Order**, "*Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*."

As the title suggests, OMB's primary goal is to gather input on procedural reforms to both formal and informal agency adjudications and pre-adjudication enforcement protections. A few of the topics on which OMB is seeking comment and the types of questions posed include:

1. Investigations: What ensures speedy and fair investigations? What prevents prolonged, drawn-out investigations? Must an agency "show cause" at some point to keep investigating?

2. Burden of Proof: Do administrative adjudications effectively put the burden of proof on the defendant to show her innocence? How could this problem be solved?

3. Evidence: Many agencies do not use formal or extensive rules of evidence in their administrative enforcement cases. Should they? Should agencies use something like the Federal Rules of Evidence used by federal courts?

4. Disclosures: Do or should agencies routinely turn over all exculpatory evidence to administrative defendants? When should that disclosure be required automatically?

5. Impartiality: Administrative actions are often decided by agency personnel or administrative law judges embedded in the agency. Are these decision-makers sufficiently independent and impartial? Or does their position make them lean too much in favor of the agency? What would be needed to make these decision-makers impartial?

6. Penalties: Agencies can impose monetary penalties through administrative enforcement. Are they transparent in how they determine the penalty amount? Are penalties fair and proportionate to the offense? Do agencies set penalties in a consistent manner?

The input OMB gathers might influence changes at many federal agencies, including PHMSA's Office of Pipeline Safety (OPS). Along these same lines, the Department of Transportation (DOT) recently ***updated its general enforcement procedures*** to ensure fairness and due process for regulated entities by codifying existing 2018 and 2019 policy documents on those topics. These new DOT rules are applicable to PHMSA, although OPS has not updated its more specific rules or guidance for administrative enforcement of the Pipeline Safety Act and the 49 C.F.R. Part 190 rules. The combined effect of the Executive Order, the DOT procedural rules, and the OMB process might catalyze a hard look at its practices.

Please contact the Troutman Sanders' Pipeline Practice group if you are interested in learning more about OMB's process or if we can assist you in preparing comments.