

October 28, 2020

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

Dear Director Vought,

The undersigned write in support of [Executive Order 13,892](#), “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.”¹ Section 10 of the Order (“Section 10”) requires that by April 6, 2020, agencies were to have submitted to the President and posted on their websites a report demonstrating that their “enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act.” So far, however, only a few have done so. We applaud OMB’s [efforts](#) to ensure businesses are afforded due process and treated fairly in administrative enforcement proceedings² and urge you to hold federal agencies accountable to the reporting requirement of Section 10.

Small businesses are the lifeblood of a free and prosperous economy. They spark innovation, drive competition, and provide jobs for millions of Americans. In these extraordinary times, small businesses are essential to the nation’s economic resilience and recovery from the hardships created by the COVID-19 pandemic. Indeed, the President issued another [executive order](#) earlier this year reaffirming this Administration’s commitment to fairness in administrative enforcement and adjudication, among other things, to “give businesses, especially small businesses, the confidence they need to re-open[.]”³

Congress passed the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) to ensure compliance with federal regulations is not overly burdensome on small business. But in practice, agency investigative and enforcement powers are prone to abuse. For example, agencies commonly issue civil investigative demands (“CID”) that are broad in scope and require businesses to respond with vast amounts of electronically stored information in specific formats.⁴ This process can be extensive and prohibitively expensive, exhausting a business’s resources, even before a penalty is assessed or liability found. This is especially true for small businesses. In some cases, an agency’s overaggressive enforcement actions can be the death knell for a small business, shuttering it before compliance could ever be achieved or liability determined.⁵

¹ Exec. Order 13892, 84 C.F.R. 55239 (2019).

² See OMB, Improving or Reforming Regulatory Enforcement or Adjudication, 85 FR 5483 (2020).

³ Exec. Order 13924, 85 C.F.R. 31353 (2020).

⁴ See ABA Presidential Transition Report at 28; Letter from Michael Pepson, Regulatory Counsel, Americans for Prosperity Foundation, to Russell T. Vought, Acting Director, OMB (Mar. 16, 2020).

⁵ For particularly compelling examples of real-world victims of agency investigative and enforcement abuse, see Rhea Lana Riner, *Franz Kafka in Footie Pajamas: My Consignment Company For Secondhand Children’s Cloths Has Somehow Run Afoul of Federal Regulators*, WALL STREET JOURNAL (Oct. 30, 2015), <https://on.wsj.com/338dFLC>; Dune Lawrence, *A Leak Wounded This Company. Fighting the Feds Finished It Off*, BLOOMBERG BUSINESSWEEK (Apr. 25, 2016),

Section 10 requires agencies to report to the President, and post for the public, what measures they are taking to ensure their enforcement activities are transparent and treat small businesses fairly, as SBREFA directs. These reports would be beneficial to the agencies that produce them and the parties they regulate. The exercise of assessing enforcement and investigative activities for SBREFA compliance will reinforce agencies' commitment to treating small businesses fairly and highlight opportunities for improvement. Additionally, the reports will increase transparency, serve as a resource for small businesses to better understand civil enforcement and investigative processes, and facilitate compliance.

The Section 10 reports were due April 6, 2020. Now, more than six months after the deadline, it appears only nine agencies have produced the report: Environmental Protection Agency, Federal Communications Commission, Federal Election Commission, Federal Energy Regulatory Commission, Federal Mine Safety and Health Review Commission, Merit Systems Protection Board, Nuclear Regulatory Commission, Pension Benefit Guarantee Corporation, and Surface Transportation Board.⁶

Federal agencies should be held to the same standards of compliance to which they hold regulated parties, at the very least. These agencies should not be allowed to disregard their own reporting requirements while, at the same time, weaponizing CIDs against businesses and refusing to accommodate smaller entities whose limited resources make compliance costs prohibitive.

Overly burdensome regulations and unreasonable enforcement activities should not be barriers to economic prosperity for American businesses and individuals. We urge you to hold

<https://bloom.bg/3aMLfJS>; Jon Hill, *CFPB Won't Ditch Another Doc Demand Over Constitutionality*, LAW360 (Feb. 21, 2020), <https://www.law360.com/articles/1243155>.

⁶ See Federal Energy Regulatory Comm'n, *Section 10 of Executive Order No. 13892: FERC's Compliance with Section 223 of the Small Business Regulatory Enforcement Fairness Act*, <https://www.ferc.gov/sites/default/files/2020-05/small-business-fairness-act.pdf>; Federal Mine Safety & Health Review Comm'n, *Report of SBREFA Compliance Under Executive Order 13,892*, <https://www.fmsihrc.gov/sites/default/files/Report%20of%20SBREFA%20Compliance%20Under%20Executive%20Order%2013892.pdf>; U.S. Merit Systems Protection Bd., *Small Business Regulatory Enforcement Fairness Act Compliance Report*, https://www.mspb.gov/guidance/files/Small_Business_Regulatory_Enforcement_Fairness_Act_Compliance_Report.pdf; FCC, *Response to Section 10 of Executive Order 13892*, <https://www.fcc.gov/sites/default/files/ocbo-04062020.pdf>; Surface Transp. Bd., *Report on Compliance with the Small Business Regulatory Enforcement Fairness Act of 1996*, <https://prod.stb.gov/wp-content/uploads/STB-EO-13892-SBREFA-Report-April-6-2020.pdf>; Nuclear Regulatory Comm'n, <https://www.nrc.gov/docs/ML2003/ML20037A918.pdf>; FEC, *Report of the Federal Election Commission on Compliance with the Small Business Regulatory Enforcement Fairness Act of 1996, as Required by Executive Order 13892*, https://www.fec.gov/resources/cms-content/documents/fec_report_sbrefa_compliance_eo-13892.pdf; EPA, *Report to the President Demonstrating that the U.S. Environmental Protection Agency's Civil Administrative Enforcement Activities, Investigations, and Other Actions Comply With the Small Business Regulatory Enforcement Fairness Act of 1996, Including Section 223 of the Act*, <https://www.epa.gov/sites/production/files/2020-04/documents/eos13892brefareportandattachment.pdf>; Pension Benefit Guarantee Corporation, *Small Business Regulatory Enforcement Fairness Act (SBREFA) Compliance Report*, <https://www.pbgc.gov/sites/default/files/2020-small-business-regulatory-enforcement-fairness-act-compliance-report.pdf>. This assessment is based on review of the [Federal Register](#) and [public searches of federal websites](#).

agencies accountable to the reporting requirement of Section 10 of Executive Order 13892, and we stand ready to work with you to ensure small businesses are treated fairly in civil administrative enforcement and adjudication.

Sincerely,

Americans for Prosperity
The Libre Initiative
American Consumer Institute
The Buckeye Institute
Cause of Action Institute
Center for a Free Economy
Center for Freedom and Prosperity
Civitas Institute
Competitive Enterprise Institute
Consumer Action for a Strong Economy
FreedomWorks
Institute for Energy Research
Institute for Liberty
Less Government
Mississippi Center for Public Policy
National Federation for Independent Business
National Taxpayers Union
Rio Grande Foundation
Secure America's Future Economy
Small Business & Entrepreneurship Council
Tea Party Patriots Action
60 Plus Association