UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of SCOTTSDALE CAPITAL ADVISORS CORPORATION, JOHN J. HURRY, TIMOTHY B. DIBLASI, and D. MICHAEL CRUZ For Review of Disciplinary Action Taken by FINRA	File No. 3-18612

PETITIONERS' MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY

I. INTRODUCTION

Petitioners John J. Hurry, D. Michael Cruz, and Scottsdale Capital Advisors Corp. respectfully submit this motion for leave to submit supplemental authority pursuant to Rule of Practice 154. This application stems from Executive Order 13,924, issued by the President on May 19, 2020 and titled *Executive Order on Regulatory Relief to Support Economic Recovery*. Exec. Order No. 13,924, 85 Fed. Reg. 31,353 (May 22, 2020) (Exhibit 1). On August 31, 2020, the Administrator of the Office of Information and Regulatory Affairs ("OIRA") issued an official memorandum regarding the implementation of Executive Order 13,924. Memorandum for the Deputy Secretaries of Executive Departments and Agencies Relating to Implementation of Section 6 of Executive Order 13,924 (Aug. 31, 2020) ("Ray Memorandum"), *available at* https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf (Exhibit 2).[1]

The Ray Memorandum was issued pursuant to the directive of the President that "heads of all agencies" should "revise their procedures and practices" in light of "principles of fairness in administrative enforcement and adjudication," with the overarching goal of providing regulatory "relief" to facilitate the growth and development of businesses and promote the country's economic recovery. Exec. Order 13,924, § 6, 85 Fed. Reg. at 31,355. To inform the review by agencies, and guide their revisions of their procedures, the Ray Memorandum provides agencies with a discussion of fundamental precepts and "best practices." Ray Memorandum at 1–5. A number of the practices highlighted in the Ray Memorandum are

[1] The Commission may take official notice of both documents. *See* 17 C.F.R. § 201.323; *In the Matter of Gregory Reyftmann*, Release No. 1233, 2018 WL 722362, at *2 (Feb. 6, 2018) (taking official notice of "relevant public government records" under Rule of Practice 323); *cf. Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2, 69 n.6 (D.D.C. 2019) (explaining that "judicial notice may be taken of government documents available from reliable sources," and taking judicial notice of Executive Order and Presidential memorandum).

precisely implicated in this proceeding, *see, e.g.*, Opening Br. for Appeal of John J. Hurry at 4–9, 18–25, 31–32, and are presumably being evaluated by the Commission as it conducts the review directed by the Executive Order. The Commission should apply those same principles as it resolves this proceeding, abjuring FINRA's unfair and destructive approach of "regulation by enforcement," its deployment of shifting arguments and unasserted claims, and the imposition of disproportionate sanctions.

II. ARGUMENT

1. Critical and Applicable Considerations Emphasized in the Memorandum

a. Liability Should Be Imposed Only for Charged Violations of Statutes or Regulations

Integral to the appeal of this case, and in particular the issues relating to Mr. Hurry, is FINRA's shift of theory, during the course of the proceeding, from an argument predicated on purported violations of Section 5 to the contention relied on by the NAC, *i.e.*, that Mr. Hurry's formation of a foreign firm somehow constituted "unethical" conduct. It was FINRA's construction and use of its new theory that caused the Commission to grant to Mr. Hurry the "extraordinary remedy" of a stay pending appeal because Mr. Hurry "had at least raised serious legal questions" as to "whether FINRA provided him with fair notice of the allegation forming the basis of its finding that he violated Rule 2010." *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 34-83783, 2018 WL 3738189, at *2 (Aug. 6, 2018). As stated by the Commission, "the Rule 2010 charge was premised on Hurry's alleged underlying violation of Section 5—a violation that *FINRA now admits Hurry did not commit*." *Id.* at *3 (emphasis added). The fact that the NAC found him liable based on a different "basis that appears not to have been alleged in the complaint is a serious legal question going to the merits." *Id.*

The Ray Memorandum explicitly directs agencies to consider and apply principles of fair notice, stating that the document initiating an enforcement action should include "an explanation as to how the asserted conduct is prohibited by the cited statute and regulation," and that "[a]gencies should review their procedures for adjudication to ensure that liability is imposed only after notice and an opportunity to respond." Ray Memorandum at 4. Application of those directives in this case plainly supports the view that the agency should have been held to its charging theory and that FINRA's use of its new theory to obtain an industry bar of an individual with no prior disciplinary history was patently improper.

FINRA's assertions regarding the other Petitioners were also unprecedented or even directly contrary to law, constructed and then combined by FINRA to support its claims of violations of Section 5 or failure to supervise. To the contrary, abundant evidence confirmed that Scottsdale established and implemented a deposit review process to address the issues regarding registration and relevant exemptions. FINRA could not and did not establish that Scottsdale failed to compile and analyze the relevant information concerning each transaction. The evidence was also clear that its review process was effective: roughly half of the proposed deposits failed to survive Scottsdale's scrutiny and were rejected. Nonetheless, FINRA dissected the materials received by Alpine and insisted that any flaw in the paperwork established a failure of diligence rather than a different but reasonable conclusion by the firm. That approach was combined with plainly erroneous legal assertions, *e.g.*, that underlying notes were not securities, and that the broker-dealer exemption under Section 4(a)(4) was unavailable. It then sought disproportionate sanctions, yet another violation of the principles espoused in the Ray Memorandum. And all of FINRA's strained claims were pressed in the complete absence of any evidence that *any* of the transactions at issue actually presented a violation of Section 5.

b. Agencies Should Consider Applying the Rule of Lenity

The due process issues were compounded in this case because not only did FINRA shift to an uncharged theory of liability but also there had been no fair notice that FINRA's newly concocted theory even existed. No statute or regulation prohibits the formation and affiliation with a foreign financial firm and no precedent existed for the idea that a properly formed business would be considered *a priori* an unethical endeavor. There had never been any guidance, ruling or even suggestion that multi-national businesses were engaged in improper conduct simply because the corporate structure included foreign businesses and, in fact, the establishment of a vertically integrated structure, including both foreign and domestic entities, is a common and successful business model of everything from technology companies to financial firms. FINRA's notion that the formation of and acceptance of business from a foreign affiliate is "unethical" is not only unsupported, it is pedantic and antithetical to modern business development and combinations. Nor was there any evidence presented to support the claim that the involvement of the foreign firm in any way diminished the regulatory obligations of Scottsdale; in fact, the evidence made clear that it did not. Under those circumstances, the obvious and substantial question whether Rule 2010 could possibly prohibit the formation and integration of a related business must be resolved "in favor of the targeted party." Ray Memorandum at 2.

c. Agencies Should Apply Fundamental and Well-Grounded Rules of Evidence in Proceedings

The decision on appeal relied heavily on the admission of the on-the-record ("OTR") testimony of Gregory Ruzicka. *At no time* did Petitioners have the opportunity to cross-examine him. The introduction of that testimony, and the heavy reliance on it by the Hearing Panel and the NAC as the basis for liability and imposition of the most severe of penalties, was violative of

foundational concepts of the right to confront and cross-examine. And here, the use of that OTR testimony was an even greater affront to principles of fairness because the NAC then refused to consider the clear and startling evidence of that witness's mental unfitness.

This precise issue is addressed in the Ray Memorandum, with agencies being directed to adopt or amend rules of evidence "to eliminate unfair prejudice" and "reduce the use of hearsay evidence." Ray Memorandum at 3. Given those principles, the Commission should reject the use of inadmissible, unchallenged and unreliable evidence in this case and reverse the NAC's decision.

III. CONCLUSION

In relation to at least three separate and substantial issues in the pending appeal, the Commission has now been directed to review and revise its procedures in light of principles of fairness, and in accordance with the goal of regulatory relief to support economic recovery. Implementation of the principles discussed in the Ray Memorandum could well lead the Commission to issue rules that would expressly prohibit the conduct at issue here, including the assertion of an uncharged basis for liability; prosecution based on an unprecedented and insupportable theory that the formation of a foreign firm can constitute unethical conduct; and the use of the OTR testimony of an unfit and unreliable witness as the basis for those shifting theories of liability and imposition of the harshest of sanctions. In the interim, consideration of those same essential precepts, and the underlying goal of stimulating economic growth, provides further support for the Commission's reversal of the NAC's decision. Petitioners respectfully request that the Commission grant this motion and consider the supplemental authority filed herewith in its review of Petitioners' application.

Dated: October 15, 2020

Respectfully submitted,

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By: */s/ Kevin Harnisch*

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ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that foregoing document contains 1537 words.

/s/ Kevin Harnisch ______________
Kevin J. Harnisch

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, I caused the foregoing to be served by email on the following:

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/s/ Kevin Harnisch ______________
Kevin J. Harnisch

EXHIBIT 1

Federal Register
Vol. 85, No. 100
Friday, May 22, 2020

Presidential Documents

Title 3—

The President

Executive Order 13924 of May 19, 2020

Regulatory Relief To Support Economic Recovery

In December 2019, a novel coronavirus known as SARS–CoV–2 (''the virus'') was first detected in Wuhan, Hubei Province, People's Republic of China, causing an outbreak of the disease COVID–19, which has now spread globally. The Secretary of Health and Human Services declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID–19. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared that the COVID–19 outbreak in the United States constituted a national emergency, beginning March 1, 2020.

I have taken sweeping action to control the spread of the virus in the United States, including by suspending entry of certain foreign nationals who present a risk of transmitting the virus; implementing policies to accelerate acquisition of personal protective equipment and bring new diagnostic capabilities to laboratories; and pressing forward rapidly in the search for effective treatments and vaccines. Our States, tribes, territories, local communities, health authorities, hospitals, doctors and nurses, manufacturers, and critical infrastructure workers have all performed heroic service on the front lines battling COVID–19. Executive departments and agencies (agencies), under my leadership, have helped them by taking hundreds of administrative actions since March, many of which provided flexibility regarding burdensome requirements that stood in the way of implementing the most effective strategies to stop the virus's spread.

The virus has attacked our Nation's economy as well as its health. Many businesses and non-profits have been forced to close or lay off workers, and in the last 8 weeks, the Nation has seen more than 36 million new unemployment insurance claims. I have worked with the Congress to provide vital relief to small businesses to keep workers employed and to bring assistance to those who have lost their jobs. On April 16, 2020, I announced Guidelines for Opening Up America Again, a framework for safely re-opening the country and putting millions of Americans back to work.

Just as we continue to battle COVID–19 itself, so too must we now join together to overcome the effects the virus has had on our economy. Success will require the efforts not only of the Federal Government, but also of every State, tribe, territory, and locality; of businesses, non-profits, and houses of worship; and of the American people. To aid those efforts, agencies must continue to remove barriers to the greatest engine of economic prosperity the world has ever known: the innovation, initiative, and drive of the American people.

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States to combat the economic consequences of COVID–19 with the same vigor and resourcefulness with which the fight against COVID–19 itself has been waged. Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give

businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.

Sec. 2. *Definitions.* (a) ''Emergency authorities'' means any statutory or regulatory authorities or exceptions that authorize action in an emergency, in exigent circumstances, for good cause, or in similar situations.

(b) ''Agency'' has the meaning given in section 3502 of title 44, United States Code.

(c) ''Administrative enforcement'' includes investigations, assertions of statutory or regulatory violations, and adjudications by adjudicators as defined herein.

(d) ''Adjudicator'' means an agency official who makes a determination that has legal consequence, as defined in section 2(d) of Executive Order 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication), for a person, except that it does not mean the head of an agency, a member of a multi-member board that heads an agency, or a Presidential appointee.

(e) ''Pre-enforcement ruling'' has the meaning given it in section 2(f) of Executive Order 13892.

(f) ''Regulatory standard'' includes any requirement imposed on the public by a Federal regulation, as defined in section 2(g) of Executive Order 13892, or any recommendation, best practice, standard, or other, similar provision of a Federal guidance document as defined in section 2(c) of Executive Order 13892.

(g) ''Unfair surprise'' has the meaning given it in section 2(e) of Executive Order 13892.

Sec. 3. *Federal Response.* The heads of all agencies are directed to use, to the fullest extent possible and consistent with applicable law, any emergency authorities that I have previously invoked in response to the COVID–19 outbreak or that are otherwise available to them to support the economic response to the COVID–19 outbreak. The heads of all agencies are also encouraged to promote economic recovery through non-regulatory actions.

Sec. 4. *Rescission and waiver of regulatory standards.* The heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements with respect to those requirements, for the purpose of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order.

Sec. 5. *Compliance assistance for regulated entities.* (a) The heads of all agencies, excluding the Department of Justice, shall accelerate procedures by which a regulated person or entity may receive a pre-enforcement ruling under Executive Order 13892 with respect to whether proposed conduct in response to the COVID–19 outbreak, including any response to legislative or executive economic stimulus actions, is consistent with statutes and regulations administered by the agency, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order. Pre-enforcement rulings under this subsection may be issued without regard to the requirements of section 6(a) of Executive Order 13892.

(b) The heads of all agencies shall consider whether to formulate, and make public, policies of enforcement discretion that, as permitted by law and as appropriate in the context of particular statutory and regulatory

programs and the policy considerations identified in section 1 of this order, decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards, including those persons and entities acting in conformity with a pre-enforcement ruling.

(c) As a result of the ongoing COVID–19 pandemic, the Department of Health and Human Services, including through the Centers for Disease Control and Prevention, and other agencies have issued, or plan to issue in the future, guidance on action suggested to stem the transmission and spread of that disease. In formulating any policies of enforcement discretion under subsection (b) of this section, an agency head should consider a situation in which a person or entity makes a reasonable attempt to comply with such guidance, which the person or entity reasonably deems applicable to its circumstances, to be a rationale for declining enforcement under subsection (b) of this section. Non-adherence to guidance shall not by itself form the basis for an enforcement action by a Federal agency.

Sec. 6. *Fairness in Administrative Enforcement and Adjudication.* The heads of all agencies shall consider the principles of fairness in administrative enforcement and adjudication listed below, and revise their procedures and practices in light of them, consistent with applicable law and as they deem appropriate in the context of particular statutory and regulatory programs and the policy considerations identified in section 1 of this order.

(a) The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

(b) Administrative enforcement should be prompt and fair.

(c) Administrative adjudicators should be independent of enforcement staff.

(d) Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.

(e) All rules of evidence and procedure should be public, clear, and effective.

(f) Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

(g) Administrative enforcement should be free of improper Government coercion.

(h) Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

(i) Administrative enforcement should be free of unfair surprise.

(j) Agencies must be accountable for their administrative enforcement decisions.

Sec. 7. *Review of Regulatory Response.* The heads of all agencies shall review any regulatory standards they have temporarily rescinded, suspended, modified, or waived during the public health emergency, any such actions they take pursuant to section 4 of this order, and other regulatory flexibilities they have implemented in response to COVID–19, whether before or after issuance of this order, and determine which, if any, would promote economic recovery if made permanent, insofar as doing so is consistent with the policy considerations identified in section 1 of this order, and report the results of such review to the Director of the Office of Management and Budget, the Assistant to the President for Domestic Policy, and the Assistant to the President for Economic Policy.

Sec. 8. *Implementation.* The Director of the Office of Management and Budget, in consultation with the Assistant to the President for Domestic Policy and the Assistant to the President for Economic Policy, shall monitor

compliance with this order and may also issue memoranda providing guidance for implementing this order, including by setting deadlines for the reviews and reports required under section 7 of this order.

Sec. 9. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

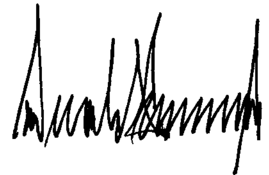
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Notwithstanding any other provision in this order, nothing in this order shall apply to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services).

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
May 19, 2020.

[FR Doc. 2020–11301
Filed 5–21–20; 11:15 am]
Billing code 3295–F0–P

EXHIBIT 2

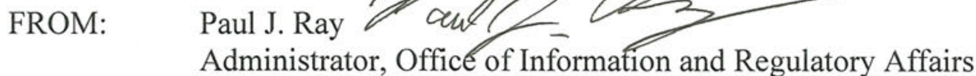
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

August 31, 2020

M-20-31

MEMORANDUM FOR THE DEPUTY SECRETARIES OF EXECUTIVE DEPARTMENTS AND AGENCIES



FROM: Paul J. Ray
Administrator, Office of Information and Regulatory Affairs

SUBJECT: Implementation of Section 6 of Executive Order 13924

On May 19, 2020, the President signed Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery*. Section 8 of the Order provides that the Director of the Office of Management and Budget, in consultation with the Assistant to the President for Domestic Policy and the Assistant to the President for Economic Policy, shall issue any memoranda needed to guide implementation of the Order. Building on Director Russell T. Vought's June 9, 2020, Memorandum M-20-25, *Implementation of Executive Order 13924* and pursuant to his delegation, this memorandum is being issued to implement Section 6 of Executive Order 13924.

Section 6 of the Order directs "heads of all agencies" to "consider the principles of fairness in administrative enforcement and adjudication" enumerated in subparts (a) through (j) and to "revise their procedures and practices in light of them, consistent with applicable law and as they deem appropriate in the context of particular statutory and regulatory programs and the policy considerations identified in section 1 of this order." I request that agencies coordinate with OIRA staff to issue any needed final rules under 5 U.S.C. § 553(a)(2) and (b)(A) wherever possible, by November 26, 2020 (absent a waiver granted by the Administrator), with a request for public comment that agencies may consider in any future revisions.

To assist in implementation of section 6, OMB has compiled the below list of best practices for your consideration, insofar as consistent with your "particular statutory" authority, "regulatory programs," or other "policy considerations identified in Section 1" of the Order, as you review your existing procedures and prepare any needed revisions.

(a) The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

- Agencies should review their procedures to ensure that members of the regulated public are not required to prove a negative to prevent liability and enforcement consequences in the absence of statutory standards requiring otherwise. This general

principle should not be applied to prevent placing the burden of proof on the potential recipients of government benefits, including in benefit termination actions.
- Agencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement.

(b) Administrative enforcement should be prompt and fair.

- Agencies should seek approval of an Officer of the United States, or if necessitated by good cause, his or her designee, before entering into a tolling agreement that would have the effect of extending the statute of limitations for an infraction.
- Agency regulations should apply limiting principles to the duration of investigations; regulations should require investigating staff to either recommend or bring an enforcement action, or instead cease the investigation within a defined time period after its commencement absent a showing of unusual circumstances that is endorsed by an Officer of the United States, or if necessitated by good cause, by his or her designee.
- If a party has been informed by an agency that it is under investigation, the agency should inform the party when the investigation is closed and, when the agency has made no finding of violation, so state.
- Agencies should consider and appropriately adopt estoppel and res judicata principles to eliminate multiple enforcement actions for a single body of operative facts. Simply put, an agency should have only one bite at the apple to investigate and seek enforcement against a regulated entity for a static factual predicate that is not a continuing or expanding violation.
- Agency employees' performance metrics and compensation structures should incentivize excellence, accuracy, integrity, efficiency, and fairness in the application and execution of the law. Performance metrics should not detract from the aim of reaching fact-based, unbiased decisions with respect to all aspects of enforcement; employees should not be rewarded on any basis that incentivizes them to bring cases or seek penalties or settlements that are meritless or unwarranted.
- If they have not done so already, agencies must publish a rule of agency procedure governing civil administrative inspections. *See* Executive Order 13892 section 7.

(c) Administrative adjudicators should operate independently of enforcement staff on matters within their areas of adjudication.

- Agency adjudicators[1] should not engage in ex parte communications with, and should operate independently from, investigators and enforcement staff, as the Administrative Procedure Act requires for formal adjudications under 5 U.S.C. §§ 554(d) and 557(d). Agency line adjudicators should not engage in ex parte

[1] This term includes line adjudicators, administrative appellate entities, and those engaging in informal adjudications.

communications with, and should operate independently from, administrative appellate entities. Agencies should develop reporting and disclosure structures for violations of such requirements and should establish command structures for these offices that are independent of each other.

- Agency adjudicators' performance metrics and compensation structures should incentivize fact-based, unbiased adjudication decisions. Adjudicators should not be rewarded based on the penalties they award or in any other way that misaligns incentives.

(d) Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.

- Administrative agencies should conform their civil adjudicatory evidence disclosure practices to those described by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *Giglio v. United States*, 405 U.S. 150, 154 (1972), and *Kyles v. Whitley*, 514 U.S. 419, 432–33 (1995). Agency officials should timely disclose exculpatory evidence to the target party of enforcement using similar procedures as those laid out in the *Justice Manual* of the U.S. Department of Justice (previously known as the *U.S. Attorney's Manual*). Likewise, agencies should automatically disclose evidence material to the mitigation of damages or penalties, consistent with *Brady*, 373 U.S. at 87.

(e) All rules of evidence and procedure should be public, clear, and effective.

- In addition to ensuring compliance with 5 U.S.C. § 556(d), agencies should adopt or amend regulations regarding evidence and adjudicatory procedure to eliminate any unfair prejudice, reduce undue delay, avoid the needless presentation of cumulative evidence, and promote efficiency. Agencies should seek to reduce the use of hearsay evidence with limited exceptions (*Richardson v. Perales*, 402 U.S. 389 (1971)). They should generally require the application of the framework in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to determine the veracity of scientific evidence. Based on the nature of the statute administered, agencies should consider incorporating other standards under the Federal Rules of Evidence, including Rule 403. Agencies should make their rules of evidence and procedure easily accessible on their websites.
- In furtherance of the requirement contained in 5 U.S.C. § 555(b), agencies should explicitly authorize the representation of regulated parties by legal counsel and in appropriate cases, by qualified representatives. Agencies should also take steps to avoid disadvantaging parties who are not represented by counsel, including by writing rules of evidence and procedure in plain language.

(f) Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

- Agencies should establish policies of enforcement discretion that decline enforcement or the imposition of a penalty, as appropriate, in the course of enforcement when the agency determines that the regulated party attempted in good faith to comply with the law.
- Agencies should make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions.
- Agencies should adopt expiration dates and/or termination criteria for consent orders, consent decrees, and settlements that are proportionate to the violation of the law that is being remedied. Decade(s)-long settlement terms that are disproportionate to the violation(s) of law should be strongly disfavored absent a clear and convincing need for time to implement a remedy such as, e.g., infrastructure improvements or long-term remedial actions.
- Consent orders, consent decrees, and settlements should not bar private parties from disseminating information about their cases.
- If they have not already done so, agencies should establish procedures to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties, including grace periods to cure minor violations without fear of penalty in compliance with Executive Order 13892 section 9.

(g) Administrative enforcement should be free of improper Government coercion.

- Retaliatory or punitive motives, or the desire to compel capitulation, should not form the basis for an agency's selection of targets for investigations or enforcement actions, or other investigation and enforcement decisions such as, e.g., rulings on discovery.
- To prevent the above motives from playing a role, agencies should not initiate additional investigations of a party after commencing an enforcement action against that party absent an internal showing of good cause that is reviewed by an Officer of the United States, except when the additional investigation is prompted by facts uncovered in the initial investigation.

(h) Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

- Agencies should review their procedures for adjudication to ensure that liability is imposed only after notice and an opportunity to respond.
- In any document initiating an investigation or enforcement action, an agency should include a citation to the statute and regulation asserted to be violated, and an explanation as to how the asserted conduct is prohibited by the cited statute and regulation, in addition to complying with Executive Order 13892 section 3.
- Information or materials obtained in an administrative investigation or enforcement action should only be referred to the U.S. Department of Justice or other relevant criminal investigation or enforcement authority for criminal investigation in a manner

that is consistent with the law and with best practices as established by policies, procedures, and guidelines regarding parallel investigations.

(i) Administrative enforcement should be free of unfair surprise.

- If they have not already done so, agencies should create procedures to make available pre-enforcement rulings as required by Executive Orders 13892 section 9 and 13924 section 5.
- Agencies should ensure they have rules in place that provide parties with a reasonable period of time to respond to filings or charges brought by the agency. For example, agencies should provide parties with at least as much time to respond to an agency notice of charges as parties would have to respond to filings in civil complaints brought in federal court under the Federal Rules of Civil Procedure, unless the need for urgent action to protect the public warrants otherwise.

(j) Agencies must be accountable for their administrative enforcement decisions.

- In addition to the substantive mandates of 5 U.S.C. §§ 552(a)(1), 555(c) and other Administrative Procedure Act provisions, the initiation of investigations and enforcement actions should carry the structural protection of requiring approval of an agency official who is an Officer of the United States or, if necessitated by good cause, his or her designee. Such agency official should condition approval at the investigation and enforcement stages on the agency's compliance with Executive Order 13892 sections 3 through 9 and Executive Order 13891 sections 3 and 4 as they pertain to the matter, among other factors.
- Agencies should identify, collect, and periodically make publicly available decisional quality and efficiency metrics regarding adjudications under bureaucratic, judicial, and split enforcement models (of adjudication), to include, e.g., the number of matters that have been pending with the agency over relevant time periods, the number of matters disposed by the agency annually, and data on the types of matters before and disposed of by the agency.

cc: The Assistant to the President for Domestic Policy
The Assistant to the President for Economic Policy
The Director of the Office of Management and Budget