The American Short Line and Regional Railroad Association (ASLRRA), on behalf of itself and its member railroads, submits these comments in response to the Office of Management and Budget (OMB)’s Request for information: Improving and/or reforming regulatory enforcement and adjudication.\(^1\) OMB invites the public to identify additional reforms that will ensure adequate due process in regulatory enforcement and adjudication.

The ASLRRA represents small business railroads and larger regional railroads across the United States. These short line railroads operate in 49 states and thus experience the variation in regulatory application as it may vary by agency and region. As small businesses, our members are greatly impacted by agency compliance with agencies’ policies towards small business. The ASLRRA will comment on this aspect as well as on some of the questions for which specific information is requested. These comments relate particularly to civil penalties pursuant to 49 U.S. Code Chapter 201 as administered by the Federal Railroad Administration (FRA).

1. **Actions prior to the initiation of adjudication.**

The interaction prior to the initiation of adjudication by the FRA against a small railroad involves an FRA safety inspector conducting an inspection and finding a railroad to be in non-compliance with a safety regulation. The FRA statement of agency policy at Appendix C to 49 CFR Part 209 - FRA’s Policy Statement Concerning Small Entities states “In addition to the seriousness of the violation and the person's history of compliance, FRA inspectors consider

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\(^1\) ASLRRA is a non-profit trade association representing the interests of approximately 600 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate 47,500 miles of track in 49 states, or approximately 29% of the national freight network, touching in origin or destination one out of every five cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network. 85 Fed. Reg. 5,483 (Jan. 30, 2020).
“‘such other factors as the immediate circumstances make relevant.’” Regarding alleged violations by small entities, those factors include “whether the violations were made in good faith (e.g., based on an honest misunderstanding of the law), and whether the small entity has moved quickly and thoroughly to remedy the violation(s).” Generally, the presence of both good faith and prompt remedial action should mitigate against taking a civil penalty action, especially if the violations are isolated events. However, despite this policy, some of our member railroads in FRA’s Region 1 experience maximum penalties on a regular basis. OMB can assist in this area by reminding the agencies that enforcement policies should be consistent throughout the country and that policies towards small businesses in particular are uniformly applied.

After the FRA safety inspector recommends that a civil penalty be issued for an alleged non-compliance, the inspector notifies the railroad in writing. After this notification, the alleged violation is sent to FRA’s Office of Chief Counsel to be formally transmitted to the railroad as a Notice of Probable Violation (NOPV). After receiving an NOPV, the railroad must work with an FRA attorney to address the alleged violation. This process can be very time consuming and complex for small businesses, many of whom do not regularly retain their own counsel. A better process would be for FRA safety inspectors to work directly with small railroads while the inspector is considering recommending a civil penalty so that the railroad could interact directly with the field contact to provide mitigating information before an NOPV is issued.

2. **Respondents having to prove their innocence.**

In the settlement negotiation process for FRA NOPVs, small railroads have found that it is agency practice to require railroads to present their information presuming that the inspector’s allegations are true. Small railroads are often placed in the untenable position of having to raise affirmative defenses, such as the statute of limitations, when conversing with federal agency counsel. In effect, small railroads work to prove their innocence to the FRA once an NOPV is issued, even in cases where the FRA has made a factual error. We believe the burden of proof should rest with the agency to prove that a regulatory violation has occurred instead of the small business having to prove that it did not violate a federal requirement.

3. **Evidence favorable to the respondent and transparency of fines.**

Small railroads find that it is their responsibility to raise any evidence favorable to their position. This often includes the railroad having to request from FRA prior FRA inspection records for the railroad property or equipment in question. Further, any comparable NOPVs issued to similar railroads or events must be raised by the railroad, as FRA does not include this information in its NOPV package to the railroad. It is a large burden for a small business to have to request government records as well as other comparable records that it does not possess. Pursuant to FRA’s policy towards small entities in Appendix C to 49 C.F.R. Part 209, as well as to increase greater transparency in civil penalties, especially those against small businesses, FRA should provide this information to any small entity subject to an NOPV.

It has been the impression and experience of small railroads that FRA’s legal counsel views the FRA Office of Safety and its inspectors as the client, as opposed to the American public. This often results in the attorney zealously advocating for the opinions and positions of the FRA inspector instead of what is in the best interest of railroad safety and the American public. OMB could assist in this area by providing guidance and training to federal attorneys stressing that the American people are the true clients that they represent.

Respectfully submitted,

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