

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 731

Rules Relating To Board-Initiated Investigations

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS**

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## INTRODUCTION

The Association of American Railroads (AAR), on behalf of itself and its freight railroad members, respectfully submits these comments in response to the Surface Transportation Board’s Notice of Proposed Rulemaking in Docket No. EP 731, *Rules Relating To Board-Initiated Investigations* (May 6, 2016) (Decision).

Although Congress has given the Board the power to conduct investigations “on the Board’s own initiative,” it has placed strict statutory limits on that power. Among these are the core jurisdictional limit that Board-initiated investigations must involve issues of “national or regional significance,” and the requirement that the Board afford parties under investigation a variety of procedural and other protections. *See* Surface Transportation Board Reauthorization Act of 2015, Public Law No. 114-110, 129 Stat. 2228 (2015), codified in relevant part at 49 U.S.C. § 11701. And to underscore its concern that the Board conduct self-initiated investigations in a fair manner, Congress specifically directed the Board to “satisfy due process requirements” and “take into account ex parte constraints” when issuing regulations governing self-initiated investigations. STB Reauthorization Act § 12(c).

As discussed below, the proposed rules must be modified in key respects to conform to the text and purpose of the statute, and to ensure fair procedural and due process-related protections for parties under investigation.

## BACKGROUND

Section 12(a) of the STB Reauthorization Act permits the Board to open investigations “on the Board’s own initiative.” Surface Transportation Board

Reauthorization Act of 2015, Public Law No. 114-110, 129 Stat. 2228 (2015), codified in relevant part at 49 U.S.C. § 11701. Section 12(a) further provides that “[i]f the Board finds a violation of this part [*i.e.*, Title 49, Subtitle IV, Part A] in a proceeding brought on its own initiative, any remedy from such proceeding may only be applied prospectively.”

After granting the Board the power to open investigations on its own initiative and defining the scope of appropriate remedies, Congress placed restrictions on the Board’s investigative powers. In the very next provision of the Act—Section 12(b), entitled “Limitations on Investigations of the Board’s Initiative”—Congress restricted the Board’s jurisdiction, established deadlines for certain steps in the investigation, and specified that procedural protections must be given to parties under investigation.

These limitations are mandatory. Section 12(b) provides that “[i]n any investigation commenced on the Board’s own initiative, the Board *shall*—

(1) not later than 30 days after initiating the investigation, provide written notice to the parties under investigation, which shall state the basis for such investigation;

(2) only investigate issues that are of national or regional significance;

(3) permit the parties under investigation to file a written statement describing any or all facts and circumstances concerning a matter which may be the subject of such investigation;

(4) make available to the parties under investigation and Board members—

(A) any recommendations made as a result of the investigation; and

(B) a summary of the findings that support such recommendations;

(5) to the extent practicable, separate the investigative and decisionmaking functions of staff;

(6) dismiss any investigation that is not concluded by the Board with

administrative finality within 1 year after the date on which it was commenced;  
and

(7) not later than 90 days after receiving the recommendations and summary of findings under paragraph (4)—

(A) dismiss the investigation if no further action is warranted; or

(B) initiate a proceeding to determine if a provision under this part has been violated.”

STB Reauthorization Act § 12(b), codified at 49 U.S.C. § 11701(d) (emphasis added).

Congress directed the Board, within one year, to “issue rules, after notice and comment rulemaking, for investigations commenced on its own initiative” that comply with the requirements set forth above, that “satisfy due process requirements,” and that “take into account ex parte constraints.” STB Reauthorization Act § 12(c).

The Board issued its proposed rules on May 6, 2016.

## **DISCUSSION**

The Board must modify its proposed rules in key respects. These changes are necessary to conform the rules to the statute, to provide guidance to Board staff and the public, and to preserve the due process rights of parties under investigation. For ease of reference, attached as Exhibit A is a flow chart depicting the sequence of events for the three stages proposed by the Board, from Preliminary Fact-Finding, to Board-Initiated Investigations, through Formal Board Proceedings.

**A. The Board Must Modify The Proposed Rules To Conform To The Statute By Encompassing Preliminary Fact-Finding Within The One-Year Period.**

Congress provided that the Board “shall . . . dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced.” 49 U.S.C. § 11701(d)(6). Under the proposed rules, however, the one-year period begins upon issuance of the Order of Investigation. Decision at 5.

The proposed rules must be modified to conform to the statutory time limitation by providing that the Preliminary Fact-Finding phase be included within the one-year period. If more than one year has elapsed from the commencement of Preliminary Fact-Finding, and the Board has not yet decided whether to begin a Formal Board Proceeding, then the Preliminary Fact-Finding or Board-Initiated Investigation must be terminated.

The purpose of the statutory time limit is to ensure the Board moves expeditiously in determining whether to open a Formal Board Proceeding, while at the same time ensuring that private parties whose conduct is being examined are not forced to endure the burdens and uncertainty of an open-ended inquiry that could last for years. Moreover, just like statutes of limitations and repose, the one-year period prevents parties from being forced to defend against stale claims or to answer for alleged conduct that occurred long ago.

Providing for an open-ended, limitless Preliminary Fact-Finding phase undermines the purpose of the statutory scheme. The proposed rules would allow Board staff to conduct investigative activities, including requests that parties provide “testimony, information, or documents,” Decision at 3, for as long as the staff wishes—under the

theory that because these investigative activities are merely “Preliminary Fact-Finding” rather than a “Board-Initiated Investigation,”<sup>1</sup> the statutory clock does not start. That approach is inconsistent with the plain intention of Congress, which wanted the Board to make a determination within one year from the beginning of investigatory activities. It would frustrate the congressional purpose to adopt rules that would allow Board staff to conduct an inquiry potentially lasting years simply by labeling it “Preliminary Fact-Finding.” From the perspective of the regulated party, the burdens and commercial uncertainty resulting from the staff’s Preliminary Fact-Finding investigative activities are little different from the burdens and commercial uncertainty resulting from a Board-Initiated Investigation. Thus, although providing for a Preliminary Fact-Finding phase makes practical sense and should be maintained in the final rules, the Board should provide that the one-year clock begins running from the commencement of Preliminary Fact-Finding and thereby ensure that the statutory deadline is not undermined.

In addition, to provide clarity to regulated parties and guidance to Board staff, the Board should provide that Preliminary Fact-Finding begins when the Director of Proceedings or the Board approves Preliminary Fact-Finding.

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<sup>1</sup> The discussion of the Preliminary Fact-Finding phase describes the production of information as voluntary (Decision at 3), but the proposed rules are not wholly consistent with that characterization. Proposed Rule 1122.11 [Certifications and Restrictions] refers generally to “producing documents under this part.” In addition, 49 U.S.C. § 11144(b) grants employees designated by the Board the authority to demand to inspect and copy any record of a rail carrier. If the intention is to make compliance with requests for information or documents during the Preliminary Fact-Finding phase truly voluntary, express language should be added to Proposed Rule 1122.3.

**B. The Preliminary Fact-Finding Provision Should Be Modified.**

It makes practical sense to provide for a Preliminary Fact-Finding phase to determine whether a Board-Initiated Investigation is warranted. That said, the Board should clarify or modify Proposed Rule 1122.3 in several key respects.

1. As discussed above in Part A, the proposed rules conflict with the text and purpose of 49 U.S.C. § 11701(d)(6) because they allow for an open-ended Preliminary Fact-Finding phase of indefinite duration. The Board should therefore modify the rules to provide that the one-year clock begins running from the commencement of Preliminary Fact-Finding. But at a minimum, the Board must provide *some* reasonable time limit on the Preliminary Fact-Finding phase, which under no circumstances should last more than a few months. The congressional mandate to issue regulations to implement the Board’s self-initiated investigation authority—an authority expressly governed by a strict one-year time limit—cannot possibly be read as empowering the Board to issue regulations allowing potentially *years-long* investigative activities.

2. The proposed rules give Board *staff* the discretion to begin Preliminary Fact-Finding. *See* Proposed Rule 1122.3 (“The Board staff may, in its discretion, conduct nonpublic Preliminary Fact-Finding . . .”). That is a decision that should be made by the Director of the Office of Proceedings or the Board, given the potentially significant consequences on regulated parties from the Preliminary Fact-Finding itself, as well as the future consequences if the Preliminary Fact-Finding turns into a Board-Initiated Investigation and possibly a Formal Board Proceeding. The proposed rules

should be modified to provide that the staff may begin Preliminary Fact-Finding only with the approval of the Director of the Office of Proceedings or the Board.

3. The Board should also clarify that any materials gathered in connection with Preliminary Fact-Finding and provided to the Board will be subject to disclosure in any subsequent Board-Initiated Investigation on the same terms as other materials gathered during the Board-Initiated Investigation.

4. The Board should add language expressly requiring the staff to notify the parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. This requirement appears to be implicit in the proposed rules, which require the staff to “notify any parties involved that the process has been *terminated*,” Proposed Rule 1122.3 (emphasis added), but the Board should require specific notice that the process has *commenced*. A notice requirement is sound policy that aligns with the Board’s goal of maintaining an open dialogue between regulated parties and Board staff. A key function of the Office of Public Assistance, Governmental Affairs, and Compliance is to answer questions about, and provide informal guidance on, the procedures and actions of the Board. It would chill informal communications between regulated parties and the Office if parties were constantly concerned that they might be the subject of Preliminary Fact-Finding but did not know about it. In addition to being sound policy, notice is required as a matter of due process and fundamental fairness. Regulated parties respond to STB requests for information on a regular basis, and it would sow doubt and distrust if the parties shared information with staff without knowing whether the regulator was making an ordinary inquiry or secretly engaged in Preliminary

Fact-Finding. As explained above, given the authority for Board employees to require rail carriers to provide information or submit to inspection under Section 11144(b) at any time, a response to a request without knowledge that Preliminary Fact-Finding is underway cannot be considered voluntary or with fair notice of the potential consequences.

**C. The Provisions Related To Board-Initiated Investigations Should Be Modified.**

Congress directed the Board to “satisfy due process requirements” and “take into account ex parte constraints” in developing regulations to govern Board-Initiated Investigations. STB Reauthorization Act § 12(c). The Board should modify its proposed rules with this congressional mandate in mind.<sup>2</sup>

1. The Board should clarify the standard for determining when a Board-Initiated Investigation is warranted based on the results of Preliminary Fact-Finding.

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<sup>2</sup> In addition to the specific limitations imposed by the statute itself, there are of course numerous rights and restrictions that arise from the Constitution and apply to investigations and enforcement proceedings alike, including procedural due process rights, the right to fair notice, and the right to a neutral and impartial decisionmaker. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (holding that due process protections apply to administrative proceedings, and explaining that “[t]he ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness”); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (“Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.”).

Although the preamble provides some guidance, *see* Decision at 3-4, the proposed rules themselves do not.<sup>3</sup>

The Board should follow the statutory text and adopt a two-part test for determining when a Board-Initiated Investigation is warranted.

*First*, the Board must determine that the issue is of national or regional significance. That is a core jurisdictional limit on the Board’s investigatory power. Congress expressly provided that “[i]n any investigation commenced on the Board’s own initiative, the Board shall . . . *only* investigate issues that are of national or regional significance.” 49 U.S.C. § 11701(d)(2) (emphasis added). Thus, the Board should modify the proposed rules (either Rule 1122.3 or 1122.4) to provide that a Board-Initiated Investigation may only be commenced upon a determination by the Board that the issue is of national or regional significance. In that regard, the language in the preamble does not track the legal standard. *See* Decision at 3 (Board staff will recommend investigation where “the potential violation *may* be of national or regional significance”) (emphasis added). The Board should expressly require that any Order of Investigation include a finding that the issue *is* of national or regional significance.

Moreover, because this is a jurisdictional limitation on the Board’s power, the Board must be certain at every phase of the process that the issue is—and remains—of national or regional significance. For example, even where the Board has concluded that

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<sup>3</sup> Although the preamble and the statute (49 U.S.C. § 11701(d)(7)(A)) use the word “warranted,” the proposed rules address when an investigation is “appropriate” or “not appropriate.” Proposed Rule 1122.3. In the interest of consistency, the Board should modify the language of the rules to provide for when an investigation is “warranted” or “not warranted.”

an issue is of national or regional significance, it must take evidence and consider arguments presented during the Board-Initiated Investigation or Formal Board Proceeding phase that the Board's initial determination was incorrect. Indeed, the Board has an independent obligation to confirm its jurisdiction at every phase, even if no party has challenged the determination. Just as a federal court must immediately dismiss a case if it determines months or even years into litigation that it lacks jurisdiction, the Board must terminate an investigation or proceeding if new information demonstrates that its initial jurisdictional determination was incorrect, or that subsequent developments have rendered it incorrect. *See, e.g., Checketts v. Dep't of Treasury*, No. DE-0752-01-0019-I-1, 2002 WL 422954 (M.S.P.B. Mar. 11, 2002), *aff'd*, 50 F. App'x 979 (Fed. Cir. 2002) (explaining that "the issue of Board jurisdiction is always before the Board" and dismissing case for loss of jurisdiction).

The Board should define the phrase "national or regional significance" ex ante, so that regulated entities have fair notice and can understand with greater specificity what types of matters are appropriate for Board-Initiated Investigations. Consistent with Congress's intent that such investigations be restricted to cases of unusual importance, the Board should define "national or regional significance" as meaning "widespread and significant effects on transportation service or markets in a region or across the nation." The Board should also make clear, either in the preamble or in the Final Rules themselves, that individual rate disputes, or disputes involving a single shipper, do not meet the jurisdictional requirement.

*Second*, the Board should only issue an Order of Investigation upon a determination by the Board that there is reasonable cause to believe that there may be a violation of 49 U.S.C. Subtitle IV, Part A. A Board-Initiated Investigation should not be launched merely on an allegation or a hunch. Although the Board would be required to make a “reasonable cause” finding before opening an investigation, that finding would necessarily be based only on the Preliminary Fact-Finding and would not in any sense be binding or create any presumption during the Board-Initiated Investigation phase.

2. The rules should expressly state that the Board will separate investigative from decisionmaking functions of staff. The proposed rules merely repeat the statutory language by providing that “[t]o the extent practicable, an Investigating Officer shall not participate in any decisionmaking functions in any Formal Board Proceeding(s) opened as a result of any Board-initiated Investigation(s) that he or she conducted.” Proposed Rule 1122.4. If the Board believes situations could arise where it would not be “practicable” to separate investigative and decisionmaking functions, it must explain its reasoning. The ritualistic incantation of statutory language is not sufficient.

The Board must specify the protections it will put in place to prevent staff members from serving in both an investigatory and decisionmaking role. Among other things, the Board should include in its rules provisions that will:

- Identify all staff who will work in an investigation, not just the Investigating Officers.

- Notify Board Members, decisional staff within the Board, and parties subject to investigation who has been designated investigation staff for any particular Board-Initiated Investigation.
- Prohibit ex parte contacts between all staff involved in investigative activities and Board Members and other Board employees, and bar such investigation staff from helping draft Board decisions in the same matter under investigation. However, investigation staff could draft Section 11701(d)(4) recommendations and summaries of findings at the conclusion of a Board-Initiated Investigation.
- Notify the parties in the event a staff member participates in both the investigatory and decisionmaking processes and provide a full accounting of the staff member's actions and role.

3. The Board should modify the provision in Proposed Rule 1122.5(a) that the Investigating Officer “shall provide the parties under investigation a copy of the Order of Investigation.” It should not take 30 days to notify parties that they are under investigation. If the Board wants to preserve its discretion to use the full 30 days if necessary in a particular case, it could provide for a 10-day notification period absent extraordinary circumstances justifying a delay. In any event, the rules should provide that if prior to the service of an Order of Investigation, the investigation staff request the subject to provide information, submit to an interview, allow the inspection of records, or communicate on any matter relating to the Preliminary Fact-Finding or Board-Initiated Investigation, the investigation staff is required first to notify the party that it is or may be subject to a Section 11701(d) investigation.

4. The Board should give parties under investigation full access to all exculpatory and potentially exculpatory materials. This approach tracks the landmark *Brady* decision, which holds that prosecutors who fail to disclose evidence “material to guilt or punishment” violate the due process rights of defendants. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Specifically, the Board should require Investigating Officers to turn over to parties exculpatory and potentially exculpatory materials obtained during any Board-Initiated Investigation in sufficient time for the parties to review and address the materials before the Board decides to begin a Formal Board Proceeding. *See, e.g.,* Federal Energy Regulatory Commission, *Policy Statement on Disclosure of Exculpatory Materials*, 129 FERC ¶ 61,248 (2009); Federal Election Commission, *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34,986 (June 15, 2011).

The Board should therefore add the following language to Proposed Rule 1122.10: “During the course of a Board-Initiated Investigation, the staff shall identify all material that is exculpatory or potentially exculpatory. Any such materials that are not known to already be in the possession of the subject of the Board-Initiated Investigation shall be provided to the subject in a prompt manner, sufficient to allow the subject to review and comment on the materials before the Board makes the decision whether to begin a Formal Board Proceeding. To the extent any such materials contain confidential information produced by a third party, the staff may place reasonable limits on public dissemination of the materials.”

5. In addition, the Board should modify Proposed Rule 1122.10 to give parties under investigation full access to transcripts of their testimony. *See* 5 U.S.C. § 555(c) (“A person compelled to submit data or evidence is entitled to retain or procure . . . a copy or transcript thereof . . .”). The Board should also delete the words “if any” (from the phrase “Transcripts, if any, of investigative testimony shall be recorded . . .”) to make clear that all investigative testimony shall be on the record.

6. The Board should give the party subject to a Board-Initiated Investigation the right to obtain discovery, at least during the Formal Board Proceeding phase. As currently drafted, the proposed rules give parties no discovery rights whatsoever. The right to take discovery is a critical element of a fair proceeding, as parties under investigation will often need information in possession of third parties in order to present a complete defense.<sup>4</sup> The rules can address this omission by confirming that persons who provide information or otherwise participate in the Formal Board Proceeding are considered parties to a proceeding for purposes of the Board’s discovery rules at 49 C.F.R. § 1114, and that a party that is the target of a Formal Board Proceeding is entitled to reasonable discovery against such parties.

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<sup>4</sup> If the party being investigated will be expected to prove that its conduct does not violate ICCTA and is denied access to discovery of third parties with responsive information merely because they do not choose to participate or to participate only through their trade association, the investigated party would be deprived of a fair hearing and the Board deprived of relevant information. The inequity would be compounded if such third parties would then be allowed to file complaints seeking damages based on a finding that ICCTA was violated while the rail carrier is estopped from defending the liability claim.

7. The proposed rules authorize the Investigating Officer to issue subpoenas and conduct wide-ranging and apparently limitless discovery. *See* Proposed Rule 1122.9. The Board should take a more reasonable approach by placing limits on the discovery the Investigating Officer may conduct. Just as the Federal Rules of Civil Procedure limit the number of document requests and depositions private litigants may obtain, the Board should recognize similar limits on the discovery powers of the Investigating Officer. Allowing (per target) up to 20 interrogatories, 30 document requests, and 3 depositions with each deposition limited to no more than one seven-hour day would be reasonable in this context.

Other agencies have adopted this approach. For example, the International Trade Commission has enacted similar limitations to “prevent an undue burden on parties” to be “consistent with Federal Rule of Civil Procedure 30(a),” and to “reduce the burdens and costs of discovery by imposing reasonable limits on discovery.” *Rules of General Application and Adjudication and Enforcement*, 78 Fed. Reg. 23,474, 23,477-78 (Apr. 19, 2013).

The proposed rules also purport to authorize the Investigating Officer to “request the production of any information . . . potentially relevant or material to the basis for the Board-Initiated investigation.” Proposed Rule 1122.9(a). This is an excessively broad standard and should be narrowed to documents that are likely to be directly relevant to the investigation described with particularity in the Order of Investigation served on the parties being investigated. *See Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 208-09 (1946) (administrative subpoenas “shall not be unreasonable” and must specify

documents “adequate, but not excessive, for the purposes of the relevant inquiry”). The investigated parties are entitled to reasonable notice of the scope of the Board-Initiated Investigation when responding to requests for information, documents or records, and should not be expected to guess at what the Investigating Officer may consider potentially relevant.

8. Proposed Rule 1122.11, entitled “Certifications and false statements,” should be removed. Parties who produce documents in response to a government subpoena, or who make statements under oath to a federal officer, are already subject to a variety of sanctions for noncompliance. For that reason, it is unnecessary to require parties to submit a certified statement that they have produced “all the documents called for by the Investigative Officer.” *See* Proposed Rule 1122.11(a). This would impose a burden beyond that associated with discovery before the Board. Parties normally undertake to perform reasonable searches for responsive documents (as the proposed rules recognize when they call for a statement certifying that a “diligent search” was conducted). Moreover, given the volume of duplicative digital documents if *all* documents were actually produced, such a requirement is unrealistic and potentially counterproductive. The rules should be revised to require the person to confirm that it produced all responsive, non-privileged documents located after reasonable search and subject to any agreed-upon protocols regarding reduction of duplicative documents.

In addition, Proposed Rule 1122.11(b) is unduly onerous in its specifications for privilege logs. The Board should take the approach used by the Southern District of New York, which has recognized that “[w]ith the advent of electronic discovery and the

proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative.” Cmt. to S.D.N.Y. Civ. R. 26.2(c). Accordingly, that court’s rules provide that “it is presumptively proper to provide the information required . . . by group or category,” rather than “document-by-document or communication-by-communication listing.” S.D.N.Y. Civ. R. 26.2(c).

Likewise, it is unnecessary and gratuitous to include a provision specifically threatening parties involved in Board proceedings with criminal penalties for perjury and false statements. *See* Proposed Rule 1122.11(c). Particularly to the extent the Board wishes to instill a spirit of cooperation among parties to Board proceedings, the inclusion of an unnecessary provision warning of criminal penalties sounds a jarring note.

Finally, the Board should follow the approach taken by other agencies and adopt a “witness rights” provision. For example, the Securities and Exchange Commission’s Form 1662, which is read at the start of agency depositions, sets forth the rights and responsibilities of the witness. *See* <https://www.sec.gov/about/forms/sec1662.pdf>.

9. The confidentiality provision, Proposed Rule 1122.6, is flawed and should be modified. After providing that “[a]ll information and documents [gathered during the Preliminary Fact-Finding or Board-Initiated Investigation phases] . . . shall be treated as nonpublic by the Board and its staff,” the proposed rules then state that confidentiality can be waived as long as the Board “authorizes . . . public disclosure.” *Id.*, § 1122.6(a)(1). The language of the proposed rules is vague, and it may be that the Board is not claiming unbounded discretion to make confidential *information and documents*

public. *See id.* (authorizing the Board to direct “the public disclosure of activities conducted under this part prior to the opening of a Formal Board Proceeding”). In any event, the Board should revise this language to eliminate any ambiguity and assure regulated parties that the Board is not claiming absolute power to publicize confidential documents and information at its whim. In addition, the Board should be clear that it will continue to apply the existing protections and notification requirements for confidential materials set forth in 49 C.F.R. § 1001.4, including in situations where potential complainants seek access to materials gathered during an investigation.

10. The attorney disqualification provision should be removed. Proposed Rule 1122.9(b) provides in full: “With regard for due process, the Board may for good cause exclude a particular attorney from further participation in any Board-Initiated Investigation in which the attorney is obstructing the Board-Initiated Investigation.” This provision is unnecessary and appears intended to deter zealous advocacy—or to give the Board a basis for threatening to disqualify an attorney for challenging the Investigative Officer’s demands for documents or testimony. The right to counsel in administrative proceedings is mandated by the Administrative Procedure Act as well as by the Due Process Clause. *See* 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945 (5th Cir. 1981) (“The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process . . . and extends to administrative, as well as courtroom, proceedings.”).

Neither the preamble nor the proposed rules themselves offer any explanation as to why the Board’s existing powers are insufficient to prevent purported “obstruction.” All attorneys practicing before the Board are subject to a variety of ethical obligations, including those of the jurisdiction in which the attorney resides or is appearing, and there is no need for the Board to grant itself additional powers to punish anything it deems “obstruction.” The Board’s approach is flawed for the additional reason that “good cause” is an insufficient legal basis for disqualification—the consequence of which is to deny the regulated party its right to be represented by the counsel of its choice. *See Sec. & Exch. Comm’n v. Csapo*, 533 F.2d 7, 11 (D.C. Cir. 1976) (“[B]efore the [agency] may exclude an attorney from its proceedings, it must come forth . . . with concrete evidence that his presence would obstruct and impede its investigation.”) (internal quotation marks omitted). The total absence of any procedural protections afforded the party or its counsel before the Board orders disqualification compounds the infirmity of this unnecessary provision. It should be removed.

11. Proposed Appendix A to Part 1122 gives the Investigating Officer the option of providing his or her proposed recommendations and summary of findings to the parties under investigation, and allowing them to prepare a written statement that would accompany submission of the recommendations and findings to the Board. The Board should make this procedure mandatory rather than optional. Parties should have the right to file a statement aimed at persuading the Investigating Officer (and if not the Investigating Officer, then the Board itself) why a Formal Board Proceeding is unwarranted. Indeed, there would be no legitimate reason *not* to follow this procedure

aside from concerns of undue delay. But any such delay would be minimal, as the Board could require that any response be submitted promptly (*e.g.*, within 14 days).

Even if the Board does not require Investigating Officers to provide parties with the proposed findings and recommendations *prior* to submitting them to the Board, the Board should require that the findings and recommendations be provided to the parties at the time they are submitted to Board Members. Otherwise, the parties' "right to submit statements," Proposed Rule 1122.12, is a hollow guarantee. A party under investigation's ability to submit a meaningful statement is compromised if the Investigating Officer refuses to disclose what he or she found and recommended.

The Board should also clarify that parties may submit supporting data, evidence and verified statements to accompany their written statement. Giving parties a mere 15 pages in which to present their arguments, *see* Proposed Appendix A to Part 1122, is not sufficient, and the page limit should be extended. But if the Board adheres to its proposed approach, the rules should be modified to clarify that supporting data, evidence and statements or accompanying verifications or affirmations do not count toward the page limit. Relatedly, the Board should state explicitly what Appendix A appears to assume—that parties have a right to submit arguments, not just evidence and data. Allowing arguments will assist the Board in its assessment of the evidence and data, and enhance the Board's decisionmaking process.

12. The Board should clarify the standard for commencing a Formal Board Proceeding based on the results of the investigation. The Board should provide that it will only commence a Formal Board Proceeding if it finds—once it has considered the

results of the investigation—that there is reasonable cause to believe a violation of 49 U.S.C. Subtitle IV, Part A has occurred. That threshold finding would necessarily be based only on the results of the investigation and would not in any sense be binding or create a presumption applicable during the Formal Board Proceeding.

Finally, the Board should also clarify that a Show Cause Order does not shift the burden of proof regarding potential violations. At all times, the burden rests on the Government to prove a violation, and the grant of authority to conduct Board-Initiated Investigations does not alter that. A party to whom a Show Cause Order has been issued should not be required to prove its innocence.

### **CONCLUSION**

The Board should modify its proposed rules in the ways discussed above.

Respectfully submitted,

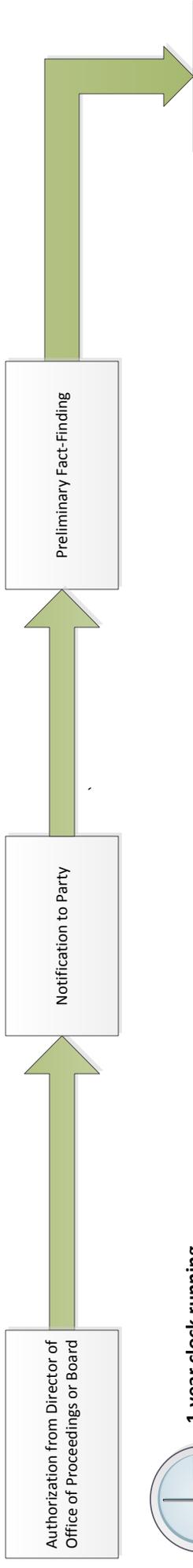
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# **EXHIBIT A**

# PRELIMINARY FACT-FINDING



1-year clock running



# BOARD-INITIATED INVESTIGATION

