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Norfolk Southern Corporation  
Law Department  
Three Commercial Place  
Norfolk, Virginia 23510-9241

Aarthy S. Thamodaran  
Assistant General Attorney

(757) 823-5296  
E-Mail: [aarthy.thamodaran@nscorp.com](mailto:aarthy.thamodaran@nscorp.com)

July 15, 2016

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

**Re: STB Ex Parte No. 731 – *Rules Relating to Board-Initiated Investigations***

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served on May 16, 2016 in the above docketed proceeding, Norfolk Southern Railway Company respectfully submits the enclosed comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Thamodaran', written in a cursive style.

Aarthy Thamodaran  
Counsel for Norfolk Southern Railway Co.

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 731**

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***RULES RELATING TO BOARD-INITIATED INVESTIGATIONS***

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**James A. Hixon  
John M. Scheib  
Aarth S. Thamodaran  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510**

***Counsel to Norfolk Southern  
Railway Co.***

**Dated: July 15, 2016**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 731**

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***RULES RELATING TO BOARD-INITIATED INVESTIGATIONS***

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Norfolk Southern Railway Company (“NS”) submits these comments to assist the Surface Transportation Board (“STB” or “Board”) in promulgating regulations consistent with Section 12(c) of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, 129 Stat. 2228 (“Act”). NS also joins in the comments filed in this proceeding by the Association of American Railroads (“AAR”).

Pursuant to Section 12(a) of the Act, 49 U.S.C. § 11701(a) is amended to authorize the Board to bring an investigation *on its own initiative* in addition to upon receipt of a complaint. However, the Board’s new authority is limited by three sources of constraints: (1) the Board’s governing statute, as amended by the Act; (2) due process and the Administrative Procedure Act, Public Law 79–404, 60 Stat. 237 (“APA”); and (3) best practices of other administrative agencies.

First, the Board’s governing statute, 49 U.S.C. Subtitle IV.<sup>1</sup> Under 49 U.S.C. § 11701(d)(2), as amended by the Act, the Board shall “only investigate issues that are of national or regional significance.” This jurisdictional limitation has been described as a “high bar” by several shipper-side commentators.<sup>2</sup> Thus, issues subject to the Board’s new investigative authority are necessarily few in number. And under § 11701(d)(6), as amended by the Act, 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.” Thus, the Board cannot conduct protracted, indefinite investigations. Clearly, Congress deliberately chose not to revive the broad investigative powers vested with the Interstate Commerce Commission (“ICC”) in decades past. These statutory limitations must be honored in the Board’s regulations.

Second, due process and the APA. Sections 12(c)(2) and (3) of the Act direct the Board to issue regulations that “satisfy due process requirements” and “take into account ex parte constraints.”<sup>3</sup> Furthermore, several APA provisions apply directly to agency investigations.<sup>4</sup> Thus, due process and APA requirements must be fully incorporated in the Board’s regulations.

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<sup>1</sup> See S. REP. NO. 114-52, at 10 (2015) (noting that “investigations would still need to be within the scope of [the Board’s] existing authority, which would not expand”).

<sup>2</sup> See Linda Chiem, *STB Unlikely To Freely Wield New Investigative Power*, LAW360 (May 20, 2016), available at <http://www.law360.com/articles/798738/stb-unlikely-to-freely-wield-new-investigative-power> (identifying potential matters of national or regional significance as major rail service disruptions, failure to provide service to a particular market, or burdensome contracts applying to large swaths of shippers).

<sup>3</sup> By contrast, although the Federal Energy Regulatory Commission (“FERC”) and the Securities and Exchange Commission (“SEC”) also are authorized to conduct investigations, based on NS’s review, Congress did not specifically direct these agencies to satisfy due process requirements. See, e.g., 16 U.S.C. § 797; Securities Exchange Act of 1934, Public Law 73–291, 48 Stat. 881 (1934). But see *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (May 15, 2008), available at <http://www.ferc.gov/whats-new/comm-meet/2008/051508/M-1.pdf> (noting that the manner in which FERC’s investigative prosecutors do their job “impacts public perception of our mission . . . and we are clarifying certain of our procedures to ensure that the subjects of an investigation receive due process both in perception and reality”); John S. Stoppelman, *Report of the Task Force on SEC Rules Relating to Investigations*, 42 BUS. LAW.

Third, agency best practices. The investigative rules and actions of other administrative agencies are instructive as to applicable due process and APA requirements as well as other practices designed to make agency investigations more efficient, fair, transparent, and ultimately, effective in furthering the agency's statutory mission. To the extent appropriate, these best practices should be reflected in the Board's regulations.

In Part I of these comments, NS recommends ways for the Board to revise its proposed regulations, as proposed in the Notice of Proposed Rulemaking served in this proceeding by the Board on May 16, 2016 ("NPRM"), to meet the directives of § 11701, as amended by the Act:

- Clarify that the Board must either issue a decision dismissing the Board-Initiated Investigation or deciding the merits in the related Formal Board Proceeding within one year of commencing the Preliminary Fact-Finding phase, if there is one, or the Board-Initiated Investigation; and
- Define how the Board intends to apply the jurisdictional standard of "national or regional significance" and clarify that the issue under investigation must remain of national or regional significance throughout the Board-Initiated Investigation and related Formal Board Proceeding.

In Part II of these comments, NS recommends ways for the Board to revise its proposed regulations in the NPRM to comply with applicable due process and APA requirements:

- Ensure and enforce the absolute separation of investigative and decisionmaking functions, with corresponding restrictions on ex parte communications between the Board staff conducting the Preliminary Fact-Finding and the Investigating Officers and other Board employees conducting the Board-Initiated Investigation, on the one hand, and the Board employees and members participating in a related Formal Board Proceeding, on the other hand, through enhanced recordkeeping and prompt disclosures to the parties under investigation;
- Abide by the disclosure requirements of both Section 5 and Section 12 of the Act;

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789, 789 (May 1987) (noting that "in practice, SEC investigations are sufficiently adversarial that due process concerns are appropriate").

<sup>4</sup> See, e.g., *FLRA v. NASA*, 120 F.3d 1208, 1215 (11th Cir. 1997) (holding that the right to counsel under 5 U.S.C. § 555(b) of the APA applies in agency investigations). See also *Professional Reactor Operator Society v. NRC*, 939 F.2d 1047, 1052 (D.C. Cir. 1991) (explaining that the APA applies equally across all administrative agencies, as a default matter).

- Permit subpoenaed witnesses to obtain copies of their evidence and transcripts of their testimony, provided that such witnesses may be limited to inspection of their transcripts for good cause;
- Create a fixed right for the parties under investigation to have a meaningful opportunity to respond specifically to the Investigating Officer’s recommendations and summary of findings;
- Eliminate the Board’s ability to exclude counsel for good cause;
- Create a reasonable opportunity for the person claiming confidentiality to respond to the Board’s denial of a request for confidential treatment prior to any public disclosure of the purportedly confidential information;
- Ensure that subpoenas are issued only where they are likely to lead to admissible evidence regarding the investigated issue of national or regional significance and are otherwise limited in scope, specific in directive, and in good faith; and
- Specify in the Order to Show Cause the actual issues for consideration in the Formal Board Proceeding, *i.e.*, the alleged violations of national or regional significance.

In Part III of these comments, NS recommends ways for the Board to revise its proposed regulations in the NPRM to reflect investigative best practices of other administrative agencies:

- Require the Investigating Officer to disclose to the parties under investigation all exculpatory evidence;
- Grant discovery rights to the parties under investigation for material gathered by the Board; and
- Limit the permissible amount of discovery conducted by the Board’s investigative staff.

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## **I. STATUTORY-RELATED CONCERNS**

Pursuant to 49 U.S.C. § 11701(d), as amended by the Act, the Board must revise its proposed regulations to: (A) account for the one-year deadline to conclude investigations with administrative finality; and (B) define the jurisdictional limitation to investigate only issues of “national or regional significance” and clarify that the investigated issue must remain of national

or regional significance throughout the Board-Initiated Investigation and Formal Board Proceeding.

**A. One-Year Deadline**

49 U.S.C. § 11701(d)(6), as amended by the Act, requires the Board to “dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced.” To comply with this deadline, two questions must be resolved: (1) when does an investigation commence; and (2) what is administrative finality?

***1. Commencement of Investigation***

Based on Congress’s intent, an investigation commences with the Preliminary Fact-Finding phase proposed in 49 C.F.R. § 1122.3. As noted above, the Act expressly provides that the Board has one year to conclude any “investigation” with administrative finality.<sup>5</sup> The Act does not contemplate a separate Preliminary Fact-Finding phase. As such, the Board effectively would circumvent Congress’s intent, as expressed in the new § 11701(d)(6), if it were allowed to create an entirely new investigative phase and conduct this phase wholly outside of the one-year statutory deadline. This would be nothing more than clever accounting. The Board’s creation of the Preliminary Fact-Finding phase is a blatant attempt to buy itself more time to conduct an investigation than afforded by Section 12 of the Act.

Furthermore, if the Preliminary Fact-Finding phase were not subject to the one-year statutory deadline, this phase would be free from any durational restraints. It is important to note that other administrative agencies do not permit indefinite “pre-investigation” phases. For example, the SEC instructs that its corresponding phase, Matters Under Inquiry, “should be

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<sup>5</sup> See 49 U.S.C. § 11701(d)(6).

closed or converted to an investigation within sixty days.”<sup>6</sup> Similarly, the Board’s Preliminary Fact-Finding phase must be included within the one-year statutory deadline to prevent abuses of the Board’s limited investigative authority.<sup>7</sup>

Thus, an investigation initiated under Section 12 of the Act begins with the Preliminary Fact-Finding phase, if there is one.<sup>8</sup>

## 2. *Administrative Finality*

Based on judicial precedent and other provisions of the Board’s governing statute, administrative finality occurs only with the Board’s decision either dismissing the Board-Initiated Investigation or deciding the merits in the related Formal Board Proceeding (“Board Decision”).

Final agency action “marks the consummation of the agency’s decisionmaking process.”<sup>9</sup> The Supreme Court uses a tripartite test to assess when agency action is final: (1) the action is definitive; (2) the action has a direct, immediate effect on the parties; and (3) judicial review serves efficiency or enforcement of the regulatory scheme.<sup>10</sup> Applying this test in *Newport Galleria Group v. Deland*, the D.C. Circuit held that the EPA’s initiation of an investigative proceeding under the Clean Water Act is not final agency action: (1) it “merely represents a judgment that the matter is worth looking into;” (2) it means “only that adjudicatory proceedings

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<sup>6</sup> *Enforcement Manual*, SEC DIVISION OF ENFORCEMENT 16 (June 4, 2015), available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>7</sup> See also Stoppelman, *supra* note 3, at 789 (concluding that “de facto unlimited investigations are an abuse of governmental authority”).

<sup>8</sup> As such, 49 U.S.C. § 11701(d)(1), as amended by the Act, requires the provision of “written notice to the parties under investigation, which shall state the basis for such investigation” within 30 days after initiating the Preliminary Fact-Finding phase.

<sup>9</sup> E.g., *Bennett v. Spear*, 520 U.S. 154, 178 (1967).

<sup>10</sup> *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239 (1980).

will commence” and does not fix any legal rights; and (3) judicial review at this juncture would only interfere with the agency’s mission to decide issues of fact and law based on a full record developed over the course of the proceeding.<sup>11</sup>

Similarly, courts repeatedly have held that investigative recommendations, actions, and decisions lack administrative finality. For example in *Reliable Automatic Sprinkler Co. v. Consumer Products Safety Commission*, the D.C. Circuit held that agency activities amounting “to an investigation of appellant’s sprinkler heads, a statement of the agency’s intention to make a preliminary determination that the sprinkler heads present a substantial product hazard, and a request for voluntary corrective action . . . do not constitute final agency action.”<sup>12</sup> As another example, in *Tenneco, Inc. v. FERC*, the Fifth Circuit held that an order to investigate is not final agency action, because it does not fix any legal rights and no facts are adjudicated.<sup>13</sup> And in *FPC v. Hope Natural Gas Co.*, the Supreme Court held that even findings as to lawfulness in an agency investigation are simply a “preliminary, interim step towards possible future action.”<sup>14</sup>

As in *Newport Galleria*, the Board’s initiation of a Formal Board Proceeding as a result of a Board-Initiated Investigation is not final agency action: (1) it does not constitute a definitive statement of the Board’s position, but merely represents that further inquiry is warranted; (2) no legal rights are fixed at the onset of the proceeding; and (3) judicial review at this stage would interfere with the Board’s mission to decide issues of fact and law based on a full record. Only with the Board Decision is the Supreme Court’s test for final agency action satisfied. As in

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<sup>11</sup> 618 F. Supp. 1179, 1185 (D.C. Cir. 1985).

<sup>12</sup> 324 F.3d 726, 732 (D.C. Cir. 2003).

<sup>13</sup> 688 F.2d 1018, 1022 (5th Cir. 1982).

<sup>14</sup> 320 U.S. 591, 618-19 (1944).

*Reliable Automatic Sprinkler, Tenneco, and Hope Natural Gas*, all investigative recommendations, actions, and decisions prior to the Board Decision lack administrative finality.

Other provisions of the Board’s governing statute reinforce that administrative finality occurs only with the Board Decision. For example, 49 U.S.C. § 11701(e)(1), as amended, only permits judicial review upon conclusion of the Formal Board Proceeding and an “order of the Board finding [] a violation”—not at any preceding point in the Preliminary Fact-Finding, Board-Initiated Investigation, or Formal Board Proceeding. And, the effect of regulatory provisions on judicial review has been held to mirror the doctrine of administrative finality.<sup>15</sup> Similarly, 49 U.S.C. § 722(d) generally provides that “an action of the Board under this section is final on the date on which it is served.” And, the Board has equated finality under § 722(d) with administrative finality, repeatedly defining final action as that which consummates the Board’s decisionmaking process.<sup>16</sup> Administrative finality in § 11701(d)(6) cannot be ascribed a different meaning from administrative finality in § 722(d).<sup>17</sup>

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<sup>15</sup> See, e.g., *People’s Counsel of District of Columbia v. Public Service Commission*, 474 A.2d 1274, 1292 n31 (D.C. Ct. App. 1984) (holding that a D.C. Code provision, excepting the agency’s refusal to issue a declaratory order from judicial review, precluded the court “from reviewing substantive decisions made during the course of an investigation leading to such a dismissal” as such “decisions made during the course of a preceding investigation are held to lack the finality necessary to warrant judicial review,” and explaining that the effect of the D.C. Code provision “on the judicial review of findings and conclusions made during the course of an investigation is very similar to that of the doctrine of administrative finality”).

<sup>16</sup> See, e.g., *Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, 2011 STB LEXIS 282, at \*16 (STB served June 14, 2011) (noting that the “action was completed and became final with our 2007 decision in *Tongue River III*, served on October 9, 2007”); *Texas Municipal Power Agency v. BNSF Ry. Co.*, 2004 STB LEXIS 597, at \*3 (STB served Sept. 27, 2004) (stating that “the prior decision does not become administratively final for purposes of seeking judicial review until the Board has acted on the administrative appeal”). See also *Major Rail Consolidation Procedures*, 2001 STB LEXIS 546, at \*114-15 (STB served June 7, 2001) (noting that a “person may, at any time, file a petition to reopen any *administratively final action* of the Board” under § 722(c)) (emphasis added).

<sup>17</sup> See, e.g., *Barber v. Thomas*, 560 U.S. 474, 497 (2010) (requiring a “textual integrity whereby the same term should have the same meaning each time it is used by the statute”).

Although the Senate Report for the Act provides that the “time period needed to complete a proceeding, after receipt of the recommendations and summary of findings, would not be included in the 1 year time limitation for investigations,”<sup>18</sup> this legislative history is trumped by the unambiguous new § 11701(d)(6). As discussed above, “administrative finality” is a known term of art with a specific definition, thus precluding any need to rely on legislative history.<sup>19</sup> And, Congress is presumed to have known and adopted this specific definition of “administrative finality” when drafting the Act.<sup>20</sup> Excluding the Formal Board Proceeding from the one-year statutory deadline makes the term “administrative finality” in the new § 11701(d)(6) mere surplusage, in violation of basic canons of statutory interpretation.<sup>21</sup> As such, the Senate Report does not alter the fact that an investigation initiated under Section 12 of the Act concludes with administrative finality only with the Board Decision. The Board should not presume that Congress expressed itself in a single Senate Report rather than in the unambiguous statutory text approved by both Houses and signed by the President.<sup>22</sup>

The foregoing analysis also is not altered by 49 U.S.C. § 11701(c), which gives the Board three years to complete a “formal investigative proceeding,” based on the Board’s own pre-Act interpretation of § 11701(c), as adopted by the courts:

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<sup>18</sup> S. REP. NO. 114-52, at 13 (2015).

<sup>19</sup> See, e.g., *BedRoc Ltd., LLC v. US*, 541 U.S. 176, 187 n8 (2004) (citing “our longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text”).

<sup>20</sup> See, e.g., *Morissette v. US*, 342 U.S. 246, 263 (1952) (noting that Congress is presumed to know and adopt the generally accepted definitions of terms of art and statutory provisions).

<sup>21</sup> See, e.g., *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 299 n1 (2006) (noting that it is “generally presumed that statutes do not contain surplusage”).

<sup>22</sup> See, e.g., *BedRoc*, 541 U.S. at 187 n8 (noting that “[w]e thus cannot accept Justice Stevens’ invitation to presume that Congress expressed itself in a single House Committee Report rather than in the unambiguous statutory text approved by both Houses and signed by the President”).

*[The Board] thus reads “formal investigative proceeding” to refer to such proceedings pursuant to the “otherwise provided” clause of subsection (a). The Board notes its interpretation is consistent with the I.C.C.’s reading of 49 U.S.C. § 11701 (as recodified in 1978). Because the term “formal investigative proceeding” had an established meaning before the ICCTA was enacted, the Board suggests Congress is presumed to have been aware of that interpretation when it retained the phrase in section 11701(c) in 1995.*<sup>23</sup>

Similarly in 2015, Congress is presumed to have been aware of this preexisting interpretation when it retained the phrase “formal investigative proceeding” in § 11701(c) and legislated the separate one-year deadline in § 11701(d)(6) for investigations initiated under Section 12 of the Act.<sup>24</sup> Congress specifically chose not to use the term “formal investigative proceeding” in § 11701(d)(7)(B),<sup>25</sup> and this choice should be given meaning.

Thus, to the extent § 11701(c) and § 11701(d)(6) need to be reconciled at all, the most logical reconciliation is as follows:

- First, the three-year statutory deadline in § 11701(c) applies to formal investigative proceedings which the Board may commence on its own initiative “as otherwise provided” in Title 49.<sup>26</sup> This is the precise scope of the provision that the Board has advanced to the courts.

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<sup>23</sup> *BNSF Ry. Co. v. STB*, 604 F.3d 602, 609 (D.C. Cir. 2010) (emphases added). *See also AEP Texas North Co. v. BNSF Ry. Co.*, 2006 STB LEXIS 709, at \*9 (STB served Nov. 13, 2006) (stating that, “[f]or example, section 11123 gives the Board broad authority to investigate emergency service crises on its own initiative. If the Board were to launch an investigation of a service crisis, such an investigation would need to be completed within 3 years. Likewise, an agreement between rail carriers regarding the pooling or division of traffic must be approved by the Board, and section 11322 authorizes the agency to ‘begin a proceeding under this section on its own initiative.’ Again, any such Board-initiated investigation would need to be concluded within 3 years.”); *Complaints Filed Pursuant to the Savings Provision of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 407-12 (1983) (interpreting “formal investigative proceeding” similarly).

<sup>24</sup> *See, e.g., Morissette*, 342 U.S. at 263 (noting that Congress is presumed to know and adopt the generally accepted definitions of terms of art and statutory provisions).

<sup>25</sup> After receiving the recommendations and summary of findings, the Board shall either dismiss the investigation or “initiate a *proceeding* to determine if a provision under this part has been violated.” § 11701(d)(7)(B) (emphasis added).

<sup>26</sup> *See supra* note 23.

- Second, the one-year statutory deadline in § 11701(d)(6) applies to investigations which the Board may commence on its own initiative pursuant to Section 12 of the Act. As calculated above, these investigations run from the Preliminary Fact-Finding phase, if there is one, or the Board-Initiated Investigation through the Board Decision.

No other interpretation gives meaning to each word of Section 12 of the Act and of 49 U.S.C. § 11701. Any assertion by the Board that its decision to initiate a Formal Board Proceeding turns off the one-year deadline of § 11701(d)(6) and starts the three-year deadline of § 11701(c) is indefensible based on the clear statutory text and the specific definitions of “administrative finality” and “formal investigative proceeding.”

In sum, the Board must issue a decision either dismissing the Board-Initiated Investigation or deciding the merits in the related Formal Board Proceeding within one year of commencing any Preliminary Fact-Finding phase or the Board-Initiated Investigation.

#### **B. National and Regional Significance**

49 U.S.C. § 11701(d)(2), as amended by the Act, mandates that the Board shall “only investigate issues that are of national or regional significance.” This is a severe jurisdictional limitation on the Board’s new investigative authority.

Although national or regional significance is not a new standard for the Board,<sup>27</sup> it lacks a precise definition. Based on a review of relevant precedent, the Board has announced only two overarching principles related to this standard. First, “service problems of national or regional significance tend to emerge on Class I railroads, rather than on short line railroads.”<sup>28</sup> Second, “only transactions involving major market extensions are of regional or national transportation

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<sup>27</sup> See, e.g., 49 C.F.R. § 1180.2 (defining a significant transaction as one “not involving the control or merger of two or more class I railroads that is of regional or national transportation significance”).

<sup>28</sup> *United States Rail Service Issues – Performance Data Reporting*, EP No. 724 (Sub-No. 4), 2016 STB LEXIS 115, at \*57 (STB served Apr. 29, 2016).

significance.”<sup>29</sup> Even without a precise definition, it is clear from the Board’s ad hoc application that the standard of national or regional significance sets a high—albeit currently somewhat amorphous—bar.<sup>30</sup> Issues of national or regional significance are necessarily few in number. For example, the Board cannot investigate a discrete complaint raised by an individual shipper against a particular carrier.

But with respect to this amorphous bar, the Board should heed the calls for clarity by courts. For example in *City of Vernon v. FERC*, the D.C. Circuit held that FERC was required to explain “what elements are necessary *and sufficient* to make a prima facie case . . . . Otherwise we must ‘guess at the theory underlying the agency’s action.’”<sup>31</sup> The court found particularly troubling that FERC used a “we-know-it-when-we-see-it” approach for claims of rate discrimination. As in *City of Vernon*, the “national or regional significance” standard affects the scope of issues subject to the Board’s new investigative authority. And, it does more. The

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<sup>29</sup> *Railroad Consolidation Procedures*, EP No. 282 (Sub-No. 3), 1982 ICC LEXIS 63, at \*9 n4 (ICC served Feb. 19, 1982).

<sup>30</sup> See, e.g., *Rio Grande Industries, Inc., et al. – Purchase and Related Trackage Rights – Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, FD No. 31505, 1989 ICC LEXIS 195 (ICC served July 31, 1989) (finding a transaction to be of national or regional significance where it involved two Class I carriers and a major market extension, made more important “[b]ecause of the size and nature of the Chicago rail market, and its importance to the North-Central region of the United States”); *National Grain Car Supply Conference*, EP No. 519, 1994 MCC LEXIS 146, at \*5 (ICC served Apr. 11, 1994) (finding issues related to grain car supply to be of national or regional significance because of the consequences for the national agricultural sector). But see, e.g., *Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al.*, FD No. 35654 (STB served Sept. 5, 2012) (not finding a transaction to be of national or regional significance where it involved the consolidation of the two largest national shortline holding companies, even though “more than 100 shortline railroads, operating in 37 states, would be consolidated under a single corporate umbrella”); *Norfolk Southern Ry. Co., Pan Am Rys., Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC*, FD No. 35147 (STB served July 18, 2008) (not finding a transaction to be of national or regional significance where it involved the ownership or operation of approximately 437 miles of rail line, despite arguments that it would create the largest carrier and alter Northeast traffic patterns).

<sup>31</sup> 845 F.2d 1042, 1048 (D.C. Cir. 1988) (internal citation omitted) (emphasis in original).

Board does not have the power to initiate or continue an investigation unless the issue is of national or regional significance. Accordingly, “national or regional significance” needs to be clearly defined to allow the Board (and its members, Investigating Officers, employees, and staff) to clear this jurisdictional hurdle and to permit meaningful judicial review of the Board’s investigative actions. The Board cannot continue to rely on a “we-know-it-when-we-see-it” approach.

A proposed definition is provided below for the Board’s consideration:

For purposes of 49 U.S.C. § 11701(d)(2), issues of national or regional significance shall mean issues with widespread and substantial effects on rail transportation services or markets.

Relatedly, it is worth emphasizing that this jurisdictional limitation must be dynamic. An initial determination that the investigated issue is of national or regional significance is not set in stone. The Board must ensure that the investigated issue is *and continues to be* of national or regional significance throughout the Board-Initiated Investigation and related Formal Board Proceeding. If at any time the Board finds that the issue no longer is of national or regional significance, the investigation must terminate immediately so that the Board does not exceed the boundaries of its statutory authority.

## **II. DUE PROCESS AND APA DEFECTS**

Based on applicable due process and APA requirements, the Board must revise its proposed regulations to: (A) fully separate the investigative and decisionmaking functions, with corresponding restrictions on *ex parte* communications, and comply with the disclosure requirements of both Section 5 and Section 12 of the Act; (B) permit subpoenaed witnesses to obtain copies of their evidence and transcripts of their testimony; (C) create a fixed right for the parties under investigation to respond specifically to the Investigating Officer’s

recommendations and summary of findings; (D) eliminate the Board’s ability to exclude counsel for good cause; (E) create a reasonable opportunity for the person claiming confidentiality to respond to the Board’s denial of a request for confidential treatment; (F) ensure that subpoenas are issued only where they are likely to lead to admissible evidence regarding the investigated issue of national or regional significance and are otherwise limited in scope, specific in directive, and in good faith; and (G) specify in the Order to Show Cause the actual issues for consideration in the Formal Board Proceeding related to the Board-Initiated Investigation.

**A. Separation of Investigative and Decisionmaking Functions and Corresponding Restrictions on Ex Parte Communications**

49 U.S.C. § 11701(d)(5), as amended by the Act, states that the Board shall “to the extent practicable, separate the investigative and decisionmaking functions of staff.” Proposed 49 C.F.R. § 1122.4 echoes 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.” This general statement is insufficient to address applicable due process and APA requirements.

As an initial matter, it is important to address what degree of separation of investigative and decisionmaking functions is “practicable” for the Board. NS respectfully submits that the Board “practicably” can fully and absolutely separate the investigative and decisionmaking functions. Consider 5 U.S.C. § 554(d)(2) of the APA:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . , except as witness or counsel in public proceedings.

Although there is an exception for “the agency or a member or members of the body comprising the agency,”<sup>32</sup> this exception applies only where “involvement in all phases of a case is dictated ‘by the very nature of administrative agencies.’”<sup>33</sup> With respect to the Board, involvement of the same Board members, employees, staff, and other agents in all phases of an investigation is not dictated by the Board’s nature or current organizational structure.

Moreover, separation of investigative and decisionmaking functions is a fundamental due process right:

The investigators, if allowed to participate (in adjudication), would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, . . . ; and [a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.<sup>34</sup>

The underlying test is whether “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”<sup>35</sup> For example in *Amos Treat & Co., Inc. v. SEC*, the investigating officer, Mr. Cohen, a director of the Division of Corporate Finance for the SEC, later became a member of the SEC.<sup>36</sup> The D.C. Circuit ruled that, although the SEC could use and consider materials gathered and recommendations submitted by the Division of Corporate Finance under Mr. Cohen’s direction, the SEC could not actually charge the party under investigation and conduct

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<sup>32</sup> 5 U.S.C. § 554(d)(2)(C).

<sup>33</sup> *E.g., Grolier Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980).

<sup>34</sup> *Id.* at 1219 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 44, 56 (1950)).

<sup>35</sup> *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (citing *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).

<sup>36</sup> 306 F.2d 260, 266-67 (D.C. Cir. 1962).

hearings with Mr. Cohen's participation.<sup>37</sup> The court said that doing so "would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed."<sup>38</sup>

Furthermore, separation of investigative and decisionmaking functions has not been interpreted "so narrowly that it applies only to cases where the same person acts as prosecutor or investigator and judge."<sup>39</sup>

[B]y forbidding adjudication by persons "engaged in the performance of investigative or prosecuting functions," Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of "investigator" or "prosecutor," but all persons who had, in that or a factually related case, been involved with *ex parte* information, or who had developed, by prior involvement with the case, a "will to win."<sup>40</sup>

And, a failure to separate investigative and decisionmaking functions is not rendered moot simply because it did not appear to sway the agency's ultimate vote or decision.<sup>41</sup>

Thus, to satisfy due process requirements, the Board's proposed 49 C.F.R. § 1122.4 must be expanded so that all Board staff, employees, and Investigating Officers who were significantly involved in the Preliminary Fact Finding phase, if there was one, and the Board-Initiated Investigation are barred from participation in any decisionmaking functions in a related

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (holding that the Chairman should not have participated in the agency's decision when he had been deeply involved in a related investigative proceeding during his prior service as Chief Counsel to the Senate Subcommittee for Antitrust).

<sup>39</sup> *Utica Packing Co. v. Block*, 781 F.2d 71, 76 (6th Cir. 1986).

<sup>40</sup> *Grolier*, 615 F.2d at 1220.

<sup>41</sup> See, e.g., *Cinderella Career*, 425 F.2d at 592 (citing *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) (stating that "[l]itigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured")).

Formal Board Proceeding. In order to enforce this absolute separation of investigative and decisionmaking functions, the Board should enhance the disclosure requirements under proposed § 1122.4. In addition to identifying the Investigating Officer(s) in the Order of Investigation, the Board also should identify all other Board staff and employees involved in the Preliminary Fact-Finding phase and Board-Initiated Investigation. This list should be updated by the Board on a continuing basis and made available to the parties under investigation, similar to the requirement under proposed § 1122.5 for the Board to provide written notice to the parties if it adds or removes Investigating Officer(s). If a related Formal Board Proceeding is ultimately opened, no Board staff, employees, and Investigating Officers from the list may participate therein.

Relatedly, the Board's proposed regulations currently contain no restrictions on ex parte communications, most importantly, communications between the Board staff conducting the Preliminary Fact-Finding and the Investigating Officers and other Board employees conducting the Board-Initiated Investigation, on the one hand, and the Board employees and members participating in a related Formal Board Proceeding, on the other hand.<sup>42</sup> This violates the specific directive in Section 12(c)(3) of the Act for the Board to issue rules that "take into account ex parte constraints."

"[W]here a single entity is the prosecutor, judge, and jury . . . there are significant due process concerns regarding ex parte communications and the dividing line between decisional and non-decisional Staff."<sup>43</sup> Board employees serve as the investigator, prosecutor, judge, and

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<sup>42</sup> See NPRM at 6 (stating only that "[c]onsistent with analogous ex parte constraints in other procedures at the Board, the Board members, as a matter of policy, would not engage in off-the-record verbal communications concerning the matters under investigation with parties subject to Board-Initiated Investigations").

<sup>43</sup> William Scherman, John Shepherd, & Jason Fleischer, *The New FERC Enforcement: Due Process Issues in the Post-Epact 2005 Enforcement Cases*, 31 ENERGY L. J. 55, 70-71 (2010). This does not contradict the argument above that the Board can fully separate the investigative

jury in the investigation process set forth in the NPRM. Thus, basic notions of due process demand prohibitions on ex parte communications, particularly between the Board staff conducting the Preliminary Fact-Finding and the Investigating Officers and other Board employees conducting the Board-Initiated Investigation, on the one hand, and the Board employees and members participating in a related Formal Board Proceeding, on the other hand. A line must be drawn between decisional and non-decisional Board employees.

Ex parte constraints can be found in 5 U.S.C. § 554(d) of the APA:

The employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . , unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.<sup>44</sup>

Intra-agency ex parte communications place the parties under investigation at a significant disadvantage and generally compromise the integrity of the agency's decisionmaking process. Absent ex parte restrictions, the Investigating Officer could freely discuss the Board-Initiated Investigation with the Board members and/or other decisional employees. Although the Board notes in the NPRM that the parties under investigation could submit written statements to the Board pursuant to proposed 49 C.F.R. § 1122.12,<sup>45</sup> this is a poor consolation prize. Not privy

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and decisionmaking functions. Although the Board does not need to place the same employees in charge of investigative and decisionmaking functions, the Board houses all such employees in charge of these various functions.

<sup>44</sup> See also *Air Products & Chemicals, Inc. v. FERC*, 650 F.2d 687, 709 (5th Cir. 1981) (suggesting that a violation of § 554(d) would exist if facts regarding the proposed investigation were communicated by the enforcement staff to the Commission, rather than a recommendation on the narrow question of whether an investigation should ensue).

<sup>45</sup> NPRM at 6.

to the discussions between the Investigating Officer and the decisional Board employees, the parties would be forced to take shots in the dark with any such written statements, blindly guessing as to which arguments and defenses to raise.<sup>46</sup>

Thus, to implement Section 12(c)(3) of the Act, the Board must adopt regulations prohibiting the Board staff conducting the Preliminary Fact-Finding and the Investigating Officers and other Board employees conducting the Board-Initiated Investigation from engaging in any ex parte communications with the Board employees and members participating in the Formal Board Proceeding, and vice versa. Proposed language is provided below for the Board's consideration:

Except to the extent required for the disposition of ex parte matters as authorized by law, (1) no employee or agent of the Board who performs or performed investigative or prosecuting functions in the Preliminary Fact-Finding or Board-Initiated Investigation, shall make or knowingly cause to be made to any member of the Board, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the Formal Board Proceeding, an ex parte communication relevant to the merits of that or a factually related proceeding; and (2) no member of the Board or any other employee who is or who reasonably may be expected to be involved in the decisional process in the Formal Board Proceeding, shall make or knowingly cause to be made to any employee or agent of the Board who performs or performed investigative or prosecuting functions in the Preliminary Fact-Finding or Board-Initiated Investigation, an ex parte communication relevant to the merits of that or a factually related proceeding.

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<sup>46</sup> See, e.g., Scherman *et al.*, *supra* note 43, at 77 (noting that “the subject of a FERC enforcement proceeding is at a disadvantage from the very beginning. The [then-]current ex parte rules permit the Enforcement Staff unfettered communication with the Commission and its advisory Staff regarding the merits of a case prior to the issuance of an order to show cause. However, the subject of an investigation is limited to written communications with the Commission. This places Enforcement Staff in a powerful position, allowing it to narrowly craft its arguments so that it hits the issues that most appeal to the Commission, while the subject of an investigation must use a more ‘shotgun’ approach”).

The Board's existing sanctions under 49 C.F.R. § 1102.2(f)(1) and (3)<sup>47</sup> should continue to apply if the foregoing restrictions on ex parte communications are violated. However, the Board should slightly modify the existing disclosure requirements under § 1102.2(e) as follows:

If a prohibited ex parte communication occurs, the Board must promptly transmit either the written communication or a transcript of the oral communication to the parties under investigation. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

In sum, the Board must fully separate the performance of investigative and decisionmaking functions and must prohibit ex parte communications between the Board staff conducting the Preliminary Fact-Finding and the Investigating Officers and other Board employees conducting the Board-Initiated Investigation, on the one hand, and the Board employees and members participating in a related Formal Board Proceeding, on the other hand. These due process requirements should be enforced by the Board through increased recordkeeping and prompt disclosures to the parties under investigation.

***1. Section 5 and Section 12***

There is a further component to intra-agency ex parte communications which should be considered. Section 5 of the Act permits Board members to engage in nonpublic meetings to discuss official agency business under three circumstances: (1) no formal or informal vote or other official agency action is taken at the meeting; (2) each individual present at the meeting is a member or employee of the Board; and (3) the General Counsel of the Board is present at the meeting. However, within two business days after the conclusion of the meeting, the Board must

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<sup>47</sup> “The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited ex parte communication concerning the merits of a proceeding.” § 1102.2(f)(1). And, “[t]he Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates the foregoing rules.” § 1102.2(f)(3).

publish a list of the individuals present at the meeting and a summary of the matters discussed (“Disclosures”), unless the discussion relates to an “ongoing proceeding” before the Board, in which case the Board must make the Disclosures on the date of the final Board decision in that proceeding.

As explained in NS’s previous letter to the Board dated April 25, 2016, which is attached hereto as Exhibit A and made a part hereof, the Board must comply with both Section 5 and Section 12 of the Act. Pursuant to the latter, the commencement of an investigation<sup>48</sup> must be disclosed to the parties under investigation within 30 days.<sup>49</sup> However, if the Board members hold a nonpublic discussion regarding such investigation (or the potential therefor), pursuant to Section 5 of the Act, the Disclosures must be made within two business days of that meeting. Even if this meeting occurs before the investigation actually commences, the Board cannot postpone the Disclosures until it ultimately commences the Preliminary Fact-Finding phase, if there is one, or the Board-Initiated Investigation. And, the Board definitely cannot postpone the Disclosures until its final decision in the related Formal Board Proceeding; for, a Section 12 investigation clearly is not an “ongoing proceeding” for purposes of Section 5 given that a Formal Board Proceeding may result from a Board-Initiated Investigation.<sup>50</sup>

Thus, the Board must comply with the disclosure requirements of Section 5 and Section 12 of the Act. As commanded by due process, the Board’s priority must be to provide prompt notice to the potential or actual parties under investigation of any ex parte communications which could compromise the separation of investigative and decisionmaking functions.

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<sup>48</sup> See *supra* Part I.A.1 (explaining that the investigation commences with the Preliminary Fact-Finding phase, if there is one).

<sup>49</sup> 49 U.S.C. § 11701(d)(1).

<sup>50</sup> See 49 U.S.C. § 11701(d)(7)(B).

## **B. Rights of Subpoenaed Witnesses**

The Board's proposed regulations currently fail to include any rights for subpoenaed witnesses to obtain copies of their evidence and transcripts of their testimony, in violation of applicable APA requirements.

Under 5 U.S.C. § 555(c) of the APA, a "person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding, the witness may for good cause be limited to inspection of the official transcript of his testimony." The rights for subpoenaed witnesses under § 555(c) safeguard the integrity of the agency's decisionmaking process:

Parties should in any case have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth, to refresh their memories in the case of stale proceedings, and to enable them to be advised by counsel. They should also have such copies whenever needed in other judicial or administrative proceedings.<sup>51</sup>

Accordingly, in compliance with § 555(c), FERC provides that:

A witness who has given testimony in an investigation shall be entitled, upon written request, to procure a transcript of the witness' own testimony on payment of the appropriate fees, except that in a non-public formal investigation, the office responsible for the investigation may for good cause deny such request. In any event, any witness or his counsel, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.<sup>52</sup>

Thus, to satisfy APA requirements, the Board must add an express right for subpoenaed witnesses to obtain copies of their evidence and transcripts of their testimony, provided that witnesses may be limited to inspection of such transcripts for good cause.

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<sup>51</sup> H. R. REP. NO. 79-1980, at 33 (1946).

<sup>52</sup> 18 C.F.R. § 1b.12.

### C. Response to Recommendations and Summary of Findings

The Board's proposed Appendix A to Part 1122 allows the Investigating Officer "in his or her discretion" to "choose[]" whether to inform the parties under investigation of the recommendations and summary of findings ("Recommendations") and whether to advise the parties of their ability to respond to the Recommendations ("Optional Process"). This Optional Process violates the parties' fundamental due process rights to notice and a meaningful opportunity to be heard<sup>53</sup> and directly contravenes the parties' rights under the APA.

Under 5 U.S.C. § 557(c) of the APA:

Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

Accordingly, there are two key defects with the Optional Process:

First, § 557(c) states that the parties "are entitled" to this reasonable opportunity for submission—not that the parties "may be entitled" to this opportunity. As such, the parties under investigation must be advised, *in all cases*, not subject to the Investigating Officer's discretion, of their right to submit a written response to the Recommendations.

This defect is not remedied by the fact that the parties under investigation could submit written statements to the Board at any time under proposed 49 C.F.R. § 1122.12, because this does not ensure that the parties have a reasonable opportunity to respond specifically to the Recommendations, as required by § 557(c). Similarly in *Koniag, Inc., Uyak v. Andrus*, the D.C.

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<sup>53</sup> See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

Circuit found a due process violation where the decision of the Administrative Law Judge (“ALJ”) was forwarded to the agency for its recommended decision without notice to or an opportunity for comment from the aggrieved parties, even though such parties could comment at a prior phase on the ALJ’s decision and at a later phase on the agency’s ultimate decision.<sup>54</sup>

Second, it is unclear whether the parties under investigation would have sufficient information to respond *meaningfully* to the Recommendations.<sup>55</sup> The rights under § 557(c) are only consequential if the parties have a detailed target at which to aim their response. But, the Board’s proposed regulations are worryingly silent here. Appendix A leaves it to the Investigating Officer’s discretion to decide whether to “inform the parties under investigation (orally or in writing) of the” Recommendations; and, the option to inform the parties orally strongly suggests that the parties would not have a detailed target for their response. This defect is compounded by the fact that the Board’s proposed regulations contain no *ex parte* restrictions, as discussed above in Part II.A, and no discovery rights for the parties under investigation, as discussed below in Part III.B. The Recommendations are the only real window into the Investigating Officer’s arguments and case against the parties under investigation. The curtains must be thrown open, as a matter of due process.

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<sup>54</sup> 580 F.2d 601, 609 (D.C. Cir. 1978). The D.C. Circuit assigned great import to the fact that Congress had required “maximum participation” from the aggrieved parties, essentially requiring an opportunity for the parties to comment at each procedural phase. An analogous congressional intent arguably is embodied in the Act. 49 U.S.C. § 11701(d)(4), as amended, requires that the Recommendations be “ma[d]e available to the parties under investigation,” presumably to ensure that the parties could respond specifically to the Recommendations. Congress did not legislate that the availability of the Recommendations to the parties under investigation would be optional.

<sup>55</sup> See also *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976) (holding that due process requires a “meaningful opportunity” to challenge new evidence); *Air Products & Chemicals*, 650 F.2d at 697 (noting in the context of agency hearings that “an agency should either disclose the contents of what it relied upon or, in the case of publicly-available information, specify what is involved in sufficient detail to allow for *meaningful* adversarial comment and judicial review”) (emphasis added).

As a model example, FERC provides that:

In the event the Investigating Officer determines to recommend to the Commission that an entity be made the subject of a proceeding . . . or . . . a defendant in a civil action to be brought by the Commission, the Investigating Officer shall, unless extraordinary circumstances make prompt Commission review necessary in order to prevent detriment to the public interest or irreparable harm, notify the entity that the Investigating Officer intends to make such a recommendation. *Such notice shall provide sufficient information and facts to enable the entity to provide a response.* Within 30 days of such notice, the entity may submit to the Investigating Officer a non-public response, which may consist of a statement of fact, argument, and/or memorandum of law, with such supporting documentation as the entity chooses . . . . If the response is submitted by the due date, the Investigating Officer shall present it to the Commission together with the Investigating Officer's recommendation. The Commission will consider both the Investigating Officer's recommendation and the entity's timely response in deciding whether to take further action.<sup>56</sup>

Unlike FERC, the Board's proposed regulations do not require the Investigating Officer to provide advance notice to the parties under investigation of the Recommendations. And unlike FERC, the Board's proposed regulations do not require the Investigating Officer to provide sufficient information to enable the parties to respond meaningfully to the Recommendations.<sup>57</sup>

Thus, to satisfy due process and APA requirements, the Board must convert the Optional Process in Appendix A to Part 1122 into a fixed and unwavering right for the parties under investigation to receive advance notice of the Recommendations, which notice shall contain sufficient information to permit a meaningful response by the parties, which response shall be submitted to and considered by the Board alongside the Recommendations.

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<sup>56</sup> 18 C.F.R. § 1b.19 (emphasis added).

<sup>57</sup> See also Scherman *et al.*, *supra* note 43, at 74 (finding a severe due process defect with FERC's previous regulatory process which "permitted great discretion on the part of the [i]nvestigating [o]fficer into whether to permit a [ ] submission, and the relevant rules also did not require the same information relating to the allegations and recommendations being made to the Commission to be relayed to the subject of an investigation").

#### D. Right to Counsel

The Board's proposed 49 C.F.R. § 1122.9 critically threatens the fundamental due process right to counsel by stating that "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."

As a matter of due process, the "assistance of counsel is a fundamental right essential to a fair trial."<sup>58</sup> Likewise, 5 U.S.C. § 555(b) of the APA states that a "party is entitled to appear . . . by or with counsel or other duly qualified representative in an agency proceeding." Based on the expansive definition of "agency proceeding" in this context,<sup>59</sup> courts have held that the right to counsel under § 555(b) applies to agency investigations.<sup>60</sup>

The right to counsel under § 555(b), which specifically includes the right to counsel of one's own choice,<sup>61</sup> is near absolute; and, courts have struck down various attempts by agencies

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<sup>58</sup> *E.g., Gideon v. Wainwright*, 372 U.S. 335, 335 (1963).

<sup>59</sup> *See* H. R. REP. NO. 79-1980, at 31-32 (1946) (describing the right to counsel as a "statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency *in connection with any function, matter, or process whether formal, informal, public, or private*") (emphasis added).

<sup>60</sup> *See, e.g., FLRA v. NASA*, 120 F.3d 1208, 1215 (11th Cir. 1997) (holding that the APA right to counsel applies in "investigatory interviews"); *Backer v. Commissioner of Internal Revenue*, 275 F.2d 141, 143 (5th Cir. 1960) (stating that it "is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment"); *Professional Reactor*, 939 F.2d at 1052 (holding that the APA right to counsel applies in "investigatory interviews").

<sup>61</sup> *See, e.g., Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375, 380-81 (7th Cir. 1969) (noting that denying a petitioner "his chosen counsel may have had a prejudicially adverse effect on witnesses and inhibited succeeding counsel from fully advancing petitioner's position").

to restrict this right.<sup>62</sup> Generally, agencies cannot exclude the party's counsel of choice absent a violation of the applicable code of ethics.<sup>63</sup>

Courts have set a very high bar for when agencies are otherwise permitted to exclude a party's counsel from investigations. In *SEC v. Csapo*, the D.C. Circuit held that the SEC may exclude counsel only with "'concrete evidence' that his presence would obstruct and impede its investigation."<sup>64</sup> Similarly in *Professional Reactor*, the D.C. Circuit invalidated a rule allowing the agency to exclude counsel upon a "reasonable basis [] to believe that the investigation or inspection will be obstructed, impeded, or impaired."<sup>65</sup> The court rejected the agency's arguments that the reasonable basis standard, which was admittedly less exacting than the concrete evidence standard of *Csapo*, was warranted by the agency's statutory mission to protect the public health and safety.<sup>66</sup> Similarly, the Board's proposed "good cause" standard is far less exacting than that in *Csapo*; and, as in *Professional Reactor*, the Board would not be able to justify this less exacting standard based on its statutory mission or investigative authority.

Thus, the Board must revise proposed 49 C.F.R. § 1122.9 to satisfy due process and APA requirements.

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<sup>62</sup> Emily Creighton and Robert Pauw, *Right to Counsel Before DHS*, 32ND ANNUAL IMMIGRATION LAW UPDATE SOUTH BEACH 4 n16 (2011), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Right-to-Counsel-Article.pdf>.

<sup>63</sup> See, e.g., *Backer*, 275 F.2d at 144 (finding no reason to exclude able and highly ethical counsel); *Great Lakes Screw*, 409 F.2d at 381 (acknowledging that overzealousness of counsel does not justify exclusion). See also Julie Andersen Hill, *Divide and Conquer: SEC Discipline of Litigation Attorneys*, 22 GEO. J. LEGAL ETHICS 373, 401-02 (Spring 2009) (explaining that agency rules which intimidate attorneys into less effective advocacy effectively deny the client's right to counsel of choice).

<sup>64</sup> 533 F.2d 7, 11 (D.C. Cir. 1976).

<sup>65</sup> 929 F.2d at 1051.

<sup>66</sup> *Id.* at 1051-52.

### **E. Confidentiality Requests**

Although the Board describes requests for confidential treatment in proposed 49 C.F.R. § 1122.7, the Board's proposed regulations fail to provide for any notice of and an opportunity to challenge the Board's denials of such requests prior to the public disclosure of the purportedly confidential information. This ignores applicable APA requirements.

Under 5 U.S.C. § 555(e) of the APA:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

To comply with § 555(e), an “agency must explain why it decided to act as it did” so that a court can assess whether such action was the product of reasoned decisionmaking or was arbitrary and capricious.<sup>67</sup> The notice and explanation required by § 555(e) are critical to preserve an opportunity for meaningful judicial review of agency actions. This rationale is especially compelling in the context of agency action regarding requests for confidential treatment, as erroneous disclosures could harm vital commercial, economic, and security interests. Thus, persons claiming confidentiality are entitled to prompt notice and an explanation of the Board's denials of requests for confidential treatment.

In fact, FERC has incorporated the requirements of § 555(e) in its regulations regarding denials of requests for confidential treatment:

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<sup>67</sup> *Butte County v. Hogen*, 613 F.3d 190, 194-95 (D.C. Cir. 2010) (noting that the agency's statement should not be a conclusion). *See also City of Gillette v. FERC*, 737 F.2d 883, 886 (10th Cir. 1984) (holding that the “statement of grounds under § 555(e) should be sufficiently detailed that the reviewing tribunal can appraise the agency's determination under the appropriate standards of review”).

Notice of the decision by the investigating [o]fficer or other appropriate official to deny a claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality no less than 5 days before its public disclosure.<sup>68</sup>

Thus, to satisfy APA requirements, the Board must provide the person claiming confidentiality with prompt notice and an adequate explanation of its decision to deny any requests for confidential treatment and must permit a reasonable opportunity for responses by such persons prior to any public disclosure of the purportedly confidential information.

#### **F. Subpoena Limits**

The Board must be cognizant of applicable constitutional limits on the subpoena power. Although the Board's proposed 49 C.F.R. § 1122.9 provides that subpoenas may be issued "in accordance with 49 U.S.C. § 1321," § 1321 says nothing about due process requirements, unlike Section 12(c)(2) of the Act.

As a constitutional matter, the general rule is that "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unduly burdensome."<sup>69</sup> Relatedly, an abuse of process exists where a subpoena is "issued for an improper purpose, such as to harass the taxpayer or put pressure on him to settle a

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<sup>68</sup> 18 C.F.R. § 1b.20.

<sup>69</sup> *Bowsher v. Merck & Co, Inc.*, 460 U.S. 824, 858 (1983). *See also FTC v. American Tobacco Co.*, 264 U.S. 298, 298 (1924) (stating that a "governmental fishing expedition into the papers of a private corporation on the possibility that they may disclose evidence of crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment"); *FTC v. Texaco*, 555 F.2d 862, 881 (D.C. Cir. 1977) (noting that investigative subpoenas will not be enforced if compliance "threatens to unduly disrupt or seriously hinder normal operations of a business").

collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.”<sup>70</sup>

Thus, to satisfy due process requirements, the Board must ensure that any subpoenas are limited in scope, relevant in purpose, specific in directive, and in good faith.<sup>71</sup> Of course, for these limitations to be meaningful in the context of investigations initiated under Section 12 of the Act, the Board must first define “national or regional significance,” as discussed above in Part I.B, and then ensure that subpoenas are used only where they are likely to lead to admissible evidence regarding the investigated issue of national or regional significance and are otherwise reasonable.

#### **G. Content of Order To Show Cause**

Under proposed 49 C.F.R. § 1122.5(d), the Order to Show Cause is only required to “state the basis for the Formal Board Proceeding and set forth a procedural schedule.” The Board must ensure that the Order to Show Cause is wholly consistent with due process requirements.

The Order to Show Cause marks the formal transition from an agency investigation to an agency adjudication.<sup>72</sup> At this point, the full extent of due process requirements is undeniably

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<sup>70</sup> *US v. Powell*, 379 U.S. 48, 58 (1964). Although *Powell* specifically addressed investigations by the IRS, federal courts have applied its “improper purpose” test to investigatory subpoenas issued by other administrative agencies. *See, e.g., FERC v. Smith*, 2013 U.S. Dist. LEXIS 61749 (applying *Powell* to FERC subpoenas); *FEC v. Committee To Elect Lyndon La Rouche*, 613 F.2d 849 (D.C. Cir. 1979) (applying *Powell* to FEC subpoenas).

<sup>71</sup> For the record, NS supports the use of third-party subpoenas that meet these standards in any Formal Board Proceeding, particularly given that such third-party subpoenas are generally permitted in litigation before civil courts.

<sup>72</sup> *See* 49 C.F.R. § 1122.5(d) (stating that a “Formal Board Proceeding commences upon issuance of a public Order to Show Cause”).

triggered.<sup>73</sup> The twin core pillars of due process are the right to notice and the meaningful opportunity to be heard.<sup>74</sup> Similarly under 5 U.S.C. § 554(b) of the APA, “persons entitled to notice of an agency hearing shall be timely informed of-- (3) the matters of fact and law asserted.” Due process and the APA emphasize proper notice to protect the integrity of the agency’s decisionmaking process. Absent proper notice, the defendants are unable to meaningfully respond to and fully defend against the levied charges.<sup>75</sup>

For example in *Russell v. State Board of Registration for the Healing Arts*, the court held that, with respect to the final disciplinary hearing:

The [b]oard should have provided, “timely and adequate notice detailing the reasons for the proposed [discipline] and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own . . . evidence . . . .” The notice given by the [b]oard in this case did not provide specific notice of the charges, i.e., “notice detailing the reasons for the proposed discipline.” While it could be argued that Appellant already knew the charges, that knowledge would not relieve the [b]oard of its duty to give notice of those charges or reasons for discipline. Further, the notice given by the [b]oard also failed to inform Appellant of his opportunity to contest the charges or his right to present witnesses or evidence. An “effective opportunity to defend” must include advance notice of the right to contest the charges and the right to present evidence.<sup>76</sup>

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<sup>73</sup> See, e.g., *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (stating that “when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process”).

<sup>74</sup> E.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

<sup>75</sup> See, e.g., *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 351 n6 (Del. 1993) (finding a due process violation where the entire proceeding focused on the party’s role as a market-maker and the party was never informed that it also was being charged as an undisclosed principal, “thereby preventing it from being able to respond adequately to that charge”).

<sup>76</sup> 1998 Mo. App. LEXIS 1744, at \*16-17 (W.D. Mo. Oct. 6, 1998) (internal citations omitted).

Thus, to satisfy due process and APA requirements, the Order to Show Cause, at minimum, must specify the actual issues for consideration in the Formal Board Proceeding, *i.e.*, the alleged violations of national or regional significance. The fact that the parties under investigation may be aware of the charges against them, as well as of evidence that has been collected by the Board, from the Preliminary Fact-Finding and Board-Initiated Investigation does not excuse the Board from compliance with these requirements.

### **III. BEST PRACTICE RECOMMENDATIONS**

Based on investigative best practices of other administrative agencies, the Board should revise its proposed regulations to: (A) require the Investigating Officer to disclose all exculpatory evidence to the parties under investigation; (B) grant discovery rights to the parties under investigation for material gathered by the Board; and (C) limit the permissible amount of discovery conducted by the Board's investigative staff.

#### **A. Exculpatory Evidence**

The Board's proposed regulations do not require the Investigating Officer to disclose any exculpatory evidence to the parties under investigation. This compromises the fairness of the Board-Initiated Investigation and related Formal Board Proceeding for the parties under investigation.

In *Brady v. Maryland*, the Supreme Court held, in the context of a criminal case, that the prosecution must disclose evidence favorable to the accused, including any evidence that would negate guilt or lessen penalties<sup>77</sup> ("Brady Rule"). The Brady Rule reflects the "well-known principle that the prosecution's overriding obligation is 'not that it shall win a case, but that

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<sup>77</sup> 373 U.S. 83, 87 (1963).

justice shall be done.”<sup>78</sup> Because the Brady Rule is a constitutional outgrowth, legal constructs like the attorney-client privilege, work product privilege, or privilege for deliberative processes cannot be used to avoid such disclosure.<sup>79</sup> However, courts have recognized that the Brady Rule does not apply to “non-evidence” such as legal strategies, theories, and evaluations of evidence.<sup>80</sup>

At least five administrative agencies have adopted the Brady Rule: the Commodity Futures Trading Commission; the SEC; the Federal Maritime Commission; the Federal Deposit Insurance Corporation; and FERC.<sup>81</sup> As stated by FERC, the Brady Rule “serves the Commission’s goal of providing fairness to regulated entities appearing before it.”<sup>82</sup>

FERC specifically applies the Brady Rule to “investigations and administrative enforcement actions.”<sup>83</sup> During an investigation, FERC staff “will scrutinize materials it receives from sources other than the investigative subject(s)” for exculpatory evidence; and “[a]ny such materials or information that are not known to be in the subject’s possession shall be provided to the subject.”<sup>84</sup> After an enforcement matter has been scheduled for administrative

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<sup>78</sup> James R. Acker & Catherine L. Bonventre, *Perspective: Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1275-76 (2010).

<sup>79</sup> E.g., CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3D, at § 254.2 (2000).

<sup>80</sup> See, e.g., *Morris v. Ylst*, 447 F.2d 735, 742 (9th Cir. 2006); *US v. NYNEX Corp.*, 781 F. Supp. 19, 25-26 (D.D.C. 1991).

<sup>81</sup> Justin Goetz, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for “Brady” Disclosure*, 95 MINN. L. REV. 1424, 1425 n11 (2011). See also *Committee Report: Natural Gas Regulation Committee*, 31 ENERGY L. J. 623, 634 (2010) (discussing FERC’s adoption of the Brady Rule); Scherman *et al.*, *supra* note 43, at 67-68 (describing the importance of the Brady Rule for administrative agencies and FERC in particular).

<sup>82</sup> *Policy Statement on Disclosure of Exculpatory Materials*, 129 FERC ¶ 61,248 (Dec. 17, 2009), available at <http://www.ferc.gov/whats-new/comm-meet/2009/121709/m-2.pdf>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

hearing, FERC staff certifies to the presiding administrative law judge whether exculpatory evidence was provided to the investigative subject(s).<sup>85</sup>

Board precedent suggests a willingness to adopt the Brady Rule. *In the Matter of John M. Nader*, the defendant argued that the Office of Compliance and Consumer Assistance improperly withheld exculpatory evidence.<sup>86</sup> Without categorically rejecting the Brady Rule, the ICC held that the defendant was not prejudiced given that much of the allegedly exculpatory evidence was public.<sup>87</sup> By implication, had the exculpatory evidence not been public, the defendant would have been prejudiced by the withholding.

As a best practice, furthering the Board's mission to serve as an impartial, neutral regulator,<sup>88</sup> the Board should explicitly state that the Brady Rule applies to investigations initiated under Section 12 of the Act. The Investigating Officer should be required to provide all exculpatory evidence, gained during the course of the Preliminary Fact-Finding and the Board-Initiated Investigation or otherwise in the Board's records, to the parties under investigation. This should occur sufficiently before the Investigating Officer's Recommendations are provided to the Board (and at least contemporaneously with the Investigating Officer's provision of the Recommendations to the parties under investigation, as discussed above in Part II.C), so that the parties under investigation have a meaningful opportunity to incorporate this exculpatory evidence in any written response to the Recommendations, again as discussed above in Part II.C.<sup>89</sup> And as is FERC's practice, concurrently with the provision of the Recommendations to

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<sup>85</sup> *Id.*

<sup>86</sup> 1985 ICC LEXIS 236 (ICC served Aug. 19, 1985).

<sup>87</sup> *Id.* at \*34-35.

<sup>88</sup> *See, e.g.*, 49 U.S.C. § 10101 (requiring "fair and expeditious regulatory decisions").

<sup>89</sup> *See, e.g., Matthews*, 424 U.S. at 349 (holding that due process requires a "meaningful opportunity" to challenge new evidence).

the Board, the Investigating Officer should be required to certify that it has provided all exculpatory evidence to the parties under investigation.

## **B. Discovery Rights for Parties Under Investigation**

The Board's proposed regulations do not provide the parties under investigation with any discovery rights, especially of material gathered by the Board. However, this is not true at all administrative agencies with investigative powers.<sup>90</sup>

In fact, there is a general preference among agencies in favor of discovery rights,<sup>91</sup> because such discovery rights promote “fairness and accuracy of the agency proceedings and [] facilitate more efficient and meaningful judicial review.”<sup>92</sup> In the context of Board investigations initiated under Section 12 of the Act, as noted above in Part II.C, discovery rights for the parties under investigation also would further their rights under due process and the APA to submit a meaningful response to the Recommendations.

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<sup>90</sup> See, e.g., *Hi-Tech Furnace Systems, Inc. v. FCC*, 244 F.3d 781, 789 (D.C. Cir. 2000) (noting that an “agency’s decision not to permit discovery . . . is not . . . committed to an agency’s absolute discretion”); Memorandum and Order, at 9-10, *FTC v. Bisaro*, 10-mc-00289 (D.D.C. 2010) (granting discovery rights to the party under investigation regarding the agency’s communications with third parties); Daniel J. Plaine, David L. Roll, & Mark D. Whitener, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Protection of Competitors or Protection of Competition: Section 337 and the Antitrust Laws*, 56 ANTITRUST L. J. 519 (Aug. 1987) (noting that parties in an International Trade Commission investigation “conduct discovery using the same discovery tools available in civil litigation, although on an abbreviated timetable”).

<sup>91</sup> The Administrative Conference of the United States, the independent agency of the federal government which promotes improvements in the procedures of federal agencies, has favored agency court discovery since 1963; the Federal Trade Commission (“FTC”) and Federal Communications Commission (“FCC”) have implemented regulations permitting generous discovery since the late 1960s; the Model State Administrative Procedure Act has included liberal discovery provisions since 1981; and, various federal agencies currently permit discovery largely to the same extent as the Federal Rules of Civil Procedure. 79 BROOKLYN L. REV. 1569, 1619-20 (Summer 2014) (internal citations omitted).

<sup>92</sup> E.g., Anne R. Traum, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 491, 534 (Dec. 2011).

As an example, the SEC specifically allows the parties under investigation to discover “documents” obtained by the Division of Enforcement “prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.”<sup>93</sup> Documents are defined broadly as “writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained,” including:

- (i) Each subpoena issued;
- (ii) Every other written request to persons not employed by the Commission to provide documents or to be interviewed;
- (iii) The documents turned over in response to any such subpoenas or other written requests;
- (iv) All transcripts and transcript exhibits;
- (v) Any other documents obtained from persons not employed by the Commission; and
- (vi) Any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management, if the Division of Enforcement intends either to introduce any such report into evidence or to use any such report to refresh the recollection of any witness.<sup>94</sup>

The SEC only allows the withholding of documents under four specified conditions:

- (i) The document is privileged;
- (ii) The document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this section, or is otherwise attorney work product and will not be offered in evidence;
- (iii) The document would disclose the identity of a confidential source; or
- (iv) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.<sup>95</sup>

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<sup>93</sup> 17 C.F.R. § 201.230(a).

<sup>94</sup> *Id.*

<sup>95</sup> 17 C.F.R. § 201.230(b).

And, the SEC specifically states that “[n]othing in this paragraph (b) authorizes the Division of Enforcement . . . to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.”<sup>96</sup>

Thus, as an administrative best practice and in furtherance of due process and APA requirements, the Board should grant discovery rights to the parties under investigation for material gathered by the Board.<sup>97</sup>

### **C. Discovery Limits for Investigating Officer**

Proposed 49 C.F.R. § 1122.9 broadly permits the Investigating Officer to conduct interviews or depositions, inspect property, and request records that are “potentially relevant or material to the issues related to the Board-Initiated Investigation.” The Board’s proposed regulations currently contain no limits on the permissible amount of discovery the Board’s investigative staff may conduct. This is contrary to judicial best practices and ignores the resource constraints facing the Board.

Discovery often is limited in civil courts for several reasons. First and foremost, judicial efficiency. For example in *Thinking About Civil Discovery in Alabama: Using the Federal Rules of Civil Procedure as a Thinking Tool*, Carol Rice Andrews states that “presumptive limits are positive devices for both the requesting and responding parties.”<sup>98</sup> With respect to interrogatories and depositions, Andrews explains that such limits are a “legitimate means to

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<sup>96</sup> *Id.*

<sup>97</sup> *See supra* note 71 regarding NS’s support for the use of third-party subpoenas in proceedings.

<sup>98</sup> 60 ALA. L. REV. 683, 688 (2009).

control and focus discovery” by forcing lawyers to strategically plan and judicially use their allotted interrogatories and depositions.<sup>99</sup>

Accordingly, the Federal Rules of Civil Procedure (“FRCP”) limit discovery, with respect to depositions and interrogatories, as a default matter. A party must obtain leave of court or a stipulation from the opposing party to conduct more than 10 depositions; to conduct a deposition exceeding 1 day of 7 hours;<sup>100</sup> and to serve more than 25 interrogatories.<sup>101</sup> As explained in the Advisory Committee Notes to Rule 33, as part of the 1993 amendments to the FRCP, “[t]he aim [of such limitations] is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.” Pursuant to the FRCP, a court also “[o]n motion or on its own” can “limit the frequency or extent of discovery” if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; or (ii) the proposed discovery is outside the permissible scope of relevance.<sup>102</sup>

Thus, limits on discovery advance the principles of efficiency and, as an administrative best practice, the Board should limit the permissible amount of discovery conducted by investigative staff.<sup>103</sup> As discussed above in Part II.F, discovery should be limited to the issue of national or regional significance that gives rise to the Board’s investigative authority under

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<sup>99</sup> *Id.* at 689-90 (noting that “[w]aste of interrogatories is legendary”).

<sup>100</sup> FED. R. CIV. P. 30(a)(2), 30(d). *See also* Comment to SEC Rules of Practice, Rule 233 (stating that depositions “are not allowed for purposes of discovery”). The SEC Rules of Practice contemplate depositions upon oral or written examination only if a party believes the witness will be unable to attend or testify at the hearing. *Id.*, Rules 233 and 234.

<sup>101</sup> FED. R. CIV. P. 33(a)(1).

<sup>102</sup> FED. R. CIV. P. 26(b)(2)(C).

<sup>103</sup> *See, e.g.*, 49 U.S.C. § 10101 (requiring “expeditious handling and resolution of all proceedings”).

Section 12 of the Act and should be likely to lead to admissible evidence regarding that issue. Additional limits on discovery should be set to ensure that discovery is otherwise reasonable—not unduly duplicative, burdensome, or expensive. These two sets of limits on discovery build upon the Board’s existing practice.<sup>104</sup> The Board also could establish an appeals process for discovery issues to ensure that discovery is subject to some degree of oversight, again, to ensure that discovery is likely to lead to admissible evidence regarding the issue of national or regional significance and is not unreasonably duplicative, burdensome, or expensive.

#### IV. CONCLUSION

To sum, NS has identified various ways for the Board to revise its proposed regulations in the NPRM regarding its new authority to bring an investigation on its own initiative. NS’s comments are consistent with: the directives of Section 12 of the Act as well as the Board’s governing statute of 49 U.S.C. Subtitle IV, as amended; applicable due process and APA requirements; and best practices of other administrative agencies.

NS reiterates that the Board’s new authority to bring an investigation on its own initiative is limited. The Board cannot exploit its new investigative authority pursuant to Section 12 of the Act at the risk of violating its governing statute, the due process and APA rights of the parties under investigation, as well as basic considerations regarding efficiency, fairness, transparency, and ultimately, effectiveness in furthering the Board’s mission. If Congress had intended to vest

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<sup>104</sup> See, e.g., 49 C.F.R. § 1114.21(a)(1) (stating that in Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding”); *Canadian Pacific Ry. Co., et al. – Control – Dakota and Minnesota & Eastern R.R. Corp., et al.*, FD No. 35081 (Sub-No. 2) (STB served Mar. 26, 2014) (requiring a party to comply with a discovery request that would not be “unduly burdensome”); *Waterloo Ry. – Adverse Aban. – Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook County, ME*, AB No. 124 (Sub-No. 2) (STB served Nov. 14, 2003) (noting that “relevance means that the information might be able to affect the outcome,” and finding that discovery requests were reasonable when they “may lead to admissible evidence”).

the Board with expansive investigative authority, Congress would have legislated accordingly. Instead, Congress vested the Board with limited investigative authority to ensure that the Board remains an impartial, neutral regulator.

NS looks forward to working with the Board in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. A. Hixon', written in a cursive style.

**James A. Hixon**  
**John M. Scheib**  
**Aarthy S. Thamodaran**  
**Norfolk Southern Corporation**  
**Three Commercial Place**  
**Norfolk, VA 23510**

*Counsel to Norfolk Southern  
Railway Co.*

**Dated: July 15, 2016**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 731**

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***RULES RELATING TO BOARD-INITIATED INVESTIGATIONS***

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**EXHIBIT A**



Norfolk Southern Corporation  
Law Department  
Three Commercial Place  
Norfolk, Virginia 23510-9241

**John M. Scheib**  
General Counsel- Commerce

(757) 629-2831  
(757) 533-2607 (Fax)  
[john.scheib@nscorp.com](mailto:john.scheib@nscorp.com)

April 25, 2016

The Honorable Daniel R. Elliott, III  
Chairman  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Dear Chairman Elliott:

Norfolk Southern Railway ("NS") noted with interest your recent correspondence to Congressional committees regarding the Surface Transportation Board's ("STB" or "Board") progress toward implementing the provisions of the STB Reauthorization Act of 2015, Public Law 114-110 ("Act"). Those letters outline the steps the agency would take in light of the Act, including the initiation of rulemaking proceedings. Although NS may have comments on other aspects of the Board's implementation of the legislation, NS writes today regarding an important omission. In particular, no action arising from Section 5 is included in the chart.

As you know, Section 5 creates an exception to the requirements of The Government in the Sunshine Act, Public Law 94-409, permitting Board members to engage in nonpublic collaborative discussions if certain requirements are met. Specifically, Section 5 provides that a majority of the members may hold a meeting that is not open to public observation to discuss official agency business if—

- no formal or informal vote or other official agency action is taken at the meeting;
- each individual present at the meeting is a member or an employee of the Board;
- and
- the General Counsel of the Board is present at the meeting.

Further, that provision requires the Board to then make available in a place easily accessible to the public: (1) "a list of the individuals present at the meeting" and (2) "a summary of the matters discussed at the meeting" ("the disclosure"). The Board must provide this information within 2 business days after the conclusion of the meeting except to the extent the discussion "relates to

an ongoing proceeding before the Board,” in which case, the Board must make the disclosure on the date of the final Board decision in that proceeding.

Given that the Board has begun meeting pursuant to this provision, NS would like to take this opportunity to point out there are substantial ambiguities in Section 5 that would benefit from clarifying regulations. NS raises this issue now, at this early stage of the implementation of the Act and in this constructive manner, to allow the Board to consider how such ambiguities could be clarified – perhaps even in the context of the rulemaking proceedings that have already been scheduled.

As an initial issue, it is not obvious what matters constitute “ongoing proceedings” for the purposes of Section 5. The Board frequently solicits public comments without proposing rules or holds informational hearings on various topics, to which it assigns Ex Parte docket numbers.<sup>1</sup> The Board has stated that “[i]n the future, should the Board hold similar informational hearings, *the proceeding will be deemed automatically discontinued once the record closes, unless the Board announces otherwise prior to the close of the record.*”<sup>2</sup> Thus, these types of Ex Parte proceedings may not be “ongoing proceedings” under Section 5 unless the Board announces otherwise prior to the close of the record, and therefore the summary must be posted within 2 business days of the meetings. The uncertainty surrounding what the Board might interpret to be an ongoing proceeding was recently highlighted when the Board surprisingly issued final rules four years after the close of the record in a proceeding that was closed by the plain language of the decision in Ex Parte 431(Sub-No. 3) *et al.* See, e.g., *Improving Regulation and Regulatory Review*, EP 712 (STB served Feb. 18, 2016). The scope of the term “ongoing proceeding” therefore needs clarity and refinement by the Board.

Similarly, the Board’s new authority to launch an investigation on its own motion in certain limited circumstances illustrates ambiguity about ongoing proceedings. Section 12(b) of the Act draws a distinction between “investigations” and “proceedings.” Although the initiation of an investigation must be disclosed to the parties being investigated within 30 days pursuant to Section 12, if there were a Section 5 discussion among Board members whether to initiate an investigation, that discussion must be disclosed with two days because an investigation is explicitly not a proceeding. These provisions should be reconciled through rulemaking because an investigation under Section 12 is clearly not an “ongoing proceeding” since an investigation can result in a proceeding. But how the Board will reconcile the statutory provisions – in particular the 2-day disclosure requirement of Section 5 and the 30-day disclosure requirement of Section 12 is unclear.

Moreover, Board member discussions regarding investigations raise troubling issues regarding the conflicting roles of Board staff as advocates in an investigation and the Board members’ roles as adjudicators of a proceeding that results from an investigation. At what point does a Board member discussion under Section 5 regarding an investigation result in prejudgment of a possible proceeding that might result from the investigation? How will the

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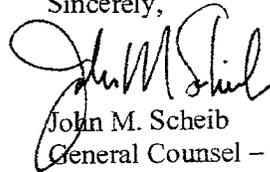
<sup>1</sup> *Review of the STB’s General Costing System*, EP 431 (Sub-No. 3) *et al.* (STB served Jan. 19, 2010).

<sup>2</sup> *Id.*

Board reconcile the fact that the Board “to the extent practicable, separate the investigative and decision making functions of staff” under Section 12 with the fact that the General Counsel must be present at a meeting under Section 5? Will the General Counsel, and other employees of the Board who attend Section 5 meetings be recused from participating in the decision making process if the substance of an investigation is discussed? Under Section 12, what staff will be permitted to initiate a proceeding that results from an investigation and can those staff members have been involved in any Section 5 meetings during and about the investigation conducted pursuant to Section 12? The short point is that questions abound, and the Board would be wise to raise them, get input from the stakeholders, and clearly set forth the rules under which it will implement Section 5, taking into account other Sections such as Section 12.

It appears that over the next several months the Board will be engaged in multiple rulemaking proceedings where these issues may be addressed. As part of the stakeholder community that will be very interested in the timely release of the information required by Section 5, NS looks forward to the Board providing the public with its thoughts on the implementation of Section 5 of the Act and with the opportunity to comment.

Sincerely,



John M. Scheib

General Counsel – Commerce

cc: Honorable Deb Miller, Vice-Chairman  
Honorable Ann D. Begeman