October 13, 2015

Chairman Ron Johnson
Ranking Member Thomas R. Carper
U.S. Senate Committee on Homeland Security & Governmental Affairs
Washington, DC

Re: Judicial Review of Independent Agency Analyses Required Under S. 1607

Dear Chairman Johnson and Ranking Member Carper:

I was recently invited to testify before the U.S. Senate Committee on Homeland Security and Government Affairs at a hearing that examined several "regulatory reform proposals," including S. 1607, the Independent Agency Regulatory Analysis Act. In my testimony for that hearing, I outlined my concerns about how the S. 1607's judicial review provisions would invite increased litigation over independent agencies' rules that would ultimately delay rulemakings and waste scarce judicial resources. I have the same concerns about the substitute version that the Committee on Homeland Security and Government Affairs voted on during a recent markup hearing.

My concern about the judicial review provisions of the original version of S. 1607 stems from the bill's requirement that the rulemaking record contain any analyses performed by independent agencies, as well as the "nonbinding assessment" produced by the White House Office of Information and Regulatory Affairs (OIRA) during its review of these analyses. Judicial review is now focused on the requirement that agencies provide "adequate reasons" for the adoption of a rule. *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387. This demand originated in *Motor Vehicle Mfgs. Assoc. v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983), which required agencies to provide a "satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made.'" Once the analyses undertaken by an independent agency is part of the rulemaking record, a judge is free to decide that the agency has failed to provide an adequate explanation for its rule because of defects or inadequacies in the analyses.

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The "adequate reasons" requirement, when applied to regulatory impact analyses in the rulemaking record, poses two problems. First, cost-benefit studies are often imprecise because of the uncertainties involved in making monetary estimates, particularly of benefits. Second, because there is no definition of what constitutes an adequate explanation, judges skeptical of regulation can treat the uncertainty involved in making cost-benefit estimates as a lack of an adequate explanation. Industry groups therefore have a strong incentive to challenge as many aspects of the independent agency's various analyses as possible as part of their litigation strategy. Presiding judges would likewise have greater opportunities to substitute their non-expert judgment on complex matters of science, technology, and economics for that of the experts at the independent agencies to justify blocking rules that they are opposed to for political or other improper reasons.

The independent agencies generally voluntarily undertake regulatory impact analysis, and as a result, this problem with the "adequate reasons" requirement already exists to a large extent. The proposed legislation, however, will make the situation worse for the following reason. Aware of the potential risks involved for judicial review, independent agencies would have a strong incentive to change their rules or conduct additional analyses to avoid receiving a negative assessment of their pending rules from OIRA. This is turn would give the White House significant influence over the nature and scope of these proposed rules. As this pattern becomes more entrenched, the influence that the President would acquire over independent agencies' regulatory decision-making would necessarily increase.

Because White House oversight often reflects political motivations, the existence of OIRA review of regulatory impact studies gives the White House an opportunity to politicize independent agencies that does not now exist. As noted above, the Committee on Homeland Security and Government Affairs during its markup of S. 1607 last week considered a substitute version of the bill that included a few changes that appeared to be directed at mitigating the role of judicial enforcement of the bill's various analytical and procedural requirements. These changes are not sufficient to assuage my original concerns regarding the bill. In particular, they do nothing to address the likely change in judicial review dynamics that would emerge if this bill were to become law.

I remain unconvinced that anything like S. 1607 is needed at all. Independent agencies are already subject to robust analytical requirements and oversight mechanisms. As I explained in my testimony, these particularly include the potential that the commissioners from the party that does not control the presidency can dissent when the majority adopts a rule. This makes independent agencies unique and distinguishes them from Executive Branch agencies. This bill would likely accomplish little more than empowering the White House to subject independent agencies to unprecedented politicized interference, thereby defeating the careful design of these agencies to be insulated against such improper interference in their decision-making.

Accordingly, the Committee should consider revising these provisions. It appears that the most straightforward approach for accomplishing these needed changes would be to continue to exempt independent agencies from OIRA oversight.

Thank you for your attention to my concerns regarding the judicial review provisions of S. 1607 as discussed above. At your request, I would be happy to discuss these views with you further.

Sincerely,

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