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July 23, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Re: Support for S. 1607, the “Independent Agency Regulatory Analysis Act of 2015”

Dear Chairman Johnson and Ranking Member Carper:

On behalf of the American Bar Association (ABA), which has nearly 400,000 members, I write to express our strong support for S. 1607, the Independent Agency Regulatory Analysis Act of 2015, introduced by Senators Portman, Warner, and Collins. This bipartisan bill would affirm the authority of the President to issue an executive order requiring independent regulatory agencies to comply, to the extent permitted by law, with regulatory analysis requirements that are currently applicable to executive agencies when adopting new regulations. We urge you and your Committee colleagues to support this important legislation during the upcoming markup scheduled for July 29.

The core objective of S. 1607 falls squarely within longstanding ABA policy that the Constitution’s choice of a unitary executive justifies presidential involvement in rulemaking activities of federal agencies. As a 1986 ABA resolution explained, “[t]he Constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and the independent agencies and, thus...executive orders [governing that involvement] should be extended to the independent agencies.”<sup>1</sup> The ABA reiterated this position in 1990 when it adopted a recommendation of the Administrative Conference of the United States (ACUS) stating that, as a matter of principle, presidential review of informal rulemaking should apply to independent regulatory agencies to the same extent it applies to all other executive agencies.<sup>2</sup>

The ABA supports greater presidential coordination, review and oversight of the regulatory process for several important policy reasons. First, the President is in the best position to centralize and coordinate the regulatory process, a task that has become increasingly important with the proliferation of administrative agencies whose responsibilities often overlap with one another. Second, the President, unlike administrative officials, is electorally accountable to the people and is the only official in government with a true national constituency. These characteristics make the

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<sup>1</sup> The ABA resolution adopted in February 1986 and its accompanying report are available at [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/1986my\\_execoversight\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/1986my_execoversight_authcheckdam.pdf). The resolution and a slightly revised version of the report are reprinted and discussed in Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181 (1986).

<sup>2</sup> See ABA Resolution 302 and the related report, available at [http://www.americanbar.org/content/dam/aba/directories/policy/1990\\_am\\_302\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302_authcheckdam.pdf).

President uniquely well-situated to design regulatory policy in a way that is responsive to the interests of the public as a whole. Finally, the President, by virtue of his or her accountability and capacity for inter-agency coordination and centralization, has the unique ability to energize and direct regulatory policy in a way that would be impossible if that policy were to be set exclusively by administrative agency officials.<sup>3</sup>

In the ABA's view, the Constitution's choice of a unitary executive, combined with the policy reasons outlined above, justifies presidential involvement in the rulemaking activities of federal agencies in general,<sup>4</sup> including the issuance of a new executive order requiring independent regulatory agencies to comply with the same regulatory analysis requirements applicable to other agencies when adopting new regulations. From the standpoint of sound policy in the federal rulemaking process, we believe that there is no meaningful difference between the "independent" agencies and those agencies to which the current executive order (E.O. 12866) applies.

These two categories of agencies engage in regulatory activities that are typically indistinguishable from a functional standpoint. Indeed, those activities often concern the same or similar subject areas; consider, for example, the overlapping work of the Department of Justice and the Federal Trade Commission in the area of antitrust enforcement. The same considerations that justify a coordinating presidential role with respect to "executive" agencies apply with full force to those characterized as "independent."

The report underlying the ABA's 1990 resolution acknowledges the perspective that some functions of independent agencies might be hampered in certain circumstances by presidential oversight.<sup>5</sup> Several specific provisions in the bill appear to be designed to accommodate such concerns. For example, the assessment of a draft rule prepared by the White House Office of Information and Regulatory Affairs (OIRA) would be "nonbinding," and OIRA would lack power to prevent the agency from going forward with its proposed rule, until the two sides' differences are settled (whereas under E.O. 12866, OIRA can "return" a rule to the agency if it is dissatisfied with it). (On the other hand, the bill describes what are referred to as "principles" in E.O. 12866 as "requirements.")

Although the ABA currently takes no position on specific provisions of this type, the ABA urges Congress to pay particular attention to ensuring that implementation of the legislation would not impair the ability of independent agencies to perform their statutory functions. In particular, the report accompanying the ABA's resolution emphasized the need for firmer deadlines. OIRA should not delay agencies' submission of draft regulatory actions and should complete the process of review in a timely fashion.<sup>6</sup>

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<sup>3</sup> For a more detailed discussion of the policy reasons for the unitary executive and the need for greater presidential involvement in the regulatory process, please see the background report for the ABA's resolution adopted in February 1986, *supra* note 1, at 151-156.

<sup>4</sup> While the ABA believes that presidential oversight is appropriate for executive and independent agency rulemaking in general, not all types of agency rules are suited to presidential oversight. Exempt categories should include formal rulemaking, ratemaking, and rulemaking that resolves conflicting private claims to a valuable privilege. *See* ABA Resolution 302 and the related background report, *supra* note 2, at page 1.

<sup>5</sup> Report, *supra* note 2, at 25.

<sup>6</sup> *See* ACUS Statement #18, "Improving the Timeliness of OIRA Regulatory Review," available at <https://www.acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf>.

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In conclusion, we endorse S. 1607 insofar as it generally seeks to authorize presidential involvement in the rulemaking activities of both executive and independent regulatory agencies.

Thank you for considering the ABA's views on this important legislation. If you have any questions regarding our views, please contact Larson Frisby, the ABA's Associate Governmental Affairs Director, at (202) 662-1098 or [larson.frisby@americanbar.org](mailto:larson.frisby@americanbar.org), or Anna Shavers, Chair of the ABA Section of Administrative Law & Regulatory Practice, at (402) 472-2194 or [annashavers.aba@gmail.com](mailto:annashavers.aba@gmail.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members of the Senate Committee on Homeland Security and Governmental Affairs  
The Honorable Mark R. Warner  
The Honorable Susan M. Collins