



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2017

President Donald Trump
The White House
Washington, D.C. 20500

Dear President Trump:

Executive supervision of the federal rulemaking process is a bipartisan fixture of the modern presidency. Over four decades, administrations led by presidents of both parties have analyzed proposed federal rules to examine their economic impact and ensure consistency with the administration's broader policy agenda.

Currently, however, there is a significant gap in our nation's regulatory oversight framework that threatens our workplaces, states, and communities with costly rules that were not effectively vetted. Over the past two decades, independent agencies—such as the Consumer Financial Protection Bureau, the Comptroller of the Currency, and the Consumer Product Safety Commission—emerged as drivers of regulatory bureaucracy. These agencies created numerous rules that substantially affected economic activity across the U.S. Yet these and other independent agencies operate outside the established review process.

Now is the time to require independent agencies to regulate with accountability. As Governors and state Attorneys General, we urge you to extend greater regulatory oversight to independent agencies.

The need for reform

In 1981, President Ronald Reagan created the framework for White House review of federal regulations. Through an executive order, President Reagan established the Office of Information and Regulatory Affairs within the White House and charged this office to analyze proposed federal regulations and assess their expected costs and benefits.¹

Since President Reagan, presidents generally refrained from applying the regulatory oversight framework to every agency across the federal government. White House review has extended to agencies whose heads serve at the pleasure of the president—commonly called “executive agencies.” Presidents have not required, however, independent agencies—whose heads may be removed only for cause—to comply with the regulatory oversight framework. Consequently, an oversight gap has emerged. Whereas executive agencies must submit their rules for White House review, independent agencies continue to operate without this important

¹ “Federal Regulation,” Executive Order 12,291 (Feb. 17, 1981).

check and balance. With the growth of independent agencies over the past few decades, the gap has become a gaping oversight hole.

Carving out independent agencies from regulatory oversight does not withstand scrutiny. As a recent American Bar Association report noted, “Much of the policymaking of independent agencies is not functionally distinct from that of executive agencies.”² Another report reflecting a consensus view of the leading regulators appointed by presidents of both parties explained: “[I]ndependent agencies’ regulations present the same need for a centralized system to assess economic efficiency, ensure consistency with administration priorities, and facilitate interagency coordination.”³

Moreover, many rules promulgated by independent agencies have enormous economic effects. A report from President Obama’s White House found that independent agencies issue just as many economically significant rules—defined as having more than \$100 million of annual impact—as non-exempt agencies. The existing framework shields independent agencies from external review and leaves American workplaces and communities at the risk of rules that may rely on incorrect data and assumptions, that are based on politics, not expertise, or that are inconsistent with other rules.⁴ Accountable government requires that we regulate our independent regulators.

The solution—a new executive order

Independent agencies are subject to the executive branch. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court repeatedly described independent agencies as components of the executive branch.⁵ Nearly four decades ago, the Department of Justice’s Office of Legal Counsel—the prestigious office responsible for providing authoritative legal opinions to the executive branch—recognized that the president’s constitutional power to “take care that the Laws be faithfully executed” extends to independent agencies.

Consistent with Article II of the Constitution, the Justice Department’s opinion states that the president is “uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.”⁶ It recognizes that

²American Bar Association Section of Administrative Law and Regulatory Practice, *IMPROVING THE ADMINISTRATIVE PROCESS* (2016), at 10, available at https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf.

³Institute for Policy Integrity, *STRENGTHENING REGULATORY REVIEW* (2016), at 1–2, available at http://policyintegrity.org/documents/RegulatoryReview_Nov2016.pdf.

⁴Joseph P. Mohorovic, *Improving the Process of Making Rules at Independent Agencies*, *THE REGULATORY REVIEW* (Jan. 9, 2017), available at <https://www.thereview.org/2017/01/09/mohorovic-improving-process-rules-independent-agencies/>.

⁵See, e.g., 130 S. Ct. 3138, 3155, 3163 (2010) (describing independent agencies as having executive power and as components of the executive branch).

⁶Proposed Executive Order “Federal Regulation,” 5 Op. Off. Legal Counsel 59, 60–61 (1981).

Congress, through legislation, may limit the executive branch's supervision over regulatory agencies. At the same time, the opinion concludes that where Congress has not acted to constrain executive supervision, the president may "guide and limit" the discretion of rulemaking officers and require that they submit their proposed regulations to the White House.⁷

The Justice Department has not amended the decades-old opinion that the executive branch may exert regulatory control over independent agencies. Indeed, the view has become commonplace across presidential administrations of both parties. President Clinton issued an executive order that required independent agencies to prepare a comprehensive regulatory agenda.⁸ President Obama recommended that independent agencies submit their rules to cost-benefit analysis.⁹ Legal scholars also agree with the position that the president may direct independent agencies to comply with the regulatory oversight requirements set forth in Executive Orders dating back to the Reagan Administration. A panel of experts from the American Bar Association recently concluded that independent agencies "can properly be made subject" to these Executive Orders, and "strongly urged" the president to take this important step.¹⁰

Conclusion

The gap in executive branch review of federal regulations demands attention. We urge you to fill the void that permits independent agencies to issue rules without meaningful external review. Now is the time for a new executive order that subjects independent agencies to an oversight process designed to produce better regulations.

Very truly yours,



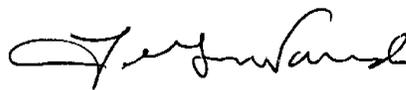
Ken Paxton
Attorney General of Texas



Leslie Rutledge
Attorney General of Arkansas



Mark Brnovich
Attorney General of Arizona



Lawrence Wasden
Attorney General of Idaho

⁷ *Id.* at 61.

⁸ "Regulatory Planning and Review," Executive Order 12,866 (Oct. 4, 1993).

⁹ "Improving Regulation and Regulatory Review," Executive Order 13,563 (Jan. 18, 2011).

¹⁰ IMPROVING THE ADMINISTRATIVE PROCESS, *supra* n. 2., at 10.



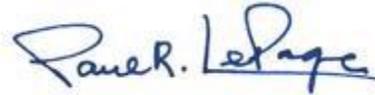
Curtis Hill
Attorney General of Indiana



Derek Schmidt
Attorney General of Kansas



Jeff Landry
Attorney General of Louisiana



Paul LePage
Governor of Maine



Phil Bryant
Governor of Mississippi



Josh Hawley
Attorney General of Missouri



Doug Peterson
Attorney General of Nebraska



Adam Laxalt
Attorney General of Nevada



Mike DeWine
Attorney General of Ohio



Mike Hunter
Attorney General of Oklahoma



Alan Wilson
Attorney General of South Carolina



Brad Schimel
Attorney General of Wisconsin

cc:

Hon. Neomi Rao
Administrator Office of Information and
Regulatory Affairs (OIRA)
Eisenhower Executive Office Building
Washington, DC 20502