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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

RUSSELL SULLIVAN, STAFF DIRECTOR
CHRIS CAMPBELL, REPUBLICAN STAFF DIRECTOR

February 14, 2011

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Administrator Sunstein:

As the ranking member of the Senate's Committee on Finance, I am obliged to ensure the appropriate review and promulgation of the regulations issued by Agencies within the Finance Committee's jurisdiction. As you are well aware, the Executive Branch may not enact through regulation what Congress declined to adopt in law. The Constitution assigns to Congress exclusively the legislative power. Yet, I am increasingly concerned that the volume and breadth of regulations being issued by Executive Agencies jeopardizes the constitutional principle of separation of powers and usurps the legislative authority delegated to Congress through the Constitution.

I noted with interest, therefore, President Obama's charge to your office in his State of the Union: "To reduce barriers to growth and investment, I've ordered a review of government regulations. When we find rules that put an unnecessary burden on businesses, we will fix them." This was underscored by the new Executive Order issued by the President on January 18, 2011, stating that government regulations be "transparent, coordinated and simplified," and that federal agencies develop "cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness." These are laudable goals, and this level of review is long overdue. Several reports have suggested a dysfunctional clearance process with respect to regulations issued under your watch, including reports that provisions were inserted into regulations without your knowledge and that regulatory impact statements have been inaccurate or misleading. The implementation of the Patient Protection and Affordable Care Act has been little short of chaotic, as the Departments involved have had to issue subregulatory guidance in the form of Releases, Notices, Frequently Asked Questions, and Model Notice Language Samples to clarify and revise previously issued rules. These reports raise a number of questions about the ability of your office to provide appropriate oversight of the thousands of pages of regulations being approved by your office.

The Honorable Cass R. Sunstein
Page Two
February 14, 2011

In addition to the aforementioned concerns, I would add that nowhere in the President's Executive Order is there a reminder to Agency officials that the regulations which they promulgate must comport with the statutory language adopted through the constitutionally established lawmaking process.

While I look forward to asking you at some later date broader questions about the justification for regulations that exceed or contradict the dictates of properly enacted laws, in the near term, I am required to ensure the integrity of the review process at the Office of Information and Regulatory Affairs (OIRA). Specifically, Agencies must be accurately and adequately evaluating the economic impact of the regulations submitted for OIRA review. Furthermore, it is critical that the Senate be apprised of the processes your office has in place to review the regulations it receives to ensure that the required thorough and complete economic impact analysis has been conducted. It is my understanding that your office has the sole responsibility of determining whether a rule is a "major rule" within the meaning of 5 USC Section 804(2) of the Congressional Review Act. However, the standards used by the Agencies to make economic impact determinations appear to be open to broad, and possibly standardless Agency interpretation. There is also confusion over whether the Agencies need to get OIRA review for CRA purposes. My concern is that this discretion results in an inconsistent and inaccurate assessment of what is or is not a 'major rule' and that many regulations which should receive greater scrutiny are not being thoroughly reviewed.

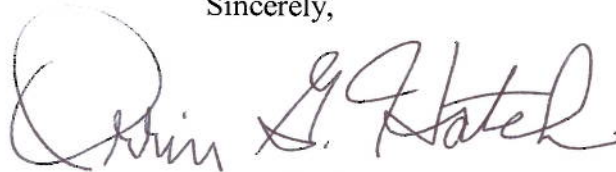
To better evaluate the economic impact of these regulations, I am requesting the following: 1) that OIRA brief my staff on its process for evaluating Agency economic impact assessments; 2) that all regulations with a proposed economic impact of \$100 million or more be submitted to my office at the same time the Agency sends them to OMB for review. This request is pursuant to the Congressional Review Act (CRA) which requires federal agencies to submit their covered final rules to Congress and GAO before they can take effect. Section 801(a)(1)(A) of the CRA states that: "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing (1) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule."; 3) a briefing by your office to better understand the process OIRA uses to ensure that Agencies are affording the public a full 60 days to comment on proposed regulations and at what point that 60 day clock is triggered as that appears to be another area left to Agency discretion; and 4) a written explanation as to whether "longstanding Agency practice across several Administrations" could allow the IRS and Treasury to make the determination of whether an IRS rule is a major rule or a non-major rule instead of OIRA making such determination. If the IRS and Treasury can determine a rule's status as a major or non-major rule without OIRA input, can other agencies similarly make such determinations as to rules they promulgate without OIRA input?

The Honorable Cass R. Sunstein
Page Three
February 14, 2011

While this request is limited, for now, to regulations that have an economic impact of \$100 million or more, I will be paying close attention to all regulations within the Finance Committee's jurisdiction to determine whether they comply with the President's Executive Order and to ensure that regulators do not exceed or contradict the statutory authority established pursuant to the Constitution's legislative process.

Thank you for your prompt attention to this matter and I would appreciate your working with my staff to schedule the requested briefings by March 11, 2011. If you have any questions regarding this letter please contact either Kimberly Brandt or Brendan Dunn of the Committee staff at 202/224-4515.

Sincerely,

A handwritten signature in cursive script that reads "Orrin G. Hatch". The signature is written in dark ink and is positioned above the printed name.

Orrin G. Hatch
Ranking Member

Cc: President Barak Obama
Secretary Timothy Geithner
Secretary Kathleen Sebelius
Secretary Hilda Solis
Secretary Janet Napolitano
Secretary Gary Locke
Administrator Michael Astrue
Ambassador Ron Kirk