

OFFICE OF ATTORNEY GENERAL  
STATE OF WEST VIRGINIA



PATRICK MORRISEY  
ATTORNEY GENERAL

July 11, 2016

**Via Certified Mail**

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

The Honorable Harry Reid  
Minority Leader  
United States Senate  
522 Hart Senate Office Building  
Washington, DC 20510

The Honorable Paul Ryan  
Speaker  
United States House of Representatives  
H-232, US Capitol  
Washington, DC 20515

The Honorable Nancy Pelosi  
Minority Leader  
United States House of Representatives  
H-204, US Capitol  
Washington, DC 20515

**Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Kansas, Michigan, Montana, Nevada, North Dakota, Ohio, South Carolina, Texas, Utah, and Wisconsin on eliminating burdensome and illegal regulations by strengthening the Administrative Procedure Act.**

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Ryan, and Minority Leader Pelosi:

As the chief legal officers of our States, we are concerned about the mounting costs that unlawful federal regulations—advanced in violation of the Administrative Procedure Act—impose on citizens, businesses, and state and local governments. With seemingly increasing frequency, federal agencies are: (1) issuing guidance documents as a way to circumvent the notice-and-comment process; (2) regulating without statutory authority; (3) failing to consider

regulatory costs; and (4) failing to fully consider the effect of their regulations on States and state law. We are encouraged that the U.S. House of Representatives and the U.S. Senate recently have considered legislation directed toward resolving some of these concerns.<sup>1</sup> We write today to urge Congress to go further and take concrete action to ensure that federal agencies are in fact providing opportunity for notice and comment for all binding regulatory requirements, acting within their delegated authority, and always rigorously assessing the costs of their regulations.

The U.S. Constitution's separation of powers structure not only ensures that no branch of the federal government encroaches on another, but also protects individuals and States from overreach by the federal government. *See, e.g., Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). Under the Constitution, Congress makes laws and the President, sometimes acting through agencies, "faithfully execute[s]" them. U.S. Const., Art. II, § 3. The President's power of executing the law includes the ability "to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). That separation of powers is critical to protecting the rights of individuals and the States from an overzealous federal executive.

A critical bulwark for that separation of powers is the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, enacted in 1946 to ensure transparency and reasoned decision-making in agency rulemaking. The APA requires an agency to publish a notice of proposed rulemaking in the Federal Register and "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553. This notice-and-comment process is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). That transparency gives the public an opportunity to inform the agency when a rulemaking is contrary to statutory authority, based on unsound reasoning, or lacks factual support.

The APA also protects the separation of powers by providing for vacatur of agency actions not authorized by Congress. A reviewing court must "hold unlawful and set aside" any action found to be, among other things: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] . . . without observance of procedure required by law." 5 U.S.C. § 706(2). In other

---

<sup>1</sup> *See, e.g.,* Regulations from the Executive in Need of Scrutiny Act, H.R. 427, 114th Cong.; The Principled Rulemaking Act, S. 1818, 114th Cong.; Early Participation in Regulations Act, S. 1820, 114th Cong.

words, the APA is intended to ensure that “an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 468, 471 (1988).

Finally, inherent in the APA’s requirement of reasoned decision-making is the presumption that agencies will weigh the costs of regulation against its benefits. As the Supreme Court recently said, “[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This is especially important in light of the increasing costs imposed by regulations on individuals and businesses. In 2014, executive agencies published 77,687 pages of regulations in the Federal Register.<sup>2</sup> In the Code of Federal Regulations, where all regulations binding on the public are published, 175,268 pages were included in 2014.<sup>3</sup> Individuals must navigate these regulations whenever they seek to expand their business or build a home on their property, which impose not only the burden of determining what the law requires but also compliance costs. In 2012, individuals and businesses spent an estimated \$2.028 trillion on regulatory compliance.<sup>4</sup> That same year, small business owners listed regulatory uncertainty and unreasonable regulations as their top concerns.<sup>5</sup>

As the chief legal officers of our States, we are concerned that agencies often avoid compliance with the protections Congress established in the APA. Three categories in particular bear mentioning.

*First*, agencies issue guidance documents, interpretive rules, and policy statements that effectively bind regulated parties, but that are not required to go through the APA’s notice-and-comment process, 5 U.S.C. § 553(b)(A). For truly non-binding guidance documents, the exemption from notice and comment may be appropriate. But when these documents are binding in practice and subject regulated entities to the risk of enforcement actions, lawsuits, fines, and sanctions for noncompliance, the exemption in the APA becomes a dangerous

---

<sup>2</sup> Federal Register Pages Published 1936-2014, Federal Register, <https://www.federalregister.gov/uploads/2015/05/Federal-Register-Pages-Published-1936-2014.pdf>.

<sup>3</sup> Code of Federal Regulations Total Pages 1938-1949 Total Volumes and Pages 1950-2014, Federal Register, <https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf>.

<sup>4</sup> W. Mark Crain & Nicole V. Crain, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business 1 (Sept. 10, 2014), <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

<sup>5</sup> Holly Wade, Small Business Problems and Priorities, 12 (August, 2012) available at <http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf> (last visited October 4, 2015).

loophole for agencies to exploit.<sup>6</sup> For example, the Consumer Financial Protection Bureau (“CFPB”) issued in 2013 a guidance document defining unfair, deceptive, or abusive acts or practices for the collection of consumer debts that was never subject to the notice-and-comment process.<sup>7</sup> Though it is styled as non-binding guidance, the definitions are binding requirements in practice: The CFPB entered into a consent order with ACE Cash Express requiring the company to pay civil penalties for, among other violations, disclosing the existence of a debt to a third party in violation of the guidance. *ACE Cash Express, Inc.*, 2014-CFPB-0008 (July 10, 2014). Other agencies have been called out by courts for issuing self-described guidance documents that should have gone through notice and comment. In 2010, for instance, EPA issued a guidance document requiring EPA regional directors to accept alternative state programs to comply with the National Ambient Air Quality Standards for ozone. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 316 (D.C. Cir. 2011). EPA styled the document as non-binding guidance to avoid notice and comment, but the U.S. Court of Appeals for the D.C. Circuit disagreed, holding that the document was in practice a binding legislative rule that required notice and comment. *Id.* at 320. In 2011, the Department of Labor issued Training and Employment Guidance Letters without notice and comment, but the D.C. Circuit again disagreed because the letters were binding in practice. *Mendoza v. Perez*, 754 F.3d 1002, 1019–20 (D.C. Cir. 2014).

*Second*, agencies adopt regulations not authorized by Congress and in some cases directly contrary to the statute under which they are adopted. For example, in 2010 EPA sought to expand a Clean Air Act program by rewriting express numerical permitting requirements set by statute. 75 Fed. Reg. 31,514 (June 3, 2010). The Supreme Court rejected that regulation as a “patently unreasonable” and “outrageous” “seizur[e] [of] expansive power . . . the statute is not designed to grant.” *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). In 2013, the Federal Energy Regulatory Commission (“FERC”) attempted to “manufacture[] ambiguity” in the Federal Power Act. *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 589–90 (D.C. Cir. 2015). The D.C. Circuit rejected FERC’s imposition of a restriction on the definition of “municipality” that did not exist in the plain text of the statute. *Id.* at 592. Most recently, the Department of Health and Human Services sought to apply the Public Health Service Act (“PHSA”) to fixed indemnity insurance plans where the owner lacks “minimum essential coverage” under the Affordable Care Act. *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 324 (D.D.C. 2015). A federal district court rejected the rule as contrary to the PHSA, which plainly exempts “fixed indemnity insurance” without qualification. *Id.* at 327–28. All of these agencies put themselves in the position of writing laws that Congress did not approve. *See, e.g.*,

---

<sup>6</sup> Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 *Duke L. J.* 1311 (1992).

<sup>7</sup> CFPB Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013), [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf).

*Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). While in many cases the courts are able to block these illegal initiatives, often it takes years for them to do so at which point regulated entities, including States, have already spent an enormous amount of money complying with the rules.<sup>8</sup>

*Third*, agencies fail to consider relevant factors, notably the costs imposed on regulated entities, when deciding on regulatory alternatives. The Supreme Court recently held that EPA unreasonably failed to consider costs when regulating power plants under the Clean Air Act. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Clean Air Act instructs EPA to regulate emissions of hazardous air pollutants from power plants if it finds regulation “appropriate and necessary.” *Id.* at 2704. The Supreme Court held that it was unreasonable for EPA to refuse to consider costs because “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Id.* at 2707. Also, the Small Business Administration has at least twice recently concluded that EPA failed to consider the costs its regulations would impose on small businesses.<sup>9</sup> According to the SBA, EPA failed in 2009 to consider the effect of its greenhouse gas tailoring rule, among the first federal regulations concerning greenhouse gases, on small entities.<sup>10</sup> Then in 2012, EPA failed to provide data demonstrating that small businesses could achieve certain hazardous air pollutant emissions standards without significant cost.<sup>11</sup>

---

<sup>8</sup> See, e.g., Janet McCabe, In Perspective: the Supreme Court’s Mercury and Air Toxics Rule Decision, EPA Connect (June 30, 2015, 10:34 AM), <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/> (noting that even though the Supreme Court rejected a portion of the agency’s rule, “the majority of power plants are already in compliance or well on their way to compliance”).

<sup>9</sup> Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Dec. 23, 2009), <https://www.sba.gov/content/letter-dated-122309-environmental-protection-agency-1>; Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Mar. 12, 2012), [https://www.sba.gov/sites/default/files/files/Chromium\\_Electroplating\\_Comment\\_Letter\\_FINAL\\_Mar\\_12\\_2012.pdf](https://www.sba.gov/sites/default/files/files/Chromium_Electroplating_Comment_Letter_FINAL_Mar_12_2012.pdf).

<sup>10</sup> Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Dec. 23, 2009), <https://www.sba.gov/content/letter-dated-122309-environmental-protection-agency-1>.

<sup>11</sup> Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Mar. 12, 2012), [https://www.sba.gov/sites/default/files/files/Chromium\\_Electroplating\\_Comment\\_Letter\\_FINAL\\_Mar\\_12\\_2012.pdf](https://www.sba.gov/sites/default/files/files/Chromium_Electroplating_Comment_Letter_FINAL_Mar_12_2012.pdf).

*Fourth*, agencies fail to fully consider the effect of their regulations on States and state law. For example, the CFPB on March 26, 2016 announced that it was considering new federal standards for credit lines, installment loans, deposit advances, automobile-title secured loans, and payday loans.<sup>12</sup> These federal standards may conflict with, and therefore preempt, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000), state laws concerning the size and length of payday loans, interest rates and fees, licensing systems, and record keeping.<sup>13</sup> But as the Supreme Court has observed, regulatory decisions at the state level can better “allow[] local policies more sensitive to the diverse needs of a heterogeneous society, permit[] innovation and experimentation, [and] enable[] greater citizen involvement in democratic processes.” *Bond v. United States*, 564 U.S. 211, 221 (2011) (internal quotations omitted). That is why a 1999 executive order still requires agencies to “consult, to the extent practicable, with appropriate State and local officials” when they foresee conflict between their regulations and state law. Executive Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); *see also* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009) (reaffirming “the principles outlined in Executive Order 13132”). We urge Congress to bolster this requirement by mandating that agencies consult with States when considering regulations that may preempt state law.

We urge Congress not simply to consider legislation but to take action to ensure that agencies engage in transparent rulemaking consistent with separation of powers principles and the laws enacted by Congress. The three categories we have discussed here are just examples of the significant and growing problem posed by unlawful federal regulations. We have fought, and will continue to fight, this problem on a case-by-case basis in the courts. But the time for broader action by Congress is long overdue.

We appreciate your prompt attention to this critical issue.

---

<sup>12</sup> Press Release, Consumer Financial Protection Bureau, CFPB Considers Proposal to End Payday Debt Traps (Mar. 26, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/>.

<sup>13</sup> *See, e.g.*, Ala. Code §§ 5-18A-12, § 5-18A-13; Alaska Stat. §§ 06.50.440, 06.50.460; Colo. Rev. Stat. § 5-3.1-105; Fla. Stat. § 560.404; Kan. Stat. Ann. § 16a-2-404(1)-(2); Ky. Rev. Stat. Ann. § 286.9-100; S.C. Code Ann. § 34-39-180(E).

Sincerely,



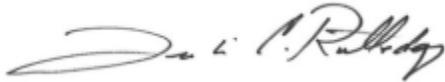
Patrick Morrissey  
West Virginia Attorney General



Luther Strange  
Alabama Attorney General



Mark Brnovich  
Arizona Attorney General



Leslie Rutledge  
Arkansas Attorney General



Sam Olens  
Georgia Attorney General



Derek Schmidt  
Kansas Attorney General



Bill Schuette  
Michigan Attorney General



Tim Fox  
Montana Attorney General



Adam Paul Laxalt  
Nevada Attorney General



Wayne Stenehjem  
North Dakota Attorney General



Mike DeWine  
Ohio Attorney General



Alan Wilson  
South Carolina Attorney General



Ken Paxton  
Texas Attorney General



Sean D. Reyes  
Utah Attorney General

The Honorable Mitch McConnell, Harry Reid, Paul Ryan & Nancy Pelosi

July 11, 2016

Page 8

A handwritten signature in black ink, appearing to read "Brad Schimel". The signature is fluid and cursive, with the first name "Brad" and last name "Schimel" clearly distinguishable.

Brad D. Schimel

Wisconsin Attorney General