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BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
U.S. HOUSE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
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HEARING ON H.R. 3438, THE "REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS ACT OF 2015"; AND H.R.2631, THE "REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015"

Chairman Marino, Ranking Member Johnson, and Members of the Committee,

I thank you for inviting me to discuss my views of the two bills under consideration, H.R. 2631 and H.R. 3438.

I am a Professor of Law at Georgetown University Law Center. I teach Administrative Law, Legislation and Regulation, Environmental Law, and advanced courses on regulation. I have also been a professor of law or visiting professor of law at Columbia Law School, Cornell Law School, Emory Law School, and University of Illinois School of Law. I have published extensively, with books published by Cambridge University Press, Cornell University Press, and Wolters Kluwer, and dozens of articles and book chapters, including articles on regulatory and administrative law issues in *Stanford Law Review*, *NYU Law Review*, *Cornell Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, *George Washington Law Review* and numerous other journals. Before becoming a professor, I practiced law in New York City. As a lawyer, I have represented leading corporations, government entities, and not-for-profits. I was a law clerk for United States Judge Jose A. Cabranes and am a graduate of Columbia Law School and Amherst College. I have previously testified at numerous hearings on regulatory and environmental issues before committees of both the House of Representatives and the Senate.

I am here on my own behalf and not on behalf of any organization or entity.

I. H.R. 2631

H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, would require agencies to engage in notice-and-comment rulemaking before they could revise a longstanding interpretive rule. I suspect that this bill relates to, or perhaps is motivated by, the same concerns that led to the litigation that culminated in the Supreme Court's decision earlier this year in *Perez v. Mortgage Bankers Ass'n*, 138 S.Ct. 1199 (2015). That case unanimously rejected a lower court decision and strain in law in the DC Circuit that had, in settings that were not fully defined, required agencies to go through notice and comment rulemaking if they were going to abandon or change a longstanding interpretive rule, at least where the initial interpretation had led to substantial reliance interests or investment. The *Perez* Supreme Court, however, rejected this DC Circuit innovation. Drawing heavily on precedent long established in the Supreme Court's unusually clear decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Court in *Perez* held that the Administrative Procedure Act (APA) explicitly exempts agencies from having to engage in notice and comment procedures before "formulating, amending, or repealing" an interpretive rule. The APA similarly does not require notice and comment process for several other types of related rules such as "general statements of policy, or rules of agency organization, procedure, or practice." Courts have no power, the Supreme Court has now clearly stated in several cases, to improvise and impose additional procedural requirements not required by the APA, another statute, or the agency's own regulations.

The Supreme Court has thus clearly rejected efforts to develop judicial doctrine that would

constrain agency changes in interpretive rules. But because the *Perez* and *Vermont Yankee* decisions were statutory interpretation decisions, they do not preclude a new contrary legislative choice such as that proposed by H.R. 2631. I therefore turn now to assessment of the wisdom of this bill.

This bill is likely motivated by concerns about excessive regulatory power, perhaps influenced by critics of agency use of interpretive rules, policy statements, guidelines, and other rule-like documents that are regularly issued and utilized, yet without a preceding notice and comment process. This critical strain tends to make several claims, but as further discussed below, often fails to acknowledge that many, if not most, of such interpretations and policy statements are issued at the request of business interests seeking clarifications of government policy as well as regulatory consistency. Critics of agency use of interpretive rules and other similar guidance and policy documents often claim that agencies abuse the legal option of such rules to enhance their own power or escape accountability. Such criticisms may have a kernel of truth, or at least describe motivations behind and impacts of some interpretive rules, but certainly does not describe the usual reasons for use of such rules or establish the wisdom of requiring notice and comment rulemaking to change any longstanding interpretive rule.

The question is whether this bill's effort to impose notice and comment process across the board as a required antecedent to changing an interpretive rule that is more than a year old is necessary or a good idea. I think such a bill, on balance, would be a bad idea, especially for businesses. It also would predictably backfire, creating incentives for behavior that would be more problematic than current use of interpretive rules.

First, and very importantly, a definition of "interpretive rules" is not provided in the APA or this bill and is not clear. All agencies issue a wide array of rule-like documents that could be characterized as interpretive rules, where they provide a legal interpretation and often clarify their view of a legal issue in a particular context. The APA could be read as exempting several distinctive and different categories of rule-like documents from notice and comment process, as litigants and courts have argued and developed through case law. But the line between an "interpretive rule" and a "statement of policy" is far from clear, and agency enforcement guidelines ostensibly issued to guide agency personnel are obviously of great interest to targets of regulation and at times could be characterized as "interpretive rules." So a definition of what is covered is important. If such a bill is to clarify the law, it needs to be quite explicit about what is or is not covered and make clear the differences among these categories of rules.

Second, most interpretive rules and other related rule-like guidance or policy documents are procedurally and substantively desirable and almost inevitable. Interpretive rules address open questions or legal application uncertainties, often at the request of businesses subject to regulation. Businesses tend to prefer certainty to uncertainty, especially where the stakes are high. Notice and comment rulemaking is one option to bring clarity to the law, but that process tends to be far slower. The numerous impact statements imposed on many rules through statutes and executive orders regarding federalism, small business impacts, paperwork, and costs and benefits, to name a few, slow down many rules. Moreover, due to the more substantial

investment notice and comment rules entail, they are less likely to be adjusted and improved once promulgated. An interpretive rule, in contrast, is sought and often preferred by both the agency and businesses subject to regulation because it can be issued more easily. And if the interpretation proves to be problematic, it can be adjusted without preceding burdensome process. By imposing an across-the-board requirement that all long-enduring interpretive rules cannot be changed without notice and comment process, agencies will be discouraged from taking on the added work that change would entail. Even rules on modest issues would become rigidified. Regulatory responsiveness, which tends to be a virtue, not a vice, would be undercut.

Third, businesses may wish for a world with less regulation, but when laws and regulations do exist due to laws duly enacted by Congress, businesses want to know what is required and agencies will want their many officials to understand the law. Both agencies and businesses subject to regulation hence tend to prefer regulatory certainty and consistency to ad hoc judgments that cannot be predicted. Interpretive rules are a way to improve such agency consistency and legal predictability.

Fourth, this bill will predictably backfire. Scholars have repeatedly noted that as notice and comment rulemaking has been subjected to an increasing array of analytical hurdles imposed by other statutes and presidential executive orders, as well as often rigorous "hard look review" in the courts, the response of many agencies is to avoid making law in this increasingly burdensome and ossified manner. Similarly, telling agencies that long-lived interpretive rules can only be changed through notice and comment rulemaking will make other less procedurally onerous policymaking modalities comparatively more attractive. If interpretive rules would now be saddled with more procedural rigor, ad hoc agency policymaking or policymaking via adjudication would become relatively more appealing. This bill would create strong incentives prospectively for agencies to cease issuing interpretive rules. Either no interpretations will be offered, or they will be offered under the guise of other non-notice and comment rules recognized by the APA. The result will be less knowable and less predictable regulation.

Importantly, *Perez* arguably made a bill such as this less necessary. Although *Perez* clearly affirmed the APA's language and limited judicial procedural second guessing, it also included strong language about the limited power of interpretive rules and, it appears, other forms of law interpretation by agencies that do not go through preceding notice and comment process. Such rules do not create the uniformly binding impact of a promulgated rule placed in the Code of Federal Regulations. In contrast, a notice and comment rule, if it survives judicial challenges, is then binding on the agency, on the targets and beneficiaries of regulation, and on the courts as well. They have the force of law. Interpretive rules, in contrast, are a tentative statement of the law that are subject to ongoing contestation in the courts and subject to judicial review second guessing.

Similarly, other recent Supreme Court precedents teach agencies that they will receive less deference if they utilize an interpretive rule instead of more democratically participatory and responsive notice and comment process. Instead of the substantial deference often provided

under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), interpretive rules and other policy statements, manuals and the like usually do not have the "force of law" and will at most receive so-called "sliding scale" deference that in substantial part rests on the thoroughness and persuasiveness of the agency's views. *See United States v. Mead Corp*, 533 U.S. 218, 230 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Court doctrine hence already discourages strategic use of interpretive rules, giving them less impact and resulting in less deference to agencies.

A separate issue is a body of law that has sometimes provided agency interpretations of their own rules with an especially deferential form of judicial review. A growing body of scholars, judges, and several justices have in recent years called for rejection of this doctrine, often referred to as *Auer* deference due to its articulation in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Not all interpretive rules involve this form of interpretation, but it can pose a problem. This bill, however, says nothing about this form of deference and many administrative law scholars and court watchers in any event anticipate its demise or weakening in the near future.

Rigidifying agency interpretive rules and even discouraging their use are both bad ideas, even if some agencies may at times overuse interpretive rules or change them abruptly. Current legal doctrine limits their power. In addition, most agencies use such rules for sound reasons, often at the request of businesses and to further broadly shared goals of consistent and knowable law. Agencies tend to be sensitive to the views and needs of all stakeholders subject to or protected by their regulations and interpretive rules. They also know that congressional committees watch over them. I am unaware of any empirical study documenting pervasive agency abuse of interpretive rules and their frequent unwise abrupt change preceded by no advance public vetting of such changes. An across-the- board imposition of notice and comment process for any interpretive rule that has been in existence for more than a year is an unwise and unneeded change in the law.

II. H.R. 3438

H.R. 3438 is quite simple, but could have a devastating effect on the law, while also causing massive economic and health harms and creating legal uncertainty. By its terms, this bill would stay any "high-impact rule" that "may impose an annual cost on the economy of not less than" $1 billion if challenged in court by anyone. Hence, rather than courts reviewing stay motions and later the merits of a regulation under a body of law long developed by the Supreme Court, the mere fact of a challenge would result in a stay "pending judicial review." Presumably, this means until the completion of judicial review, although it does not quite say that. This bill is a bad idea at several levels.

First, virtually all high stakes rules will be challenged by someone, so virtually all such rules under a law such as this proposal would receive new statutorily granted stays. Since such rules often now generate millions of comments and are issued with lengthy technical documents,

Federal Register preambles, and additional legal memoranda, briefing of such challenges itself takes many months, sometimes years. Then, depending on the agency and underlying statute, battles can be joined on the court appropriate for review, on the relevant standard of review, on litigants' standing and, eventually, a rule's merits. A ruling can then lead to appeals, or *en banc* review, or petitions for Supreme Court review. This all will often add up to years of litigation before challenges to a regulation result in what appears to be a final ruling. But many rules are at that point partially upheld or, even if rejected, are remanded for potential curative actions by the agency. The net result will, in reality, be that virtually all "high-impact rules" would be stayed for years, regardless of the merits of the challenges.

Second, a related concern and uncertainty is how this bill would relate to laws or regulations that, by their terms, provide substantial lead time before they become fully effective. Would these time periods be tacked on at the conclusion of years of litigation?

Third, of greater concern, rules of broad impact typically are addressing a huge risk to a population or the environment. A virtually guaranteed stay would mean that the regulated harms might go unchecked for years, potentially resulting in illnesses and deaths or environmental destruction on a huge scale. That such impacts would continue has been shown by innumerable cost-benefit analyses by agencies and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). US laws regulate many risks, and in our highly urbanized and industrialized society with massive and often uniform methods of production, risks and harms on a huge scale are a prevalent risk. Cost-benefit analysis is criticized by many, but one of its valuable lessons is that prudent regulation should be preceded by consideration of both the costs *and the benefits* of any regulation. An automatically stayed regulation would turn those regulatory benefits into years of ongoing harms.

Moreover, courts considering traditional motions for stays of a new regulation already provide a check on shoddy regulation and under Supreme Court doctrine must engage in a balanced examination of a rule's merits, as well as the costs and benefits of any stay.1 Courts will hear from a wide array of supporters and challengers. This bill, in contrast, would by fiat grant a stay, regardless of the stakes, the legal merits, and risks and costs of the harms that would otherwise be addressed. It is rare that even very high cost rules are not accompanied by massive, usually far higher societal and economic benefits of regulation. With this bill's automatic stay, those harms would go on for years, typically costing the country and its citizens and possibly the environment billions of dollars in harms that would usually far surpass regulatory costs.

Fourth, this bill would engender legal uncertainty on its most important trigger of applicability. What does "annual cost on the economy" mean? No reputable economist, or public health

1 Under Supreme Court law, courts must consider "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting from *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

expert, or regulatory expert would ever suggest that regulations should be assessed looking only at the "cost" side of the ledger. Benefits must be assessed as well. Furthermore, many laws are meant to protect vulnerable populations or some sensitive or important amenity or the environment, meaning that their protection should be given priority due to the considered judgment of an earlier Congress that is now in duly enacted law. But this problem in not defining "cost" goes further. While it could mean costs alone—which would be odd and illogical-- it might be read to mean "net costs" derived from looking at benefits and costs. It could mean direct costs or, consistent with most calls for expanded cost-benefit analysis, it might mean "societal costs." But all learned advocates of cost-benefit analysis call for consideration of both societal costs and societal benefits, and also the net sum of the two. Or it could mean costs in the economic sense of costs imposed on the economy due to the possible drag or inefficiencies created by regulation, or what some call a "deadweight" loss. This number would likely be much smaller.

The illogic of talking about costs alone is evident if one considers a basic pollution control example. If a regulation results in one company paying for a good or service—say a pollution control strategy--and others receive that payment, there is no net societal cost unless something about the regulation results in other inefficiencies. Or, for another example, if under the just finalized Clean Power Plan power plants shift to greater reliance on natural gas or cleaner forms of energy and consumers and the environment benefit, that complex array of costs and benefits and legal priorities should all be considered by agencies and courts. To assess where the "net" falls requires one to consider all harms and benefits of the regulated activity and world with regulation, as well as consideration of whether those harms are internalized or externalized by some other regulatory strategy, common law regimes, or markets. Put simply, to consider costs alone without any consideration of benefits is illogical, contrary to any defensible form of regulatory analysis, and would lead to ongoing massive harms that could swamp regulatory burdens.

Finally, a bill like H.R. 3438 could be seen as an indirect legislative effort to defeat regulations or render laws a partial nullity when more direct and democratically accountable legislative action would fail. Under the guise of giving courts a chance to review challenges, laws would be nullified for years even where the courts and Congress have clearly required an agency to undertake the regulatory action and even in settings where the regulation might be rock solid. A body of scholarship and court doctrine criticizes such indirect legislative strategies due to their lack of democratic accountability. Through vague or indirect language or procedures, here an automatic stay mandate, such bills try to achieve ends that would fail if sought through direct and open congressional efforts to amend the underlying statute. Similarly, stealth appropriations riders that seek to change substantive laws or create selective legal carve-outs have long been criticized due to their lack of transparency and democratic unaccountability. If the Constitution's democratically accountable legislative process could not be surmounted to amend the law underlying a high-impact regulation, and if a regulatory stakeholder could not succeed in the lengthy regulatory process with arguments rooted in law and science, then Congress should not empower a single litigant to achieve the same impact by merely filing a lawsuit. Such a legislative end-run would undercut the Constitution's legislative process, derail duly enacted

laws, ignore the legal and factual merits of the underlying regulation, and disrespect courts that have long applied a nuanced body of law to assess requests for stays of a challenged regulation.

Conclusion

Both bills may spring out of concerns with particular regulations or Supreme Court decisions, but both could cause serious long-term harms to well-established administrative law doctrines. Moreover, any bill that imposes a stay on any high-impact rule threatens to bless years of ongoing harms, illness and deaths. Sometimes stays will be well deserved, but it is far better for courts to engage in an informed and balanced assessment of the merits of the challenge and regulatory costs and benefits than for Congress to pass a law that would make such stays automatic upon the filing of any legal challenge.