U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 05 2018

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 4537, the "International Insurance Standards Act of 2017," as introduced and amended in committee. The Department objects to a number of provisions in the bill that raise constitutional concerns.

1. Encroachments on the President's Exclusive Authority to Conduct Diplomacy

Various provisions of H.R. 4537 would contravene the President's exclusive authority over the conduct of diplomatic relations. *See United States v. Louisiana*, 363 U.S. 1, 35 (1960) (The President is "the constitutional representative of the United States in its dealings with foreign nations."). "The President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history." *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. __, at *4 (Sept. 19, 2011), https://www.justice.gov/file/18346/download. In each instance of a constitutional violation, we recommend that the problematic provision be deleted or made hortatory, by changing "shall" in relevant places to "should."

a. Restricting the President's Vote in International Fora and Mandating Negotiating Terms for International Agreements (Section 3(a))

Section 3 would intrude on the President's exclusive authority to determine what positions to take before international bodies and in international negotiations. *See Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. __, at *5 (June 1, 2009) ("*Section 7054*") (The President has the "exclusive authority to determine the time, scope, and objectives of international negotiations or discussions.") (internal quotations omitted)), https://www.justice.gov/file/18496/download. Section 3(a) would require that United States representatives "in any international regulatory, standard-setting, or supervisory forum or in any negotiations of any international agreements relating to the prudential aspects of insurance shall not agree to, accede to, accept, or establish, and shall use their voice and shall vote to oppose, any proposed agreement or standard . . . unless such proposed agreement or standard" is consistent with current United States standards. Section 3(c) would provide that "[n]othing in this section shall be construed to prevent participation in negotiations of any proposed agreement or standard." Read in concert, these provisions would require that United States representatives, when voting in international bodies or negotiating international agreements, oppose positions that are inconsistent with current United States insurance standards. We recommend deleting sections 3(a) and 3(c) or making those sections hortatory by changing "shall" to "should" in both sections. Although section 3(c) does not present a constitutional concern standing alone, deleting section 3(a) would make section 3(c) superfluous.

b. Specifying Who Will Represent the United States in International Fora and Negotiations (Sections 4, 7(c)(3))

Sections 4 and 7(c)(3) would contravene the President's exclusive authority to decide who should represent the United States in diplomatic exchanges. *See Section 7054* at *8 (The President possesses the "exclusive authority 'to determine . . . the individuals who will represent the United States in those diplomatic exchanges.'"). Section 4 would require that United States representatives, "[i]n developing international insurance standards . . . and throughout the negotiations of such standards," "include" state insurance commissioners or their designees "in such meetings"—i.e., in the international negotiations. Section 7(c)(3) likewise would require that United States representatives, "[t]hroughout the negotiations" of an international insurance agreement, "include in such meetings" state insurance commissioners or their designees. We recommend deleting these provisions or making them hortatory, by changing "shall" in relevant places to "should."

c. Imposing Conditions on the President's Authority to Initiate, Negotiate, Sign, or Otherwise Agree to International Agreements (Sections 4, 5, 7(c)(1)(A), 7(c)(3))

Sections 4, 5, and 7(c) would impermissibly encroach upon the President's authority to initiate, negotiate, and sign international agreements by dictating whom the President must consult as part of the negotiating process. "As the 'sole organ' of the United States in its international relations, the President himself has authority to represent the United States in negotiating or concluding international agreements." Restatement (Third) of Foreign Relations Law of the United States § 311 cmt. b (1986) (quoting March 7, 1800 speech of John Marshall). Sections 5 and 7(c) would further encroach upon this presidential authority by prohibiting the President from entering into negotiations or concluding an agreement unless he first consulted with Congress and an advisory committee. Specifically:

- Section 4 would require the Executive, in developing and negotiating international insurance standards, to "closely consult and coordinate with and include in such meetings, State insurance commissioners" or their designees.

- Section 5(a) would require the Executive to provide notice to and consult with congressional committees before the Executive could "initiat[e] negotiations to enter into an [international] agreement" relating to the prudential aspects of insurance.

- Section 5(b) would require the Secretary of the Treasury to consult with an advisory committee "[b]efore entering into an [international] agreement" relating to the prudential aspects of insurance.

- Section 5(c) would prohibit parties representing the United States from signing or otherwise agreeing to, accepting, or establishing an international agreement relating to the prudential aspects of insurance that "would not have the force and effect of law," unless the Executive first submitted a copy of the agreement to Congress and gave Congress at least 90 days to pass a joint resolution disapproving the agreement.

- Section 7(c)(1)(A) would amend 31 U.S.C. § 314(b)(2) to require that the Secretary of the Treasury and the United States Trade Representative, before initiating negotiations to enter into an agreement about prudential insurance measures, consult with congressional committees on the nature of the agreement to be negotiated, the extent to which it will achieve purposes defined by Congress, and the nature of changes to any laws that would be required to carry out the intended agreement.

- Section 7(c)(3) would also add a subsection (e) to 31 U.S.C. § 314, requiring "parties representing the Federal Government" to "closely consult with and coordinate with" state insurance commissioners or their designees throughout the negotiation of international agreements regarding prudential insurance measures.

We recommend deleting these provisions or making the notice, consultation, and reporting conditions hortatory, by changing "shall" in relevant places to "should."

2. Violations of the Bicameralism and Presentment Requirements (Sections 5(c), 6(a), 7(c)(2)(C), 7(c)(3))

Sections 5 and 6 would also violate the requirements of bicameralism and presentment for a bill to become law under Article I, Section 7 of the Constitution. Sections 5 and 6 would establish a procedure for congressional review of "any agreement [relating to the prudential aspects of insurance] that would not have the force and effect of law." Section 5(c) would require submission of any such agreement to Congress, and section 6(a)(1) would provide that the "United States shall not be considered a party to such agreement if" Congress enacted a joint resolution of disapproval within 90 days of when the President submits the agreement to Congress. Section 6(a)(2) would further provide that in the event of a presidential veto, "the joint resolution shall be treated as enacted into law before the end of the 90-day period . . . if both Houses of Congress vote to override such veto on or before the later of the last day of such 90-day period." Moreover, under section 6(a)(2), if both Houses of Congress voted to override the veto within 15 days of when Congress received the veto message from the President, the joint resolution would still be treated as having been enacted into law before the end of the 90-day period. During the 90-day review period, as well as during any 15-day extension in the event of a presidential veto, section 5(b) would prevent the President from agreeing to, accepting, or establishing the agreement. Section 7(c)(2)(C) and (c)(3) would incorporate this procedure for international agreements regarding prudential insurance standards that "may enter into force with respect to the United States."

These provisions would allow Congress to enact legislation outside the constitutionally prescribed bicameralism and presentment process, *see INS v. Chadha*, 462 U.S. 919, 951 (1983), by giving legal effect to an action of Congress (the mere enrollment of a bill followed by a presidential veto) if (1) Congress were to pass a joint resolution of disapproval late in its 90-day window of review, and (2) the 15-day period following the President's veto were to extend beyond that 90-day window. Forbidding the President from entering into any type of international agreement would be an action "of the kind to which the procedural requirements of Art. I, § 7 apply." *Id.* at 952. The prohibition would have "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . , all outside the legislative branch." *Id.*

The provisions of sections 5(c), 6(a), 7(c)(2)(C), and 7(c)(3) that attach legal consequences to an enrolled bill vetoed by the President should therefore be deleted or made hortatory. Alternatively, Congress could extend the review period from 90 to 105 days in all cases and eliminate the 15-day extension in the event of a veto.

3. Requirements to Disclose Privileged Information (Sections 4, 7(c)(1)(B), 7(c)(3))

Sections 4 and 7(c)(3) would also unconstitutionally require the disclosure of privileged information. By directing the Executive to include state insurance commissioners or their designees in "meetings" where international insurance agreements are negotiated, these provisions would require the President to disclose the content of diplomatic communications to third parties. "Interwoven with the President's constitutional authority to conduct diplomatic relations is his constitutional authority to determine whether to disclose the content of international negotiations: without such power, he could not ensure the confidentiality and secrecy that are essential elements of diplomacy." *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267–68 (1996).

Section 7(c)(1)(B) would raise similar concerns by providing that "Congressional Committees and staff with proper security clearances shall be given access to United States negotiating proposals, consolidated draft texts, and other pertinent documents related to the negotiations, including classified materials." These requirements would both force the disclosure of diplomatic communications and intrude on the President's constitutional authority to control the dissemination of national security information. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (the "authority to protect [information bearing on national security] falls on the President as head of the Executive Branch and as Commander in Chief"); *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) ("[A] congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch." (internal quotation marks omitted)) Additionally, the mandated disclosures might include materials protected by the presidential communications and deliberative process components of executive privilege. *See Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 8–10 (2008) ("Executive privilege . . . extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decisionmaking.")

For these reasons, we recommend eliminating sections 4, 7(c)(1)(B), and 7(c)(3) or making them hortatory. If these changes are not made, we would, consistent with the longstanding practice of the Executive Branch, treat all of these provisions in a manner consistent with the President's constitutional authority to control the dissemination of classified material and other information protected by executive privilege within the Executive Branch.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Maxine Waters
Ranking Member