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## United States Senate

COMMITTEES:  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
INTELLIGENCE  
APPROPRIATIONS  
INDIAN AFFAIRS

January 16, 2015

The Honorable Penny Pritzker  
Secretary  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, D.C. 20230

Dear Secretary Pritzker:

To meet President Obama's announced policy changes regarding Cuba on December 17, 2014, the Commerce Department amended certain provisions of the Export Administration Regulations through a new rule published on January 16, 2015. While the economic and social benefits behind such policy changes are debatable, I am concerned that your Department's circumvention of certain rulemaking requirements runs counter to congressional intent of the Administrative Procedure Act.

Congress enacted the Administrative Procedure Act (APA) in 1946 to provide federal agencies with the tools and authority to implement public laws in accordance with their full legislative intent. The APA includes several safeguards and oversight mechanisms to ensure agencies would complete specific public disclosures and hear comments from the American people and affected parties. If an agency intends to create, amend, or repeal a rule, it must first publish the proposed change in the Federal Register and allow interested parties an opportunity to review and comment on the proposed rule.

Although the notice of proposed rulemaking and public comment provisions in the APA apply to all agencies, a narrow exception was included for matters involving a military or foreign affairs function.

While the exception is important for matters of national security, it is not intended to be absolute. The Senate Judiciary Committee report filed in conjunction with consideration of the Administrative Procedure Act during the First Session of the 79th Congress clearly states:

*The phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those "affairs" which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable inter-national consequences...The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule making procedures they will adopt in a given situation within their terms. It should be noted, moreover, that the exceptions apply only "to the extent" that the excepted subjects are directly involved.*

The rule issued by your Department states in part that “The provisions of the Administration Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States.”

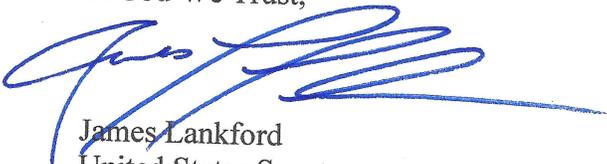
In light of these clear, written intentions of the federal lawmakers who authored the APA, I would appreciate a response from your office to the following:

- 1) How do your agency’s actions in amending the Cuban Assets Control Regulations, without providing a notice of proposed rulemaking, comment period, and delay in effective date, conform to the clearly expressed congressional intent of the APA with respect to the narrowness of how “foreign affairs functions” should be interpreted?
- 2) Given that the United States has not had formal diplomatic relations with Cuba since 1961, please detail how subjecting your department’s new rules to the public rulemaking provisions contained in the APA would have “clearly provoke[d] definitely undesirable international consequences?”
- 3) Does the agency intend to promulgate other rulemaking actions in conjunction with the change in Cuba policy? If so, does the agency intend to use the foreign affairs exemption, or is it the opinion of the agency that the exemption is not absolute?

The United States has not had formal diplomatic relations with Cuba since 1961, and as the President noted in his December 2014 announcement, Cuba remains a nation governed by the Communist party. Given this drastic shift in our nation’s foreign policy, I believe that the public should have been afforded an opportunity to comment and do not believe that such comments would have resulted in undesirable, international consequences.

I appreciate your taking the time to address these concerns and look forward to your response. Please direct any questions to Adam Farris, of my staff, at [adam\\_farris@lankford.senate.gov](mailto:adam_farris@lankford.senate.gov) or 202-224-5754.

In God We Trust,



James Lankford  
United States Senator