REPORT

IMPROVING THE ADMINISTRATIVE PROCESS: A REPORT TO THE PRESIDENT-ELECT OF THE UNITED STATES (2016)*

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW
AND REGULATORY PRACTICE†

INTRODUCTION

As the forty-fifth American President, you will face a pressing need to improve the process by which federal agencies make law and affect the lives of millions of Americans. The American Bar Association's (ABA) Section of Administrative Law and Regulatory Practice has prepared this report for your consideration in the hope that we have identified focused, non-partisan strategies for improvement and reassessment. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government

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* The Editors of the *Administrative Law Review* are pleased to reprint the original language of this report as a service to our readers.

† The recommendations in this report were endorsed in principle by a vote of the Council of the Section on August 6, 2016. The Council gave final approval of the Report on September 9, 2016. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

This report was prepared for the Section by an Ad Hoc Committee on Administrative Law Transition. Members of the Committee included: Jack M. Beermann, Emily S. Bremer, Jeffrey Bossert Clark, Cary Coglianese, John F. Cooney, Michael A. Fitzpatrick, Michael Eric Herz, Jeffrey Lubbers, Roger Nober, Paul R. Noe, David Rostker, Peter L. Strauss, and Christopher J. Walker.

attorneys, judges, law professors, and members of nonprofit organizations. Officials from all three branches of the federal government sit on its governing Council. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

In generating this report, the Section sought at every stage to achieve consensus among the broad range of interests represented in our membership. This report is nonpartisan and was prepared well in advance of the 2016 presidential election. The Council of the Section finally approved this report on September 9, 2016, to ensure completion prior to the election. As a result, we believe the recommendations discussed in the report should have wide support and be susceptible of early acceptance.

EXECUTIVE SUMMARY

This report offers the following recommendations:

- *Transition Workers*
  - Ensure that your transition workers adhere to the Transition Code of Ethical Conduct contained in the Appendix to Administrative Conference of the United States (ACUS) Recommendation 88-1.

- *Appointment of Your Administration*
  - First, both you and the Senate should act promptly.
  - Second, effective administration of regulatory and beneficiary programs requires the appointment of persons of high ability to positions of leadership.
  - Third, attach considerable importance to appointing a Chairman for ACUS and to securing the funding it needs for continued effectiveness.

- *Midnight Rulemaking*
  - First, use a notice-and-comment process when you undertake to review a midnight rule that has already been published but has an effective date that is not imminent.
  - Second, when the effective date of a midnight rule is imminent, your administration should consider, if permitted by law, delaying the effective date of the rule for up to 60 days to facilitate your review.

- *Oversight and Improvement of the Rulemaking Process*
  - First, use effective regulatory planning mechanisms.
  - Second, continue the interagency regulatory review process consistent with the principles and procedures embodied in Executive Order 12866 and Executive Order 13563, use benefit-cost analysis for economically significant rules unless prohibited by law, and secure the funding necessary for its effectiveness.
  - Third, ensure appropriate transparency in White House oversight of agency rulemaking through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).
  - Fourth, the scope of regulatory review properly includes both "significant" regulatory actions and "significant" guidance documents, and there should be a streamlined process to review guidance.
  - Fifth, support the use of sound scientific risk assessment.
  - Sixth, continue and, where appropriate, expand upon existing bilateral and multilateral regulatory cooperation and coherence efforts between the United States and other countries, and identify new opportunities for regulatory cooperation.
  - Seventh, extend Executive oversight to many independent regulatory agencies.

- *Improvements to the Administrative Procedure Act*
  - Support the improvements to the Administrative Procedure Act (APA) recommended by ABA Resolution 106B.

- *Posting Guidance on Websites*
  - Ensure that all agency guidance documents are made available online in a timely and easily accessible manner.

- *Retrospective Review*
  - Build on the efforts of previous administrations and take steps to institutionalize careful, in-depth retrospective review of existing rules.
  - Conduct a thorough review of the more than 13,700 Executive orders issued by all Presidents to date, and consider which are no longer necessary or appropriate, so that those can be revoked.

- *Use of Information and Communication Technologies*
  - Continue to improve existing information and communication applications and dedicate the resources and attention necessary to keep up with continuous technological evolution.

- *Agency Adjudication*
  - First, support legislation that would enhance both the legitimacy and uniformity of agency adjudicatory decisions.
  - Second, re-establish a strong Office of Administrative Law Judges (ALJs) in the Office of Personnel Management (OPM).
  - Third, provide urgent attention to the burgeoning backlog of cases in some of the nation's most important high-volume administrative adjudicatory programs.
  - Finally, encourage agencies to avoid taking excessive time to review front-line decisions in important application adjudications, such as permitting, licensing, and petitions for waivers.

- *Alternative Dispute Resolution*
  - First, expand the Administration's commitment to using Alternative Dispute Resolution (ADR) techniques in both agency adjudication and rulemaking.
  - Second, build on this foundation by issuing an Executive order to express support for ADR.

DISCUSSION AND RECOMMENDATIONS

Transition Workers

A hallmark of American government is the orderly and peaceful transition of authority following the presidential election. As Congress recognized in the Presidential Transition Act of 1963, a smooth transition is necessary to "assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign," and it directs all officers of the government to take steps to promote the orderly transition of power between the outgoing and incoming administrations. In 1988, ACUS studied the role of the President-elect's transition organization and adopted Recommendation 88-

1, *Presidential Transition Workers Code of Ethical Conduct.*[1] The Recommendation is designed to ensure that the large number of private citizens who participate in the transition on behalf of the incoming President avoid conflicts of interest that might arise in the course of the transition.

We urge that your transition workers adhere to the Transition Code of Ethical Conduct contained in the Appendix to ACUS Recommendation 88-1. This code requires transition workers to disclose their present employment and the source of funding for their participation in the transition. It also prohibits transition workers from engaging in financial self-dealing, misusing government property or non-public agency information, and representing anyone in matters before the agency during and, for a limited time, after the transition. Beyond these requirements, is also very important that transition workers be clearly identified so that federal agencies know who represents the President-Elect before granting access to government facilities and information. Therefore, we urge your transition organization to provide each agency with a list of the names of the transition team for that agency, along with each worker's written agreement to adhere to the ethical standards referenced above and the statement disclosing their present employment and source of funding.

APPOINTMENT OF YOUR ADMINISTRATION

Among your very first decisions will be to choose the appointees who will people your administration. At the highest level, this requires senatorial confirmation; but many appointments are made by you alone or by those whom you appoint to high office with Senate confirmation. These are political judgments at root, yet we believe law and experience offer perspectives that are appropriate for us to address here.

First, we urge both you and the Senate to act promptly. Unfilled vacancies imperil effective administration. Prompt appointments are essential for the government to operate and to act efficiently and consistently in the public interest. Nonetheless, past Presidents have not always been prompt in sending nominations forward, and the Senate has not always been prompt in considering nominations once sent. These problems have only continued. Your primary control over the administrative apparatus does not reside in your ability to issue orders or to monitor performance, but rather is exercised through your selection of sound administrators to lead those agencies. That counsels deep and urgent attention to the

1. ACUS is a free-standing federal agency that studies administrative procedure and makes nonpartisan, consensus-based recommendations for improvements to the President, Congress, agencies, and the Judicial Conference. *See* 5 U.S.C. §§ 591–596; www.acus.gov.

appointment process on all sides.

Second, effective administration of regulatory and beneficiary programs requires the appointment of persons of high ability to positions of leadership. The appointment of qualified and committed administrators is necessary to guarantee the faithful execution of the laws. We recognize that Presidents regularly appoint people who have actively participated in the successful presidential campaign, or who are party loyalists, or who are promoted by influential constituency groups. Appointments stemming from these factors can, of course, be appropriate. Nevertheless, we, as practitioners and others involved in the substantive areas that will be directly affected by your appointments, urge you not to allow those factors to overshadow qualities such as competence, leadership ability, and familiarity with the programs that will fall within your appointees' charge. We also urge you to observe the many time-honored qualifications for presidentially appointed offices that are embedded in legislation, which can help to secure the cooperation of disparate interests that is essential to the success of governmental programs. Such qualifications in the people you appoint are important to the fulfillment of your own constitutional responsibility to take care that the laws be faithfully executed.

Third, we urge you to attach considerable importance to appointing a Chairman for ACUS and to securing the funding it needs for continued effectiveness. In preparing this Report, we have been impressed by how often we have been able to draw on ACUS recommendations. The agency is a continuing source of understanding and consensus recommendations on administrative procedure.

MIDNIGHT RULEMAKING

As has been the case for decades, the volume of agency regulations is likely to have increased substantially in the final months of your predecessor's administration. As has become standard practice, your administration will likely undertake a comprehensive review of regulations that were promulgated late in your predecessor's term in office to ensure that these regulations conform to your administration's policies and meet the high standards necessary for effective regulation. As previous incoming administrations have done, you may wish to order a halt to the issuance of new regulations until they can be reviewed by an appointee of your administration, and you may wish to order your appointees to review all pending regulations and all regulations that have been published but have not yet gone into effect. If you or anyone in your administration issues such an order, the order should be published and should contain clear instructions on the procedures agencies must follow in conducting the review. Most importantly, we urge you to undertake this review in an

orderly and transparent manner, in line with ACUS Recommendation 2012-2, *Midnight Rules*.[2]

First, we urge you to use a notice-and-comment process when you undertake to review a midnight rule that has already been published but has an effective date that is not imminent. Under this process, before taking any action to alter the rule or its effective date, your administration should allow a notice-and-comment period of at least 30 days to invite the public to express views on the legal and policy issues raised by the rule, including whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. The administration should then take account of the public comments in determining whether to amend, rescind, delay the rule, or allow the rule to go into effect. If possible, the administration should initiate, if not complete, this process prior to the effective date of the rule.

Second, we urge that when the effective date of a midnight rule is imminent, your administration should consider, if permitted by law, delaying the effective date of the rule for up to 60 days to facilitate your review. This approach recognizes that an imminent effective date may preclude full adherence to the process described above. Before deciding whether to delay the effective date, however, the administration should, where feasible, allow at least a short comment period regarding the desirability of delaying the effective date. If your administration cannot provide a comment period before delaying the effective date of the rule, it should instead offer the public a subsequent opportunity to comment on when, if ever, the rule should take effect.

OVERSIGHT AND IMPROVEMENT OF THE RULEMAKING PROCESS

The scope and complexity of regulation, competing national goals, and economic concerns have made it a central task of our government to choose wisely among competing priorities and policy choices.[3] To compound the challenge, Congress often legislates broad goals and leaves regulatory agencies with the difficult task of filling in the details of regulatory programs, a process which requires further balancing of competing priorities.[4] Accordingly, it is imperative that the President have an effective, evidence-based mechanism for interagency review of rules to coordinate regulatory decisions from a broad, societal perspective. For over 35 years, every President regardless of party affiliation has supported a coordinated, interagency regulatory review process through OIRA.

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2. *See* 77 Fed. Reg. 47,800, 47,802–04 (Aug. 10, 2012).

3. *See* ACUS, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5287, 5287–88 (Feb. 2, 1989).

4. *Id.*

It is essential that the development of regulatory policies be guided by thoughtful analysis that can reconcile tradeoffs, and that regulations be carefully calibrated to achieve their goals in the most efficient and effective manner possible. Benefit-cost analysis can reveal the most promising alternatives to achieve statutory goals. In the Clinton Administration's first *Report to Congress on the Costs and Benefits of Federal Regulation*, OMB concluded:

> [R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.
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> The only way we know how to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.[5]

First, we urge you use effective regulatory planning mechanisms. The Regulatory Plan of Section 4 of Executive Order 12866 and the statutory Unified Agenda of Federal Regulations into which it feeds are important both as policy coordination and management tools for your administration and as early public notice of impending rulemaking activity, encouraging communication with responsible agencies while impending proposals are being developed. From an external perspective, however, their use appears to have been suboptimal: although these elements apply to all agencies, independent commissions as well as executive agencies, not all have regularly participated in the Section 4 process; not all intended rulemakings of significance are listed even by participating agencies; provision of a Regulatory Identification Number (RIN) permitting ready access to documents on Regulations.gov is often omitted; and publication of the plan has been somewhat irregular. In particular, the regulatory activities of such agencies can have major public consequences, and the public deserves to know what such agencies are planning in that regard.

ACUS Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*,[6] identifies several ways to make more effective use of these

5. OMB, OIRA, *Report to Congress on the Costs and Benefits of Federal Regulation* (Sept. 30, 1997), at 10.

6. 80 Fed. Reg. 36,757, 36,757–58 (June 26, 2015).

mechanisms, including by:

- Convening the agency heads early in your administration, and at least annually, to coordinate regulatory priorities.

- As the Executive order and other instructions currently provide, requiring all agencies to (1) participate in the Regulatory Plan, (2) list in the Plan and semi-annual Regulatory Agenda all planned rulemaking activity of likely public interest, and (3) create RIN numbers for each such listed rulemaking possibility.

- Encouraging each agency to maintain a website that contains its regulatory agenda and is updated in real time to reflect concrete actions taken with respect to rules such as initiation, issuance, or withdrawal of a rule or change of contact person. These websites should be linked with the Unified Agenda website.

- Requiring agencies to improve their listing practices on the Plan and the Agenda. Agencies should be required to make reasonable efforts to accurately classify all Agenda items—for example, rules should not be classified as "long[-]term actions" when the agency contemplates issuing a proposed or final rule within the next year. Agencies should be required to explain how all rules were resolved once they have been listed, rather than removing any rule without explanation.

You may also wish to go further and give careful consideration to the possibility of implementing by Executive order a regulatory budget applicable to all federal cabinet departments and agencies. This has often been urged as a valuable, flexible management, and policy-setting tool, but it requires complex accounting of future costs and benefits and special attention to possible unanticipated consequences.

Second, we urge you to continue the interagency regulatory review process consistent with the principles and procedures embodied in Executive Order 12866 and Executive Order 13563, use benefit-cost analysis for economically significant rules unless prohibited by law, and secure the funding necessary for its effectiveness. Republican and Democratic Presidents alike have found this approach to be an efficient way to manage the administrative state, and the Section believes this tradition should continue to be honored. To ensure that the regulatory review process is effective, efficient, and timely, we recommend you ensure

that there are adequate resources available to implement it.[7]

Third, we urge you to ensure appropriate transparency in White House oversight of agency rulemaking through OIRA. From their beginning, the Executive orders creating the system of centralized executive review of agency rulemaking (e.g., Executive Order 12866) have included openness provisions supporting public trust in their administration. These provisions have:

- Committed OIRA to providing public notice of matters under review, communications and meetings with persons outside the administration, timely action on matters submitted for its review, and eventual publication of all documents exchanged between OIRA and the agency during the review process.

- Committed each agency to revealing its drafts submitted to OIRA for review and providing "complete, clear and simple" identification of substantive changes between these drafts and its actions subsequently taken, including identification of changes made at OIRA's suggestion or recommendation.

Adherence to these commitments by both OIRA and the acting agencies contributes to public understanding and trust of this important process, offering some assurance against its being used in ways inconsistent with its promises of objective review. We urge you to adhere to these commitments. Assiduous avoidance of delays and respect for openness are important elements for creating public trust in the process of centralized regulatory review.

Fourth, the scope of regulatory review properly includes both "significant" regulatory actions and "significant" guidance documents, and there should be a streamlined process to review guidance. The Section has long supported the extension of White House oversight to guidance documents. The ABA also has called for public review and comment on significant interpretive rules and policy

7. *See* ACUS, Statement #18, *Improving the Timeliness of OIRA Regulatory Review*, 78 Fed. Reg. 76,275, 76,276 (Dec. 17, 2013). When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. *See* Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, *Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2017*, at 20, table A-3 (May 17, 2016). At the same time, OIRA's statutory responsibilities have grown through a wide variety of requirements, including the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and various appropriations riders.

statements,[8] a position that is implemented by the OMB Bulletin for Agency Good Guidance Practices, which is still in effect today. In the summer of 2007, the Section opposed congressional appropriations riders that would have defunded both the procedures in Executive Order 13422 for interagency review of guidance documents and the Good Guidance Practices Bulletin.[9] We urge you to implement effective procedures for the development and use of guidance as well as for interagency review of draft guidance documents.

Fifth, we urge you to support the use of sound scientific risk assessment. Many agencies are responsible for regulating risks to health, safety, or the environment. In order for them to implement these missions, they must have adequate expertise in state-of-the-art risk and benefit assessment methods to support optimal risk management. Under the sponsorship of our Section, the ABA has developed a detailed recommendation containing principles for the use of risk assessment in the regulatory process.[10] The recommendation urges, for example, that risk assessments should be based on a careful analysis of the weight and quality of the scientific evidence, including such site-specific and substance-specific information as may be available, as well as information about the range and likely distribution of risk. It also emphasizes that scientific findings and professional judgment in risk *assessments* should be explicitly distinguished from the policy judgments in risk *management.* In addition, the recommendation provides that the process should be kept as free as possible from political bias, and that risk assessments should explicitly acknowledge and explain the limitations of their methodology, data, and assumptions. As your incoming administration undertakes to familiarize itself with the challenges of risk assessment and risk management, we commend the ABA principles to its attention.

Sixth, we urge you to continue and, where appropriate, expand upon existing bilateral and multilateral regulatory cooperation and coherence efforts between the United States and other countries, and we urge you to identify new opportunities for regulatory cooperation. Properly designed and implemented, cooperation between U.S.

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8. ABA House of Delegates, Resolution 120C (August 1993). The ABA recommended that: "Before an agency adopts a non-legislative rule that is likely to have a significant impact on the public, the agency should provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations . . . ."

9. *See, e.g.*, Letter to the Honorable Brad Miller et al. from Professor Michael Asimow, Chair, ABA Section of Administrative Law and Regulatory Practice (Nov. 19, 2007).

10. *See* ABA Section of Administrative Law and Regulatory Practice, *Recommendation*, http://www.abanet.org/adminlaw/risk02.pdf.

and foreign regulators to better align regulations—without reducing health, safety and environmental protections—can yield significant benefits for consumers and manufacturers, while promoting U.S. economic growth. These efforts should be focused on achieving greater coherence and alignment between essentially equivalent standards of protection that meet at least the U.S. standard. For these reasons, regulatory cooperation has been endorsed and pursued by Presidents of both parties, with increased emphasis and activity over the past two Administrations.[11]

In addition to delivering benefits by eliminating unnecessary nontariff trade barriers (NTBs), regulatory cooperation can take the form of mutual recognition of standards, the sharing of test data, technical and scientific information, and risk assessments, the elimination of duplicative testing, certification, and inspection requirements, and ensuring effective use of regulatory analysis and centralized regulatory review. This cooperation can reduce operational costs for regulatory agencies that are under increasing budgetary pressure, allowing them to focus limited resources on the highest risk activities, where regulation can have the greatest benefit.

Seventh, we urge you to extend Executive oversight to many independent regulatory agencies. While to date, Presidents generally have refrained from applying their regulatory oversight Executive orders to independent agencies,[12] the ABA's endorsement of presidential oversight includes the extension of oversight to the independent regulatory agencies.[13] In 1990, the ABA recommended that "presidential review should apply generally to all federal rulemaking, including that by independent regulatory agencies."[14]

Our Section, echoing the clearly presented view of the Office of Legal Counsel[15] and numerous academic commentators, has taken the position

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11. *See* ABA House of Delegates, Resolution 109B (August 2012); Executive Order 13609, Promoting International Regulatory Cooperation, 77 Fed. Reg. 26,413 (May 4, 2012); ACUS, Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012).

12. *But see* Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (applying to independent regulatory agencies as well as Cabinet Departments and agencies).

13. *See* ABA House of Delegates, *Recommendation: Presidential Review of Rulemaking* (Annual Meeting 1990); *see also* Letter from Administrative Law Scholars on "S. 3468, Independent Regulatory Analysis Act," to Senators Joe Lieberman and Susan Collins (Jan. 2, 2013) (affirming President's authority to direct independent regulatory agencies to submit their proposed rules for review by OIRA); *cf.* ACUS, Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,352, 41,355-57 (June 10, 2013) (providing recommendations of practice of benefit-cost analysis at independent agencies).

14. ABA House of Delegates, *Recommendation: Presidential Review of Rulemaking, supra* note 13.

15. Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget,

that the independent regulatory commissions can properly be made subject to the provisions of Executive Order 12866 and Executive Order 13563 requiring cost-benefit analysis, OMB review, and retrospective review of rules. (A copy of the Section's recommendation and report is attached for your reference.) Much of the policymaking of independent agencies is not functionally distinct from that of executive agencies, and where that is the case, presidential oversight is appropriate. The independent agencies already and properly are required to participate in the regulatory plan, under Section 4 of Executive Order 12866. In Executive Order 13579, President Obama took the additional step of urging, though not requiring, the independent agencies to comply with the provisions for cost-benefit analysis and retrospective review of rules in Executive Order 13563 and Executive Order 12866.

The Supreme Court has clearly and properly held that independent regulatory commissions are elements of the executive branch, necessarily subject to presidential oversight[16]—which, of course, must include the constitutional authority to require their written reports on how they intend to carry out the duties Congress has created for them. Imposing compliance with the regulatory oversight Executive orders as an obligation could answer judicial concerns about the need for such analyses, while providing a clear and well-established framework for their execution that the judicial expressions necessarily lack. We strongly urge you to bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review, and retrospective review of rules currently reflected in Executive Order 12866 and Executive Order 13563.

IMPROVEMENTS TO THE APA

We urge you to support the improvements to the APA recommended by ABA Resolution 106B. On February 8, 2016, the ABA House of Delegates adopted ABA Resolution 106B urging Congress to modernize the rulemaking provisions of the APA. Intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies, the recommended reforms include: (1) codifying the requirement that an agency fully disclose data and other information used in rulemaking; (2) codifying the requirement that agencies develop a

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from Larry L. Simms, Acting Ass't Atty. Gen., Office of Legal Counsel 7 (Feb. 12, 1981), *reprinted in* Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158 (1981) ("[U]nder the best view of the law" the proposed Executive order, eventually issued as Exec. Order No. 12,291, "can be imposed on the independent agencies.").

16. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

rulemaking record and a public docket for each rulemaking; (3) establishing a minimum comment period of 60 days for major rules, subject to an exemption for good cause; (4) tightening and clarify several outdated definitions; (5) authorizing new presidential administrations to delay the effective date of so-called midnight rules finalized at the end of the prior administration; (6) promoting retrospective review of major rules; (7) codifying some provisions and also improve the usefulness of the Unified Regulatory Agenda; (8) repealing or narrowing several outdated exemptions from the notice-and-comment process; and (9) requiring agencies to seek post-promulgation comments on some rules issued without notice-and-comment. The resolution also encourages agencies to experiment with reply comment processes.

In addition to supporting legislative improvements to the APA, we recommend that you pursue these reforms administratively unless prohibited by law. We also urge you to consider supporting agency use of negotiated rulemaking in appropriate circumstances.[17]

POSTING GUIDANCE ON WEBSITES

Agencies produce many explanatory documents that can assist the public in understanding better their legal obligations. Known variously as "guidance, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions,"[18] these materials are formally non-binding but in practice can sometimes become effectively binding, as they prove pivotal in how agencies choose to carry out their responsibilities and exercise their discretion. Members of the public need to be able to find relevant guidance documents, but they are not always accessible on agency websites—and even when the documents are accessible, they can be very difficult for members of the public to locate.[19]

We urge you to make it a priority to ensure that all agency guidance documents are made available online in a timely and easily accessible manner. The recently enacted FOIA Improvement Act of 2016 reiterates the longstanding requirement that guidance meant to influence public conduct be published, and now requires online, rather than print, publication, thus easing this agency

17. *See* 5 U.S.C. §§ 561–570; ACUS, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,895 (Dec. 27, 1985); ACUS, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,708 (July 15, 1982).

18. ACUS, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103, 30,104 (June 18, 1992).

19. ACUS, Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,988, 35,933 (June 25, 2014) (noting that certain "guides are often difficult to find on agency Web pages").

obligation. Even before the enactment of this law, best practices articulated by OMB included "the goal of making all [agencies'] significant guidance documents currently in effect publicly available on their Web sites."[20] The Small Business Regulatory Enforcement Fairness Act of 1996 similarly has required that compliance guides for small businesses be posted on an agency's website in an "easily identified location."[21] ACUS has separately urged agencies to make rulemaking information generally,[22] and guidance documents in particular,[23] easier to find online.

RETROSPECTIVE REVIEW

We urge you to build on the efforts of previous administration and take steps to institutionalize careful, in-depth retrospective review of existing rules. For decades, both Republican and Democratic administrations have required agencies to subject significant new rulemaking proposals to an institutionalized process that seeks to anticipate what impacts the rule is likely to have after it is adopted. Yet after these same rules have been adopted, they are no longer subject to an institutionalized process of assessing retrospectively what benefits and costs they have actually produced. Since at least the Carter Administration, each administration has conducted its own retrospective review of existing rules, calling upon agencies to remove rules that have become outmoded, ineffective, or inefficient. The Regulatory Flexibility Act calls upon agencies to review retrospectively certain rules that have significant impacts on small businesses,[24] and other substantive statutes occasionally will direct agencies to review specific rules.[25] Notwithstanding these efforts and directives, it remains that "retrospective review of regulations has not been held to the same standard as prospective review" and the idea of retrospectively reviewing rules has generally only applied to "subsets of regulations."[26] In 2011, President Obama issued

20. OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007).

21. Pub. L. No. 110-28, 121 Stat. 205 (2007).

22. ACUS, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012).

23. ACUS, Recommendation 2014-3, *supra* note 19, at 35,993.

24. *See* 5 U.S.C. § 610.

25. Joseph E. Aldy, Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules and the Evidence for Improving the Design & Implementation of Regulatory Policy (Nov. 17, 2014) (report to ACUS), http://www.acus.gov/report/retrospective-review-report.

26. ACUS, Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114, 75,115 (Dec. 17, 2014).

Executive Order 13563 that articulated the general principle that agencies "must measure, and seek to improve, the actual results of regulatory requirements," and called upon each agency to "periodically review its existing significant regulations" to determine how well they are working in practice.[27] Under this Executive order, agencies have undertaken several rounds of retrospective reviews and have reported only the results of these reviews. This process articulated in Executive Order 13563 is consistent with a longstanding ACUS recommendation, which calls on agencies to "develop processes for systematic review of existing regulations."[28] In 2014, ACUS reaffirmed its earlier recommendation, expressly endorsed the goals reflected in Executive Order 13563, and recognized that retrospective review requires adequate funding.[29] It also urged agencies to start planning for retrospective review at the time they create new rules, recommended that agencies adopt well-reasoned priorities for retrospective review, and advised them to undertake retrospective reviews with appropriate levels of methodological rigor and transparency.[30] The ABA Section of Administrative Law and Regulatory Practice also has advised agencies "on an ongoing basis to invite members of the public to identify rules that particularly warrant review."[31] These various recommendations will remain important for your next administration to pursue; only with retrospective review can the American public know what value they are getting—or are not getting—from the regulations adopted by federal agencies.

Second, we urge you to conduct a thorough review of the more than 13,700 Executive orders issued by all Presidents to date and consider which are no longer necessary or appropriate, so that those can be revoked. The large total number of Executive orders and other presidential directives (e.g., presidential memoranda) makes it infeasible for agency personnel to know and follow them all. Retrospective review and pruning of these directives is necessary to ensure their viability and effectiveness.

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27. 76 Fed. Reg. 3821 (Jan. 21, 2011). Executive Order 13563 was subsequently supplemented with Executive Order 13579 and Executive Order 13610, which also have called for agencies to undertake more retrospective reviews.

28. ACUS, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109, 43,110 (Aug. 18, 1995)

29. ACUS, Recommendation 2014-5, *supra* note 26.

30. *Id.*

31. ABA Section of Administrative Law and Regulatory Practice, Comments on S.1029, The Regulatory Accountability Act of 2013 (Dec. 16, 2014); *see also* Cynthia Farina, Achieving the Potential: The Future of Federal E-Rulemaking: A Report to Congress and the President (2008) (prepared for the Section's Committee on the Status and Future of Federal E-Rulemaking and endorsed by the Section).

USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES

The previous two administrations have taken important steps to make the administrative process more transparent and participatory using various online tools and strategies. The Bush Administration, for example, established a one-stop, centralized online docketing system called Regulations.gov, which houses to this day all the rulemaking documents for all executive agencies, affording the public an opportunity to learn about and submit electronic comments on proposed rules. The Obama Administration has not only maintained Regulations.gov but it has initiated other online efforts to promote open and participatory government, including the White House online petitioning system called "We the People" and a government-wide online data depository called Data.gov.

These initiatives should be continued and strengthened for several reasons. First, as members of the public increasingly rely on online forms of communication in personal and business transactions, they increasingly expect that they will be able to learn about and interact with their government in an online capacity. Second, as this Section has noted in previously recommending that government "aggressively advance the use of information and communication technologies in rulemaking," these types of "technologies can promote transparency, enhance the breadth and quality of public participation in regulatory decisionmaking, help agencies make better rules more efficiently, and provide . . . data for use in program oversight and evaluation."[32]

We urge you to continue to improve existing information and communication applications and to dedicate the resources and attention necessary to keep up with continuous technological evolution. As much progress as the preceding two administrations have made toward the achievement of these objectives through new information and communication technologies, more work remains. Existing applications can be improved still further, such as by incorporating all independent agencies' rulemakings into Regulations.gov. In addition, as technology continues to evolve, agencies need to remain vigilant and dedicate resources to keep their systems up-to-date and secure, in addition to innovating with new technologies altogether (such as machine learning).[33] Your administration should make it a top priority to advance the aggressive use of information and communication technologies in rulemaking.

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32. ABA Section of Administrative Law and Regulatory Practice, Improving the Administrative Process: A Report to the President-Elect of the United States (2008).

33. For a list of additional possibilities, *see* Cary Coglianese, *E-Rulemaking: Information Technology and Regulatory Policy* (2004) (report to the National Science Foundation), available at https://www.law.upenn.edu/live/files/5565-erulemakingreport2004.

AGENCY ADJUDICATION

Although agency use of ADR should be encouraged as an alternative to agency adjudication (see above), adjudications remain a key aspect of many agencies' responsibilities. When the APA was enacted in 1946, its adjudication provisions set forth a standard package of procedures, including use of independent, impartial hearing examiners, a hearing process, and separation of the functions of investigation, prosecution, and decision. At the time, there was a widespread expectation that when agencies were required by statute to provide hearings in adjudications, the hearings would have to comply with these new provisions, particularly the mandate for an independent, impartial decisionmaker, and separation of functions.

The APA also specifies, however, that these procedural protections are required only for adjudications "required by statute to be determined on the record after opportunity for an agency hearing."[34] Many courts—including the D.C. Circuit—have ceded broad discretion to agencies to determine for themselves whether the language of their organic statutes triggers application of APA formal adjudication requirements. As a result, even when conducting hearings in matters where the decisionmaker is limited by statute to the record created by the parties, many agencies have managed to avoid the APA's adjudication procedures and the use of ALJs that are normally required as presiders in such proceedings.

First, we urge you to support legislation that would enhance both the legitimacy and uniformity of agency adjudicatory decisions. In 2005, the ABA adopted Resolution 114, urging Congress to provide the APA protections of an impartial decisionmaker (not necessarily an ALJ), separation of functions, and prohibition on ex parte contacts to all non-APA hearings in which the decisions are to be made based upon the evidence compiled in a statutorily required hearing. We urge you to support enactment of legislation embodying these requirements.

Second, we urge you to re-establish a strong Office of ALJs in OPM. This office once was charged with overseeing the nuts and bolts of the ALJ selection process and with developing policies to improve the program. In recent years, these tasks have been de-emphasized in OPM's organizational chain. Re-establishing the Office would give new emphasis to these important tasks.

Third, we urge urgent attention to the burgeoning backlog of cases in some of the nation's most important high-volume administrative adjudicatory programs. Social Security disability backlogs have exceeded one million cases. Programs

34. 5 U.S.C. § 554(a).

adjudicating veterans benefits claims, Medicare reimbursement claims, and immigration cases have historically experienced high backlogs. We urge your administration to provide resources and to support initiatives to reduce these backlogs.

Finally, we urge you to encourage agencies to avoid taking excessive time to review front-line decisions in important application adjudications, such as permitting, licensing, and petitions for waivers. The overall final agency actions on such important matters are often significantly delayed, and current principles of review of agency action mean that such decisions pending in the process of final adjudications—which nonetheless may be outcome determinative—cannot be challenged until the final decision, making such pending decisions unreviewable in practice.

ALTERNATIVE DISPUTE RESOLUTION

First, we urge you to expand the Administration's commitment to using ADR techniques in agency adjudication. The Administrative Dispute Resolution Act, enacted in 1990 and made permanent in 1996, encourages and provides a statutory framework for agency use of ADR techniques in agency proceedings.[35] In agency adjudications, the use of mediation, arbitration, minitrials, settlement judges, and other techniques can provide more efficient and more satisfying resolution of agency adjudications than formal hearings. This has been shown to be true in enforcement actions, government contract disputes, federal tort claims, and many other types of proceedings. Agency use of ombudsmen is also recognized by the Act and is increasing. These techniques have bipartisan support and we urge you to strongly encourage them.

Executive Order 12866 currently provides encouragement for the use of negotiated rulemaking: "Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[36] There is no equivalent Executive order pertaining to ADR generally, although a presidential memorandum of May 1, 1988 stated: "As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, ... each Federal agency must take steps to: (1) promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other ADR techniques, and (2) promote greater use of

35. *See* 5 U.S.C §§ 571–584.

36. 78 Fed. Reg. 51,735 at § 6(a)(1) (Oct. 4, 1993).

negotiated rulemaking."

Second, we urge your Administration to build on this foundation by issuing an Executive order to express similar support for ADR. In addition, the ADR Act's requirement for agencies to designate a senior official as the agency "dispute resolution specialist," responsible for developing and implementing the agency's ADR policy should be re-emphasized.

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