AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8, 2016

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend the rulemaking provisions of the Administrative Procedure Act ("APA"). Specifically, Congress should:

1. Codify the requirement that an agency fully disclose data, studies, and other information upon which it proposes to rely in connection with a rulemaking, including factual material that is critical to the rule that becomes available to the agency after the comment period has closed and on which the agency proposes to rely;

2. Provide for the systematic development by the agency in each rulemaking of a rulemaking record as a basis for agency factual determinations and a record for judicial review. The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period. The record should be accessible to the public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted, or sensitive material;

3. Establish a minimum comment period of 60 days for "major" rules as defined by the Congressional Review Act, subject to an exemption for good cause;

4. Clarify the definition of "rule" by deleting the phrases "or particular" and "and future effect"; update the term "interpretative rules" to "interpretive rules"; and substitute "rulemaking" for "rule making" throughout the Act;

5. Authorize a new presidential administration to (i) delay the effective date of rules finalized but not yet effective at the end of the prior administration while the new administration examines the merits of those rules, and (ii) allow the public to be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed;

6. Promote retrospective review by requiring agencies:

> a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time;

b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal;

7. Add provisions related to the Unified Regulatory Agenda that would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda 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), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify all agenda items. All agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda. These provisions should not be subject to judicial review;

8. Repeal the exemptions from the notice-and-comment process for "public . . . loans, grants [and] benefits" and narrow the exemptions for "public property [and] contracts" and for "military or foreign affairs functions"; and

9. Require that when an agency promulgates a final rule without notice–and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:

a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;

b. The adequacy of the agency's compliance with the foregoing obligation would not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and

c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.

FURTHER RESOLVED, That the American Bar Association recommends that federal agencies experiment with reply comment processes in rulemaking, such as by (a) providing in advance for a specific period for reply comments; (b) re-opening the comment period for the purpose of soliciting reply comments; or (c) permitting a reply only from a commenter who demonstrates a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period.

REPORT

The Administrative Procedure Act (APA) has been in effect for almost seventy years. The rulemaking process has evolved in many ways not anticipated in 1946. This evolution has been driven both by innovations in administrative practice and by a burgeoning body of case law. While the basic chassis of the APA has been shown to be fundamentally sound, a variety of updates to the APA's rulemaking provisions deserve serious consideration. This Report outlines nine recommendations for such updates on which a broad consensus exists within the Section of Administrative Law and Regulatory Practice. It also explains a related recommendation to encourage the use of "reply comment" processes in rulemaking.

I. Codify the requirement that an agency fully disclose data, studies, and information upon which it proposes to rely in connection with a rulemaking

The opportunity to comment on the factual basis for proposed rules is fundamental to the democratic legitimacy of the rulemaking process. Empirical studies and other factual material often have an important impact on how an agency weighs competing concerns in drafting a final rule. We therefore urge amending the APA to require that agencies provide the public with an opportunity to comment on factual material upon which the agency proposes to rely in connection with a rulemaking.

The APA currently requires agencies to give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[1] A series of court decisions has interpreted this provision to require agencies to disclose the factual basis for a proposed rule.[2] This is critical to commenting effectively and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts.[3] That makes codification highly desirable.

To that end, we advocate adding a provision to 5 U.S.C. § 553 to require agencies, by means of a docket (discussed immediately below), to provide public notice of, and access to, all data, studies, and other information considered or used by the agency in connection with its determination to propose the rule that is not protected from disclosure.

Agencies should also be required to provide the public with an opportunity to respond to factual material which becomes available to the agency after the comment period has closed, which is critical to the rule, and on which the agency proposes to rely.

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[1] 5 U.S.C. § 553(b)(3).

[2] *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

[3] *See* Am. Radio Relay League v. FCC, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting); AARP v. EEOC, 489 F.3d 558, 567 (3d Cir. 2007).

These requirements would strike an appropriate balance between ensuring that the public has an opportunity to comment meaningfully on proposed rules and not unduly delaying the rulemaking process.

II. Specify requirements for a "record" and "docket" for informal rulemaking

A court cannot review an agency rule without a record. Given the attention devoted in administrative case law and scholarship to judicial review of rulemaking, it is surprising that the APA does not require agencies to retain a record for judicial review. To date, the courts have filled this omission. The judicial review provisions of the APA refer to a "record,"[4] and the Supreme Court has long interpreted this provision to apply to informal rulemaking.[5]

The necessity for agencies of maintaining a rulemaking record is therefore firmly established in administrative practice but not in the APA. The ABA has long supported codifying this requirement.[6] To that end, we advocate adding a provision to 5 U.S.C. § 553 providing that agencies must preserve the "whole record" upon which they based an informal rule. Such codification would clarify the legal responsibilities of agencies and provide guidance to courts.

The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period.

The record should be accessible to the public via a docket that the agency should establish for each rulemaking. This disclosure requirement should not be absolute. For instance, agencies should be allowed to withhold privileged information and to comply with applicable copyright protections. Agencies should ensure that all relevant information is placed in the docket for a proposed rule no later than the date when the notice of proposed rulemaking is published, or as soon as possible if the agency comes into possession of the information at a later date. All information submitted in connection with comments on the proposal should also be placed promptly into the docket. An agency's failure to place information that it possesses into the docket on a timely basis could justify extending the comment period. Given the functional migration of agency dockets to the Internet via www.regulations.gov, this provision should also clarify that such dockets must exist in both electronic and physical form.

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[4] 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

[5] *See, e,g.*, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978).

[6] *See* 106 ABA ANN. REP. 549, 785 (1981) (1981 ABA Recommendation).

III. Establish a minimum comment period for proposed major rules

Interested parties need sufficient time to read, consider, and draft meaningful comments on proposed rules. An insufficient comment period may make the notice-and-comment process less deliberative and democratic, produce less-than-optimal results, and increase the likelihood of judicial challenges to the rule. The APA does not, however, specify a minimum time period for which agencies must accept public comments on notice-and-comment rules.

Providing a minimum time period would help ensure that the public has ample opportunity to comment on proposed rules. The ABA has long supported amending the APA to generally require a 60-day comment period.[7] We note that a 60-day comment period is consistent with recommendations in a recent executive order[8] as well as a recent recommendation from the Administrative Conference of the United States (ACUS) for "significant regulatory actions."[9] Longer comment periods may be appropriate for complex rulemakings.

At the same time, we recognize that many rules are noncontroversial and may not receive any comments. Indeed, the comment period for non-economically significant rules in recent years has averaged less than 39 days.[10] A 60-day comment period will thus be longer than the nature of many rulemakings warrants, or may conflict with a need for expeditious action. On the other hand, rules that qualify as "major" under the Congressional Review Act[11] typically will require that much time for interested persons to understand the agency's proposal and to develop comments. We therefore support requiring a minimum comment period of 60 days for major rules. To the extent that an agency believes that even a major rule should be subject to a shorter comment period, it should be allowed to set one for good cause, provided it offers an appropriate

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[7] *Id.* at ¶ 5(a) (recommending a 60-day minimum comment period).

[8] E.O. 13563, § 2(b), 76 Fed. Reg. 3821, 3821-22 (Jan. 21, 2011) (providing that, "[t]o the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days").

[9] ACUS Recommendation 2011-2, ¶ 2, 76 Fed. Reg. 48789, 48791 (Aug. 9, 2011) (suggesting that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" and at least 30 days for all other rules).

[10] *See* Stephen J. Balla, Brief Report on Economically Significant Rules and the Duration of Comment Periods (April 19, 2011) (supplemental consultant report in support of ACUS Recommendation 2011-2) at 2.

[11] 5 U.S.C. § 804(2) (defining a "major rule" as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—**(A)** an annual effect on the economy of $100,000,000 or more; **(B)** a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or **(C)** significant adverse effects on competition, employment, investment,

explanation. We would anticipate that courts would defer to the agency's choice in such cases to the same extent that they currently defer to agency determinations to make a rule effective sooner than 30 days after publication in the Federal Register.[12] The foregoing balances the need to ensure that the public has an opportunity to comment meaningfully on proposed rules with other compelling needs.

IV. Clarify the definition of "rule"

The APA's definition of "rule"[13] has been a target of criticism since the statute was enacted. The opening words of the definition – "the whole or a part of an agency statement of general or particular applicability and future effect" – are out of keeping with the manner in which administrative lawyers actually use the word "rule" in two respects:

- Taken literally, the current definition's inclusion of "or particular" deems an agency decision to be a "rule" even if it applies only to one party.
- Similarly, the reference to "prospective effect" implies that agency action with retroactive effect cannot be a rule – even though rules may in appropriate circumstances have retroactive effect, particularly where Congress expressly authorizes such rules.[14] It makes more sense for the scope of the prohibition on retroactivity to be addressed directly by these existing administrative law principles as opposed to ambiguously in the definition of a "rule."

To avoid these unintended results, courts frequently apply the commonly understood definition of "rule" notwithstanding the APA definition.[15] The words "or particular" and "and future effect" should therefore be deleted from the definition, leaving the definition to hinge on whether the agency decision is addressed generally (a rule) or to named parties (an order).

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productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.").

[12] 5 U.S.C. § 553(d)(3).

[13] 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing").

[14] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

[15] *See, e.g.*, Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

This change would reconcile the APA with commonly understood use of the term "rule." Other prominent authorities have long recognized this common usage, and the recommended change would make the APA consistent with the Model State Administrative Procedure Act, longstanding ABA policy, and prior recommendations of ACUS.[16]

Accordingly, we recommend that the following definition of "rule" replace the definition that appears in 5 U.S.C. § 551(4):

> (4) "rule" means the whole or a part of an agency statement of general applicability that interprets, implements or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

We also reiterate our support for updating the term "interpretative rules" to "interpretive rules." This change would bring the Act into conformity with virtually universal usage.[17]

Finally, we also suggest that the Act be conformed to modern word usage by substituting "rulemaking" for the two-word version "rule making" wherever it appears.

V. Address "midnight" rules

Outgoing administrations being replaced by one of the other political party are often criticized for issuing rules in their waning days that become effective during the new administration. ACUS recently addressed the issue.[18] Its recommendation opines that incoming administrations should be authorized to delay the effective date of such "midnight" rules while they examine their merits, and that the public should be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed. We propose that either 5 U.S.C. § 553 of the APA be amended to track the ACUS recommendation, or a new provision be added, such as the following:

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[16] Model State Administrative Procedure Act § 1-102(30) (2010); *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389-91 (1972); *Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act*, 3 A.C.U.S. 61-62 (1973).

[17] *See, e.g.*, Perez v Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1204 & n.1 (2015) ("[The term . . . 'interpretive rule'] is the more common phrasing today, and the one we use throughout this opinion.").

[18] ACUS Recommendation 2012-2, 77 Fed. Reg. 47802 (Aug. 10, 2012).

(x) RULES ADOPTED AT THE END OF A PRESIDENTIAL ADMINISTRATION.—

(A) During the 60-day period beginning on a transitional inauguration day (as defined in section 3349a), with respect to any final rule that had been placed on file for public inspection by the Office of the Federal Register or published in the Federal Register as of the date of the inauguration, but which had not yet become effective by the date of the inauguration, the agency issuing the rule may, without notice and comment, delay the effective date of the rule for not more than 60 days for the purpose of obtaining public comment on whether the rule should be amended or rescinded or its effective date further delayed.

(B) If an agency delays the effective date of a rule under subparagraph (A), the agency shall give the public not less than 30 days to submit comments on whether the rule should be amended, rescinded or allowed to go into effect as written.

VI. Promote retrospective review

To varying degrees, most rules become out of date with the passage of time. One option for promoting continued timeliness and appropriateness is for agencies to review all of their rules over a specified timeframe. This is the approach of the Regulatory Flexibility Act, at least with respect to rules that have a significant economic impact on a substantial number of small entities.[19] Such an across-the-board approach has multiple shortcomings, however. First, rules are implemented over varying timeframes, and the data necessary to determine if a rule has been effective in accomplishing its objectives may or may not be available at a given date. Second, some rules may be more in need of change than others. Finally, external stakeholders will almost certainly be far more concerned about some rules than others. Agency resources devoted to retrospective review will come necessarily at the expense of issuing new rules or enforcing existing ones, and thus should be focused on the rules with the greatest impact that most warrant review.

The ABA therefore supports two reforms, neither of which would be subject to judicial review, that would take account of these considerations in promoting retrospective review.

First, we recommend that the preamble to each major rule[20] contain a plan that will assist the agency in assessing the effectiveness of the rule in accomplishing its regulatory objectives. Such a plan should identify those objectives and describe information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives. It may be that other rules or program activities of the agency are also directed toward or affect the relevant objectives. In such cases, the plan

[19] 5 U.S.C. § 610.

[20] *Supra note 11*

could contemplate assessment of these initiatives collectively. The plan should also describe how the agency intends to compile the relevant information over time. It would be beneficial for agencies to solicit comments on these issues in notices of proposed rulemaking to ensure that the final rule is designed to facilitate the collection of data that will allow evaluation of effectiveness. This recommendation builds upon a recent ACUS recommendation[21] and a memorandum from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).[22]

Second, agencies should, on an ongoing basis, invite members of the public to identify rules that particularly warrant review, and should focus on reviewing such rules. Consistent with the shift of the rulemaking process to the Internet, this invitation should permit such "nominations" to be submitted electronically. It could also provide for members of the public to vote for or "like" earlier nominations. We note that agencies need not accept the suggested reforms, prioritize them by their degree of popularity, or even respond to them. But they should at least be receptive to such suggestions from their constituencies and give due regard to the relative breadth of support for particular changes. Section 553(e) currently says: "Each agency shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule." Congress could add thereafter:

> Each agency shall, on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

VII. Codify and enhance the Unified Regulatory Agenda

The Unified Regulatory Agenda is an important mechanism for agencies to apprise the public of their upcoming rulemaking activity. Unified Agenda requirements are currently provided by Section 4 of Executive Order 12866,[23] and the Unified Agenda is available on OIRA's website. However, the executive order only requires the agenda to be updated semi-annually. Some agencies now maintain websites that provide more current data on important rulemakings. We recommend codifying the executive order's requirements so they clearly apply to all agencies. Codification should also include a variety of enhancements to the Agenda contained in a recent ACUS recommendation on the topic.[24] The ABA recognizes that compliance with these requirements in the dynamic rulemaking process may not be perfect, and we do not address conditioning issuance of a rule on compliance with Agenda requirements. But the provisions we recommend will help move the Agenda more fully into the Information Age and enable it to fulfill its

[21] ACUS Recommendation 2014-5, ¶ 2, 79 Fed. Reg. 75114, 75116 (Dec. 17, 2014).

[22] Memorandum for Heads of Executive Departments and Agencies from Cass Sunstein entitled "Final Plans for Retrospective Analysis of Existing Rules," at 2 (June 14, 2011).

[23] Executive Order 12866, 58 Fed. Reg. 58715 (Sept. 30, 1993).

[24] ACUS Recommendation 2015-1, 80 Fed. Reg. 36757 (June 26, 2015).

potential as a vital and useful source of public information about the status of agency rulemaking. We also realize that not all agencies may be able to implement these requirements immediately due to resource constraints or other reasons. Agencies could be given some period of time to comply, and should be given adequate resources to do so.

Section 4 of EO 12866 also requires agencies to issue an annual regulatory plan that describes, among other things, the agency's regulatory objectives and priorities and how they relate to the President's priorities. In recent years, some independent regulatory agencies have stopped submitting such plans. 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. They should therefore resume participation in the planning process.

Accordingly, the ABA recommends that:

- Each agency should maintain a website that contains its regulatory agenda. These agency agendas should be 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. Such real-time updates would make the Agenda more useful to the public, but would be ministerial in nature and would not require agencies to continually reassess their priorities.
- The Unified Agenda website should link to agency agenda webpages.
- Agencies should be required to explain how all rules were resolved rather than removing rules without explanation.
- All active rulemakings should be reflected in an entry in the public Agenda.
- Agencies should be required to make reasonable efforts to accurately classify all Agenda items – that is, rules should not be classified as "long-term actions" when the agency contemplates issuing a proposed or final rule within the next year.
- OIRA should be required to publish the Regulatory Plan on an annual basis. Independent regulatory agencies should be required to participate in the Plan.

VIII. Repeal and update outmoded exemptions

We urge repealing the broad and anachronistic exemption in § 553(a)(2) for "public . . . loans, grants [and] benefits." Significant public effects arising from the activities of federal agencies are sometimes shielded from public input by this exemption. ACUS has repeatedly called for repeal of this exemption, beginning in 1969,[25] and the ABA has concurred with a minor reservation relating to public property and contracts.[26] We fear that the adverse effect of these exemptions will only increase now that the Department of Agriculture (USDA) has revoked its policy – dating back to 1971 – of

[25] ACUS Recommendation 69-8, 38 Fed. Reg. 19782 (1969).

[26] 1981 ABA Recommendation, *supra* note 6, at 783-84, 788.

voluntarily employing notice–and-comment in rulemakings that fall within the terms of the former exemption.[27]

As the ABA did in 1981, we urge Congress to narrow the exemption in § 553(a)(2) for "public property [and] contracts" so that the development and formulation of generally applicable policies with respect to public property and contracts would be governed by § 553.

We also urge narrowing the exemption in § 553(a)(1) relating to "military or foreign affairs functions." Both the ABA and ACUS have long recommended that this exemption be limited to the scope of the Freedom of Information Act exemption for classified information.[28] Otherwise, rules addressing military and foreign affairs functions should be subject to the public notice–and-comment requirements of § 553 unless they are covered by another exemption.

A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with this recommendation's overall emphasis on promoting public participation and agency accountability in rulemaking.

IX. Codify existing use of interim final rulemaking for the exercise of the "good cause" exemption and set requirements for the consideration of public comments in final rulemaking

As emphasized above, the opportunity to comment on the factual basis of rules in advance of their adoption is fundamental to the democratic legitimacy of the rulemaking process. However, there are circumstances in which it is reasonable to allow an agency to engage in rulemaking without providing the public that opportunity. The APA specifically authorizes agencies to do so through the "good cause" exemption, which allows an agency to promulgate a rule without notice and comment when notice and comments would be "impracticable, unnecessary, or contrary to the public interest."[29] While this allowance is appropriate, we believe that its proper exercise does not negate the public policy value, both to the public and to the agency, of public comment.

ACUS considered agency use of the "good cause" exemption in 1995, and recommended procedures by which an agency would invite "post-promulgation comments." For instances in which the agency believes notice and comment are "unnecessary," it recommended "direct final rulemaking," in which any "significant adverse comment" from the public would be sufficient to prevent the rule from

[27] 78 Fed. Reg. 64194 (Oct. 28, 2013)

[28] 1981 ABA Recommendation at 784, 788-89; ACUS Recommendation 73-5, 39 Fed. Reg. 4847 (1974).

[29] 5 U.S.C. § 553(b)(3)(B).

automatically becoming final. For instances in which the agency believes notice and comment are "impracticable" or "contrary to the public interest," it recommended issuance of an "interim final rule," which would serve simultaneously as a notice of final rulemaking and a request for comments. ACUS further recommended that the agency should, "as expeditiously as possible," respond to comments and make changes to the rule. It suggested the agency consider setting a deadline for consideration of comments and a termination date for the interim final rule.

Since the 1995 ACUS recommendation, use of interim final rulemaking has become commonplace, to the point that, in some cases, Congress has required the use of interim final rulemaking to meet tight statutory deadlines for rulemaking. With the increase in interim final rulemakings, the number of instances in which agencies do not "finalize" these rulemakings by responding to public comments and making appropriate changes has also increased. This practice risks leaving in place a rule developed without public scrutiny and possibly based on an incomplete or erroneous administrative record. The public policy principles that underlie the authority of each agency to engage in the making of laws should be given full consideration, especially for those regulations initiated under exigent circumstances.

Legislation has been advanced that would address this growing problem by providing that interim rules would cease to have effect if agencies did not respond to comments and reissue the rule within 9-18 months.[30] We are reluctant to establish a single legally enforceable deadline by which such a response must occur – the diversity of rules and the potential scope of competing obligations on an agency both counsel allowing agencies to set a deadline. We note that Congress can – and generally should – set a deadline for the agency to "finalize" an interim final rule whenever it authorizes an agency to issue such a rule. We are also reluctant to establish such a draconian sanction. The APA already contains an adequate remedy in Section 706(1).[31]

Therefore, without commenting on the extent to which federal agencies are exercising the 'good cause' exemption appropriately, we recommend that the APA be amended to require that, when an agency promulgates a final rule without notice and comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it should invite the public to submit post-promulgation comments and should set a target date by which it expects to adopt a successor rule after consideration of the comments received. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date. The adequacy of the agency's compliance with the foregoing obligation

[30] *See* H.R. 185, § 3 (proposed 5 U.S.C. § 553(g)(2)(B)) (2015). This sanction would not be triggered where notice and comment was "unnecessary."

[31] 5 U.S.C. § 706(1) (authorizing reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed").

should not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking should be unaffected.[32]

The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule. This does not require an agency to restate the prior preamble in the subsequent one, but it does require the agency to discuss the information or reasoning supporting the original rulemaking insofar as it is relevant to the later one.

X. Encourage experimentation with "reply comment" processes

ACUS has twice recommended that federal agencies employ "reply comment" processes, in which members of the public can react to comments that have been filed earlier in a rulemaking.[33] Several agencies, most notably the Federal Communications Commission and the Federal Energy Regulatory Commission, have employed the practice routinely, and have indicated that the process is beneficial for two principal reasons: it results in issues being narrowed to their most essential elements, and the prospect of being the subject of reply comments discourages commenters from making maximalist claims in their initial comments.[34]

The ABA does not believe that Congress should mandate use of reply comment periods at this stage. However, we do believe the practice can improve rulemaking and that all agencies should experiment with the process in a way that is reasonably calculated to produce data regarding when and how it can be most beneficial. Accordingly, the ABA urges federal agencies to experiment with reply comment processes in their rulemakings. An agency could, for example, provide in advance that persons who file comments within the comment period on a proposed rule would be entitled, during a second comment round, to file comments limited to responding to points made by other commenters in the first round. An agency could also determine, after the close of a comment period, that the record would benefit if the agency solicited reply comments by reopening the comment period for a specific time. An agency might also permit a commenter to file a reply if the commenter demonstrated a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period. Agencies

[32] These include 5 U.S.C. § 706(1) and actions for mandamus.

[33] *See* ACUS Recommendation 76-3, ¶ 1(a), 41 Fed. Reg. 29654 (July 19, 1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); ACUS Recommendation 2011-2, ¶ 6, 76 Fed. Reg. at 48789 ("Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted.").

[34] *See* Stephen J. Balla, Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States (March 15, 2011) (consultant report in support of ACUS Recommendation 2011-2) at 12.

should seek to gather information that would enable them to evaluate the merits or demerits of approaches that they try.

Respectfully submitted,

Jeffrey A. Rosen, Chair
Section of Administrative Law and Regulatory Practice
February 2016

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeffrey A. Rosen, Section Chair

1. Summary of Resolution(s).

   The resolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act. he APA has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

   The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for "major" rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require 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.

2. Approval by Submitting Entity.

   The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 18, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   The resolution would reaffirm multiple aspects of several long-standing ABA policies, particularly 106 ABA ANN. REP. 549, 785 (1981). *See also The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389-91 (1972). This resolution does not conflict with existing ABA policies.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

6. Status of Legislation. (If applicable)

   N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   Policy could be implemented by legislative action.

8. Cost to the Association. (Both direct and indirect costs)

   None.

9. Disclosure of Interest. (If applicable)

   N/A

10. Referrals.

    Business Law Section
    Government and Public Sectors Lawyers Division
    Intellectual Property Law Section
    Labor and Employment Law Section
    Public Contract Law Section
    Public Utility, Communications and Transportation Law Section
    Science and Technology Law Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Congress to urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act.

2. Summary of the Issue that the Resolution Addresses

While it remains a cornerstone of the administrative state, the Administrative Procedure Act has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for "major" rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require 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.

4. Summary of Minority Views

None.