COMPARISON CHART

This chart compares ABA Resolution 106b with the relevant ACUS recommendations. Please note that while the ABA resolution is directed to Congress and endorses statutory changes to the Administrative Procedure Act, the majority of ACUS recommendations are directed to federal agencies and take no position on codification.

American Bar Association Resolution 106b	**Administrative Conference of the United States Recommendations**
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.	(Recommendation 2013-3, *Science in the Administrative Process*, ¶ 3) *Disclosing Underlying Studies and Data*. To the extent practicable and permitted by law and applicable policies, each agency should identify and make publicly available (on the agency website or some other widely available forum) references to the scientific literature, underlying data, models, and research results that it considered. In so doing, the agency should list all information upon which it relied in reaching its conclusions, as well as any information material to the scientific analysis that it considered but upon which it ultimately did not rely. Consistent with the limitations in the Information Quality Act (IQA) guidelines issued by the Office of Management and Budget and its own IQA guidelines, each agency should ensure that members of the public have access to the information necessary to reproduce or assess the agency's technical or scientific conclusions. (Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 2) *The Public Rulemaking Docket*. Agencies should manage their public rulemaking dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking docket should include all materials in the rulemaking record, subject to legal limitations on disclosure, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke. In addition, it may be prudent not to include some

	sensitive information online and to note instead that this material is available for physical review in a reading room.
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.	(Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 1) *The Rulemaking Record*. In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in an informal rulemaking proceeding should include: a. Notices pertaining to the rulemaking; b. Comments and other materials submitted to the agency related to the rulemaking; c. Transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; d. Reports or recommendations of any relevant advisory committees; e. Other materials required by statue, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and f. Any other materials considered by the agency during the course of the rulemaking. (Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 3) *The Administrative Record for Judicial Review.* The…record provided to the court…should contain all of the materials in the rulemaking record as set forth in paragraph 1, except that agencies need not include materials protected from disclosure by law nor materials that an agency has determined are subject to withholding based on appropriate legal standards, including privilege.

	(Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, p. 4) "Considered" entails review by an individual with substantive responsibilities in connection with the rulemaking. …[T]he rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factional or other analysis in the document, or because the agency did not or will not rely on it.
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.	(Recommendation 2011-2, *Rulemaking Comments*, ¶ 2) [F]or "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.
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.	(Statement # 3, *Statement of the Administrative Conference on ABA Resolution No.1 Proposing to Amend the Definition of "Rule" in the APA*) The Conference agrees with Resolution No. 1 calling for improved definitions of "rule" and "order" so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication; it endorses the recommendation of the ABA that the words "or particular" and the entire second clause be

	deleted from the definition of "rule" in the [APA]. (NB: This statement contained several qualifications and emphasized that the changes endorsed are "definitional and prospective rather than operational and retrospective.")
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.	(Recommendation 2012-2, *Midnight Rules*, ¶ 5) Incumbent administrations should continue the practice of sharing appropriate information about pending rulemaking actions and new regulatory initiatives with incoming administrations. (Recommendation 2012-2, *Midnight Rules*, ¶ 8) In order to facilitate incoming administrations' review of midnight rules that would not otherwise qualify for one of the APA exceptions to notice and comment, Congress should consider expressly authorizing agencies to delay for up to 60 days, without notice and comment, the effective dates of such rules that have not yet gone into effect but would take effect within the first 60 days of a new administration.
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	(Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 1) Agencies should work with the Office of Management and Budget (OMB), as appropriate, to develop retrospective review a robust feature of the regulatory system. (Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 2) When formulating new regulations, agencies should, where appropriate, given available resources, priorities, authorizing statutes, nature of the regulation, and impact of the regulation, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. The rigor

	electronic means, suggestions for rules that warrant review and possible modification or repeal.	of analysis should be tailored to the rule being reviewed. The agencies should consider including the following in the framework [for reassessing the regulation]: a. The methodology by which they intend to evaluate the efficacy of and the impacts caused by the regulation… b. A clear statement of the rule's intended regulatory results with some measurable outcome(s)… c. Key assumptions underlying any regulatory impact analysis being performed on the regulation. … d. A target time frame or frequency with which they plan to reassess the proposed regulation. e. A discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review. (Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 7) As appropriate and to the extent resources allow, agencies should employ statistical tools to identify the impacts caused by regulations, including their efficacy, benefits, and costs and should also consider the various factors articulated in recommendation 5 in determining how regulations might be modified to achieve their intended purpose more effectively. (Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 13) Agencies should leverage outside expertise both in reassessing existing regulations and devising retrospective review plans for new regulations. … Agencies should also consider using social media, as appropriate, to learn about actual experience under the relevant regulation(s).

	(Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 14) Agencies should disclose relevant data concerning their retrospective analyses of existing regulations on "regulations.gov," their Open Government webpages, and/or other publicly available websites. …[A]gencies should organize the data in ways that allow private parties to run additional analyses concerning existing rules' effectiveness. Agencies should encourage private parties to submit information and analyses and should integrate relevant information into their retrospective reviews.
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.	(Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, ¶ 1) Federal agencies should take steps to provide on their websites and/or, where appropriate, through other media, periodic updates concerning rulemaking developments outside of the semiannual reporting periods connected with the Unified Agenda. These periodic updates would likely focus primarily on concrete actions undertaken in connection with particular rules…but could also include changes regarding rules still under development…. Each agency's Unified Agenda entry should include a notice of where information about updates can be found; if updates are published on the agency's website, a link to the appropriate webpages should be included in the Unified Agenda. OIRA and RISC should also facilitate sharing among agencies of best practices for providing periodic, digital updates on rulemaking developments.
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".	(Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*) The present law should therefore be amended to discontinue the exemptions [in relation to "public property, loans, grants, benefits, or contracts"] to strengthen procedures that will

	make for fair, informed exercise of rulemaking in these as in other areas. (Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, pg. 7) Another long-overdue change in the Act is elimination of section 553(a)(2)'s exemption from notice-and-comment procedures for matters relating to "public property, loans, grants, benefits, or contracts." As the Conference recognized…this "proprietary exemption" is an anachronism. (Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, p. 1) [T]he breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted. (Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, ¶ 2(a)) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). That is, section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.
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	(Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, p. 1) The advantages of public participation in agency rulemaking are widely recognized: the agency benefits because interested persons are encouraged to submit information the agency needs to make its decision…

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	(Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, ¶ 1) Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is "impracticable" or "contrary to the public interest." However, a post-promulgation comment opportunity should not be required when the agency determines public procedures are "unnecessary" as that term has been interpreted by courts reviewing agency use of the good cause exemption. (Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, ¶ 2) To implement paragraph 1, agencies should: a. Publish a notice of the post-promulgation comment opportunity in the Federal Register along with the rule and the agency's statement of reasons for its finding of good cause; b. Give interested persons an appropriate period of time to submit comments on the rule; and c. Within a reasonable time after close of the comment period, publish a statement in the Federal Register indicating the agency's adherence to, or plans to change, the rule and include in the statement a response to significant and relevant issues raised by the public comments. … (Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, p. 4) The Conference therefore recommends that, where an agency invokes the good cause exemption because notice and comment are "impracticable" or "contrary to the public

	interest," it should provide an opportunity for post-promulgation comment.
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.	(Recommendation 2011-2, *Rulemaking Comments*, ¶ 6) Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.