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Attn: Mabel Echols  
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Records Management Center  
Office of Management and Budget  
Room 10102, NEOB  
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Washington, DC 20503

Via email: [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov)

Dear Ms. Echols:

The Section of Administrative Law and Regulatory Practice (Section) of the American Bar Association (ABA) appreciates the opportunity to comment on presidential supervision of agency rulemaking.<sup>1</sup> 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.

The ABA has long welcomed centralized oversight of rulemaking as an essential element of effective government functioning.<sup>2</sup> We offer the following comments based on this and other ABA and Section recommendations and on the Section's long-time commitment to and experience with promoting improvements in the federal administrative process through non-partisan dialogue. As the Section stated in a 2008 report, "Improving the Regulatory Process: A Report to the President-Elect of the United States," (hereinafter "Report"):

The practice of White House oversight and coordination it reflects has longstanding bipartisan (and ABA) support as an important

<sup>1</sup> 74 Fed. Reg. 8819 (Feb. 16, 2009).

<sup>2</sup> See House of Delegates, Recommendation: Presidential Review of Rulemaking (Annual Meeting 1990).

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element in realizing the aims of efficient, coordinated, yet reasonably open administration in a democratic system.<sup>3</sup>

Below we address ten important issues implicated by the request for comments.

### **1. The White House should ensure that rulemaking oversight is transparent and efficient.**

The ABA has recognized the importance of a transparent and efficient oversight process. The ABA's endorsement in 1990 of the guidelines of the Administrative Conference of the United States (ACUS) concerning the implementation of Executive Order Nos. 12291 and 12498 spoke to the necessity of a timely and transparent oversight process. At that time, the ABA adopted several recommendations of ACUS, including:

- Where an agency submits a draft rule for OIRA review, the agency submission and any additional formal analyses submitted for review should be made available to the public when the rule is published.<sup>4</sup>
- Communications from OIRA transmitting factual information relating to the rule not already in the rulemaking file, or communications from OIRA transmitting factual submissions or views or positions of persons outside the government, should be placed in the public file of the rulemaking.<sup>5</sup>

Both of these recommendations are currently embodied in E.O. 12866.

In its Report, the Section noted that although “[n]otice-and-comment rulemaking ... was intended to provide an efficient and open method of promulgating rules, it is today “neither as efficient nor as open as it could be.”<sup>6</sup> The report continued:

At the ... stage ... of reviewing agency efforts in particular rulemakings, the important considerations are those of efficiency, faithfulness to underlying legislative mandate, and, again, political acceptability. . . . Assiduous avoidance of delays and continuing respect for openness are also important elements in the process of centralized regulatory review.<sup>7</sup>

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<sup>3</sup> Section of Administrative Law and Regulatory Practice, *Improving the Administrative Process: A Report to the President-Elect of the United States 3* (2008).

<sup>4</sup> ACUS Rec. 88-9, 1 CFR 305.88-9 (1989).

<sup>5</sup> *Id.*

<sup>6</sup> Section of Administrative Law and Regulatory Practice, *supra* note 3, at 3.

<sup>7</sup> *Id.* at 3-4.

We believe that E.O. 12866 promotes these values of timeliness and transparency; any revisions likewise should do so.

## **2. The scope of regulatory review should include “significant” regulatory actions and guidance documents.**

Our Report also recommended focusing presidential review of rulemaking on significant regulatory actions and guidance documents, which is reflected in Executive Order 12866, as it was amended by E.O. 13422:

At present, review is limited to “significant” regulatory actions and guidance documents (usually those with high economic consequences or important policy implications); we support maintaining this limitation in the interest of efficiency.<sup>8</sup>

The importance of guidance documents has been judicially recognized.<sup>9</sup>

The Section has long supported the extension of White House oversight to guidance documents. Although the ABA has not taken a position specifically addressing the extension of OMB review to significant guidance documents as called for in E.O. 13422, the ABA has called for public review and comment on significant interpretive rules and policy statements,<sup>10</sup> a position that is implemented by the OMB Bulletin for Agency Good Guidance Practices. In 2007, the Section opposed congressional appropriations riders that would have defunded both the provisions in E.O. 13422 for interagency review of guidance documents and the Good Guidance Practices Bulletin.<sup>11</sup>

## **3. The White House should rationalize and streamline the rulemaking process.**

In 1992, the ABA House of Delegates, at this Section’s urging, called upon the President and Congress to “exercise restraint in the overall number of required rulemaking impact analyses” and “assess the usefulness of existing and planned impact analyses.”<sup>12</sup> Our Report notes:

Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory

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<sup>8</sup> *Id.*

<sup>9</sup> *E.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

<sup>10</sup> 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 provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations . . . .”

<sup>11</sup> *See, e.g.*, Letter to the Honorable Brad Miller et al. from Professor Michael Asimow, Chair, Section of Administrative Law and Regulatory Practice (Nov. 19, 2007).

<sup>12</sup> House of Delegates: Recommendation: Rulemaking Impact Analyses (Midyear Meeting 1992).

analysis. [While] a good case can be made for each of these requirements ... [v]iewed in isolation, [t]heir cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued without public comment procedures but have real-world effects.<sup>13</sup>

The Report therefore recommended that the White House work with Congress to “replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure.”<sup>14</sup> Even without legislative action, the White House is able to rationalize and streamline the rulemaking process by withdrawing the many executive orders that require specific types of rulemaking analysis and folding these different requirements into a unified order as appropriate.

#### **4. The ABA and the Section support the use of cost-benefit analysis, but the Section also recommends that the White House consider its effectiveness.**

The ABA and our Section have long supported the use of cost-benefit analysis for developing and reviewing regulation.<sup>15</sup> Sound economic analysis has been and should continue to be an essential part of the rulemaking process. By the same token, our Report also urged the President-Elect to consider the effectiveness of cost-benefit analysis in the regulatory oversight process as part of a White House effort to rationalize and streamline the rulemaking process. The Report explained:

Cost-benefit analysis is valuable as a metric for understanding the economic impact of regulation; at the same time, the rulemaking proceedings within which it is conducted must ultimately culminate in a decision that implements the normative values embodied in the agency’s enabling legislation. Controversies over the strengths, limitations, and consequences of cost-benefit analysis as it actually operates in practice have given rise to a substantial literature, both academic and popular. The advent of a new presidential administration furnishes a very appropriate occasion for taking stock of that debate. Accordingly, we hope that you and your appointees

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<sup>13</sup> Report, *supra* n. 3, at 4.

<sup>14</sup> *Id.*

<sup>15</sup> ABA, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (1979) ; House of Delegates, Recommendation: Additional Procedures for Regulatory Review (Annual Meeting 1990) (recommending, among other things, how agencies should disclose information produced in compliance with Executive Order No. 12291 in proposed and final rulemaking notices); see also, ACUS Rec. 85-2, “Agency Procedures for Performing Regulatory Analysis of Rules” (1985); ACUS Rec. 93-4, “Improving the Environment for Agency Rulemaking” (1993).

will be attentive to these varying appraisals of cost-benefit analysis in the course of establishing your own administration's program for regulatory oversight.<sup>16</sup>

In this regard, the "principles of regulation" set forth in section 1(b) of Executive Order 12866 and its amendments generally represent a sensible framework that should be continued, and perhaps expanded in accord with advances in economic and other forms of regulatory analysis.

## **5. The White House should make more effective use of regulatory planning.**

The White House's supervision of the rulemaking process includes regulatory planning. Our Report noted the White House "has important interests in coordination among agencies and in securing [its] priorities ...."<sup>17</sup> It therefore recommended that at the initial stage of priority setting, the White House should "make more effective use of the planning mechanism of Executive Order 12866 by convening the agency heads early in your administration to coordinate regulatory priorities."<sup>18</sup> The Report identified as additional "issues of possible concern" at this stage:

- (i) whether the planning process strikes an effective and appropriate balance among the respective responsibilities of all its participants, including those whom the President (with the Senate's blessing) will have made directly responsible for agency administration; and
- (ii) whether additional measures of transparency might be warranted to assure the public's trust that decisions taken are grounded in proper concerns of public policy.

We urge you to consider these points as you review the regulatory planning portions of E.O. 12866.

## **6. The White House should ensure that agencies receive the funding necessary for excellence in science and technology.**

As part of its responsibility to superintend the regulatory process, the White House should recognize that "[o]ver the years ... Congressional mandates and regulatory demands on many agencies have grown dramatically, but these demands often have not been matched by adequate funding."<sup>19</sup> Our Report observes:

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<sup>16</sup> Administrative Law and Regulatory Practice Section, *supra* n. 3, at 4.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6.

For example, the Food and Drug Administration—and until recently the Consumer Product Safety Commission—have not been adequately funded to address important safety challenges during a time when international trade has dramatically increased and public confidence has fallen. EPA has not been adequately funded to implement chemicals management initiatives even as chemicals management policy is changing around the world.

Consider a recent report by FDA’s Science Board raising alarm that FDA cannot fulfill its mission because its scientific base has eroded, its scientific organizational structure is weak, its scientific workforce does not have sufficient capacity and capability, and its information technology infrastructure is inadequate. A crucial part of the problem is the lack of resources during a time of revolutionary change in science and ever-increasing demands on the agency.<sup>20</sup>

The Report therefore recommends that the White House “insist that agencies receive the funding they need for excellence in science and technology.”<sup>21</sup>

#### **7. The White House should ensure that attention is given to improving the management of the regulatory process.**

Another aspect of superintending the regulatory process involves its management. The “efficient operation of government and the ability of an administration to achieve its policy goals require that [the rulemaking] be managed appropriately. [Nevertheless,] the management of regulation currently enjoys little support in the form of funding, research, technical innovation, and career development from the President, Congress, the public management, and academic communities.”<sup>22</sup> Because of the importance of rulemaking, our Report asked the President to “ensure that management of the regulatory process will occupy a more prominent position in major government-wide management initiatives and programs.”<sup>23</sup>

In taking strides to improve the management of the regulatory process, our Report also urged the President “to aggressively advance the use of information and communication technologies in rulemaking,” noting that the “effective use of such technologies can promote transparency, enhance the breadth and quality of public participation in regulatory decisionmaking, help agencies make better rules more efficiently, and provide (for the first time) readily accessible inter-agency and cross-agency rulemaking data for use in

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.*

program oversight and evaluation."<sup>24</sup> The Section sponsored the Committee on the Status and Future of Federal e-Rulemaking and has endorsed its recommendations for making improvements to the federal government's existing e-rulemaking efforts.<sup>25</sup> These recommendations include creating "a lead agency [to] be charged with developing a core system for e-rulemaking to be shared by all agencies," "adopt[ing] an open architecture that encourages agencies to customize their e-rulemaking efforts in innovative ways," and "ensur[ing] that agencies have the resources and leadership needed to comply with the E-Government Act of 2002."<sup>26</sup>

## **8. The White House should support the use of sound scientific risk assessment.**

As part of its attention to the management of the rulemaking process, the White House should also ensure that agencies have adequate expertise in state-of-the-art risk and benefit assessment methods to support optimal risk management. The ABA, under the sponsorship of this Section, has developed a detailed recommendation containing principles for the use of risk assessment in the regulatory process.<sup>27</sup> The recommendation urges, for example, that risk assessments 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. We commend the ABA principles to your attention as the White House seeks to familiarize itself with the challenges of risk assessment and risk management.

## **9. The White House should extend Executive oversight to independent agencies.**

The ABA's endorsement of presidential oversight includes the extension of oversight to the independent regulatory agencies.<sup>28</sup> Specifically, in 1990 the ABA recommended that "presidential review should apply generally to all federal rulemaking, including that by independent regulatory agencies."<sup>29</sup>

The report accompanying the 1990 resolution, which informed the ABA deliberations but was not endorsed by the ABA, stated that Presidents since Reagan have been advised they have the constitutional power to include independent agencies within presidential regulatory review, but have not done

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<sup>24</sup> *Id.* at 5

<sup>25</sup> Committee on the Status and Future of Federal E-Rulemaking, *Achieving the Potential: The Future of Federal E-rulemaking: A Report to Congress and the President*, <http://www.abanet.org/adminlaw/E-Rulemaking%20Report%20Web%20Version.pdf>

<sup>26</sup> Administrative Law and Regulatory Practice Section, *supra* n. 3, at 5.

<sup>27</sup> House of Delegates, *Recommendation: Risk Assessment (Midyear 1999)*, available at <http://www.abanet.org/adminlaw/risk02.pdf>.

<sup>28</sup> *Recommendation: Presidential Review of Rulemaking*, *supra* n. 2.

<sup>29</sup> *Id.*

so. Nevertheless, the report expresses its belief that “the President has a substantial argument that his need to supervise most regulation of the traditional independent agencies is no less than for the executive agencies.” At the same time, the report recognizes that Congress has perceived a need to insulate certain kinds of regulation from presidential supervision. The report noted that the Supreme Court seemed to be moving away from a loose conception that independent agencies have a special constitutional status outside the executive branch, toward a more focused inquiry of whether the President has been denied a supervisory role that is appropriate to the particular function involved. The Report observes that much of the policymaking of independent agencies is not functionally distinct from that of executive agencies.

The report suggests that the President should “identify kinds of rulemaking programs for which presidential supervision is not appropriate. The principal inquiry should be whether the executive’s accountability can be trusted.” Thus, some categories of federal rulemaking – for example, the Federal Election Commission’s regulation of political campaigns, should be exempted because the President’s role as the head of his party may give him a personal interest in the subject matter. The report also suggests that presidential oversight may be inappropriate where “political accountability would interfere with the successful performance of the [regulatory] function,” such as the functions performed by the Federal Reserve Board. Finally, the report suggests that presidential oversight should not extend to certain types of rulemaking because administrative law doctrines existing at the time (and continuing to this day) make such oversight problematic. The report recommended that exempt categories should include formal rulemaking, ratemaking, and rulemaking that resolves conflicting private claims to a valuable privilege.

The report notes that presidential oversight of rulemaking at independent agencies implicates the issue of a “President’s constitutional power over an agency that Congress has chosen to shield from his supervision, a matter of spirited, if inconclusive, debate for many years.” The report also reviews leading case law, which it interprets as implying “a broad view of presidential power – that placing policymaking responsibilities in independent agencies infringes the President’s powers by undermining political accountability.” The report notes that the Supreme Court has left the question of Presidential oversight open; this remains the situation today. Although this issue has not been squarely presented to the Court, the Department of Justice’s Office of Legal Counsel has specifically analyzed the issue and concluded that presidential review of the rules of independent agencies is not unconstitutional.<sup>30</sup>

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<sup>30</sup> Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget, 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

**10. The White House should support funding for the Administrative Conference of the United States (ACUS) in the FY 2009 budget and include funding for ACUS in future budgets.**

As the White House seeks to resolve the complex and difficult issues involved in supervision of the rulemaking process, it would benefit by having the advice and counsel of ACUS. For over 25 years, ACUS advised federal government on and coordinated important reforms such as those addressed by the ACUS recommendations discussed in this letter. The ABA endorsement of presidential oversight of rulemaking, for example, followed the recommendations issued by ACUS concerning the implementation of Executive Orders 12,291 and 12,498.<sup>31</sup> ACUS had strong bipartisan support and assisted all three branches of government from 1964 until Congress ended its funding during the appropriations process in 1995. As elaborated in our Report, ACUS, when revitalized, can offer the White House, as well as individual agencies, substantial help and support in analyzing and identifying appropriate reforms for improving rulemaking oversight and rulemaking procedures.<sup>32</sup>

In 2004, Congress unanimously approved bipartisan legislation to reauthorize and resurrect the agency, which President Bush signed into law on October 30, 2004, but funds were not appropriated before the reauthorization period expired at the end of FY 2007. New legislation was introduced with bipartisan support to renew ACUS' reauthorization through FY 2011, and the President signed the bill, as amended, into law on July 30, 2008, as Public Law 110-290.

The Omnibus Appropriations Act (H.R. 1105) containing \$1.5 million in start-up money for ACUS was signed into law by President Obama on March 11 as P.L. 111-8. Now that ACUS has received this initial start-up funding that it needs to resume its important mission, we urge the White House to support full funding of ACUS for FY 2010 in the amount of \$3.2 million and to fully fund this critical agency in each future year. This step “would make a major contribution to enhancing the government’s capacity to improve itself in our era of dynamic change.”<sup>33</sup>

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Thank you for the consideration of these views.

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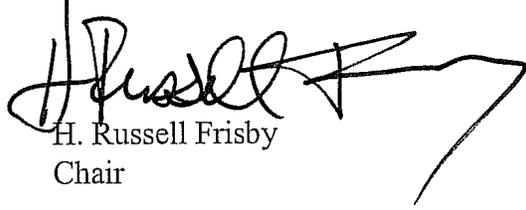
of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158 (1981) (“[U]nder the best view of the law” the proposed executive order, eventually issued as Exec. Order No. 12,291 “can be imposed on the independent agencies.”).

<sup>31</sup> Recommendation: Presidential Review of Rulemaking, *supra* n. 2.

<sup>32</sup> Administrative Law and Regulatory Practice Section, *supra* n. 3, at 8-9.

<sup>33</sup> *Id.* at 9.

Sincerely yours,



H. Russell Frisby  
Chair

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