MEMORANDUM

From: James Goodwin, Senior Policy Analyst, Center for Progressive Reform

To: Recipients

Re: ACUS Review of ABA Recommendations for Reforming the APA

Date: April 6, 2016

The final resolution contains 9 recommendations for reforming the APA, and one "further resolved." The majority of these recommendations touch on highly technical issues (*e.g.*, recommendations 4 and 8), and thus raise little controversy.

However, even where the recommendations touch on substantive matters they should also raise little controversy. Put differently, in light of the ABA's long-standing recommendation development process, the proper approach to interpreting these recommendations is one that defers to any kind of narrow reading that is necessary to avoid raising controversy. The ABA Administrative Law Section that developed these recommendations strictly follows a *consensus-based approach* that discourages broad and controversial policy recommendations. Any interpretation of these recommendations that purports to espouse a broad or controversial understanding would necessarily fly in the face of this consensus-based process, and would no doubt be inaccurate and unsupported. Furthermore, the tradition of these recommendations is to avert controversy by *codifying existing practices* that have had the benefit of long-term development and broad stakeholder support In other words, the purpose of these recommendations is more in line with a simple bookkeeping action than with charting bold new course in policy. Any reading that deviates from this understanding should not just be viewed with skepticism, but should be rejected outright.

With these broad principles in mind, I turn to specific concerns raised by specific recommendations contained in the ABA resolution.

- *Recommendation 1*: This recommendation should be interpreted as merely codifying decades-worth of existing practice in the courts with regard to what should be included the record for an informal rulemaking. This practice, first announced in the 1973 case *Portland Cement Ass'n v. Ruckelhaus*, and refined through several subsequent cases, contains key exemptions for materials that should properly be exempted from disclosure. These exempted materials might include classified information, confidential business information, and other privileged information. As such, this recommendation should not be interpreted broadly to undermine or eliminate these exemptions. ACUS itself has recognized the importance of these recommendations. See Administrative Conference

Recommendation 2013-4, The Administrative Record in Informal Rulemaking, pp. 5-6, 8-9 (Adopted June 14, 2013).[1]

Efforts to legislatively eliminate these exemptions, including the highly controversial Secret Science Reform Act of 2014 (H.R. 4012), have been made in recent years. It is therefore imperative to state clearly that this recommendation should be given the narrowest interpretation possible, and not be used as a backdoor for achieving the aims sought by controversial legislation like the Secret Science Reform Act.

- *Recommendation 6*: The goal of promoting retrospective review of existing agency rules is admirable, especially if agencies are afforded the utmost flexibility to carry out these reviews and if paired with efforts to eliminate *ex ante* procedural requirements that unnecessarily delay pending rulemakings. The problem, however, is that the conduct of retrospective review requires resources, which Congress, in its current form, is unlikely to provide. Unfortunately, the ABA resolution does not explicitly mention this resource concern. However, existing ABA recommendation do speak directly to this matter. In its 1992 recommendation on "Regulatory Impact Analysis," the ABA recommends for "the President and Congress to: exercise restraint in the number of rulemaking impact analyses" in part because of concerns about agency resource constraints.[2]

  For its part, ACUS also recognizes the concern of agency resource constraints in the context of conducting retrospective reviews. See Administrative Conference Recommendation 2014-5, Retrospective Review of Agency Rules, p. 12 (Adopted December 4, 2014).[3] Accordingly, I urge ACUS to continue applying this concern to its consideration of the ABA resolution.

- *"Further resolved"*: This resolution seeks to encourage agencies to experiment in what amounts to an iterative public comment process. It is unclear what is to be gained from this experiment, as the broad adoption of an iterative public comment process is certain to undermine the effective functioning of the rulemaking process rather than enhance. For one thing, massive resource disparities ensure that corporate interests already dominate the existing public comment process, effectively drowning out the voices of broader public. This dominance has been well documented in the scholarship of Wendy Wagner and her colleagues.[4] The addition of public comment periods would serve only to exacerbate this trend.

  Worse still, experience shows that iterative commenting introduces significant delays into

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[1] https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf

[2] Sec. of Admin. L. & Reg. Practice, Am. Bar Assoc., Policy: Regulatory Impact Analyses, http://www.americanbar.org/groups/administrative_law/policy.html (last visited April 6, 2016) (follow the hypertext link "Regulatory Impact Analyses" to download a copy of the Section's statement of policy).

[3] https://www.acus.gov/sites/default/files/documents/Recommendation%25202014-5%2520%2528Retrospective%2520Review%2529_1.pdf

[4] *See* Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011)

agency decision-making processes. For example, the EPA has in recent years sought to address concerns with its IRIS chemical assessment process by instituting what amounts to an iterative public comment process. Industry groups have taken full advantage of this process, using it to further slow down a chemical process that was already so slow that it has been the subject of grave concerns of the Government Accountability Office.[5] Since these procedures have been added, the IRIS program has effectively ground to a halt, with almost no final assessments being completed in recent years.[6]

The ABA and ACUS would do better to recommend agencies experiment with procedures that would not exacerbate existing deficiencies in the rulemaking process. Instead, they should identify innovative methods for ensuring that the public interest is better represented in rulemaking process.

[5] *See* http://www.gao.gov/highrisk/transforming_epa_and_toxic_chemicals/why_did_study
[6] http://time.com/3679218/epa-still-slow-to-study-toxic-chemicals-despite-obama-pledge/