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December 16, 2014

The Honorable Thomas R. Carper
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

The Honorable Tom A. Coburn, MD
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Re: Comments on S. 1029, the Regulatory Accountability Act of 2013

Gentlemen:

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA or Association) respectfully submits these comments regarding S. 1029, the Regulatory Accountability Act of 2013. We recognize that the Committee will not be able to take action on the bill during the 113th Congress. Nevertheless, we hope that these comments will be helpful to the Committee when it considers what administrative law reform legislation, if any, it will introduce in the next Congress.

Members of the Section have specialized experience and expertise in administrative law. Both politically and geographically diverse, these members include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council[1].

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.

[1] Jeff Weiss, our executive branch liaison, took no part in the development of this letter and abstains from it.

Introduction

In 2011, two virtually identical bills were introduced in the House and Senate as the Regulatory Accountability Act of 2011.[2] The Section submitted extensive comments on the House bill on October 24, 2011.[3] In this Congress, essentially the same bill has been introduced as H.R. 2122. Accordingly, the Section stands by its earlier comments with respect to this bill.

In the Senate, however, Senator Portman and eight other original cosponsors have introduced a substantially different bill as S. 1029. Most of the revisions address issues raised by the Section in its earlier comments to the 2011 bill. As an initial matter, therefore, the Section wishes to acknowledge the drafters for giving the Section's concerns such serious consideration. There are few more important roles the Section can serve than seeking to assist Congress in drafting legislation, especially when that legislation would modify the foundational Administrative Procedure Act (APA). We are gratified and honored when such efforts are taken into account.

As more fully explained below, the Section supports many aspects of the bill, and more so than in the case of H.R. 3010. While the Section does not fully endorse all aspects of the bill, we commend the drafters for their good faith effort to address many of our earlier suggestions, even in those areas where we disagree.

Our comments are offered, as they were in 2011, with the goal of improving the APA. The Section – and the ABA – have long supported a variety of improvements to the APA, and several such improvements are already included in the bill. The Section urges Congress to take steps to modernize the APA, and it is within the context of modernization that these comments are offered.

I. Definitions (§ 2 of the bill)

A. Definition of "guidance"

A prime example of how S. 1029 improves upon H.R. 3010 is that S. 1029 proposes to add the following to the list of definitions in the APA:

> '[G]uidance' means an agency statement of general applicability, other than a rule, that is not intended to have the force and effect of law but that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue[.]

Our understanding is that the term "guidance" replaces the terms "interpretative rules" and "general statements of policy" in the existing APA, and that the substitution of new language for old language would not, in and of itself, result in any change in the law pertaining to those types of pronouncements.

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[2] H.R. 3010 and S. 1606, 112th Cong. (2011).

[3] *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619 (2012) (attached).

The proposed definition of "guidance" (new § 551(15))[4] commendably tracks the suggestions in our prior comments, in that it:

- Omits the words "and future effect";
- States that guidance is not intended to have the force and effect of law; and
- Omits reference to "a regulatory action," a phrase not used in the APA.

However, the words "other than a rule" should be deleted from the definition, because guidance documents are always considered to be "rules" within the meaning of the APA, even though they are exempt from notice and comment requirements. It is important to maintain the understanding that guidance documents are a species of rules, so that they will continue to fall within the scope of other APA rights, including the right to petition for issuance of a rule (§ 553(e) in the current APA, § 553(i) in this bill).

B. Need to update the definition of "rule"

As we recommended in our comments on H.R. 3010, Congress should take this opportunity to improve the existing definition of "rule" in § 551(4).[5] This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, 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." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change, and has also endorsed the latter in substance.

Thus, with minor drafting cleanup, we propose that the definition should read as follows:

> (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.

C. Definitions of "high-impact rule" and "major rule"

These definitions speak of "impos[ing] cost[s] on the economy" instead of "[h]av[ing] an effect" on the economy, the phraseology of E.O. 12866.[6] The Section believes that, if the APA is going

[4] Sections 2-6 of S. 1029 make a series of amendments to sections 551, 553, 701 and 706 of Title 5, U.S. Code. For simplicity, this letter refers to these Code provisions, as they would be amended by the bill, as "sections" of the bill.
[5] *See* 64 ADMIN. L. REV. at 627-28.
[6] E.O. 12866, § 3(f) (1993).

to impose greater analytical requirements or other burdens on classes of rules on the basis of economic impacts, "cost" is preferable to "effect" for two reasons. First, it is narrower and therefore would not encompass as many rules, reducing the potential for ossification due to the greater analytical demands imposed upon higher-impact rules. Second, it focuses on the problem that motivates those greater demands: costs (rather than benefits) to the economy.

II. Applicability of Section 553 (5 U.S.C. §§ 553(a) and 553(g)(1), as proposed to be amended by the bill)

A. Guidance

H.R. 3010 defined "guidance" so that, as a practical matter, it would include "interpretive rules" and "general statements of policy," but it retained those phrases in § 553(g)(1), which sets out exclusions to the applicability of § 553. As the Section previously suggested, S. 1029 eliminates those phrases altogether by referring to "guidance" in the exclusion provision (also § 553(g)(1)).

B. Other exemptions

As in our prior comments, we urge the drafters to:

- Repeal the broad and anachronistic exemption in § 553(a)(2) for "public property, loans, grants, benefits, or contracts;" and
- Narrow the exemption in § 553(a)(1) relating to "military or foreign affairs functions."[7]

Significant public effects arising from the activities of federal agencies are sometimes shielded from public input by these exemptions.[8] We fear, moreover, that the adverse effect of these provisions will only increase now that the Department of Agriculture (USDA) has revoked its policy – dating back to 1971 – of voluntarily employing notice and comment in rulemakings that fall within the terms of the former exemption.[9] In addition, overuse of the "military or foreign affairs" exemption, in particular by agencies with a largely domestic portfolio, such as Immigration & Customs Enforcement, has distorted the original intention of the APA's drafters. Both the ABA and the Administrative Conference of the United States (ACUS)[10] have

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[7] *See* 64 ADMIN. L. REV. at 663-64. In the case of public contracts, the ABA supports repeal with minor qualifications. *See id.* at 663 n.139.

[8] *See, e.g.,* Weinberger v Catholic Action of Hawaii Peace Education Project, 454 U.S. 139 (1981); Narenji v Civiletti, 617 F.2d 745 (D.C. Cir. 1979).

[9] 78 Fed. Reg. 64194 (Oct. 28, 2013). The Section wrote to USDA to ask that it rescind this new policy, but the agency declined. *See* letter from Secretary Thomas Vilsack to Joe Whitley, Section Chair (March 20, 2014). *See generally* William Funk, *U.S. Department of Agriculture's Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking*, ADMIN. & REG. L. NEWS, Wint. 2014, at 15.

[10] The Administrative Conference of the United States is an independent federal agency that works to improve the administrative process through consensus-driven applied research and recommendations for improvement of federal agency procedures. Its membership is composed of federal officials and experts with diverse views and backgrounds from both the private sector and academia. *See* www.acus.gov.

recommended that this exemption be limited to the scope of the Freedom of Information Act exemption[11] for classified information.[12] Otherwise, rules addressing military and foreign affairs topics should be subject to the public notice and comment requirements of § 553.

III. Rulemaking Considerations (§ 553(b))

A substantial portion of the Section's 2011 comments was devoted to proposed new subsection § 553(b), which would have required agencies conducting rulemakings to consider a wide range of issues, comparable to but broader than those addressed in Section 4 of E.O. 12866. While the Section's comments recognized that the ABA had previously endorsed a more limited list of such considerations, the comments expressed significant reservations about the cumulative impact of the considerations set out in the bill and the potential effect of some of them. The comments proposed an alternative approach under which the bill would reduce existing "impact assessment" requirements such that there was no net increase in such burdens.[13]

The version of subsection (b) contained in S. 1029 is an improvement over the prior version in several respects:

- First, H.R. 3010 was at best ambiguous about whether it imposed a "supermandate" that would override substantive requirements of statutes that authorize particular rulemakings, due principally to its obligation that agencies consider the costs of a rule "[n]otwithstanding any other provision of law." The term "supermandate" has been widely discussed.[14] The Section's comments noted that Congress has made numerous statutory decisions, including those on environmental and trade issues, which prohibit agencies from making decisions based on cost. We recommended that Congress not override, in a single action, decades of specific legislative decisions on the relevant cost and benefit aspects of specific rule situations, but rather make those decisions in the context of amending those statutes.[15] S. 1029 is clearer about not imposing such a supermandate – it eliminates the "notwithstanding other law" language. To eliminate any doubt, if the bill retains a cost/benefit element, it might:

    - Qualify a cost/benefit consideration requirement with language such as "to the extent permitted by law"; or
    - Provide that where consideration of costs is not permitted, the agency shall present relevant costs and benefits only as a matter of public information.

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[11] 5 U.S.C. § 553(b)(1)
[12] ACUS Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 39 Fed. Reg. 4847 (February 7, 1974).
[13] 64 ADMIN. L. REV. at 628-43.
[14] Cass R. Sunstein*, Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV . 247, 270 (1996) (discussing Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 2 (1st Sess. 1995)).
[15] 64 ADMIN. L. REV. at 639-43.

- Second, H.R. 3010 required cost-benefit analysis for all rules subject to § 553. By contrast, S. 1029 limits cost-benefit analysis to major and high-impact rules. This change is consistent with the Section's statement that "detailed requirements should be reserved for rules of greatest significance."[16] The concept of requiring greater scrutiny of the economic and factual foundation of the costliest regulations is not a new one. For example, Executive Order 12866's "economically significant category" and the statutory "major rule" category are both premised on the sensible view that rules that command or redirect the most private sector resources should be subject to the most rigorous economic analysis.

- Third, S. 1029 substantially reduces the prior bill's requirements that agencies analyze a variety of regulatory alternatives to "a reasonable number, including any substantial alternatives or other responses identified by interested persons."

The Section commends the drafters for these changes.

The Section still believes that the changes proposed to § 553 are unwarranted. First, alleged noncompliance would be subject to judicial review, whereas E.O. 12866 explicitly provides that it does not provide an independent right of judicial review.[17] If the bill were amended to provide explicitly that allegedly insufficient compliance with such requirements could not be a basis for judicial review, our concerns would be alleviated to some degree.[18] Even if that modification were made, however, we would still be troubled by the proposed changes. The cost/benefit requirement of § 553(b)(5), for example, implicates the Section's general admonition against accumulating impact analyses. This requirement, particularly as regards "jobs, competitiveness, and productivity," raises issues that are very relevant today. However, once an impact analysis requirement is imposed, it is practically impossible to eliminate it. Historically, the list of matters for agencies to study has only gotten longer, not shorter.

IV. Notice of Initiation (§ 553(c))

A. In general

The Section's prior comments criticized H.R. 3010 for requiring an agency to issue an advance notice of proposed rulemaking (ANPRM) for a major or high-impact rule. That stance reflected a longstanding ABA policy position that the decision as to whether to resort to an informal consultative device such as an ANPRM should be left to the unreviewable discretion of an agency. In place of the ANPRM, S. 1029 proposes a "notice of initiation." Specifically, § 553(c)

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[16] *Id*. at 633.
[17] *See* E.O. 12866, § 10.
[18] Typically, even when an agency's compliance with an impact analysis requirement is not itself judicially reviewable, the resulting analysis document is added to the administrative record for the relevant rule and may be considered by a court in the course of substantive judicial review of that rule. This has long been the practice with regard to analyses prepared pursuant to presidential oversight orders. *See* Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1031, 1040 (D.C. Cir. 2012); Michigan v. Thomas, 805 F.2d 176, 188-89 (6th Cir. 1986)..

would provide that when an agency determines to initiate a rulemaking for a major or high-impact rule, it must

> (B) publish a notice of initiation of rulemaking in the Federal Register, which shall—
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> > (i) briefly describe the subject, the problem to be solved, and the objectives of the rule;
> > (ii) reference the legal authority under which the rule would be proposed;
> > (iii) invite interested persons to propose alternatives for accomplishing the objectives of the agency in the most effective manner and with the lowest cost; and
> > (iv) indicate how interested persons may submit written material for the docket.

The Section would not be able to support § 553(c) as currently written. In particular, clauses (iii) and (iv) of the provision seem indistinguishable from an ANPRM as generally understood.[19] However, we do not interpret the ABA policy as necessarily foreclosing a more modest requirement for a notice of initiation. We would not object to a narrower provision that would essentially serve as a transparency requirement identifying that a rulemaking process has started. Such a requirement would not be very different from the existing requirement to include a rule on the unified regulatory agenda. Accordingly, the Section would support § 553(c) if clauses (iii) and (iv) were deleted from the provision.

B. Docket issues

Section 553(c)(1)(A) of the bill requires that when an agency initiates a major or high-impact rulemaking the agency shall "establish an electronic docket, which may have a physical counterpart." We wholeheartedly endorse the bill's provision for electronic dockets. We are concerned, however, that the current version of the bill may include a drafting error. This section only requires an electronic docket for major and high-impact rules, but the bill later assumes the existence of a docket for regular rules. *See* § 553(d)(2) and 553(f)(4). If the drafters do not mean to distinguish the docketing obligations for regular rules v. high-impact and major rules, we recommend that the bill provide that whenever an agency issues an NPRM, it must establish an electronic docket if it does not already have one.

Section 553(c)(2) of the bill provides that "all" information provided to the agency shall be placed in the docket and made accessible to the public. We endorse the general idea of the rulemaking record being publicly accessible. However, in line with a recent ACUS recommendation,[20] we caution that this policy cannot be absolute. For example, the ACUS recommendation says that privileged information may be withheld, and that, instead of putting

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[19] *See, e.g.*, ACUS Recommendation 76-3, 41 Fed. Reg. 29654 (1976), ¶ 1(a) ("an agency may at any time announce, as by an 'advance notice of proposed rulemaking', that it intends to issue a notice of rulemaking, and in such announcement solicit comments and suggestions with respect to the contents of such notice").

[20] ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41352 (July 10, 2013).

copyrighted material online, the agency might state that this material is available for examination in the agency's reading room. Thus, we would advise the drafters to consider the qualifications to accessibility that the ACUS recommendation highlights.

V. Notice of Proposed Rulemaking (§§ 553(d)(2) and 553(f)(2)(E))

A. Codification of *Portland Cement* doctrine

In its comments on H.R. 3010, the Section asked the sponsors to codify the *Portland Cement* doctrine, which requires agencies to disclose the factual basis for a proposed rule, thereby enabling the public to comment on that information.[21] The Section commends the bill's sponsors for doing so and for requiring the agency to respond to significant issues raised in the comments.

As in our prior comments, we also urge the bill to provide that agencies provide the public with an opportunity to comment on factual material that is critical to the rule that becomes available to the agency after the comment period has closed and upon which the agency intends to rely.

B. Automatic expiration of proposed rules

As a general policy, the Section opposes statutory time limits for the expiration of proposed rules. These time limits are at odds with the goals of inducing agencies to consider their rules more carefully and holistically and to obtain broader participation in the rulemaking process. The Section's position is consistent with that of ACUS, which has also been very critical of statutory time limits in rulemaking:

> Congress ordinarily should not impose statutory time limits on rulemaking proceedings. Purely as a practical matter, modern rulemaking proceedings are too complex and varied, and involve too many stages, to permit fixing unyielding time frames for agency decisionmaking. Strict time limits, moreover, may foreclose the use of procedural techniques that can be valuable in enhancing the degree of public participation and insuring completeness of information.[22]

Note that the ACUS recommendation was directed at statutory deadlines governing *specific* proceedings that Congress had, in at least some sense, singled out as particularly warranting a firm time limit. Across-the board deadlines, as § 553(d)(4) would impose, are even more troubling.

The Section recognizes that § 553(d)(4)(B) gives an agency the option, after two years, of extending an NPRM for a single year if it publishes a Federal Register notice explaining why it needs the additional year. The Section's concerns would be sufficiently alleviated if the bill instead provided that agencies could extend an NPRM annually (without limit) on the basis of

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[21] 64 ADMIN. L. REV. at 646-47.
[22] ACUS Recommendation 78-3, *Time Limits on Agency Actions*, 48 Fed. Reg. 27509 (June 26, 1978).

such a notice. The notice should also invite public comments on the substantive merits of the extension and its fairness to affected entities.

The Section also notes that provisions such as § 553(d)(4) would not eliminate the option interested persons have of seeking judicial review for agency action unreasonably delayed.

C. Putting CFR text in NPRMs

Section 553(d)(1)(C) of the bill requires NPRMs to include the proposed text of the rule. Agencies generally do this currently, though some omit this step. We agree that there are good reasons to require them to include the proposed text of the rule so that the public gets at least one chance to directly engage the proposed text. Also, while the bill speaks of "the text of the proposed rule," we do not read this text as precluding an agency from proposing multiple regulatory options. Nor do we read it as precluding the agency from adopting different language in the final rule if, as under current law, the final rule is a "logical outgrowth" of the proposed rule.[23]

VI. Public Hearings (§ 553(e))

A. In general

H.R. 3010 would have required all high-impact rules to be issued by formal rulemaking under 5 U.S.C. §§ 556-557. The Section's prior comments heavily criticized this approach as "obsolete" and unsupported by much scholarly work.[24] The comments explained that formal rulemaking includes requirements that are inappropriate for modern rulemaking, such as the ex parte contacts ban found in § 557(d). The Section also noted that H.R. 3010 would have prescribed trial-type hearings on questions of policy or of broad, "legislative" facts.[25]

To their credit, the drafters of S. 1029 have changed their approach, no longer relying directly on the formal rulemaking procedures of 5 U.S.C. §§ 556-557. Instead, the bill would establish a new hearing requirement (still limited to high-impact rules) that would apply only as to "specific scientific, technical, economic or other complex factual issues that are generally disputed . . . the resolution [of which] would likely have an effect on the costs and benefits of the proposed rule" (new § 553(e)(1)(A)(ii)). This limitation is certainly a promising step. Still, however, the Section is opposed to the new requirement as it currently reads.

The proposed § 553(e) still differs significantly from the position articulated in the ABA's 1981 recommendation, which supported requiring agencies to conduct oral hearings with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the

[23] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).
[24] *But see* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO STATE L. J. 237 (2014).
[25] *See* 64 ADMIN. L. REV. 650-54.

agency of issues of specific fact critical to the rule."[26] The language of the proposed legislation does not require this showing, but would instead be triggered any time the issue of fact "would likely have an effect on the costs and benefits of the proposed rule" – i.e., in almost every case.

In our comments to H.R. 3010, we argued that "trial-type methods are usually unsuitable in generalized rulemaking proceedings," and that "[e]ven in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice-and-comment rulemaking."[27] Presumably, this premise goes far to explain why the 1981 ABA policy specified that a stakeholder who wants a live hearing should at least have to explain why lesser methods are not good enough.

If § 553(e) were revised to include the additional limiting language of the ABA's 1981 recommendation, so that agencies would be required to conduct oral hearings with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential," we would support it. In the absence of such a revision, we do not.

B. Hearing procedure (§ 553(e)(3))

The Section also feels that, even if § 553(e) is retained, the language specifying that "the proponent of the rule has the burden of proof" should be deleted. We believe that an agency should have the "burden of proof" regarding factual propositions that the agency is statutorily required to establish or that the agency chooses to advance, but not with respect to factual propositions that are in the nature of affirmative defenses or that were advanced by a commenter. The automatic allocation of the burden of proof to the agency is overly simplistic, and the "burden of proof" is an inapt term to capture the logic of factual controversy in rulemaking. If opponents of a rule offer a dozen factual assertions that, if credited, would each cast doubt on the rule, the agency must offer a reasoned response to each of them, but it should not have to "disprove" each of them. If some "burden of proof" language is retained, the Section urges that it be limited in its application to "factual determinations that constitute an asserted or necessary basis for the rule." [28]

The Section also questions proposed § 553(e)(3)(B)(ii), which requires each agency to adopt rules providing for "the appointment of an agency official or administrative law judge to preside at the hearing," and for "the presentation by interested parties of relevant documentary or oral evidence, unless the evidence is immaterial or unduly repetitious." This provision seems more onerous than the current requirement for

[26] *See* 64 ADMIN. L. REV. at 651-652.
[27] 64 ADMIN. L. REV. at 651.
[28] *Cf.* 64 ADMIN. L. REV. at 629.

formal rulemaking, which, where the parties will not be prejudiced, allow procedures "for the submission of all or part of the evidence in written form."[29]

C. Petitions for hearings for major rules

S. 1029 would also add a new § 553(e)(4) that would allow interested persons to petition for a hearing in the case of a major rule under this subsection on the grounds and within the time limitation set forth in paragraph (1). The agency could deny the petition if it reasonably determined that a hearing would not advance the consideration of the proposed rule by the agency or would, in light of the need for agency action, unreasonably delay completion of the rulemaking.

While the grounds for denying a petition for hearing are more flexible than with high-impact rules, the provision puts the onus on the agency to justify refusal on these grounds, rather than placing the burden on the requester to demonstrate an affirmative need for a trial-type hearing. The Section believes this subsection is problematic because the agency's denial must be "reasonable" and § 553(e)(5)(B) contemplates judicial review. At a practical level, the Section anticipates that any ambiguity in grounds for denying a hearing would make judicial review highly unpredictable and would put much pressure on an agency to "play it safe" and grant a hearing.[30] Thus, as with high-impact rules, we would support a provision of this nature only if it requires an affirmative showing that alternative procedures are inadequate.

VII. Final Rules (§ 553(f))

A. Best available science

H.R. 3010 contained multiple references to the Information Quality Act (IQA), and created a separate mini-trial process for adjudicating IQA claims during the comment period for a proposed rule. Our prior comments noted the continuing uncertainty regarding the judicial enforceability of the IQA, but said the effort to splice the IQA into Section 553 was "misdirected."[31] S. 1029 omits specific reference to the IQA and eliminates the mini-trial process, and the Section commends the drafters for those changes.

S. 1029 does contain a requirement, captioned "information quality," that requires final rules to be adopted on the basis of the "best available scientific, technical, or economic information" in cases where the rule rests upon such information. H.R. 3010 contained a similar, though universally applicable, provision. The Section's prior comments acknowledged the presence of this language in E.O. 12866 and statutes such as the Endangered Species Act (ESA), and recognized that, "[w]here agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well-founded is certainly legitimate." Nevertheless, the Section "question[ed] whether this notion belongs in the rulemaking language

[29] 5 U.S.C. § 556(d).
[30] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).
[31] 64 ADMIN. L. REV. at 655-58.

of the APA," and noted that the *Portland Cement* doctrine should accomplish the drafters' goal of forcing agencies to respond to comments that cast serious doubt on the agency's factual premises.[32]

If the bill retains the "best available" mandate, the Section urges the drafters to clarify whether the bill imposes an affirmative duty upon agencies to seek out "the best" information, or less demandingly to require agencies only to rely upon the best information either in their possession or provided them by commentators.

B. "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 addressed the issue last year. 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.[33] Section 553(f)(5) closely tracks the proposals for congressional action contained in the ACUS recommendation, and the Section warmly endorses it with two suggested modifications.

First, the ACUS recommendation proposes that agencies be authorized to extend the effective date of a not-yet-final rule for up to 60 days, provided they also give the public 30 days to comment. The bill changes the 60 days to 90 days, perhaps to give agencies more time to consider the comments they receive. The Section believes that, in choosing 60 days, ACUS was balancing the need for review by the new administration against the problem of a long delay by the transition in administrations. If an agency concludes, based on public comments or its own review that a rule warrants major changes, the more appropriate course would be to withdraw the rule at the end of the 60 days and start a new rulemaking. So the Section suggests that the drafters reinstate the 60-day period.

Second, the bill refers to the agency issuing an "order" to delay the effective date of a midnight rule, whereas courts evaluating such actions have held them to be rules. The Section suggests replacing the words "may, by order, delay the effective date of the rule" with "may, without prior notice, delay."

C. Good cause exemption

H.R. 3010 effectively revised the current "good cause" exemption of the APA to eliminate the option of not seeking comment where an agency deems doing so to be "unnecessary." Our earlier comments faulted this approach, explaining that (i) the purpose of the exemption is to allow agencies to skip notice and comment for rules that are so inconsequential that no one would want to comment adversely on them, and (ii) if the exemption has been properly invoked, there is no reason to require notice and comment proceedings after the fact.[34] The

[32] 64 ADMIN. L. REV. at 638.
[33] ACUS Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47802 (Aug 10, 2012).
[34] 64 ADMIN. L. REV. at 660-61.

Senate drafters have apparently heeded this criticism, and in substance have reverted to the status quo on this issue (§ 553(g)(2)(A)). The Section supports this approach, although we note that the new statutory language should not refer to "issuance of an interim rule." For reasons just explained, it should simply say "issuance of a rule."

VIII. Interim Rules (§ 553(g)(2))

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, while such rules are considered final rules with the force and effect of law, agencies often designate them as "interim final" or simply "interim" rules. When publishing such a rule, agencies frequently seek post-promulgation public comments. These agencies generally say they will consider the comments and may issue a revised final rule. Often, however, such rules languish indefinitely in interim form.

Section 553(g)(2) of the bill would add a new rulemaking requirement to address interim rules adopted without prior notice and comment due to impracticability or because notice and comment was contrary to the public interest.[35] The bill would provide that such interim rules will cease to have the effect of law if the post-promulgation process is not completed within 270 days of publication of the interim rule (18 months if the rule is a major or high-impact rule).

Although agencies sometimes abuse the flexibility afforded by the good cause exemption, the Section agrees with ACUS's 1995 decision not to recommend a uniform, government-wide deadline date for finalizing such rules.[36] While the Section could support legislation intended to encourage agencies to complete the post-promulgation process for interim rules, the Section cannot support the tight statutory deadlines that appear in S. 1029.

In our prior comments, the Section explained its concerns with such short deadlines. Agencies may be unable to meet them for many legitimate reasons,[37] and such deadlines may lead to the lapse of many rules if an agency cannot fully evaluate the public comments received and modify the rules before the deadline. Noting that the bill provides an even tighter deadline for a non-major or high-impact rule, the Section explained that a rule's status as non-major does not mean that the agency will be more likely to meet the deadline, that a non-major rule addresses

[35] *See* Part VII.C above regarding how the bill treats the circumstance where notice and comment is deemed "unnecessary."

[36] ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43110 (August 18, 1995).

[37] Often, a large set of complex interim rules is adopted at the same time to implement a new statute; these would all expire at the same time. Heading off that mass expirations event would impose serious demands on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so that staff are simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, so that the new agency heads need to make their own decisions about how to modify the interim rule.

less complex regulatory problems, or that such a rule will receive fewer public comments that will need to be analyzed.

If Congress were to set a deadline under which an agency must finalize an interim rule, the Section suggested a flexible approach: a three year time limit, with the opportunity for the agency to extend the deadline for a defined period upon showing good cause.[38] The Section noted that the agency's showing of good cause could be judicially reviewable, if Congress so specified.

In addition, if Congress were to impose a statutory deadline to finalize or rescind an interim rule, certain types of rules would need to be excluded from such a requirement. For example, an interim rule that invokes the "impracticable" grounds of the good cause exemption should be excluded from the statutory deadline pertaining to finalization or rescission, as the rule is needed quickly, but is of a relatively short time duration. For example, requiring the Coast Guard to complete the post-promulgation process for an interim rule creating a temporary security or exclusion zone (for naval exercises, maritime races, airplane crashes in the water, etc.), would waste time and resources.[39] Since the rescission of a rule also requires a rulemaking,[40] the Coast Guard may choose to allow the statutory deadline to expire and let the interim rule, which was already time-limited in duration, cease to have effect. For rules that routinely invoke the "impracticable" grounds of the good cause exemption, agencies would not likely incur the costs of conducting a rulemaking simply to rescind such interim rules.

IX. Effective Date (§ 553(h))

Currently, the APA requires that a substantive rule be published a minimum of 30 days before its effective date, with three exceptions: "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule."[41]

S. 1029 would eliminate the term "substantive"—which encompasses legislative rules, interpretative rules, and policy statements[42]—and thus require both substantive and procedural rules to be published a minimum of 30 days before the effective date of the rule. As a procedural rule is generally technical and intra-agency in nature and, by definition, not a rule that would have a substantive effect, the Section takes no position on this change.

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[38] There is precedent for the three-year limit: temporary tax regulations expire within three years of the date of issuance. *See* Int. Rev. Code § 7805(e)(2).

[39] *See, e.g.*, 78 Fed. Reg. 37971 (June 25, 2013) (establishing a temporary security zone in the Pacific Ocean near Coronado, CA, during an exercise by the United States Navy).

[40] 5 U.S.C. § 551(5) ("'Rulemaking' means the agency process for formulating, amending, or repealing a rule.").

[41] 5 U.S.C. § 553(d).

[42] Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1323 (1992).

As noted above, S. 1029 would define "guidance" to encompass interpretive rules and policy statements. As a conforming change, the bill thus uses the term "guidance" to replace "interpretative rules and statements of policy" in the current APA's exception for such documents from the 30-day deferred effective date requirement. The Section supports this change.

X. Retrospective Review of Rules

To varying degrees, all rules become out of date with the passage of time. One option for reviewing rules for continued timeliness and appropriateness is for agencies to review all of their rules over some timeframe. This is the approach of the Regulatory Flexibility Act, at least with respect to rules that have a significant impact on a substantial number of small entities.[43] The shortcoming of such an across-the-board approach is that some rules may be more problematically out of date than others, and external stakeholders may be far more concerned about the former than the latter. The Section believes it makes good sense, therefore, for agencies on an ongoing basis to invite members of the public to identify rules that particularly warrant review, and to focus on reviewing such rules. This is the approach adopted by S. 1029, and the Section thus supports it. We particularly like the requirement that such agencies permit such "nominations" to be submitted electronically. We note that agencies need not accept the suggested reforms, but they should at least be receptive to such suggestions from their constituencies.

XI. OIRA Guidelines (§ 553(j))

ABA policy has long supported central executive branch oversight of new rules. More stringent oversight necessarily entails additional cost to agencies and some degree of delay. OMB's resources are even more strapped than those of the agencies it oversees. For all these reasons, the weight of expertise and time consumed in conducting cost/benefit analyses, whether pursuant to legislation like S. 1029 or executive order, should correspond to the real costs of the proposed rule. OMB should review cost/benefit issues with a light touch if the rule is a relatively lower cost matter. The Section thus supports the bill's proviso that "the rigor of cost-benefit analysis required by [OMB's] guidelines [for cost/benefit analysis] shall be commensurate, as determined by [OMB], with the economic impact of the rule."

XII. Judicial Review

A. OIRA's designation of a rule as a "major rule" (§ 706(b))

The Section cannot support the proposed revision to 5 U.S.C. § 706(b) as it is presently drafted. The bill explicitly excludes from judicial review the OIRA Administrator's designation of a rule as a "major rule" when it is based on two of three grounds. By negative implication, judicial review would therefore be available for the Administrator's determination that a rule is a "major rule" on the third ground; i.e., that the rule is likely to impose "a cost on the economy in any 1 year of $100,000,000 or more, adjusted annually for inflation." An interest group that was

[43] *See* 5 U.S.C. § 610.

disadvantaged by the OIRA Administrator's designation of a rule as major may attempt to seek judicial review of the OIRA designation.

The OIRA Administrator's determination that a rule is "major" (or "high-impact") should not be subject to judicial review regardless of the basis for that determination. Allowing judicial review of OIRA determinations is a departure from current practice under executive orders on presidential review of rulemaking and existing laws.[44] For example, Executive Order 12866 and the Congressional Review Act (CRA) both provide that regulatory actions similar to making a "major rule" determination are unreviewable.[45] While the Executive Office of the President (EOP), within which OIRA resides, and OIRA have been sued under the Freedom of Information Act, adding OIRA as a defendant to an APA-based challenge may be unprecedented.

Courts would need to analyze whether the EOP qualifies as an "agency" within the meaning of the APA.[46] The Supreme Court has said that the President is not an agency and "that textual silence is not enough to subject the President to the provisions of the APA."[47] As former OIRA Administrator Cass Sunstein's article on the office indicates, the regulatory review process is an interagency one that is consultative, includes the input of many within the EOP, and at times, directly involves the President and his top advisors.[48]

If the EOP is indeed an "agency" and judicial review of an OIRA Administrator's major rule determinations was permitted, it would need to be based on some kind of record. Thus OIRA would need to produce a reviewable record covering major rule determinations.

Finally, the bill may not accomplish much in the end, because if the EOP is an agency under the APA, a court may well deem the OIRA Administrator's determination regarding a major rule designation the type of "agency action [that] is committed to agency discretion by law," and thus exempt from judicial review under 5 U.S.C. § 701(a)(2).

B. Review of guidance documents (§ 706(c))

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[44] Executive Orders 13563 and 13579 did not contain a similar definition to S. 1029's definition of a "major rule."

[45] Although the bill's definition of a "major rule" shares similarities with the definition of a "significant regulatory action" in E.O. 12866, that order states that it is not intended to give rise to judicially reviewable controversies. See § 10. Similarly, while the S. 1029 definition of what constitutes a major rule differs slightly from the CRA, that Act precludes judicial review of the OIRA Administrator's determination on all of the bases from which the Administrator could make such a determination. 5 U.S.C. §§ 805, 804(2).

[46] "Agency" is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia . . . ." 5 U. S. C. §§ 701(b)(1), 551(1).

[47] Franklin v. Massachusetts, 505 U.S. 788, 796 (1992). The Court stated "[w]e would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Id.* at 801.

[48] Cass R. Sunstein, *Commentary: The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839-40, 1847, 1858 (2013).

The Section proposes the deletion of section 706(c) from the bill. That subsection would provide that agency guidance that does not interpret a statute or regulation shall be reviewable only for procedural error. Subsection (c) has uncertain implications, and it might lead to confusion. Moreover, it is unnecessary. Presumably, subsection (c) was inserted into the bill in an attempt to exclude agency guidance that does not interpret a rule or statute from coverage under section 706(d). However, subsection (d) of the bill is itself worded to avoid that impact, because it covers only *interpretations* by an agency of its own rules.

XIII. Deference to agency interpretations of their own rules

Section 706(d) would establish a uniform standard to govern all judicial review of agencies' interpretations of their own regulations. Under current doctrine, a reviewing court is expected to defer to an agency's interpretation of its own regulation unless the agency's view is "plainly erroneous or inconsistent with the regulation."[49] As of today, such "*Auer* deference" remains the "general rule."[50] The proposed statutory formula is plainly modeled on the well-known *Skidmore* test (although, as we discuss below, § 706(d) does not follow the exact language of that case), and would mandate this quasi-*Skidmore* standard in review of all agency interpretations of their regulations.

We are concerned by the across-the-board mandate of this quasi-*Skidmore* standard for review of all agency interpretations. One of the most common criticisms of *Auer* deference is that it gives agencies an incentive to write regulations vaguely, so that they can then elaborate on them through interpretation and receive substantial deference without subjecting those interpretations to the discipline of a rigorous decision making process such as notice-and-comment rulemaking. In recent separate opinions, Justice Scalia has relied on this argument, among others, in calling for abandonment of the *Auer* test.[51] Some administrative lawyers agree with Justice Scalia that the availability of *Auer* deference does induce agencies to write rules that are vaguer than they otherwise would, and others are less convinced. But there does not seem to be any hard evidence pointing in either direction.

Regardless of how persuasive this concern is as a reason to limit *Auer*, it seems clear that this rationale has greater force in some circumstances than in others. It is relatively strong as a reason to apply *Skidmore* to guidance documents, which are commonly issued with minimal prior procedure. However, § 706(d) would apparently apply to many other types of interpretations as well. Presumably, for example, it would also apply to regulatory interpretations that agencies develop in the course of formal adjudication, which does entail a decision making process that induces rigorous deliberation. This application of § 706(d) is difficult to justify. Indeed, in the analogous context of statutory interpretation, the Court has ruled that informal guidance normally does not qualify for *Chevron* deference, but

[49] *See* Auer v. Robbins, 519 U. S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[50] Decker v. Northwest Envtl. Law Ctr., 133 S. Ct. 1326, 1337 (2013).
[51] *See* Decker v. Northwest Env. Def. Ctr., 133 S. Ct. 1326, 1339-42 (Scalia, J., concurring in part and dissenting in part); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

interpretations rendered during formal adjudication normally do.[52] Thus, it does not make sense to legislate this standard with regard to review of all agency interpretation of their rules.

Moreover, if the concern is that the courts will take too long to trim the scope of *Auer* deference, in the past few years, the Supreme Court has shown an active interest in addressing and limiting *Auer* on a case-by-case basis. In *Christopher v. SmithKline Beecham Corp*.,[53] the Court identified various exceptions to *Auer* and suggested that it might find others in future cases. On the facts of *Christopher* itself, the Court applied *Skidmore* instead of *Auer*. Given the Court's active interest in this issue, there are reasons to think that inappropriate cases for application of *Auer* will be identified in the foreseeable future on a case-by-case basis.

At a drafting level, we are concerned that the slight mismatch between the text of § 706(d) and the formulation in the *Skidmore* decision will create confusion. According to the standard case law formula, the weight given to a particular interpretation should depend on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, *and all those factors which give it power to persuade, if lacking power to control.*"[54] The proposed statute would omit the italicized words. Interestingly, the recent codification of a *Skidmore*-inspired standard with regard to review of the Comptroller's decisions to preempt state laws includes the phrase "other factors which the court finds persuasive and relevant to its decision."[55] We believe the adoption of multiple incarnations of the *Skidmore* test may prompt confusion as to whether they have independent meanings or the same meaning as the evolving interpretations of *Skidmore*. Surely the world does not need a "rule interpretation *Skidmore*" that is different from the "statutory interpretation *Skidmore*."

XIV. Substantial Evidence (§ 6 of the bill)

A. Review of high-impact rules

Section 706(e)(2) would expressly impose the "substantial evidence" standard for judicial review of high-impact rules (those rules likely to cost the economy $1,000,000,000 or more, as defined by § 551(16) of the bill). The sponsors' aim appears to be to impose a somewhat higher standard than arbitrariness review for high-impact rules. There are strong reasons to believe that this amendment will not achieve this aim and cause substantial confusion for courts and litigants.

Case law has abandoned the view that substantial evidence imposes a higher standard of review than arbitrary-capricious review. As we explained in our comments on H.R. 3010, a leading statement of this view appears in a D.C. Circuit opinion authored by then-Judge Scalia. Judge Scalia wrote, "in their application to the requirement of factual support the substantial evidence

[52] United States v. Mead Corp., 553 U.S. 218, 230(2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000).
[53] 132 S. Ct. 2156 (2012),
[54] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).
[55] 12 U.S.C.§ 25b(b)(5)

test and the arbitrary and capricious test are one and the same. The former is only a specific application of the latter."[56] All of the regional circuits have agreed in substance with this proposition.[57] Thus, the lower courts have reached a consensus that the two standards require the same degree of factual support (with the possible exception of the Federal Circuit, which has sent mixed signals on the issue[58]). Given this background law, the express adoption of the substantial evidence standard will put the courts to what Judge Scalia called a "fairly convoluted" inquiry:

> Suppose, for example, that Congress clearly intended to switch to a stricter test, but was also clearly operating on the mistaken belief that the existing test ("arbitrary or capricious") was more lenient than the "substantial evidence" standard. Should one give effect to the congressional intent to adopt a stricter standard, or rather to the congressional intent to adopt the "substantial evidence" standard (which is in fact, as we have discussed, no stricter)?[59]

In other words, given the established equivalence of the substantial evidence standard and the arbitrariness inquiry, the adoption of the substantial evidence standard could spawn confusion as to whether the bill in fact raises the level of scrutiny or merely codifies the existing standard.

We are also independently concerned about adopting the substantial evidence standard for evaluation of rules, such as high-impact rules, that clearly involve policy determinations. *Universal Camera* provides the canonical formulation of the substantial evidence standard:

> We [have] said that '[s]ubstantial evidence is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Accordingly, it . . . must be enough to justify, if the trial

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[56] Ass'n of Data Processing Sev. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984). This view has been repeatedly affirmed by the D.C. Circuit. See, e.g., Butte Cnty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010); Consumers Union of U.S., Inc. v. FTC, 80 I F.2d 417, 422 (D.C. Cir. 1986) (expressly relating this view to the "reasonable mind" definition of substantial evidence that the bill would codify).

[57] Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005); Bonnichsen v. United States, 367 F.3d 864, 880 n.19 (9th Cir. 2004); Mich. Bell Tel. Co. v. Strand, 305 F.3d 580, 586-87 & n.11 (6th Cir. 2002); Bd. of Water, Light & Sinking Fund Comm'rs v. FERC, 294 F3d 1317, 1329 (11th Cir. 2002); Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002); GTE South, Inc. v. Morrison, 199 F.3d 733, 745 n.3 (4th Cir. 1999); Lee v. Bd. of Govs. of Fed. Reserve Sys., 118 F.3d 905, 914 (2d Cir. 1997); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 n.25 (10th Cir. 1994); Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); Cent. States Enters., Inc. v. ICC, 780 F.2d 664, 674 n.10 (7th Cir. 1985); Cruz v. Brock, 778 F.2d 62, 63-64 (1st Cir. 1985). The Supreme Court has cited to the *Data Processing* reasoning and expressed no qualms about it. Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

[58] *Compare* Consol. Bearings Co. v. United States, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (lack of substantial evidence would be an abuse of discretion), *with In re* Gartside, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (arbitrary and capricious test is more deferential than substantial evidence).

[59] *Id*. at 686.

> were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[60]

This formulation does not provide helpful guidance to courts in evaluating the complex basis for a rulemaking. In contrast, the established formulation of arbitrariness review provides much more apt guidance to courts. The arbitrariness inquiry asks, for instance, whether the agency established a rational connection between facts found and the choice made, the agency had not failed to consider an important aspect of the problem, the agency made a decision based on the relevant factors, or the agency had "offer[ed] an explanation that runs counter to the evidence before the agency."[61] That inquiry is targeted to review of policymaking determinations. Finally, despite black letter statements that the arbitrariness standard is "narrow," in practice, especially in important rule makings, courts engage in probing scrutiny of agency rules under arbitrary-capricious review.[62]

The Section believes that arbitrary-capricious review as currently applied is appropriate for review of high-impact rules. To the extent that the drafters seek to impose a higher standard of review than arbitrariness review uniformly provides for review of high-impact rules, it should do so in terms other than "substantial evidence" to avoid the confusion between the arbitrariness and substantial evidence standards noted above.

B. Review of denials of petitions for public hearings in rulemaking

Section 706(e)(1) would impose a substantial evidence standard for review of denials of petitions under § 553(e), that is, petitions to hold a public hearing for high-impact rules on specific scientific, technical, economic or other complex factual issues. As noted by the D.C. Circuit, the "substantial evidence test has customarily been directed to adjudicatory proceedings or formal rulemakings."[63] Difficulties arise where the substantial evidence test is applied to determinations, like the denial of a petition for a public hearing, where the decision is not based on a trial-type record. In particular, without a trial-type record there is a concern about "the adequacy of the record to permit meaningful performance of the required review."[64] Moreover, uncertainty about the application of substantial evidence to this procedural decision would give agencies an incentive to grant petitions for costly public hearings even when they are not deserving, or to devote significant resources to "making a record" on the hearing issue, even when a hearing is not merited. Finally, given that this decision involves not only fact finding, but the exercise of policymaking discretion, the same reasons that substantial evidence is inappropriate for review of rulemakings also apply to the denial of petitions for public hearings.

XV. Agency Guidance (§ 5 of the bill)

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[60] Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).
[61] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).
[62] *See, e.g.*, Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (invalidating SEC proxy rule as arbitrary and capricious).
[63] Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974).
[64] *Id.*

Proposed § 553(l) is the substantially the same as section 5 of H.R. 3010, except that one clause has been reworded using the exact language that we proposed in our earlier comments: "Agency guidance shall . . . not be used by an agency to foreclose consideration of issues as to which the document expresses a conclusion . . . ." The Section naturally supports this revision.

* * *

In conclusion, the Section commends the authors of S. 1029 for their careful consideration of our prior suggestions and urges the Committee to use the bill's introduction as a basis for considering improvements to the APA. We hope the foregoing comments will be helpful in that effort.

Thank you for considering the Section's views on this important legislation. If you have any questions regarding our views, please contact Ronald Levin, Section Delegate to the ABA House of Delegates, at (314) 935-6490 or levin@wulaw.wustl.edu or Anna W. Shavers, Section Chair, at (402) 472-2194 or annashavers.aba@gmail.com .

Sincerely,

Anna Shavers
Chair, ABA Section of Administrative Law & Regulatory Practice

cc: Members of the Senate Homeland Security and Governmental Affairs Committee