RESOLVED, That the American Bar Association urges Congress, when it considers enactment of legislation relating to new or existing programs that involve agency adjudications with an opportunity for a hearing, to consider and determine expressly within the relevant legislation whether the hearing should be subject to the requirements of the Administrative Procedure Act (APA) in 5 U.S.C. §§ 554, 556 and 557, including presiding officer protections, ex parte prohibitions, record-based decision-making, and other procedural safeguards.

FURTHER RESOLVED, That in determining the appropriateness of requiring a formal APA adjudication, Congress should consider the following factors:

1. Whether the adjudication is likely to involve substantial impact on personal liberties or freedom, orders that carry with them a finding of criminal-like culpability, imposition of sanctions with substantial economic effect on a party or interested person, or determination of discrimination under civil rights or analogous laws.

2. Whether the adjudication would be similar to, or the functional equivalent of, a current type of adjudication in which an administrative law judge presides.

3. Whether the adjudication would be one in which adjudicators ought to be lawyers. It is recognized that some proceedings might require participation by additional adjudicators with other types of specialized expertise.

FURTHER RESOLVED, That in order to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary in any future legislation that creates the opportunity for a hearing in an adjudication, such a hearing shall be subject to 5 U.S.C. §§ 554, 556 and 557.