On January 6, 1997, the Section submitted comments to the Office of Management and Budget (OMB) regarding its proposed revision of the OMB Circular No. A-133 and its proposed rescission of OMB Circular No. A-128. The Section suggested that GSA revise various provisions of the proposed revision of OMB Circular No. A-133 to require that recipients make all information submitted to the Federal Clearing House available for public inspection "to the extent require by law or regulation," as opposed to generally making all information submitted available for public inspection.

On the topic of affirmative action, the Section recommended that the regulation read that to the full extent permitted by law, auditees shall make positive efforts to utilize small businesses, minority-owned firms and women's business enterprises to make auditees aware that there may be legal considerations involved in their contracting procedures. Finally, the Section generally concurred with the aspect of the proposed revision requiring auditors to perform tests of costs charged to cost pools during the period that the actual costs were incurred, but recommended that the final revision clarify the auditors' responsibilities with respect to different types of indirect cost rates.

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January 6, 1997

Ms. Sheila O. Conley
Office of Management and Budget
Office of Federal Financial Management
Financial Standards and Reporting Branch
Room 6025
New Executive Office Building
Washington, D.C. 20503

Re: Proposed Revision of OMB Circular No. A-133 and Proposed Rescission of OMB Circular No. A-128,

Dear Ms. Conley:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and
Proposed Revision and Recission of OMB Circulars A-133 & A-128

substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works, as well as the process of federal assistance to recipient organizations.

The Section is authorized to submit comments on federal acquisition and assistance regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

.235(c) Program-specific audits: The proposed revision provides that "[u]nless restricted by law or regulation," the auditee must make the required reporting relating to program-specific audits available for public inspection.

Comment: This language was added without comment to the final revision of OMB Circular A-133 published at 61 Fed. Reg. 19134 on April 30, 1996. It changes past procedure under OMB Circular A-133, at least for non-profit organizations. State and local governments may be obligated under state law to make audit reports and related documents publicly available. Because non-profit organizations are typically private corporations, however, the audit resolution process with non-profit organizations has been generally treated as a matter between the Federal grantor agency and the recipient. For reasons discussed further below, the Section questions whether it is in the interests of Federal grantor agencies, recipients, or the public to require recipients to make all of the information submitted to the Federal clearinghouse available for public inspection. The Section also observes that the reference to public availability of "report copies" in the regulation is unclear.

The Section proposes that the regulation read: "To the extent required by law or regulation, the auditee shall make copies of the reports submitted to the Federal clearinghouse available for public inspection."

.305(a) Auditor selection: The proposed revision states, "Whenever possible, auditees shall make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services . . . ."

Comment: Many recipients of Federal awards, including state and local governments and non-profit organizations, support efforts to increase the participation of women and minorities in contracting and other activities. Both OMB Circular A-133 and OMB Circular A-110 have encouraged such efforts.

Since the U.S. Supreme Court's decisions in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and more recently in Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (1995), however, the legal requirements for voluntary affirmative action measures in contracting as well as other areas have become more stringent. In the wake of those decisions, many state and local governments have undertaken disparity studies to document the basis and identify appropriate structures for minority business enterprise contracting programs. Earlier this year the U.S. Department of Justice issued extensive draft guidelines for affirmative action measures in federal contracting. 61 Fed. Reg. 26042 (1996). These developments may affect the legal basis and procedures for contracting by recipients of Federal awards with women- and minority-owned auditing firms.

In light of these developments, the Section recommends that the regulation read: "To the full extent permitted by law, auditees shall make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises . . . ." This language would make auditees aware that there may be legal considerations involved in their contracting procedures. In addition, the comments to the final revision might explain the reasons for the additional language, with reference to relevant legal authorities, and address the extent to which OMB Circulars A-110 and A-133 may provide legal authority for recipients of Federal awards to utilize affirmative action contracting measures.

.320(a) Report submission: The proposed revision provides for a process of data collection concerning Federal awards administered by non-Federal entities and contemplates a governmentwide database on such awards. The proposed data collection form would include information about the non-
Federal entity, its Federal awards, and audit results. As with program-specific audits, the proposed revision specifies that "unless restricted by law or regulation, the auditee shall make copies available for public inspection." The proposed revision specifically invites comments on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agencies, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden on respondents related to the collection of information, including the use of automated collection techniques or other forms of information technology.

**Comment:** The Section recognizes that information on Federal awards to non-Federal entities, particularly non-profit organizations, is widely dispersed among and within Federal agencies. The Section agrees that the proposed information collection process and database could provide a useful management tool for Federal agencies in administering Federal programs.

The Section is concerned that some of the information proposed to be included in the data collection form and database, such as audit results, is not now easily available to members of the public and that recipients of Federal awards, particularly non-profit organizations, typically view such information as a confidential matter between the recipient and the grantor agency. Recipients of Federal awards may be concerned that information on the data collection form or in the database may be more readily accessible to the public than is currently the case.

The Section recommends that the regulation read: "To the extent required by law or regulation, the auditee shall make copies of the reports submitted to the Federal clearinghouse available for public inspection." To the extent that the Federal clearinghouse or pass-through entities are required by law to make the data collection forms and information in the database publicly available, the Section recommends that the final revision and the data collection form inform recipients of that possibility.

**Subpart E -- Auditors, .500(c), .500(d), .505(b), .505(c), and .510(a):** The proposed revision is intended to clarify the auditor’s responsibility for testing and reporting on the allowability of costs charged to cost pools for indirect cost rates and cost allocation plans. Specifically, the proposed revision contemplates that the auditor will perform tests of costs charged to cost pools during the period that the actual costs were incurred, rather than during the period in which the rate was applied or in which the costs were allocated.

**Comment:** The Section generally concurs in this approach, but recommends that the final revision clarify the auditor’s responsibilities with respect to different types of indirect cost rates. The proposed approach is appropriate for predetermined indirect cost rates, where the rate is set for several years based on actual costs incurred in a base year. For other types of rates, such as a fixed indirect cost rate with a carryforward, however, actual costs in each year to which the rate applies are relevant to determining final rates. In such cases the final revision should clarify that auditors would continue to perform tests of costs charged to cost pools during each year in which the rate was applied.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Marcia G. Madsen
    David A. Churchill
    Rand L. Allen
    Lynda Troutman O'Sullivan
    Marshall J. Doke, Jr.
    Frank H. Menaker, Jr.
    John B. Miller
Proposed Revision and Recission of OMB Circulars A-133 & A-128

Alan C. Brown
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Chair and Vice Chair(s) of the Federal Assistance Committee
Alexander J. Brittin

Return to Regulatory Coordinating Committee Home Page

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