BE IT RESOLVED That the American Bar Association recommends that:

1. Any government entity designated by the President to engage in a continuing process of oversight of the rulemaking process should:
   a. issue a concise written explanation for disclosure, in the rulemaking record, whenever a proposed or final rule has been returned for reconsideration or substantive change by the oversight entity to an agency;
   b. reveal to an agency for disclosure in the rulemaking record any written communications, and a summary of any oral communications, pertaining to the substance of the proposed or final rule from members of Congress or their staffs, or from persons outside of the government, that were received by any official or staff person involved in, or to be involved in, executive oversight of the rule; and
c. regularly publish a list of all proposed or final rules for which review was concluded, or that were not returned for reconsideration or change, within ninety days after they were submitted by an agency, and the dates that the rules were submitted, and, where applicable, the dates that review was concluded, or the rules were returned for reconsideration or change.

2. An agency whose rules are subject to review by an entity described in paragraph one should identify, by the simplest method, such as by use of italics, the substantive changes between a proposed or final rule and prior drafts that were submitted for oversight review.

3. This recommendation is not applicable to the personal communications of the President or Vice-President.

4. Compliance or not with the procedures proposed in this recommendation is not intended to form the basis for judicial review.
BACKGROUND

In 1986, the Administrative Law and Regulatory Practice Section endorsed the constitutionality of executive oversight of rulemaking and recommended a set of principles to guide it. The Section has also initiated several ABA recommendations concerning procedures to facilitate the oversight process and make it more accountable. These recommendations have been addressed to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), agencies, Congress, and the White House.

The ABA has already recommended to OIRA that it should:

1. disclose its written explanation issued when it asks an agency to reconsider a regulation;

2. promptly transmit written communications received by OIRA from persons outside of the government that pertain to the substance of a proposed agency rule to the rulemaking agency for inclusion in the public file;^1

3. maintain a list identifying the time and general topic of oral communications that pertain to the substance of an agency rule under review with persons outside the government and make the list available to the rulemaking agency for inclusion in the public file;^2 and

4. complete its review of agency regulations within 60 days with possible extension of the time period to 90 days;^3

The ABA already has recommended to agencies that they should:

1. make available to the public draft proposed and final rules submitted for presidential review, and official

---

^1 Administrative Law Report No. 100 (Feb. 1986); see Peter Strauss & Cass Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Ad. L. Rev. 181 (1986).


^3 Recommendation on Executive Oversight (Feb., 1990).
written guidance from the administrator of OIRA once a notice of proposed rulemaking or final rule to which it pertains is issued; and

2. follow proposed guidelines for Federal Register publication of the results of rulemaking analyses that would clarify those results.

Finally, the ABA has recommended to the President and Congress that they exercise restraint in establishing and maintaining requirements for rulemaking analysis.

INTRODUCTION

Paragraphs la and lb of this recommendation, which concern conduit communications and issuance of written policy advice, would extend prior ABA recommendations addressed to OIRA to other oversight bodies created after the prior recommendations were adopted. The following section explains the justifications for these recommendations.

Paragraphs lc and 2 concern the timeliness of executive oversight and the disclosure to the public of prior drafts of agency rules. These recommendations seek to implement more effectively prior ABA recommendations concerning those subjects. The last section of this report explains the justifications for these recommendations.

EXTENSION OF PRIOR RECOMMENDATIONS

In the Bush administration, the responsibility of executive oversight of rulemaking has been extended by the White House to other personnel in OMB and to the Council on Competitiveness, chaired by the Vice-President. The Council has been a particularly important source of executive oversight. For example, when the Council reviewed EPA's implementation of the new Clean Air Act, it made 100 suggested changes to the agency.

4 Supra note 2.
5 Recommendation on Rulemaking Analysis (August, 1990).

2
Paragraphs 1a and 1b would apply to "executive oversight entities" defined as "any government entity designated by the President to engage in a continuing process of oversight of the rulemaking process." As paragraph 3 notes, the definition of oversight entity does not include personal communications of the President or the Vice-President. These recommendations suggest that all such executive oversight entities comply with disclosure policies promulgated by OIRA.

WRITTEN POLICY ADVICE

The ABA previously recommended that OIRA should disclose the written explanations that it issued whenever a proposed or final rule was returned by it to an agency. Paragraph 1a would extend the requirement of a public written explanation to all executive oversight entities. The ABA's previous recommendation is consistent with an Administrative Conference (ACUS) recommendation to the same effect. In 1986, OIRA adopted a procedure concerning written policy advice similar to this ABA recommendation.

The ABA's prior recommendation and this amendment of it are intended to bring a measure of accountability to the executive oversight process. Professor Glen Robinson explained the importance of such accountability when he noted that executive oversight is an important form of policy influence and direction, to be sure, but one should not suppose that, individually or collectively, these interveners, are simply representatives of the president. In fact, these executive interveners are themselves part of the administrative bureaucracy and, as such, present the same type of monitoring and control problems . . . as the agencies they seek to influence.

Professor Hal Bruff sees written policy guidance as an important element in establishing a "paper trail" of oversight activity. Speaking of OIRA's policy of issuing written policy guidance, he

---


notes that

those interested can track the written portions of OMB's activity to check its wisdom and legality. Knowing that this paper trail is being left, those within OIRA and the agencies can be expected to ensure that their interchange is within legal limits.\(^{11}\)

Publication of written policy guidance also has a disadvantage. As Professor Bruff acknowledges, "[p]resumably . . . candor suffers somewhat" when such disclosures are made.\(^{12}\)

Those concerned about the effects of disclosure on executive candor argue against it on the basis of an "unitary executive" viewpoint. They consider executive review to be an inseparable part of the process by which an agency develops a proposed or final rule. Thus, interested parties are not entitled to know anything about executive oversight because the agency's position has no official status until such oversight is complete. In support of this approach, the Justice Department has taken the position that agency logs indicating when rules are submitted for executive oversight are privileged under the FOIA,\(^{13}\) and that the Council on Competitiveness is not an "agency" for purposes of FOIA disclosure.\(^{14}\)

The unitary viewpoint, however, constitutes an understanding of the rulemaking process that does not reflect current institutional arrangements. The unitary approach does not recognize that Congress has delegated to agencies, not the President, decisionmaking authority concerning the promulgation of regulations. As long as administrators are free to ignore the President's directions (at least until they are replaced), the unitary theory does not accurately depict the institutional


\(^{12}\) Id.

\(^{13}\) See Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. 1988) (HHS justified in withholding agency logbooks that indicated when a rulemaking proposal had won the approval of OMB).

arrangements created by Congress. Nor can it be said that oversight entities are necessary speaking for the President in all of their interactions with the agencies.

Existing practices already recognize current institutional arrangements. As this report details, OIRA has procedures that reveal important aspects of the executive review process. This recommendation would simply augment these openness requirements and extend them to other oversight entities such as the Council on Competitiveness.

Given existing institutional arrangements, any proposed disclosure should be the subject of a core function test, which protects executive branch communications which relate to the core function of executive oversight. This approach is preferable because it permits public accountability where it is most needed and where it is unlikely to interfere with the President's functions. Paragraph 1a does not constitute an intrusion on the core functions of the executive oversight process, any more than the requirement that agencies issue a concise statement of basis and purpose to justify a rule constitutes a revelation of communication between an administrator and that person's subordinates.

CONDUIT CONTACTS

Paragraph 1b provides that executive oversight bodies should "reveal to an agency for disclosure in the rulemaking record any written communications, and a summary of any oral communications, pertaining to the substance of the proposed or final rule from members of Congress or their staffs, or from persons outside of the government, that were received by any official or staff person involved in, or to be involved in, executive oversight of the rule." The ABA's previous recommendation that OIRA disclose conduit communications is consistent with an Administrative Conference recommendation to the same effect. In 1986, OIRA


16 Supra note 8.
adopted procedures similar to this ABA recommendation.\textsuperscript{17}

The ABA's prior recommendation and this amendment recognize, as ACUS has stated, that the executive oversight officials "should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded conversations from outside of the government."\textsuperscript{10} Moreover, paragraph lb does not interfere with the supervisory function of executive oversight because it does not reveal any communications between an agency and the President's agents concerning rulemaking oversight. It does, however, offer an agency and the public the opportunity to consider any "views or positions of persons outside of the government" transmitted to oversight bodies such as the Council on Competitiveness, or its staff. News reports indicate that the Council has received such communications.\textsuperscript{11}

\textbf{AUGMENTATION OF PRIOR RECOMMENDATIONS}

Paragraphs la and lb extend to the Council on Competitiveness and other executive oversight bodies principles previously endorsed by the ABA. Paragraphs lc and 2 are intended to make other prior ABA recommendations more effective. The justification for these recommendations follows.

\textbf{Delayed Rules}

Observers of executive review are concerned that it may be a significant cause of "ossification" of the rulemaking process.\textsuperscript{19} The ABA recognized this concern when it recommended that OIRA complete its review of agency regulations within 60 days with

\textsuperscript{17} OMB has adopted rules that limit conduit contacts and that require information transferred to OMB is placed in the rulemaking record. Additional Procedures Concerning OIRA Reviews Under Executive Orders 12291 & 12498 [Revised], June 13, 1986, reprinted in 1988-89 REGULATORY PROGRAM OF THE UNITED STATES, app. III, 529-31.

\textsuperscript{10} Supra note 8.

\textsuperscript{11} See e.g., Duffy, Head Friends in High Places?, TIME, Nov. 4, 1991, at 25; see generally Victor, Quayle's Quiet Coup, NATIONAL JOURNAL, July 6, 1991, at 1676-80.

\textsuperscript{19} See e.g., McGarity, Ossification of the Rulemaking Process, Remarks at the Meeting of the Section of Administrative Law and Regulatory Practice (February 1, 1992).
possible extension of the time period to 90 days.\textsuperscript{21}

Paragraph ic suggests that executive oversight bodies "regularly publish a list of all proposed or final rules that were not approved for publication within ninety days after they were submitted by an agency, and the dates that the rules were submitted, and where applicable, the dates that the rules were approved." Its purpose is to permit the public to judge the extent to which executive oversight contributes to problems of delay. Anecdotal accounts of controversial rules suggest that they may be significantly delayed during the oversight process.\textsuperscript{22} Aggregate statistics currently published by OMB, however, do not reveal whether individual rules are subject to undue delay.

The cause of such delays may well be the failure of agencies to respond promptly to requests for clarification or change by executive oversight bodies. The purpose of recommendation ic, however, is not to establish blame concerning which institutions are at fault. Rather, judgments concerning executive oversight require accurate data concerning the extent of delay. Recommendation ic is an attempt to make such data public.

This requirement should not cause an undue burden on executive oversight bodies if publication is made on a regular basis such as once a year. Moreover, recommendation ic does not does not interfere with the supervisory function of executive oversight because it does not reveal any communications between an agency and the President's agents concerning rulemaking oversight.

Markup of Agency Drafts

The ABA's recommendation that agencies should make available to the public draft proposed and final rules submitted for presidential review is consistent with an ACUS recommendation to the same effect.\textsuperscript{23} Disclosure of drafts, however, does not necessarily establish an effective "paper trail" for executive oversight. Because of the complexity of many regulations, it is difficult for the public to compare any drafts with the proposed or final rule that the agency adopts. Because such comparisons, if

\textsuperscript{21} \textit{Supra} note 3.

\textsuperscript{22} \textit{See e.g.,} THOMAS MCGARTY AND SIDNEY SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (forthcoming) (OIRA review of OSHA's formaldehyde rule requires ten months without making significant changes).

\textsuperscript{23} \textit{Supra} note 8.
they can even be done, can require hours of effort, they are impractical for many persons.

Paragraph 2 suggests that an agency whose rules are subject to executive oversight review should "identify, by the simplest method, such as by use of italics, the significant changes which exist between a proposed or final rule and prior drafts that were submitted for oversight review." The recommendation would ease the burden to the public by having agencies issue a "marked up" copy of a proposed or final regulation indicating the additions and deletions that have occurred. It should not cause an undue burden on agencies because they presumably already have such an annotated version of a regulation, or could easily make one.

No Judicial Review

Paragraph 4 was added in response to concerns expressed by the White House that implementation would foster adventurous judicial review. Paragraph 4 clarifies that "[c]ompliance or not with the procedures proposed in this recommendation is not intended to form the basis for judicial review."

Respectfully submitted,

Peter Strauss
Chair, Section of Administrative Law
and Regulatory Practice

February, 1993
1. **Summary of Recommendation.**

   The resolution recommends that any entity designated by the President to engage in a continuing process of oversight of the rulemaking process: (1) should issue a written explanation for public disclosure whenever it returns to an agency a proposed or final rule for reconsideration or substantive change; (2) should reveal any written communications, and a summary of any oral communications, it receives from members of Congress or their staffs, or from persons outside of the government; and (3) should regularly publish a list of all proposed or final rules for which it did not complete review within ninety days indicating the dates on which review commenced and was concluded. The resolution also recommends that agencies should indicate by the simplest method, such as the use of italics, significant changes that exist between a proposed or final rule and drafts that were submitted for oversight review.

2. **Approval by Submitting Entity.**

   Approved at a regularly scheduled meeting of the Section Council on October 3, 1992.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   No

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   Related to Executive Oversight of Federal Agency Rulemaking and Implementation of Executive Orders (February, 1986), Publication by Agencies of Rulemaking Assessment and Other Similar Analyses (August, 1990), Implementation of Executive Orders 12,291 and 12,498 (February, 1990), Regulatory Review Procedures Used By the Office of Information and Regulatory Affairs of the Office of Management and Budget (February, 1990), and Multiplicity of Rulemaking Reporting Requirements (October 12, 1991).
5. **What urgency exists which requires action at this meeting of the House?**

Action is desirable at this meeting to allow consideration of the recommendation at the beginning of the presidential term.

6. **Status of Legislation.**

Related to S. 1942, Regulatory Review Sunshine Act of 1991 and H.R. 5702, Regulatory Sunshine Act of 1992, which were approved by the relevant Senate and House committees. No floor action was taken, however, on either bill during the 102nd Congress.

7. **Cost to the Association.**

None

8. **Disclosure of Interest.**

None

9. **Referrals.**

A copy of the Report with Recommendation was circulated to all Section and Division Chairs in November 1992.

10. **Contact Persons.** *(Prior To Meeting)*

Sidney A. Shapiro, Chair
Rulemaking Committee
University of Kansas School of Law
Green Hall
Lawrence, KS. 66045

Peter Strauss, Chair
Section on Administrative Law and Regulatory Practice
Columbia University School of Law
435 West 116th St.
New York, N.Y. 10027

11. **Contact Persons.** *(Who will present the report to the House.)*

William E. Murane
Section Delegate
Holland & Hart
555 17th Street
PO Box 8749
Denver, CO 80201

Edward J. Grenier, Jr.
Section Delegate
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404