November 14, 2013

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 1557, the “Plain Regulations Act of 2013”

Gentlemen:

On behalf of the American Bar Association (ABA), which has almost 400,000 members, I write to express our strong support for H.R. 1557, the Plain Regulations Act of 2013, which is currently before your committees. This bipartisan bill would require all federal agencies to use plain language in all new and substantially revised regulations, in accordance with guidance issued by the White House Office of Management and Budget (OMB) under the Plain Writing Act of 2010 (5 U.S.C. § 301 note). We urge you to support the bill and encourage your committees to hold hearings on the legislation in the near future.

The core objective of H.R. 1557 falls squarely within longstanding ABA policy that agencies should use plain language in writing regulations. (See ABA Resolution 103A, adopted by the ABA House of Delegates in August 1999 and its related background report, available at http://www.americanbar.org/content/dam/aba/migrated/adminlaw/plain99.authcheckdam.pdf.)

The purpose of this policy is straightforward: because regulations have the force of law, it is only just and fair that they be readily comprehensible to those who are or may be subject to the obligations they create. More broadly, in a society that prides itself on being governed by the rule of law, everyone who has an interest in some aspect of federal regulation should be able to understand it. In our view, when the federal government issues rules that clearly articulate both what is required and the expected benefits, it is most likely to achieve the goals of accountability and transparency.
The ABA has long urged federal agencies to promote understanding of legal obligations by writing plainly worded regulations, using such techniques as:

- Organizing them for the convenience of their readers;
- Using direct and easily understood language;
- Writing in short sentences, in the active voice; and
- Using helpful stylistic devices, such as question-and-answer formats, vertical lists, spacing that facilitates clarity, and tables.

The ABA is fully cognizant of the competing challenges that a federal agency faces during the rulemaking process: providing complete information while at the same time making that information as clear as possible. Ultimately, however, the topic covered and the audience sought to be addressed should control drafting issues like the order in which information should be presented.

Consistent with the ABA’s longstanding policy, H.R. 1557 would require agencies to write all new or substantially revised regulations using plain language that “is clear, concise, well-organized, minimizes cross references, and follows other best practices appropriate to the subject or field and intended audience.”

The ABA particularly endorses the bill’s reference to “minimiz[ing] cross-references,” a suggestion that the ABA’s Section of Administrative Law and Regulatory Practice offered last year in a letter supporting the bill’s predecessor, H.R. 3786. (See the Section’s December 18, 2012 letter to your committees expressing general support for H.R. 3786, available at: http://www.americanbar.org/content/dam/aba/administrative/administrative_law/hr3786_plain_regulations_act.authcheckdam.pdf.) The bill also reflects several other suggestions offered by the Section, which the ABA appreciates. Overall, the bill would promote greater understanding of regulated entities’ legal obligations, increased fairness, and better compliance.

Although the ABA supports the bill, we believe it could be further improved by adopting the following technical or clarifying amendments:

1. In Section 4(c), the bill adopts the Section’s previous proposal that either the head of the agency or a person designated by him or her be able to certify compliance on behalf of the agency. Unfortunately, the fact being certified is still “that the agency head has read the text of the proposed or final regulation. . . .” As the Section explained previously in its letter regarding H.R. 3786, this requirement “is simply unrealistic if ‘read’ is to have anything like its ordinary meaning.”

   Given the number of rules issued by agencies and the extraordinary length and complexity of many of these rules, it is simply unrealistic to expect a cabinet secretary or agency administrator to personally read every rule that his or her agency proposes and issues. If that requirement were adopted, the department or agency head would literally do nothing but read rules and would be unable to discharge his or her primary duties and
responsibilities. The Section also noted in its previous letter that the existing Plain Writing Act has no equivalent certification requirement.

For all these reasons, the ABA recommends that the certification requirement in Section 4(c) be revised to state in pertinent part that “the person certifying compliance with this Act has read the text of the proposed or final regulation and that it is in plain language.”

2. Section 2 of the bill, the purpose statement, speaks somewhat awkwardly of “the effectiveness . . . of Federal agencies to the public” and does not capture the concept of promoting public understanding. We believe it would read more clearly if it were revised to provide:

The purpose of this Act is to improve the effectiveness and accountability to the public of Federal agencies by promoting clear regulations that are easier for the Government to implement, and for the public to comply with, and understand.

In conclusion, the ABA strongly supports H.R.1557 insofar as it generally seeks to require federal agencies to write regulations using plain language but also recommends that the preceding refinements be adopted for even greater clarity and effectiveness.

Thank you for considering the ABA’s views on this important legislation. If you have any questions regarding our views, please contact Larson Frisby, the ABA’s Associate Governmental Affairs Director, at (202) 662-1098 or larson.frisby@americanbar.org, or Jamie Conrad, Chair of the Legislation Committee of the ABA Section of Administrative Law & Regulatory Practice, at (202) 822-1970 or jamie@conradcounsel.com.

Very truly yours,

Thomas M. Susman

cc: Members of the House Committee on the Judiciary Members of the House Committee on Oversight and Government Reform