November 14, 2013

The Honorable Thomas R. Carper  The Honorable Tom A. Coburn, MD
Chairman  Ranking Member
Committee on Homeland Security  Committee on Homeland Security
and Governmental Affairs  and Governmental Affairs
United States Senate  United States Senate
Washington, DC 20510  Washington, DC 20510

Re:  S. 807, the “Plain Writing Act for Regulations 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 S. 807, the Plain Writing Act for Regulations of 2013, which is currently before the Committee. This common sense bill would require all federal agencies to use plain language in all new and substantially revised regulations, in accordance with guidance to be developed by the White House Office of Management and Budget (OMB) under the bill. We urge you to support the bill and to hold a hearing on the legislation in the near future.

The core objective of S. 807 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, S. 807 would require agencies to write all new or substantially revised regulations using plain writing that is “clear, concise, and well-organized, and follows other best practices appropriate to the subject or field and intended audience.” As a result, 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. Section 5(a) requires the Director of OMB, within six months of enactment, to issue guidance on implementing the bill to ensure that the agency’s obligation to use plain writing does not diminish the agency’s ability to perform scientific or technical analysis, or to disclose scientific or technical data or any other findings, where required by law. But Section 4(b) requires agencies, within one year of enactment, to use plain writing in accordance with guidance issued by OMB under the Plain Writing Act (5 U.S.C. § 301 note), which was enacted in 2010. The ABA recommends that the bill be amended to eliminate Section 5(a)’s requirement (as does H.R. 1557, the House companion to S. 807), or alternatively, that Section 4(b) be modified to require agencies to follow the guidance issued under Section 5(a).

2. In Section 4(c), the bill requires the head of the agency to certify “that the agency head has read the proposed or final rule. . . .” 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 ABA thus recommends that the certification requirement in Section 4(c) be revised to state:

   For each proposed or final regulation issued by an agency, the head of the agency or a person designated under subsection (a)(1) shall certify to the Director that the person certifying compliance with this Act has read the proposed or final regulation and that it uses plain writing.

3. Section 3(3) of H.R. 1557 defines “plain language” to include “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 the House Judiciary and Oversight & Government Reform 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). Given the stupefying complexity of many regulatory cross-references,* and the fact that documents exist primarily as electronic files where size is essentially cost-free, there is no need to “save space” by cross-referencing other rules. We therefore urge that the corresponding definition of “plain writing” in Section 3(3) of S. 807 be similarly revised.

In conclusion, the ABA strongly supports S. 807 insofar as it generally seeks to require federal agencies to write regulations using plain writing 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 and Regulatory Practice, at (202) 822-1970 or jamie@conradcounsel.com.

Very truly yours,

Thomas M. Susman

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

*The following is an actual example from a proposed rule:

Comply with exceptions and alternatives to requirements in subpart SS as specified in § 63.2450(g) through (i), (k), (l), (m)(3), (p), and (q), except that references to emission limits in Table 1 of subpart FFFF mean the emission limits in item 2.a. of this Table, and references to reporting requirements in § 63.2520 mean Sec. 63.11501 of this subpart.

See 73 Fed. Reg. 58382 (Oct. 6, 2008). Fortunately, this language was revised in response to comments.