August 1, 2016

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC  20510

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC  20510

The Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC  20510

The Honorable Harry Reid
Minority Leader
United State Senate
Washington, DC  20510

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

The Honorable Heidi Heitkamp
Ranking Member
Subcommittee on Regulatory Affairs
and Federal Management
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC  20510

Re:  Title II of H.R. 712, the “All Economic Regulations are Transparent Act of 2016”

Dear Senate Leaders:

On behalf of the American Bar Association (ABA), I write to express our support for key aspects of Title II of H.R. 712, known as the “All Economic Regulations Are Transparent Act” (ALERT Act), which was approved by the House of Representatives on January 7, 2016, and referred to the Senate for further consideration.

The ALERT Act relates to the Unified Regulatory Agenda—a subject that is of significant interest to the ABA, our Section of Administrative Law & Regulatory Practice, and many other members of the public who are interested in and affected by federal regulation. Executive Order 12291 of February 17, 1981 first required “[e]ach agency” to publish its regulatory agenda each April and October—a requirement that was partially codified in September 1980 by the Regulatory Flexibility Act, 5 U.S.C. § 602(a). Executive Order 12866 of September 30, 1993, in turn, elaborates on these requirements by establishing what has come to be known as the Unified Regulatory Agenda. This Agenda “provides uniform reporting of data on regulatory and
deregulatory activities under development throughout the Federal Government, covering approximately 60 departments, agencies, and commissions.”

The Unified Regulatory Agenda is an integral part of the federal regulatory process. It enables regulated parties, consumers, workers, and other interested persons to understand and prepare for new rules that are planned or are under development. Indeed, the Regulatory Agenda “provides important information to agency heads, centralized reviewers, and the public at large, thereby serving the values of open government.”

In the past, the ABA Section of Administrative Law & Regulatory Practice has expressed concern when the Federal Government was not meeting its obligation to publish the semiannual Unified Regulatory Agenda in a timely manner. This past February, the ABA went further and called upon Congress to ensure that the Regulatory Agenda is updated continuously and otherwise enhanced. ABA Resolution 106B urges Congress to amend the rulemaking provisions of the Administrative Procedure Act by, among other things:

Add[ing] provisions related to the Unified Regulatory Agenda that would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda in real time to reflect concrete actions taken with respect to rules (such as initiation, issuance or withdrawal of a rule or change of contact person), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify all agenda items. All agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda. These provisions should not be subject to judicial review.

There are major reforms contained in the ALERT Act that are consistent with the key recommendations in ABA Resolution 106B, and these ABA recommendations bear directly on several (but not all) aspects of the overall bill. These proposed reforms endorsed by the ABA are also consistent with other similar reforms recently recommended by the Administrative Conference of the United States.

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1 Additional information about the Unified Agenda is available on the Office of Management and Budget’s Office of Information and Regulatory Affairs website at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp.
5 The ABA has not taken a position regarding Title I of H.R. 712, known as the “Sunshine for Regulations and Regulatory Decrees and Settlements Act.”
The ALERT Act would strengthen the Unified Regulatory Agenda in several important ways. For instance, Section 202(a) of the legislation would require the head of each agency to submit certain information to the Administrator of the Office of Information and Regulatory Affairs (OIRA) on a monthly basis, including, among other things, a summary of any rule that the agency expects to propose or finalize during that year, the objectives of and legal basis for the issuance of the rule, the stage of the rule making, and, if applicable, an approximate schedule for completing action on the rule. That section of the bill also states that after this information is provided, OIRA would be required to make such information publicly available on the Internet within 30 days.

In addition, Section 202(a) of the legislation provides that each year, OIRA would be required to publish online all the information it has received from agencies, along with certain other information such as the total number of rules proposed and finalized by each agency, and the number of agency actions that repealed a rule or reduced its scope or cost.

These and other provisions in the ALERT Act would make important statutory changes to the Unified Regulatory Agenda that are wholly consistent with the recommendations in ABA Resolution 106B. However, we offer no comment as to provisions in the legislation that are not covered by the ABA resolution.

In sum, the ABA supports these key reforms contained in the ALERT Act outlined above (and consistent with Resolution 106B) that would increase transparency in the regulatory process, improve the usefulness of the Unified Agenda, and provide benefits to the public. We thus respectfully encourage the Senate to act favorably on this important legislation as soon as possible.

We appreciate your considering the ABA’s views on this important legislation. If you have any questions regarding our position, please contact me at (202) 662-1765 or thomas.susman@americanbar.org; Larson Frisby, the ABA’s Associate Governmental Affairs Director, at (202) 662-1098 or larson.frisby@americanbar.org; or Jeffrey Rosen, Chair of the ABA Section of Administrative Law & Regulatory Practice, at (202) 879-5065 or jeffrey.rosen@kirkland.com.

Sincerely,

Thomas M. Susman

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7 See provisions in Section 202(a) of H.R. 712 that would create a new United States Code section, 5 U.S.C. § 651.
8 See provisions in Section 202(a) that would create 5 U.S.C. § 652.