The American Bar Association's Section of Administrative Law and Regulatory Practice would like to respond to the President's recent promulgation of amendments to Executive Order 12866, under the aegis of E.O. 13422, dated January 18, 2007. The order constructively addresses issues that have been of concern to our section. The ABA has long welcomed presidential oversight as an essential element of effective governmental functioning.[1] We support the extension of certain elements of the existing executive order regime to important agency guidance documents and the encouragement of informal notice and comment procedures for important guidance instruments. The notice and comment procedures have been recommended by the American Bar Association (ABA).[2] The ABA has also recommended, however, that "the President and Congress …exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[3] With this recommendation in mind, we write to address some other aspects of the executive order.

We are uncertain about OMB's intention concerning the requirement that agency heads designate regulatory policy officers who are "presidential appointees" and empower them to control rulemaking activities within the agency, subject only to case-by-case countermanding by the agency head. The executive order appears to entrust this responsibility to persons who may or may not be subject to confirmation by the Senate. We ask that OMB clarify its intentions and that it restrict the appointment of Regulatory Policy Offices to persons who are confirmed by the Senate. If the regulatory policy officers are presidential appointees not requiring senatorial confirmation and less prominently in the public eye, this accountability of action within the agency's particular responsibilities is considerably impaired.

The revised executive order requires "[e]ach agency to identify in writing the specific market failure … or other specific problem that it intends to address." The previous version of the executive order required that an "agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant agency action)…." We are uncertain what the executive order intends to accomplish by the requirement that an agency identify a "specific" market failure or other "specific" problem. We are unaware that agencies have failed previously to identify the "specific" market failure or other problem that they are addressing, but OIRA's experience may have led it to the opposite conclusion. We are concerned, however, that the requirement of "specificity" might be interpreted to require a

[1] See House of Delegates, Presidential Review of Federal Rulemaking (August, 1990) (recommendation endorsing presidential review of federal rulemaking).
[2] See House of Delegates, Rulemaking Procedures for Non-Legislative Rules (August, 1993) (recommendation endorsing public notice and comment procedures for nonlegislative rules).
[3] House of Delegates, Rulemaking Impact Analysis (February, 1992) (recommendation

more precise analysis of market failure or some other problem than Congress has required as a prerequisite for regulation. Although the revised order establishes that "[n]othing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency…", a heightened analysis requirement could unduly restrict the justifications for regulation and thus limit the justification for regulation much more than is consistent with Congress's general approach the legislation.

Finally, we are troubled by the unexplained provision of the executive order requiring agencies to coordinate with OIRA about the possible use of on-the-record rulemaking procedures in complex rulemakings. While this would of course be open to agency discretion, experience with on-the-record rulemaking led to its virtual abandonment decades ago, and for good reason. Experience has taught us that the use of formal rulemaking is cumbersome and out of all proportion to its benefits because trial-type hearings are poorly suited for determinations that turn on policy judgments.[4]

A related concern is that the executive order does not require OIRA review of "significant guidance documents" that are guidance on regulations issued by formal rulemaking. We do not understand the basis for this exception and find that it is inconsistent with the general expansion of the executive order to cover guidance documents.

We respectfully request that ORIA take into account these comments when it implements the Executive Order. In fact, we recommend that OIRA undertake public consultation concerning how the order should be implemented. We note that ORIA has engaged in just such consultation and justification regarding Bulletins involving the Information Quality Act, peer review, and risk assessment, and that public comment has led OIRA to modify its original proposals.

Thank you for your consideration of our views.

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[4] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 416 (2002) (noting "the solid evidence that the formal rulemaking procedure simply does not work").