

**AMERICAN BAR ASSOCIATION**

**SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

BE IT RESOLVED as follows with regard to rulemaking impact analyses required by statute or executive order:

1. Recognizing that rulemaking impact analysis can significantly improve the quality of agency decisionmaking by requiring agencies to analyze the effects of alternative policy proposals on potentially affected persons or entities:

a. The President and the Congress should exercise restraint in the overall number of impact analyses that are required since too many such requirements detract from the seriousness with which any requirement is taken, and could have the effect of stymieing appropriate and necessary rulemaking.

b. The President and the Congress should issue periodic reports to assess whether existing impact analysis requirements are achieving their intended purpose and benefit the public by improving the rulemaking process, and should asses whether proposed new impact analyses would meet such a test.

c. The President and Congress should ensure that agency administrators and employees receive adequate training concerning the implementation of rulemaking analyses and that agencies adhere to recommendations of the American Bar Association and the Administrative Conference of the United States (ACUS) pertaining to such impact analysis requirements, such as ACUS Recommendation 85-2, Agency Procedures for Performing Regulatory Analysis of Rules.

## REPORT

A prior ABA recommendation endorses several principles regarding executive oversight of federal agency rulemaking and the implementation of Executive Orders 12291 and 12498. <sup>1</sup> This report concludes that the American Bar Association (ABA) should adopt principles concerning executive oversight which relate to the manner in which executive oversight has been implemented since the earlier recommendation.

### **Multiplicity of Reporting Requirements**

Agencies now operate under numerous rulemaking analysis requirements. Beginning with E.O. 12,291,<sup>2</sup> which requires executive agencies to assess the benefits and costs of proposed rules, the Reagan Administration also required assessment of family, federalism, property and trade impacts. <sup>3</sup> The White House has recently added two additional reporting requirements. In November, 1990, the Office of Management and Budget (OMB) told agencies to provide “preliminary costs and benefit estimates” for regulations to be listed on the semi-annual regulatory agenda.<sup>4</sup> In March, 1991, the White House Council on Competitiveness, Chaired by the Vice-President, declared that agencies subject to E.O. 12,291 must prepare rulemaking impact analysis not only for proposed regulations, but also for “all agency policy guidance that affects the public” including strategy “statements, guidelines,

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<sup>1</sup> 1. Appendix I.

<sup>2</sup> 2. Federal Rulemaking Requirements, Exec. Order 12,291, 46 Fed. Reg. 13193 (1981), reprinted in 5 U.S.C. § 601 (1989 Supp.).

<sup>3</sup> 3. Family Policymaking Criteria and Regulation, Exec. Order 12, 606, 52 Fed. Reg. 34188 (1987), reprinted in 5. U.S.C. § 601 (1989 Suppl.); Federalism Considerations in Policy Formulation and Implementation, Exec. Order 12,612, 52 Fed. Reg. 41685 (1987), reprinted in 5. U.S.C. § 601 (1989 Supp.); Governmental Actions and Interference with Constitutionally Protected Property Rights, Exec. Order 12,630, 53 Fed. Reg. 8859, reprinted in 5. U.S.C. § 601 (1989 Supp.); E.O. 12,261, 46 Fed. Reg. 2023 (1981), reprinted in 5 U.S.C. § 601 (1989 Supp.).

<sup>4</sup> 4. Memorandum For Heads of Selected Departments and Agencies from James MacRae, Jr., Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, Nov. 29, 1990, at 1. OMB explains that in the context of a health and safety rule, an agency will have to identify the causal linkage between the hazard and the alleged health and safety risks, assess the potential human exposure, and the likely effects on humans, and balance the likely costs of correction against the health and safety benefits to be obtained. Office of Management and Budget, Bulletin No. 91-04, Nov. 26, 1990, Appendix B, at B-3.

policy manuals, grant and loan procedures, Advanced Notices of Proposed Rulemaking, press releases and other documents announcing or implementing policy that affects the public.<sup>5</sup> In addition, agencies are subject to the impact analyses requirements of the Paperwork Reduction Act,<sup>6</sup> the Regulatory Flexibility Act,<sup>7</sup> and the National Environmental Policy Act (NEPA).<sup>8</sup>

### **Cumulative Effects of Multiple Requirements**

The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. Currently, rules must be reviewed for a least six different impact statements, but a study conducted by the Office of the Federal Register during a three-month period revealed that of the 717 rules issued, none contained a “Takings” impact statement under Exec. Order No. 12630, or a “Trade” impact statement under Exec. Order No. 12261, and only three either a “Family” or “Federalism” impact statement under Exec. Orders 12616 or 12612.<sup>9</sup>

Even supporters of rulemaking review concede that some of the current required reviews are not, and should not, be taken seriously. Retention of these requirements may demean the importance of other reviews. Moreover, the existence of multiple requirements could have the effect of stymieing appropriate and necessary rulemaking.

### **Analysis of Recommendation**

The recommendation addresses the previous concerns in three ways. First, it proposes that the President and the Congress should exercise restraint in the overall number of impact analyses that are required since too many such requirements detract from the seriousness with which any requirement is taken, and could have the effect of stymieing appropriate and necessary rulemaking. Second,

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<sup>5</sup> 5. Memorandum For Heads of Executive Department and Agencies From the Vice-President, Mar. 22, 1991, at 1-2.

<sup>6</sup> 6. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 5 U.S.C. § 5315, 20 U.S.C. §§ 1221-1223, 30 U.S.C. § 1211, 42 U.S.C. § 292h., and scattered sections of 44 U.S.C.).

<sup>7</sup> 7. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

<sup>8</sup> 8. Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as amended in scattered sections of 42 U.S.C.).

<sup>9</sup> 9. Appendix II.

the recommendation proposes that the President and the Congress should issue periodic reports to assess whether existing impact analysis requirements are achieving their intended purpose and benefit the public by improving the rulemaking process, and should assess whether proposed new impact analyses would meet such a test. This proposal provides a method by which the value of rulemaking analysis requirements can be periodically assessed.

Finally, the recommendation proposes that the President and Congress should ensure that agency administrators and employees receive adequate training concerning the implementation of rulemaking impact analyses and that agencies adhere to recommendations of the American Bar Association and the Administrative Conference of the United States (ACUS) pertaining to such impact analysis requirements. The American Bar Association has endorsed specific principles concerning the:

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).

The Administration Conference has endorsed specific principles concerning the:

Agency procedures for performing regulatory analysis of rules (Recommendation 85-2); and

Presidential review of agency rulemaking (Recommendation 88-9).

Respectfully Submitted,

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