October 24, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

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

Re: H.R. 3010, the Regulatory Accountability Act of 2011.

For inclusion into the record of the Committee's hearing, to be held on Tuesday, October 25, 2011.

Dear Mr. Chairmen and Members of the Committee:

We, the undersigned 42 teachers and practitioners in the field of administrative law, regulation, and public administration, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011—a proposed revision of the Administrative Procedure Act's informal rulemaking provisions. We strenuously urge your rejection of this proposal.

The bill would substitute for the current APA Section 553 a new version that is approximately ten times longer. It would add over 60 new procedural and analytical requirements to the agency rulemaking process—many of which would apply to all non-exempt rulemaking, however ordinary and however far removed from the major health, environmental and safety regulations that we sense animate current concerns. Most of these requirements apply in repeated fashion—during enlarged obligations of advance notice of rulemaking, at the rule proposal stage, and at the stage of final adoption. The bill greatly extends the time periods necessary to complete lawful consideration of a proposed rule. It introduces formalities inviting obstructionist tactics that agencies would be unable to defend against, tactics available to regulated entities and "public interest" participants alike. It also changes long-standing judicial review doctrines applicable to the review of agency rules.

We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted. Instead it would likely lead to rulemaking avoidance by agencies—increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount the additional hurdles presented by the new Section 553. Executive officials would find it practically impossible to use rulemaking either to create new regulations or to undo old regulations.

We therefore oppose the bill in its current form and, more importantly, oppose its basic approach. While we share many of the views expressed in the comprehensive comments of the ABA Section on Administrative Law and Regulatory Practice, we wish here to emphasize our conviction that the positive aspects of the bill identified by the Section are greatly outweighed by the damage this bill would cause to administrative agencies and the public welfare they promote if it were enacted.

The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life. For that reason, it has been rarely, and only in a minor way, amended in all

those years. Its provisions for "notice-and-comment rulemaking," in particular, have proved a foundational part of our Administrative Law and of our modern democracy—a government technique that we are justly proud of and that we proselytize about around the world. Uncoordinated procedural and analytical requirements added by Congress, presidents, and the courts over the past few decades, although meritorious in many instances, have already made it more complex, costly and slow ("ossified") in the major rulemakings to which they generally apply. It has been widely noticed that the sheer weight of their combination has not only become an increasing drag on the process, but also has led agencies to substitute other less participatory procedures, such as adjudication, guidance instruments or interim-final rules, for ordinary rulemaking. H.R. 3010 would enormously exacerbate this problem. More than an amendment, it would make ordinary rulemaking so expensive and cumbersome as, essentially, to bring it to a halt.

Therefore, rather than try to add to the ABA Section's exhaustive analysis of the bill, we highlight and re-emphasize key objections to the bill that the Section has identified. We find them highly persuasive.

- For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress to rationalize them with attention to their costs, benefits, and likely impact on agency procedural choices. *This bill goes in the exact opposite direction*, adding complex and duplicative new requirements for essentially all notice-and-comment rulemaking, that will discourage any use of the process.

- Collectively, the procedural and analytical requirements added by this bill would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders (including businesses large and small) less able to plan effectively for the future. Not only new regulations, but amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Enforcement of these requirements on judicial review is available to regulatory proponents and regulatory opponents alike, adding to the burden of defensive lawyering agencies must carry. Thus, both affirmative regulation and deregulation may be impeded.

- A similar approach involving the intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences, as reported in Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285-87 (1999). The California experience suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

- Although the Section has been generally supportive of cost-benefit analysis, the bill's proposal to add a government-wide edict to the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that the bill's codification omits certain qualifying language that the

presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable.

- We can see no justification for the bill's inflexible mandate that would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs.

- The bill's proposed minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule, is too long.

- The bill's conferral of broad rights upon private persons to force an agency to use so-called "formal rulemaking" runs directly contrary to the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete.

- The bill's attempts to address the reform of the hastily enacted Information Quality Act through amendment of the APA is misdirected.

- The bill's flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources, and will likely lead to cursory reviews.

- The bill's repeal of the good cause exemption for when notice and comment is "unnecessary" is a mistake because agencies make frequent use of this exemption, almost always without any controversy whatever.

- The bill's provision that would deny any judicial deference to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination is unwarranted, falls well outside the range of doctrines that can find support in the case law and would also result in substantial burdens for the courts themselves.

For these reasons, we are united in opposing this proposal.

[Please note that the names are in alphabetical order and the affiliations are given for identification purposes only.]

Respectfully submitted,

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