

# NOTICE & COMMENT



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## New ABA Administrative Law Section Resolution on Improving the APA

by [Connor N. Raso](#) — Saturday, Dec. 19, 2015



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The [ABA's Section of Administrative Law and Regulatory Practice](#) recently approved a report and resolution on improving the APA's rulemaking provisions. The Section believes that while the basic chassis of the APA has been shown to be fundamentally sound, a variety of updates deserve serious consideration.

The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive orders and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

The resolution urges Congress to amend the APA to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for "major" rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require agencies to seek post-promulgation comments on some rules issued without notice and comment. The resolution also encourages agencies to experiment with "reply comment" processes.

In case you're interested in more, here's the full resolution:

1. Codify the requirement that an agency fully disclose data, studies, and other information upon which it proposes to rely in connection with a rulemaking, including factual material that is critical to the rule that becomes available to the agency after the comment period has closed and on which the agency proposes to rely;
2. Provide for the systematic development by the agency in each rulemaking of a rulemaking record as a basis for agency factual determinations and a record for judicial review. The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period. The record should be accessible to the public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted, or sensitive material;
3. Establish a minimum comment period of 60 days for "major" rules as defined by the Congressional Review Act, subject to an exemption for good cause;
4. Clarify the definition of "rule" by deleting the phrases "or particular" and "and future effect"; update the term "interpretative rules" to "interpretive rules"; and substitute "rulemaking" for "rule making" throughout the Act;
5. Authorize a new presidential administration to (i) delay the effective date of rules finalized but not yet effective at the end of the prior administration while the new administration examines the merits of those rules, and (ii) allow the public to be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed;
6. Promote retrospective review by requiring agencies:
  - a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time;
  - b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal;
7. Add 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;
8. Repeal the exemptions from the notice-and-comment process for "public . . . loans, grants [and] benefits" and narrow the exemptions for "public property [and] contracts" and for "military or foreign affairs functions"; and
9. Require that when an agency promulgates a final rule without notice-and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii)

set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:

- a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;
- b. The adequacy of the agency's compliance with the foregoing obligation would not subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and
- c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.

FURTHER RESOLVED, That the American Bar Association recommends that federal agencies experiment with reply comment processes in rulemaking, such as by (a) providing in advance for a specific period for reply comments; (b) re-opening the comment period for the purpose of soliciting reply comments; or (c) permitting a reply only from a commenter who demonstrates a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period.

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