



Center for Regulatory Effectiveness

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June 28, 2002

Submitted via Fax (202) 395-7245

Mr. Jefferson B. Hill
Chief, Commerce & Land Branch
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
725-17th Street, NW, Rm 3208
Washington, D.C. 20503

RE: CRE Comments on Proposed OMB Data Quality Guidelines

Dear Mr. Hill:

I am writing on behalf of the Center for Regulatory Effectiveness (CRE) to share with you the Center's comments on OMB's recently proposed Data Quality guidelines. These proposed guidelines were published for public comment pursuant to the Data Quality Act amendments to the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3516 historical and statutory notes. CRE's comments on OMB's proposed guidelines include and incorporate by reference the following attachment documents.

CRE GENERAL COMMENTS TO ALL FEDERAL AGENCIES RELATED TO DATA QUALITY GUIDELINES

Attached as Exhibit A is a paper that outlines a number of cross-cutting issues related to Data Quality guidelines which are applicable to all agencies and which contains CRE's recommendations on how such issues should be addressed. In the paper, which is incorporated by reference into CRE's comments on OMB's proposed guidelines, CRE identifies and evaluates a number of agency approaches to these cross-cutting issues. Such examples include positive agency proposals that might be emulated, as well as problematic agency proposals which should be avoided. CRE strongly believes that proper action on these key issues will help ensure that the guidelines issued by all agencies are

workable, effective, and in keeping with the requirements of the statute.

LEGAL MEMORANDUM ON THE DATA QUALITY ACT'S APPLICABILITY TO ALL INFORMATION THAT AN AGENCY HAS MADE PUBLIC

Attached as Exhibit B is a legal memorandum which summarizes an inquiry by Multinational Legal Services, Inc. into the Data Quality Act's applicability. This MLS memorandum, which is incorporated by reference into CRE's comments on OMB's proposed guidelines, concludes:

- Based on the PRA's Information Dissemination provisions, including the Data Quality Act, and the relevant legislative history, Congress intended the Data Quality Act standards to apply to all information that federal agencies in fact make publicly available.
- Thus, neither OMB nor any other federal agency has discretion to violate this legislative intent by exempting categories of information from the standards established under Data quality Act amendments to the PRA.

OMB and most other agencies have violated congressional intent by creating numerous exemptions from the guidelines' applicability. Most if not all of these exemptions arise from the definitions of "dissemination" and "information" in the OMB and other agency Data Quality guidelines. These definitions are much narrower than OMB's longstanding definitions of "dissemination" and "information" in Circular A-130.

For purposes of Data Quality standard applicability, OMB and the other federal agencies should adopt and apply the Circular A-130 definitions of "dissemination" and "information." Like the Data Quality Act, Circular A-130 implements the Information Dissemination provisions of the PRA. The Circular A-130 definitions are consistent with congressional intent regarding the PRA's Information Dissemination provisions, including the Data Quality Act amendments. OMB itself acknowledged that Congress essentially codified Circular A-130 when it enacted most of the PRA Information Dissemination provisions in 1995. *Memorandum for Heads of Executive Departments and Agencies*, Alice Rivlin, OMB Director (M-95-22, September 29, 1995). The A-130 definitions are also similar to those OMB originally proposed to use for Data Quality guidelines. 66 FR 34489, 34492-93 (June 28, 2001).

ABA COMMENTS ON EPA'S PROPOSED DATA QUALITY GUIDELINES

Attached as Exhibit C are comments filed by the American Bar Association's Section on Administrative Law and Regulatory Practice on EPA's proposed Data Quality guidelines. These ABA comments express concern over EPA's many proposed exemptions from its guidelines. Some of the

proposed EPA exemptions stem from OMB's February 22nd interagency guidelines. These ABA comments are incorporated by reference into CRE's comments on OMB's proposed guidelines.

Attached as Exhibit D are supplemental CRE Comments on OMB's proposed OMB Data quality guidelines that were prepared by CRE's Western Representative, William G. Kelly.

OMB-SPECIFIC COMMENTS

In addition to the four attached documents, CRE offers the following comments on OMB's proposed Data Quality guidelines

SPECIFIC EXEMPTIONS

OMB's proposed guidelines exempt most information made public by OMB from the Data Quality Act. The Legal Memorandum attached as Exhibit B explains that neither OMB nor any other agency has discretion to exempt any public information from the Data Quality guidelines. In addition to this general comment on OMB's proposed guidelines, CRE wishes to address four specific proposed exemptions.

Adjudicative Processes

At page 8, OMB's proposed guidelines exempt from the guidelines

Responses to subpoenae or compulsory document productions; or documents prepared and released in the context of adjudicative processes. These guidelines do not impose any additional requirements on agencies during adjudicative proceedings and do not provide parties to such adjudicative proceedings any additional rights of challenge or appeal.

The term "adjudicative processes" is not defined in either in either OMB's own proposed guidelines or in OMB's government-wide guidelines.

If OMB or any other agency had discretion to create any Data Quality exemption for "adjudicative processes," then that exemption would have to be limited to judicial or administrative processes that are truly "adjudicative." These processes would be: (1) actual federal, state or local courts, and (2) administrative proceedings subject to 5 U.S.C. § 554 (APA provision applicable to federal agency "Adjudications").

Moreover, the exemption would be limited to information that was prepared and disseminated only for purposes of those proceedings. Otherwise, an agency could use the judicial or administrative

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adjudicative process to exempt information that was prepared and disseminated for non-adjudicative purposes: *e.g.*, rulemaking records.

The ABA expressed similar concerns about EPA's proposed adjudicative processes exemption at page 2 of their attached comments. CRE also suggests that OMB review the Supreme Court's recent decision in *FMC v. South Carolina Ports Authority*, 122 S. Ct. 1864, 1872-74 (2002), which contains a detailed explanation of the procedures and rights characterizing administrative adjudicative processes. It is these procedures and rights that make administrative adjudicatory processes analogous to judicial processes.

Statements that May Be the Subject of Litigation

OMB's proposed guidelines state at page 9 that the administrative petition process and other Data Quality guidelines do not apply to "statements which are, or which reasonably may be expected to become, the subject of litigation, whether before a U.S. or foreign court or in an international arbitral or other dispute resolution proceeding." The term "statement" is not defined.

This exemption is not even limited to adjudicative processes. It is so broad and vague that it could be interpreted as excluding almost all OMB-disseminated information from the Data Quality guidelines. Almost anything OMB says or does could be the subject of litigation. OMB's own Data Quality guidelines should not contain an exemption that single handedly could eliminate the statutory requirements that OMB must implement and administer.

Information First Disseminated Before October 1, 2002, But Which Continues to Be Disseminated After that Date

At page 7, OMB's proposed guidelines state that the administrative correction procedures "apply to information disseminated by OMB after October 1, 2002." This statement is inconsistent with OMB's government-wide guidelines, which state that these correction procedures "shall apply to information that the agency disseminates on or after October 1, 2002, regardless of when the agency first disseminated the information." 67 FR 8452, 8459 (Feb. 22, 2002).

OMB's government-wide guidelines correctly apply the administrative correction process and the other Data Quality requirements to information that an agency continues to make publicly available after October 1, 2002, regardless of when it was first made available. There is no other rational way to interpret OMB's government-wide guideline on this issue.

All federal agencies subject to the Paperwork Reduction Act, including OMB itself, must comply with the applicability date established by OMB's government-wide guidelines. 44 U.S.C. §§

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3504(d)(1); 3506 (a)(1)(B); 3516 statutory and historical notes. Any change in these government-wide applicability dates would have to occur through a new public notice and comment process on OMB's government-wide guidelines.

Any change in these government-wide applicability dates would violate the Data Quality Act amendments to the PRA. Section (b)(2)(B) of the statute requires agencies subject to the PRA to “establish administrative mechanisms allowing affected persons to seek and obtain correction of information *maintained and disseminated* by the agency that does not comply with” OMB's government-wide Data Quality guidelines. 44 U.S.C. § 3516 statutory and historical notes (emphasis added). The dictionary defines “maintain” to mean “To continue; carry on.....” *The American Heritage Dictionary*, Second College Edition (Houghton Mifflin 1985). In other words, the statute requires that administrative correction process and other data Quality requirements apply to all information that covered agencies continue to make public, regardless of when the information was first made public.

If there were any exceptions to the government-wide application-date rule, then truly archival records would be one of them. OMB in its government-wide guidelines defined the term “dissemination” to exclude “archival records.” 67 FR 8452, 8460 (Feb. 22, 2002). OMB did not expressly define the term “archival records.” However, OMB discussed its intent regarding this exemption in its final guidelines published on September 28, 2001:

These guidelines require agencies to establish administrative mechanisms allowing affected persons to seek and obtain, where appropriate, correction of information maintained and disseminated by the agency that does not comply with the OMB guidelines. Many comments suggested that limits be imposed on the types of information that should be subject to these guidelines, in particular, information that is disseminated by agency libraries. *OMB agrees that archival information disseminated by federal agency libraries (for example, Internet distribution of published articles) should not be covered by these guidelines, given that libraries do not endorse the information they disseminate.* Moreover, an agency's dissemination of public filings (for example, corporate filings with the Securities and Exchange Commission) is not covered by these guidelines. *In each of these situations, the agencies have not authored these documents and have not adopted them as representing the agencies' views. By disseminating these materials, the agencies are simply ensuring that the public can have quicker and easier access to materials that are publicly available.*

66 FR 49718, 49720 (Sept. 28, 2001)(emphasis added).

In other words, OMB intended the archival records exemption from Data Quality guidelines to be limited to information that is already publicly available and which agencies have not authored, endorsed or used. Assuming that OMB has discretion to create any exemption from the Data Quality

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applicability date, then there would be no policy or factual basis for any exemption broader than this narrow archival record exemption.

OMB should appreciate and act on any correction petition at any time that demonstrates that information being made publicly available by OMB does not meet Data Quality standards. There is and can be no basis or justification for continuing to make public information that does not meet these standards.

Refusal to Correct Information

At page 6, OMB's proposed guidelines state that OMB does not always have to correct information which was disseminated in violation of the Data Quality guidelines, and which is the subject of an administrative correction petition:

When considering covered requests to determine whether a corrective action is appropriate, the reviewing Division may consider ...the following factors:

- (a) The significance of the information involved and
- (b) The nature and extent of the request and the public benefit of making the requested correction.

The Data Quality Act amendments to the PRA state that agencies shall "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the [Data Quality] guidelines...." The exemptions quoted above would deny affected persons the right "to seek and obtain correction" of information that violates the Data Quality guidelines. Consequently, like the other exemptions proposed by OMB, they violate the statute.

The ABA explained at page 2 of its comments on EPA's proposed Data Quality guidelines:

Why would a prudent federal agency not correct a false statement on its website? If the words "seek and obtain correction" in the statute mean that the affected person can obtain correction, how can the agency say it cannot be obtained, once the data is shown to be wrong or misleading?

INTERAGENCY COMMITTEES

CRE also asks OMB to address an issue that, to the best of CRE's knowledge, has not been

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addressed: how do the new Data Quality standards apply to information disseminated by interagency committees?

There are many examples of committees comprised of representatives from different agencies subject to the PRA: *e.g.*, Interagency Risk Assessment Consortium; United States Global Change Research Program; and the Human Subjects Research Subcommittee. Many of these interagency subcommittees disseminate information subject to the PRA's Data Quality requirements. The question is which agency guidelines apply? CRE agrees that this is a difficult issue, but the Center suggests the following resolution of it.

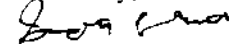
Any information disseminated by a multi-agency committee should have to comply with all Data Quality guidelines for all agencies on the committee. An administrative petition should be filed with the chairperson(s) of the committee at the time the petition is filed.

GPRA PERFORMANCE GOALS

Finally, CRE believes that in light of the ongoing importance of the Data Quality issue, all federal agencies should adopt Data Quality as a Performance Goal in its Performance Plan under the Government Performance and Results Act. Not only would this assist the agency in regularly monitoring and improving its information quality activities, but it would also serve to increase the transparency of the agency process for Congress and the interested public.

CRE would be happy to answer any questions you might have related to its comments and supporting materials. Please contact us at (202) 265-2383, if we may be of further assistance.

Sincerely,



Scott Slaughter

Chief Counsel

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Attachments