Biting The Data Quality Bullet: Burdens On Federal Data Managers Under New Section 515

*By Jim O'Reilly**

The weather forecast for Oct. 1, 2002 is gloomy and overcast in Washington, at least inside the offices of managers who have charge of their agencies' information processing functions. Under guidance from OMB implementing agencies must be ready Oct. 1 to respond to public petitions for the correction of agency data that lacks "quality, objectivity, utility [or] integrity." Petitions are very likely to be used to request substantive alteration of the underlying data, a prospect that rings alarms at controversial federal agencies. If judicial review of petitions is allowed, as many expect, new forms of collateral attack on agency decisions may result in 2003 and beyond.

At the Section's Spring Meeting in Richmond on April 19, a panel of experts hosted by the Government Information & Privacy Committee explored the alternative prospects for "data quality" challenges. Dr. Jim Tozzi, former Deputy Administrator of OMB's Office of Information & Regulatory Affairs (OIRA) and now a Washington consultant, authored the original drafts in 1999, and in 2000 found a welcoming sponsor in House Appropriations member Rep. Joanne Emerson. Though critics like OMB Watch offered their alternative terms, the Tozzi proposal was adopted as Section 515 of Public Law 106-554 and the "data quality" process becomes mandatory for all agencies on Oct. 1, 2002.

Tozzi energetically defended section 515 against its critics. Data quality is the expected norm of agency behavior, not an abstract ideal; all agencies' data sets that are maintained or disseminated should already be meeting norms of "quality, objectivity, utility and integrity." How that compliance with norms is to be accomplished in specific sets of data – ranging from pure scientific results to opinions, forecasts and projections of the economic or health futures – will be the subject of individual agency rules in summer 2002. Tozzi urged participation and public input to the agency rules and guidances.

Mark Greenwood of Washington's Ropes & Gray expects the district courts to review agency denials of a 515 petition for data correction. Tozzi and Greenwood told the crowded meeting room that Section 515 provides "law to apply" to agency denials of petitions, provides a process that reaches a final agency decision, and has a clear definition of "dissemination," facilitating judicial review of 515 petition denials. Greenwood observed that if an agency study is issued and has some independent effect, then a challenger's petition for correction of the study conclusion or data will be taken to judicial review.

Greenwood cautioned the audience to differentiate section 515's judicial review issue from the agency internal processing of petitions. Although the process of petition review will be comparable to existing reviews under the Paperwork Reduction Act, where OIRA can overrule an agency, the new section 515 is not an amendment of the PRA, so its mechanisms are not inhibited by the PRA's ban on judicial review of decisions to approve collections of information. Rather, the 515 mechanisms are like those of the normal APA adjudication of petitioners' claims about an agency decision, evoking the 1979 *Chrysler v. Brown* issues on the roughly parallel set of "reverse-Freedom of Information Act" disputes.

Insights into the new data quality norms were also offered by Greenwood. Science policy will be affected because OIRA's leadership will force agencies to make choices within models, assumptions, etc. that pay closer attention to the incoming data's scientific adequacy. Agency default assumptions that are built into a model can now be changed by petition from the persons affected, if the assumptions can be shown to lack "quality" or

continued on page 20

* Professor of Law, University of Cincinnati Law School; Chair, Committee onGovernment Information & Privacy.

ADMINISTRATIVE & REGULATORY LAW NEWS

(ISSN 0567-9494)
Published by the ABA Section of Administrative Law and Regulatory Practice, 740 15th Street, NW, Washington, DC 20005-1002. *Editor in Chief*: William Funk, Lewis & Clark Law School, Portland, OR 97219, (503) 768-6606; FAX (503) 768-6671; e-mail: funk@lclark.edu. *Associate Editor for Section News*: William S. Morrow, Jr., e-mail:wmatc@erols.com. *Associate Editor for News from the States*: Michael Asimow, e-mail: asimow@law.ucla.edu. Staff Director: Leanne Pfautz, ABA, 740 15th Street, NW, Washington, DC 20005-1002, (202) 662-1665; FAX: (202) 662-1529; e-mail: pfautzl@staff.abanet.org.
The views expressed in the *Administrative & Regulatory Law News* are not necessarily those of the Section of Administrative Law and Regulatory Practice, the American Bar Association, or the Editors.

Biting The Data Quality Bullet

continued from page 2

"objectivity" under the 515 criteria. If the agency declines to alter the model and is sued, Greenwood expects courts to allow suits where the error is not simply a mathematical measurement, but is a "characterization" such as "Acme is the worst polluter in Maine." Greenwood foresees much more frequent centralization of the adverse "characterization" decisions and more staff requests for agency counsel assistance before technical reports on controversial issues are disseminated. Agencies must now do what the private sector has routinely done with consumer research — the agency must consider how a set of data will be utilized once placed on the agency's website or published in a report. The data's use may increase likelihood of 515 challenges.

Dr. Gary Bass of OMB Watch saw "common sense turned amuck" and cautioned that 515 could be misused in the rulemaking process by opponents of the substance of an agency rule. His group is less concerned about routine error correction than about the use of disruptive tactics of judicial review outside of normal review of a final agency regulation. The OMB guidance to agencies cited the Safe Drinking Water Act risk assessment norms and said agencies could "adopt or adapt" them; most agencies will "adapt" to give themselves more flexibility. Bass believes that judicial review of denial of an administrative appeal should not be routinely available except as part of the overall review of a rulemaking.

Bass offered specific critiques of the guidance issued to agencies by OIRA: Section 515 had focused on data dissemination, but OIRA's guidance expanded its mechanisms to data use and not just to dissemination. The guidance urged agencies to use the Safe Drinking Water Act risk assessment norms that are unacceptable to OMB Watch; the group believes agencies like OSHA should use the best evidence that is available. OMB Watch is concerned that the analysis of scientific data will be done in an arbitrary manner. OIRA called for peer review, but there are undisclosed conflicts of interest in many agency peer review programs. Data quality is only one factor in decision making; health and safety decisions should be aided by precautionary principles. And more attention to public involvement is needed; OMB should have told agencies to err on the side of disclosure where any doubt exists.

Once the data is disseminated, what remedies exist for damages caused? The petition route for correction is less helpful when a false or misleading dissemination damages the affected private person. Senior Judge Loren Smith of the Court of Federal Claims reviewed the jurisprudence of his court and explained how rare the remedial opportunities have been. Congressional private bills referred to his court are the rare exception; most remedies fail under the Federal Tort Claims Act's intentional tort exclusion or the Tucker Act's requirements.

Agency regulations and guidance will appear in the Federal Register this summer. Jim Tozzi invited attendees to keep track of agency proposals at www.thecre.com. The Section Council will be working with the Government Information & Privacy Committee to make appropriate comments in response to the agency proposals. ◆

Council Capsules

continued from page 5

"produce consensus on Federal policy issues through collaborative processes open to key stakeholders."

After some discussion, Chair Gray asked council member Cooney to draft a letter to the Dispute Resolution Section outlining the Section's concerns and declining the request to co-sponsor. Those concerns include a lack of evidence that such an organization is needed at the federal level, an absence of provision for council members' disclosure of conflicts of interest, and erosion of the public/private distinction.

Multijurisdictional Practice – Part II

As reported in the previous installment of Council Capsules, the council approved sending a letter to the Commission on Multijurisdictional Practice that would communicate the Section's concern with regard to two of the safe harbors (provisions permitting the practice of law in a non-licensing jurisdiction) proposed in the Commission's interim report dated November 30, 2001. (*See Council Capsules, Multijurisdictional Practice*, ADMINISTRATIVE & REGULATORY LAW NEWS, Vol. 27, No. 3, Spring 2002).

Proposed Model Rule 5.5(c)(5), which would have allowed transactional representation, counseling and other non-litigation work in a non- licensing jurisdiction on a temporary basis, and proposed Model Rule 5.5(c)(6), which would have allowed lawyers to provide temporary services in a non-licensing jurisdiction involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer's home state, were perceived by some in the Section to not adequately address the needs of telecommunications and energy practitioners, whose practices transcend state lines and involve transactions that are subject to both federal and multi-state jurisdiction, involve ongoing negotiations, and are not dominated by federal law or