



# Center for Regulatory Effectiveness

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May 31, 2002

Mrs. Theresa M. O'Malley  
Executive Officer  
Information Technology Center  
U.S. Department of Labor  
Room N-1301  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the U.S. Department of Labor

Dear Mrs. O'Malley:

The Center for Regulatory Effectiveness (CRE) is pleased to provide you with our Comments on the Department of Labor's proposed information quality guidelines, issued pursuant to the Data Quality Act (44 U.S.C. § 3516, note). The Center had a leading role in passage of the Act and maintains a strong ongoing interest in this important issue. Please see our website, [www.theCRE.com](http://www.theCRE.com) for more information about CRE. CRE will provide additional comments on the draft OSHA and MSHA risk analysis guideline details at a future date.

Given the deference the public pays to governmental information and the significant role such information plays in regulation and public and private resource allocation decisions, the quality of the federal government's information is a matter of crucial importance to everyone who uses that information. Consequently, CRE appreciates this opportunity to provide its views and recommendations to the Department of Labor in order to help DOL achieve congressional intent in implementing this new "Good Government" law.

To assist the agency in meeting its obligations under the Data Quality Act and OMB's guidelines, CRE has prepared and enclosed the following attachments:

(1) **CRE General Comments to All Federal Agencies Related to Data Quality Guidelines**

- The above referenced paper, Attachment 1, which is an integral part of our comments to the Department on DOL's proposed Data Quality guidelines, outlines a number of cross-cutting issues related to Data Quality guidelines which are applicable to all agencies and contains CRE's recommendations on how such issues should be addressed.
  - CRE strongly believes that proper action on these key issues will help ensure that the guidelines issued by the agency are workable, effective, and in keeping with the requirements of both the statute and the government-wide standards set by OMB.
- In the paper, CRE identifies and evaluates a number of agency approaches to these cross-cutting issues. Such examples include positive agency proposals which might be emulated, as well as problematic agency proposals which should be avoided.

(2) **Legal Memorandum on the Data Quality Act's Applicability to All Public Information**

- A number of agencies, including DOL, in their proposed guidelines have exempted certain categories of public information from the Data Quality Act's standards. Consequently, CRE retained Multinational Legal Services (MLS) to examine this important issue. Attached is a legal memorandum which summarizes the MLS inquiry into the Data Quality Act's applicability to all public information. The MLS memorandum, Attachment 2, is also an integral part of CRE's comments to the FTC. In short, MLS found:
  - Analysis of the Data Quality Act, the Public Information provisions of the Paperwork Reduction Act, and legislative history demonstrate that Congress intended Data Quality Act standards to apply to all public information.
  - Thus, neither OMB nor any other federal agency has discretion to violate this legislative intent by exempting categories of information from the standards set forth pursuant to the Data Quality Act.

(3) **CRE Comments on Specific Provisions of the Department of Labor's Proposed Data Quality Guidelines**

(A) **Retroactive Application of the Data Quality Guidelines**

Every agency's Data Quality guidelines will become effective on October 1, 2002 and apply to information being disseminated on or after October 1, regardless of when the information was first disseminated. This retroactivity principle is explicitly enunciated in OMB's February 22, 2002 guidelines, III.4. All agency guidelines are

required to comply with the requirements for those guidelines set forth by OMB in their February 22<sup>nd</sup> government-wide Final Guidelines.

**DOL Draft Guidelines.** The DOL's draft guidelines state that they "apply to information disseminated by the Department on or after October 1, 2002."

**Concern:** Although DOL's statement is correct, it does not clearly indicate the important point that information being disseminated on or after October 1<sup>st</sup> is covered regardless of when the information was first disseminated.

**CRE Recommendation:** Adopt the following language: "These guidelines will cover information disseminated on or after October 1, 2002, regardless of when the information was first disseminated."

**(B) Inclusion of Rulemaking Information in the Data Quality Act Petition Process**

Information in rulemaking records, both completed and ongoing, comprises much of the information disseminated by federal agencies. Neither the Data Quality Act itself, nor OMB's February 22<sup>nd</sup> agency-wide guidelines, exclude rulemaking records from coverage under the Data Quality Act.

**DOL Draft Guidelines.** DOL's proposed guidelines state, "Concerns regarding information in a rulemaking must be presented in the rulemaking in accordance with the rulemaking's procedures."

**Concern:** The process proposed by DOL does not meet the requirements set by OMB's guidelines. OMB's guidelines request agencies to, where possible, incorporate Data Quality standards and procedures into their existing processes. However, OMB's request means that existing procedures need to be modified so that they include the standards and requirements of the Data Quality Guidelines. By simply directing that any data quality concerns be about the information in a rulemaking be addressed through the rulemaking without modifying those procedures for Data Quality needs, DOL would not be adhering to OMB's requirements. Specifically:

- (1) OMB's guidelines require a "timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines." Since some DOL dockets remain open for years without final resolution, erroneous information could remain uncorrected for extended periods unless DOL revises its rulemaking procedures to require a timely response to Data Quality concerns regarding information, though not policy issues, in the rulemaking.

- (2) Rulemakings may remain open long after the comment period has closed. Thus, unless DOL modifies the rulemaking process, all currently open dockets where the comment period has closed would be inappropriately exempted from the Data Quality guidelines. Similarly, DOL needs to make sure that all rulemaking are subject to the Data Quality guidelines, even after closure of the comment period, when new or otherwise relevant information becomes available.
- (3) The OMB guidelines also require an administrative appeal process for Data Quality petitions. DOL's proposed guidelines regarding rulemakings does not appear to allow such a right of administrative appeal.
- (4) The Data Quality guidelines and petition process apply to all information disseminated on or after October 1, 2002, regardless of when it was first disseminated. Thus, the guidelines and petition process apply to completed, as well as ongoing rulemakings.

**CRE Recommendation:** Modify the Department's Data Quality guidelines to ensure that information in past, currently open and future rulemakings is not excluded from the requirements of the Data Quality Act. In covering information in rulemakings, the guidelines should include the requirement for a prompt response to requests for correction of disseminated information. Since any potentially valid information correction requests during a rulemaking would deal only with information quality issues, not policy, the requests need to be dealt with according to the Data Quality requirements set by Congress and OMB. It should be noted that OMB's guidelines specifically discuss information underlying proposed rules as constituting a dissemination of information.

(C) **Mandatory Application of Data Quality Guidelines**

OMB's interagency Data Quality guidelines implement section 3504(d)(1) of the PRA. 44 U.S.C. § 3516 note. Section 3504(d)(1) requires that "with respect to information dissemination, the [OMB] director shall develop and oversee the implementation of policies, principles, standards, and guidelines to apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated..." 44 U.S.C. § 3504(d)(1). All federal agencies subject to the PRA must comply with OMB's interagency Data Quality guidelines when they issue their own Data Quality guidelines. 44 U.S.C. §§ 3504(d)(1); 3506(a)(1)(B); 3516 note. The MLS Legal Memorandum accompanying these Comments explains that Congress clearly intended OMB's Data Quality guidelines to apply to all information agencies subject to the PRA in fact make public

**DOL Draft Guidelines.** DOL's proposed states that the guidelines are only intended to improve the internal management of the government and "are not intended to

impose any binding requirements or obligations on the Department . . . . A Departmental agency may vary the application of information quality guidelines in particular situations where it believes that other approaches will more appropriately carry out the purpose of these guidelines or will help an agency to meet its statutory or program obligations.”

**Concern:** DOL's proposed guidelines are incorrect on this point. OMB's government-wide guidelines and DOL's own guidelines are binding on DOL.

**CRE Recommendation:** DOL's guidelines should explicitly recognize that the OMB and DOL Data Quality guidelines are binding on DOL.

**(D) Third-Party Submissions of Data to DOL**

Much of the information disseminated by federal agencies is originally submitted by states or private entities. In addition, federal agencies often disseminate research from outside parties, some of which is funded by the agency.

**DOL Draft Guidelines.** DOL's draft guidelines state the Department's definition of dissemination does not include, "agency citation to or discussion of information that was prepared by others and considered by the agency in the performance of its responsibilities."

**Concern:** Citation of studies or other information prepared by third-parties by DOL clearly constitutes a dissemination of information.

The MLS Legal Memorandum accompanying these Comments explains that Congress clearly intended the Data Quality guidelines to apply to all information that agencies in fact make public. Consequently, all third-party information that an agency makes public is subject to the Data Quality guidelines.

Where an agency does not use, rely on, or endorse third-party information, but instead just makes it public, then the agency itself should not have the initial burden of ensuring that the information meets the quality, objectivity, utility and integrity standards required by the Data Quality guidelines. The information should, however, be subject to the Data Quality correction process through administrative petitions by third parties.

When, however, an agency uses, relies on, or endorses third-party information, then the agency itself should have the burden of ensuring that the information meets the quality, objectivity, utility, and integrity standards required by the Data Quality guidelines.

**CRE Recommendation:** DOL should adopt the Department of Transportation's clear, succinct approach to the issue of third-party data submissions. DOT's proposed guidelines state, "The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely on or disseminate this information or the Department decides to do so."

**(E) Definition of Affected Persons**

The definition of an "affected person" is fundamental to the operation of the Data Quality Act because it determines who is and is not eligible to file an administrative petition for a correction of agency-disseminated information.

**DOL Draft Guidelines.** The Department of Labor provided no definition of "affected persons".

**Concern:** DOL is not providing any guidance to either the public or agency officials as to who would be entitled to seek correction of disseminated information, thus opening the door to both public uncertainty and potentially arbitrary DOL decisions on the issue.

**CRE Recommendation:** Adopt the definition of "affected persons" and "person". Used in OMB's own implementing guidelines. OMB's definition of "affected persons" encompasses anyone who benefits or is harmed by the information including, "both:(a) persons seeking to address information about themselves or about other persons to which they are related are associated; and (b) persons who use the information." OMB's definition is further detailed by their comprehensive definition of "person" which includes individuals, organized groups, corporations, international organization, and governments and government agencies.

OMB's inclusive definition of "affected persons" and of "person" provides essential clarity as to all terms used and ensures that any party affected by a covered information dissemination is able to petition for its correction, thus fulfilling the requirements of the Data Quality Act.

**(F) Deadline for Deciding a Petition**

Setting an appropriate, specific timeframe for agency decisions on information correction petitions is necessary to fulfil one of the key purposes of the Data Quality Act amendments of the PRA – enabling parties to obtain correction of information. It is also required by OMB's guidelines.

**DOL Draft Guidelines.** DOL's proposed guidelines state that the agency should, "try to respond to complaints and appeals within ninety (90) days of their receipt, unless they deem a response within this time period to be impracticable, in light of the nature of the complaint and the agency priorities."

**Concern:** DOL's proposal does not require any communication to the petitioner and allows for open-ended delays in responding to requests for correction of information, thus potent

**CRE Recommendation:** Adopt the deadlines and process proposed by agencies including HHS, the Social Security Administration, and the Nuclear Regulatory Commission which includes a 45 working day time limit for the responsible agency to respond to the petition with either: (1) a decision; or (2) an explanation of why more time is needed, along with an estimated decision date.

The HHS and similar proposals are cognizant of: (1) agency responsibility to respond in a timely and informative manner to all petitioners; and (2) that some petitions may require a longer timeframe for a response. These proposals provide agencies with flexibility without allowing open-ended delays in deciding a petition. It should be noted that these proposed guidelines do not include provisions allowing additional response extensions.

**(G) Process for Deciding an Initial Information Correction Request**

The process for acting on information correction requests, including selection of the party responsible for acting on information correction petitions, is important because this process is essential to ensure that one of the primary intents of the Act is realized: allowing affected persons to obtain necessary correction of federally disseminated information.

**DOL Draft Guidelines.** DOL's proposed guidelines state, "Agencies may designate one or more officials to review information complaints..." They go on to indicate that designated officials may consult with other offices "as the Agency may deem appropriate..."

**Concern:** DOL has not provided any specific guidance as to the official/office which should be responsible for evaluating information correction petitions. Furthermore, and even more important, DOL's draft guidelines do not provide any guidance to the designated officials as to how to decide on the validity of the information correction request, other than the ability to consult with other offices.

**CRE Recommendation:** Adopt the approach taken by The Federal Housing Finance Board. The FHFB's proposed guidelines state that the Board's "Chief Information Officer and other personnel responsible for the information will review the

underlying data and analytical processes used to develop the disputed data to determine whether the information complies with OMB and agency Guidelines and whether and how to correction the information, if appropriate."

The FHFB's short correction process statement has several important strong points which should be emulated by DOL including:

- (1) Designation of an official with primary responsibility for the correction who did not originate the information;
- (2) Examination of the data in question and the process used to produce it; and
- (3) Determination of whether the information in question complies with the Data Quality requirements of both the agency and OMB.

**(H) Process for Deciding Appeals of Initial Decisions on Information Correction Requests**

The appeal is the last administrative process open to an affected person seeking correction of information. Thus, to fulfill the Congressional and OMB intent with regard to ensuring the quality of disseminated information, it is important that agencies have a meaningful appeals process that is able to catch any errors that may have made it through both the initial dissemination quality review and the initial information correction process.

**DOL Draft Guidelines.** DOL's proposed guidelines state, "The agency should generally provide that the official conducting the second level review is not the same official that responded to the initial request or from the same office that prepared the information in question."

**Concern:** DOL's proposal is on the right track with encouraging the appeals official to be both distinct from the official making the initial decision and to be from a different office. However, the somewhat loose wording "generally provide" still could allow for the non-independent review of administrative appeals in some instances.

**CRE Recommendation:** Adopt the approach taken by the Securities and Exchange Commission. The SEC's proposed appeals process (referred to as a "request for staff reconsideration") routes the appeal to an official (usually in the Office of General Counsel) who was not involved in either producing the original data in question or in making the decision on the original request. The SEC's proposal also allow the appeal official to seek the advice of other officials. The SEC's proposal ensures that the decision on any appeal is made by an objective official.



(I). **Requirement for Agency Correction of Erroneous Information**

The Data Quality Act explicitly gives the public the right to seek and obtain correction of federally disseminated information. Thus, to comply with the law, agencies should be required to correct erroneous information disseminations covered by the guidelines.

**DOL Draft Guidelines.** DOL's proposed guidelines indicate that, when there is a valid request for information correction, the Department response will be based on a number of loosely-defined factors including "the agency's more pressing priorities and obligations."

**Concern:** DOL's proposed guidelines would not implement the Act's legal requirement that affected parties be able to obtain correction of erroneous information. Although under OMB's guidelines agencies "are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved....," the OMB guidelines do not create exemptions from the correction requirements due to "more pressing issues." 67 F.R. 8452, 8458.

**CRE Recommendation:** Adopt the information correction requirements proposed by the Department of Defense which state, "If the PAA [Public Affairs Activity of the relevant DOD Component] agrees with any portion or all of a complainant's request, he will notify the disseminator of the information that the correction must be made, and shall explain the substance of the requested correction. The PAA shall inform the requestor, in writing, of the decision and the action taken." Sec. 3.3.5.1. [emphasis added]

DOD's proposed guidelines recognize that when a request for an information correction is valid, the information "must" be corrected.

**Conclusions**

1. DOL's draft guidelines are a good and timely start to the process of implementing the Data Quality Act.
2. DOL's draft guidelines must be modified as described in the above recommendations, to come into full compliance with Congressional and OMB requirements.
3. Many of the CRE recommended improvements to DOL's draft guidelines have already been proposed by other federal agencies.

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. 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 might be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Scott Levinson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bruce Scott Levinson

Director, Federal Liaison Activities

Attachments