

Center for Regulatory Effectiveness

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August 10, 2001

Ms. Brooke Dickson
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Dear Ms. Dickson:

We are writing to provide comments on OMB's Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed.Reg. 34489-93 (June 28, 2001).

This cover letter concentrates on what we consider to be several of the most important aspects of our comments; the attachment contains more detailed discussion of those points plus additional points. We are also attaching a compendium of the pertinent portions of OMB Circular A-130 and its explanatory Appendix because our comments contain numerous references to that established OMB guidance on the same subject.

We believe both the OMB and individual agency guidelines are of great importance, and we commend OMB for issuing its proposal for public comment in a timely manner and making a commitment to issuance of the final guidance by September 30. We urge OMB to make every effort to optimize its final guidance and to optimize the guidance that will be proposed and issued by the individual agencies. Experience will likely provide a basis for continued improvement in the guidances, and therefore they should be reviewed periodically, taking into consideration the annual agency reports required by the legislation.¹

¹ Circular A-130 states, in Section 13, that "OMB will review this Circular three years from the date of issuance to ascertain its effectiveness." That review will take place November 30, 2003. All of the information quality and dissemination provisions of A-130 together with the provisions added by the subject proposed guidance and the individual agency guidances should be reviewed thoroughly at that time.

Essential Qualities of the Ombudsman Concept and Ombudsman Practice

OMB's current guidance on information quality and dissemination in Circular A-130 requires that agency CIOs (Chief Information Officers) must act as "ombudsmen" when considering alleged agency failures to comply with the information dissemination provisions of the guidance, and must recommend or take corrective action as appropriate. (Sec. 9, a, 4.) The subject proposal refers to this requirement, but it states that "the reporting requirements" in the data quality legislation "build upon Section 9 (a) (4) of OMB Circular A-130", and the proposal does not refer to these ombudsman requirements as continuing in effect in the section on corrective mechanisms (III, 3).

Continued incorporation of the ombudsman concept is crucial to effective implementation of the legislation and guidance; however, there is no explanation of the concept and its essential attributes in the proposed guidance (nor in Circular A-130). The essentials of the ombudsman concept should be set out in the new guidance. In addition, the requirement for CIOs to act as an ombudsman in considering alleged agencies failures to comply, and recommending or taking appropriate corrective action, should be set out under the corrective mechanisms provision, Section III,3, as well as under the Agency Reporting Requirements (Section IV).

The ombudsman concept has been widely commented on and generally standardized in its essentials by prominent organizations such as the American Bar Association, the United States Ombudsman Association, and the International Ombudsman Institute. There is wide agreement that the following principles must be applied:

- rigorous independence and initiative
- impartiality
- appropriate expertise and personal qualities
- sufficient resources and powers
- responsiveness to ombudsman

It is our practical experience in attempting to utilize the ombudsman provisions of Circular A-130 that current agency practice, delegations, and job descriptions may not be consistent with these principles, and that agency CIOs do not have an adequate appreciation of what it means to act as an ombudsman. It is doubtful that agencies have existing practices and delineated organizational responsibilities that are specific with regard to how a CIO acts as an ombudsman in the context of responding to a petition for correction of an agency information dissemination product. Therefore, it is not appropriate for the proposed guidelines to state that the required administrative mechanisms for correction of information "should be consonant with established agency practice . . ." (sec. III, 3.), and that the CIO serves as an ombudsman in a manner "consistent with agency practice and existing organizational responsibilities . . ." (sec. IV, 1). If current agency directives and practice are not consistent with the recognized attributes of ombudsmanship -- which should be explained in the OMB guidance -- they should be changed to conform to such attributes as set out in the OMB guidance.

Statistical and Mathematical Models

OMB is correct in stressing the importance of reproducibility and transparency of government information, key components in evaluating the quality of such data. However, OMB should explicitly address and include certain types of information which may be utilized by agencies in standard setting and other activities. Specifically, we refer to statistical and mathematical models, codes, and test methods/instructions used generate values which have regulatory effect.

Such models are often the real drivers of agency regulations and policy. Consequently, the details of the model should be made available to the public, so that interested parties may understand how regulators reached their decision and may seek to reproduce and validate an agency's results. Where errors in such models are found, the correction mechanisms in the OMB and agency guidelines should be available for their resolution. This practice furthers multiple objectives, including transparency, accountability, and information quality.

OMB should also state clearly that subsequent modifications to these models should be open to the public and subject to the Data Quality guidelines, as such modifications could impact overall operation of such models and their results.

Prior Notice and Consultation for Creation, Modification, or Termination of Significant Information Dissemination Products

The Paperwork Reduction Act of 1995 requires that agencies "provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products" OMB Circular A-130 states that it is federal policy that "[a]gencies will . . . Consider the effects of their actions on members of the public and ensure consultation with the public as appropriate." (Sec. 8, 1, (b).) It then reiterates the above-quoted statutory requirement word for word in Section 8, 6, (j). The requirement is explained further in Appendix IV to Circular A-130, under "Notice to the Public", and several examples of types of significant information dissemination products are given. The proposed guidelines do not contain this requirement. The final guidelines should reiterate this statutory requirement and incorporate the A-130 guidance.

Process for Development of Individual Agency Guidelines

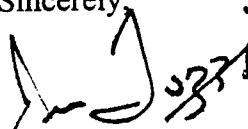
Since an agency's significant information dissemination products require notice to, and prior consultation with, the public, the agency guidance for information dissemination products that must be issued within a year following, and in conformance with, the OMB guidance is surely even more significant and should also be developed with opportunity for public comment. The PRA states that agencies shall "regularly solicit and consider public input on the agency's information dissemination activities". 44 U.S.C. § 3506(d)(2). Opportunity for public comment on the proposed agency-

specific conforming rules should be required explicitly in the OMB guidance.² When OMB subsequently reviews each agency's proposed guidance, it should then have available to it the public comments on that proposed guidance.

Since OMB has solicited public comments on its proposal, we expect that OMB will make all of the public comments it receives available in a public docket

We look forward to timely issuance of the final OMB guidance, and to OMB's review of the agency-specific guidance proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim J. Tozzi". The signature is stylized and includes a date "5/27/11" written to the right of the name.

Jim J. Tozzi

Member, CRE Board of Advisors

Attachments

² H.R. Rep. No. 592, 105th Cong., stated that the OMB rules "shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules." At 49-50 (emphasis added).

**COMMENTS ON THE OFFICE OF MANAGEMENT AND BUDGET'S
"PROPOSED GUIDELINES FOR ENSURING AND MAXIMIZING
THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF
INFORMATION DISSEMINATED BY FEDERAL AGENCIES"
66 FED.REG. 34489-93, JUNE 28, 2001**

Submitted by the Center for Regulatory Effectiveness
Washington, DC

August 10, 2001

Background

The Paperwork Reduction Act of 1995, 44 U.S.C. Ch. 35 (the "PRA"), enacted specific provisions pertaining to the subject of these proposed guidelines. One of those provisions, Section 3504, directed OMB "to develop and oversee the implementation of policies, principles, standards, and guidelines" for Federal agency dissemination of public information; while another, Section 3516, directed OMB to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." However, the statute did not contain a timeframe within which the OMB guidance was to be promulgated; nor did it provide specifically for public and agency input into development of the guidance.

Subsequently, OMB issued Circular A-130, which contained some limited guidance regarding the information dissemination provisions in the PRA. However, the majority of the Circular addressed processing of agency information collection requests and technical aspects of agency information management policy. Congress considered the guidance in Circular A-130 on information dissemination to be inadequate, and it urged OMB to promulgate separate guidance to address more thoroughly those PRA provisions, including provisions to ensure accountability. The House report on the FY1999 appropriation bill for OMB (No. 105-592, June 22, 1998) stated, at pp. 49-50:

RELIABILITY AND DISSEMINATION OF INFORMATION

The committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee

expects issuance of these rules by September 30, 1999. The OMB rules shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.

Nevertheless, OMB did not promulgate such new rules by September 30, 1999; nor did it report to the Committee by that date. Consequently, in the next Congress provisions were introduced into the OMB appropriations bill to require promulgation of the rules by a date certain. In response, OMB pointed out that its Circular A-130 already contained certain provisions pertaining to the subject, particularly the provision requiring agency CIOs to act as “ombudsmen” in investigating and acting on allegations of agency failure to follow the OMB guidance. At the same time, however, OMB acknowledged that it was “sensitive to the possibility that OMB Circular A-130 might need to be updated or supplemented to deal with concerns in this area.”³

Subsequently, Congress supplemented the PRA provisions with the provisions contained in section 515 of the OMB appropriations bill for fiscal year 2001, P.L. 106-554. Those provisions set a timeframe for promulgation of OMB guidance and conforming guidance by all Federal agencies, and they reference the underlying requirements of the PRA for issuance of OMB and agency-specific conforming rules. The provisions contain much the same directives as were set out in the House report quoted above. The OMB guidance which is the subject of these comments is proposed for issuance pursuant to those two related legislative directives (*i.e.*, the PRA and the FY2001 Appropriations Act).

Incomplete Citation of Legal Authority

The proposal references only the Appropriations Act provisions as the statutory authority for the guidance. The appropriations language itself is explicitly based on, and supplements, the PRA. The PRA contains the original directives to OMB to issue guidance for the agencies, in Sections 3504 and 3516, and the requirement that the agencies issue conforming rules, in Section 3506. The PRA also contains additional requirements that are not in the appropriations legislation, such as the requirement for pre-release consultation with stakeholders regarding release of significant new information dissemination products, or modifications or terminations, and provisions concerning the

³ Letter dated April 18, 2000, from John T. Spotila, Administrator of OMB’s Office of Information and Regulatory Affairs, to Representative Jo Ann Emerson. The text of this letter is available on the CRE website, www.thecre.com, under “Data Quality”.

authority and duties of the agencies' Chief Information Officers. The OMB guidance should describe the PRA as containing the original and fundamental statutory authority and directives, and the Appropriations Act as supplemental to the PRA.

2. Need for Clarification of Relationship to Circular A-130

The Circular and its explanatory Appendix IV currently contain a limited number of provisions implementing the information dissemination provisions of the PRA. Those provisions should be retained. The proposed OMB rules are not clear on whether the new guidance replaces the Circular and its Appendix or supplements them, and they do not inform the public and would-be commenters concerning the specific applicable provisions in the Circular and Appendix. Since the proposal does not, in most instances, advise the public that it is altering Circular A-130 and the Appendix, presumably it is intended as a supplement to the Circular. It would improve the clarity and user-friendliness of the OMB guidance considerably if the scattered relevant provisions from the Circular and the explanations from the Appendix were consolidated with the new rules, and any changes were pointed out and explained.⁴ The attachment to these comments contains the most pertinent provisions of Circular A-130 and Appendix IV that should be consolidated with the proposed guidance.

3. The Need for Mandatory Rather Than Advisory Language

There are a number of places in the proposed guidance where the term "should" is used in place of "shall" or "must".⁵ For example, section III, 1 states that "agencies should adopt a high standard of quality (including objectivity, utility, and integrity) as a performance goal." (Emphasis added.) The use of the term "goal" further dilutes the directives. This is inconsistent with directives in Circular A-130 and the underlying statutory authority which use the terms "shall" and "must". For example, the Appropriations Act states that the OMB guidance "shall" "require" the establishment of administrative mechanisms for the correction of information. Sec. 515(b)(2)(B). The PRA states that agencies are responsible for "complying with the requirements" of the Act and the policies established by OMB. Sec. 3506(a)(1)(B). And Circular A-130 states that agency heads "must" ensure agency compliance with all policies, principles, standards, guidelines, rules, and regulations issued by OMB; and that CIOs "must" consider complaints of non-compliance and recommend or take appropriate corrective action. Sec. 9,a,2 and 4. The Congressional intent, and established OMB policy, are clear that the OMB and agency guidance documents are not discretionary or advisory; they are intended to be mandatory.

⁴ For example, does the requirement in the proposal for an annual agency report on complaints and resolutions replace the requirement in Circular A-130, Sec. 9,a,4, for the CIO to make such a report to the Director of OMB by February 1 of each year? See the section below on annual agency reports.

⁵ "Should" might be considered advisory rather than mandatory. See, e.g., *In Re Richard Rogness and Presto-X Co.*, EPA FIFRA appeal final decision and order No. 95-8, July 17, 1997.

4. Thresholds for Quality

The OMB guidance should make it clear that all disseminated information is subject to the requirements of “quality, objectivity, utility, and integrity”. The proposal does not contain such an explicit statement, but rather is somewhat vague on the subject. The proposal states that “it is clear that agencies should not disseminate information that does not meet some basic level of quality”, but “[t]he more important the information, the higher the quality.” The statutes give the basic requirements for all types of information. Within those basic requirements, there may be flexibility, depending on the importance of the information, with regard to degree of emphasis or amount of detail provided, in order to achieve the practical results intended by Congress.

5. Limitations on Agency Authority to Disseminate Specific Information Products

An agency’s authority to develop and disseminate information products is not without limits. Otherwise, dissemination of information could serve as a kind of indirect regulation, expanding an agency’s influence and authority outside areas in which Congress had delegated authority. Agency authority to spend appropriated funds is limited to purposes specifically authorized by statute. Development and dissemination of electronic information, including web pages and linked documents, requires the expenditure of public funds. It is not sufficient for an agency to justify creation and dissemination of information on grounds that they are simply “consistent with” the agency’s mission. 44 U.S.C. § 1108 states that agencies may use appropriated funds only for the printing of such publications as are “necessary in the transaction of the public business required by law ...” (Emphasis added.) These limitations are contained in the statutory authority for public printing and documents, which has been interpreted to apply to all types of public information, regardless of form or format, by OMB in Circular A-130. Circular A-130 states that agencies must “[a]ssure that information dissemination products are necessary for proper performance of agency functions (44 U.S.C. 1108)...” Sec. 8, 6(a). The Circular defines “information dissemination product” as “any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristics, disseminated by an agency to the public.” Sec. 6, k. The Appendix to Circular A-130 explains that the language “necessary for the proper performance of agency functions” is considered by OMB to be the equivalent of the expression “necessary for the transaction of the public business required by law of the agency” in 44 U.S.C. 1108, and that agencies must “determine systematically the need for each information dissemination product”.

These limitation on agency authority to create and disseminate specific information dissemination products should be repeated in the OMB guidance, and the guidance should require that agencies make, and make available to the public, a specific determination of why the specific information dissemination product is needed in order for the agency to carry out a specific statutory responsibility, at least with regard to creation of significant new information dissemination products.

6. The Need for Coverage of Information Disseminated “For”, Rather Than “By”, Federal Agencies

The PRA, the fundamental statutory authority for the subject OMB guidance, states that one of its purposes is to “ensure the greatest possible public benefit from and maximize the utility of information created . . . and disseminated by or for the Federal Government” (44 U.S.C. § 3501(2) (emphasis added)). A second statement of purpose indicates a similar intent for coverage of information dissemination activities conducted “for” Federal agencies, stating a purpose to “ensure that the creation . . . [and] dissemination . . . of information by or for the Federal Government is consistent with applicable laws” 44 U.S.C. § 3501(8)(emphasis added). The legislative history leading up to the Appropriations Act provisions also indicates a Congressional intent that the OMB and agency guidance should carry out the position expressed in the PRA that the guidance should cover information created and disseminated “for” agencies.⁶ This Congressional intent was apparently overlooked in Circular A-130, however, since it contains a definition of “information dissemination product” that covers only information disseminated “by an agency to the public”, and does not refer to information created and disseminated for an agency.

Agencies should not be able to avoid information quality requirements by contracting with, or otherwise establishing a relationship with, a non-governmental entity or another Federal agency to develop and disseminate information on their behalf. Congress clearly intended that the purposes of the information dissemination quality assurance provisions of the PRA should extend to information created and disseminated “for” Federal agencies. On the other hand, the term “for” is not further defined or explained in the PRA, and an independent non-governmental entity which receives funding from a Federal agency to conduct a study with a great deal of expert independence arguably should not be subject to the OMB and agency data quality guidance because the agency would have little control over the quality of the final product. The issue appears to center on the extent of actual or potential agency control over the creation of the product and its dissemination. If an agency essentially controls, or is able to control, how a private contractor or grantee will create the information product and disseminate it, the outside party should be considered to be acting “for” the agency, and the product and process should be subject to the guidance. The Appendix to Circular A-130 alludes to this agency responsibility to control information activities of contractors and grantees. It states that “the information responsibilities of grantees and contractors are not identical to those of Federal agencies except to the extent that the agencies make them so in the underlying

⁶ Congress addressed this issue to a limited extent in the House report which was a precursor to the data quality provisions in the Appropriations Act. House Report No. 105-592 directed OMB to develop guidance for information “disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P. L. 104-13).” (At 49-50, emphasis added.) The Report also referred to making the corrective mechanism process applicable to “Federal, or Federally-supported, information dissemination”. (Emphasis added.)

grants or contracts”, and that “[w]hen agencies use private contractors to accomplish dissemination . . . [t]he contractual terms should assure that, with respect to dissemination, the contractor behaves as though the contractor were the agency.” The new OMB guidance should address this issue and require that agencies exert available control over private contractors and grantees to make them subject to the OMB and agency standards and procedures (including corrective procedures) for information quality and dissemination.

7. Prior Notice and Consultation for Creation, Modification, or Termination of Significant Information Dissemination Products

The necessity for this prior notice and consultation, and its absence from the proposed guidance, is discussed in the cover letter. The PRA requires “adequate notice”. These requirements should be contained in the guidance, and what will constitute “adequate notice” and adequate “consultation” should be addressed. The adequacy of notice will probably depend on the nature of the information product. A more specialized product, which would likely affect only a limited segment of the public and/or the business community, or which addresses a subject about which a relatively limited number of citizens or entities are knowledgeable or interested, would probably not require a broad dissemination of notice, and it might be best to simply inform the most knowledgeable and interested individuals or entities. On the other hand, agencies might want to standardize their notice procedures so that they do not have to evaluate the type of notice that should be utilized for each new information product.

The OMB guidance should also note that “consultation” indicates more than a mere opportunity to submit a set of written comments. There should be an active two-way exchange of views with the key stakeholders with a view to maximizing the quality of the information before it is released or changed, or obtaining information on its importance, or lack thereof, before deciding to terminate it.

8. The Agency Information Correction Mechanisms

Initially, we note that the proposed OMB guidelines only speak of mechanisms for obtaining correction of information that does not comply with the OMB guidance. This is too narrow a reading of the statutory language. The Appropriations Act requires agency establishment of mechanisms to obtain correction of information “that does not comply with the guidelines issued under subsection (a)”. Under subsection (b), the guidelines issued under subsection (a) must require all Federal agencies to issue conforming guidance. In addition, the PRA requires that the agencies issue guidance that complies with the OMB guidance. Thus, it is clear that Congress intended that the corrective mechanisms would apply not only to the OMB guidance, but also to the conforming guidance issued by each agency. The interpretation in the proposed OMB guidance – that the corrective mechanisms would apply only to the OMB guidance – is not a reasonable interpretation to impute to Congress. It would be odd if agencies had to comply with OMB guidance, but did not have to comply with their own guidance issued to comply with the OMB guidance. It would also

not be consistent with the broad purpose stated in the PRA of improving Government accountability for the information it disseminates. (Sec. 3501(4).) The agencies should be required to comply with both the OMB guidance and their own guidance issued pursuant to the OMB guidance.

We also note that the requirements for CIO resolution of complaints concerning non-compliance is misplaced – it has been placed in Section IV, “Agency Reporting Requirements”, when it should be part of Section III, 3 on corrective mechanisms. In addition, the wording at the start of Section III, 3, “As a matter of citizen review” is very unclear and appears inconsistent with the purpose of the section to require CIO/ombudsman and agency review of complaints.

a. **Explanation of the Essential Attributes of the Ombudsman Concept**

As discussed briefly in the cover letter comments, the ombudsman concept, which has become firmly established in the current OMB A-130 guidance and which has been incorporated into the new proposed guidance, is crucial to making the Congressional directives and OMB guidance work in practice and ensuring their credibility, and it should be explained further. As noted previously, OMB emphasized this existing mechanism in its communications with Congress during consideration of the data quality provisions in the Appropriations Act, and Congress no doubt expected that OMB would continue to require that type of corrective mechanism.

While the ombudsman concept is widely recognized internationally, it is not necessarily a familiar concept in the United States, particularly within the Federal Government. Therefore, it deserves clarification in the OMB guidance. The discussion below amplifies on the listing of essential qualities of ombudsmanship set out in the cover letter comments.⁷ The listing of essential attributes and the discussion is derived from sources such as the ABA recommended standards⁸, the

⁷ Usually confidentiality is listed as one of the essential attributes. This means that the ombudsman does not reveal the identity of complainants or the allegations they have made. This attribute is apparently intended mainly to protect complainants from reprisals in situations where the complaint involves an individual and is not a matter of public interest. Such a protection might not be appropriate in the subject situation where what is at issue is public information. On the other hand, if the complaint is very personal to the complainant, it could be appropriate for the complainant to request, and the ombudsman to grant, confidentiality. This issue should be addressed in the final guidance.

⁸ See the Ombudsman Committee homepage of the ABA’s Section of Administrative Law & Regulatory Practice, www.abanet.org/adminlaw/ombuds/home.html. See particularly the *Standards For The Establishment and Operation of Ombudsman Offices*.

United States Ombudsman Institute⁹, the Ombudsman Association¹⁰, the International Ombudsman Institute¹¹, and private sector ombudsman offices, such as those maintained by some universities¹².

Independence and initiative: It must be made clear that the CIO, when acting as an ombudsman under the OMB and agency guidance, does not work on behalf of the agency program offices, but is a rigorously independent entity. CIO contact with agency officials and staff following receipt of a complaint/request for correction must be only for such purposes as gathering facts (investigating) and exploring options for correction, rather than consulting concerning policy views, obtaining comments in defense of an agency position, or permitting other agency personnel to participate in drafting a CIO response to the complaint. (S)he must be answerable only to the head of the agency. This independence must be reflected clearly in the CIO position description; and any current position description that does not clearly reflect this attribute must be revised. It is very desirable that the CIO/ombudsman be appointed for a fixed term, and be subject to removal only for cause, such as clear dereliction in the performance of the ombudsman duties.

It must also be made clear that the CIO is free to exercise initiative and broad discretion in investigating complaints and considering remedies, and may go beyond specific allegations or suggestions made in the request for a correction. This discretion and initiative extends to being able to interview and consult with agency individuals, outside consultants, and any others who might have relevant expertise or knowledge and who are outside the office or entity responsible for creating the information, and to being able to obtain any relevant documentary materials, including ones that could be considered exempt from release to members of the public under the Freedom of Information Act.

Impartiality: The ombudsman is a neutral mediator. (S)he is not an advocate for either side of a dispute. (S)he should also not be viewed as a political appointee. This also means, that, unlike a judicial body, the ombudsman is not bound by judicial concepts of “deference” accorded to an agency by the courts.

Appropriate expertise and personal qualities: Many of the CIO duties under the PRA and Circular A-130 pertain to the maintenance of technical information systems, rather than the evaluation of the quality of information disseminated to the public. In order to handle quality complaints properly, the CIO, or perhaps the Deputy CIO, must be an individual who has experience with the types of issues likely to arise within the particular agency. For example, the CIO in a health

⁹ See www.usombudsman.org/References/publicsectorombudsman.htm. See particularly the *Model Ombudsman Act for State Governments*.

¹⁰ See www.ombuds-toa.org/toa_code&std.html. See particularly *The Ombudsman Association Standards of Practice*.

¹¹ See www.law.ualberta.ca/centres/ioi/brochure.htm.

¹² See www.wmich.edu/ombudsman/standards.htm.

or environment agency should have substantial training and experience with scientific issues involving public health and/or ecology, while one in an agency largely responsible for economic or financial matters should similarly have appropriate training and experience.

The CIO who acts as an ombudsman must also have strong personal qualities for carrying out the assigned duties and establishing respect and credibility for the office. Ideally, such a person should already have achieved a reputation for rigorous independence, impartiality, initiative, and problem solving.

Sufficient resources and powers: The agency head must ensure that the CIO is given sufficient staff and other resources to implement the guidance with thoroughness and expeditiousness. The OMB guidance should require that agencies review their CIO position descriptions to ensure that the CIO has the powers necessary to implement the guidance.

Dissemination of inaccurate information is capable of causing great harm, and if a petition for correction is not acted upon thoroughly and expeditiously that harm will continue. Circular A-130 states that the CIO “must . . . recommend or take appropriate corrective action” after receiving a complaint. The OMB guidance should direct that agencies give the CIO/ombudsman the power to have the agency withdraw or suspend an information dissemination product if, in the CIO’s judgment, the petition for correction makes out a strong case and it appears that significant harm could result from continuing dissemination of an information product while the complaint is under consideration.

Timeliness: The OMB guidance should require that the agency guidance for CIO/ombudsman consideration of a complaint should specify reasonable timeframes within which the CIO must recommend or take appropriate corrective action and provide a response to the complainant.

b. Responsiveness to ombudsman

Agencies should have an obligation to respond expeditiously to the CIO findings and recommendations, and if it will not follow them in whole or in part, to provide a reasoned justification for not doing so. The OMB guidance should require that agencies set a timeframe for agency response to CIO recommendations.

Both the ombudsman’s findings and recommendations and the agency’s response should be provided promptly to the petitioner(s). Responses of both the ombudsman and the agency should address fairly all of the principal points raised by a petitioner. If the agency accepts the findings and recommendations in whole or in part, the response should indicate what action will be taken and when, and action should be taken as quickly as possible.

9. Continuing Use of Existing Practices and Procedures by Agencies

The OMB proposal states that agencies already have in place established information quality standards and corrective mechanisms, and that the agencies may continue to rely on such mechanisms “if they satisfy the standards in the guidelines”. (P. 34490, 3d col.) To the extent that this assertion of established standards and corrective mechanisms is accurate¹³, the OMB guidance should be clearer that the agency standards and mechanism must comply with the OMB guidance, and must be changed if necessary to achieve such compliance. Other statements in the proposal appear inconsistent with such compliance and should be deleted or revised. The OMB “Summary” (beginning at p. 34490, 3d col.) states that “agencies must apply these [information] standards flexibly, consonant with existing agency information resources management and administrative practices. . . .” Section III, 3 of the proposed guidelines states that agencies’ corrective mechanisms “should be consonant with established agency practice.” And section IV, 1 of the proposed guidance states that the CIO acts as an ombudsman to resolve complaints pursuant to Circular A-130 “and consistent with agency practices and existing organizational responsibilities, with these guidelines.”

These statements are confusing and appear inconsistent. The OMB guidance should state clearly that agencies must comply with the OMB guidance (whether in A-130 or in a new form), and that, if necessary, their organization, procedures, or practices must be changed to achieve such compliance.

10. Issuance of the Agencies’ Conforming Guidance and OMB Review

It is clear from the statutory directives (e.g., 44 U.S.C. § 3506(a)(1)(B)) that the agencies’ guidelines must conform to the OMB guidelines, while also being tailored to the individual agencies’ programs and structures. Yet the proposed OMB guidance does not state this under Section II, “Agency Responsibilities”. The section on Agency Responsibilities must reflect the statutory directives.

The statement in Section III that agencies “should” adopt a high standard of quality as a “goal” is not appropriate. Pursuant to the statutory directives, the agencies “must” disseminate only information that meets the standards of quality, objectivity, utility, and integrity; this is not a “goal” to be worked towards in some indeterminate future.

As discussed in the cover letter comments, the OMB guidance should require that the agencies issue proposed guidelines with an opportunity for public comment. We also recommend that the OMB guidance provide that OMB will review both the proposed and final agency guidance, and that the draft final guidance sent to OMB for review must be accompanied by a reasonably complete response to the public comments.

¹³ It would be useful for OMB to provide references to at least some of the sources spelling out such individual agency standards and corrective mechanisms. Where such sources exist, it is likely that the standards or practices were established without public input, as Congress intends should be the case with the agencies’ guidance to be issued in conformance with the OMB guidance.

Under Section 9 of Circular A-130, the agency CIOs have responsibility for agency compliance with the PRA and OMB guidance. Thus, each agency CIO must participate in drafting and commenting on the individual agency's guidance.

11. Continuing OMB Oversight

Section 10 of Circular A-130 states that OMB will use "measures as the Director deems necessary to evaluate the adequacy and efficiency of each agency's information resources management and compliance with this Circular." Section IV, 4 of the proposed guidance provides for OMB review of the agencies' proposed conforming rules; however, there is no provision, other than that quoted from Circular A-130, for continuing OMB oversight. We recommend that OMB specifically provide for a mechanism for OMB review of specific complaints of non-compliance that raise significant or novel issues of agency compliance with the OMB guidance. An affected party would have the discretionary right to make such an appeal for OMB review, and OMB would have discretion to accept or refuse the appeal, following the complainant's receipt of the responses from the agency CIO and the agency. OMB should set a timeframe for acceptance or rejection of such an appeal, and a timeframe for acting on the matter if an appeal is accepted.

OMB should review its guidance and the agencies' guidance at least every three years, as already provided for in Circular A-130.

In addition, OMB should recommend that Executive Order 12866 be modified to add the principle that information presented by an agency as a basis for a regulatory action must comply with the OMB and agency guidance on data quality. This would give OMB authority to review proposed and draft final notices of rulemaking that were determined to be "significant regulatory actions" for compliance with data quality guidance.

12. Definitions of the terms "quality, objectivity, utility, and integrity"

We generally agree that the term "quality" was intended to encompass the other three terms, while then focusing attention on specific aspects of quality through the additional three terms. We recommend a few additions to the proposed definitions.

First, however, we note that while the guidance refers to discussion of "quality, objectivity, utility, and integrity" as "definitions"(Sec. V), they are not worded as definitions (e.g., "Utility means . . ."). Instead, they are referred to as "concepts" or "dimensions", and the agency should consider or focus on whether "whether" certain aspects of quality have been satisfied. This seems to give the guidance an advisory rather than a mandatory tone. We recommend that the final OMB guidance reword the definitions section so that the definitions are stated in a declarative manner (e.g., "' ____ ' means that the information must be In particular, scientific information must be").

With regard to quality generally, we recommend that the definition require that information be soundly based. This requirement is captured in part by the statement that “the presentation [of information] should clearly reflect the quality of the information” (a very important statement); however, that statement could be interpreted as a license to disseminate low-quality information so long as the low quality is reflected in the presentation. (This is also an example of a statement where the OMB guidance should use the terms “shall” or “must” rather than “should”.) As discussed previously, “quality” should also mean that all aspects of quality must be satisfied as a threshold of compliance, but with degrees of emphasis and detail dependent on the importance of the information.

We recommend adding that the information must be substantially up-to-date, as an aspect of being “complete” (Sec. V, 1, B).

We recommend that the definition of “utility” state clearly that the term includes the definition of “practical utility” as contained in the PRA (44 U.S.C. 3502(11)) and elaborated on in 5 CFR 1320.3(l)¹⁴, but expanded to include information dissemination.¹⁵ Although application of the concept of “practical utility” is discussed in Sec. V, 1, A of the OMB proposal, “practical utility” is not made part of a declarative definition.

Finally, we recommend that, as an aspect of “integrity”, the information must be consistent and coherent, both internally, and externally with other information dissemination products of the agency and other agencies.

13. Effectiveness and applicability

Many agency information dissemination products will have already been created and disseminated by the time the OMB guidance and the individual agency guidance are issued. The OMB guidance should state specifically that it, and the agency conforming guidance, will apply to all information dissemination products which continue to be disseminated after the guidance is issued. The guidance should be made effective immediately.

14. Annual Agency Report

The proposed guidance appears unclear in Section IV on whether the CIO must prepare and submit the annual report. On the one hand, the proposal refers to the requirement in Circular A-130 that the CIO must prepare and submit the annual report (and the Circular gives principal responsibility for compliance with the OMB guidance to the CIO); on the other hand the same

¹⁴ “Practical utility” means “usefulness taking into account its accuracy, adequacy, and reliability.”

¹⁵ The current definition is in terms of information collection and utility to the agency, rather than information dissemination and utility to the public.

section of the proposal states that the “agency” must submit the report. We recommend that the OMB guidance require that the CIO, acting as an ombudsman, prepare and submit the annual report, and that both the agency and the CIO¹⁶ should include in the report any recommendations for improving either the OMB or the agency guidance and practice.¹⁷

Since the proposal provides that all of the agency annual reports will be submitted under GPR, we assume that they will be made publicly available without the need for a FOIA request.

Summary of CRE Recommendations

Cite the PRA as well as the Appropriations Act as the legal authority and mandate.

2. Clarify the relationship of the new guidance provisions to those in Circular A-130, and consolidate all applicable provisions of A-130, Appendix IV to the Circular, and the new guidance in the final guidance.
3. Use language which is clearly mandatory rather than advisory.
4. Clarify that all agency information disseminated to the public must comply with the basic quality requirements.
5. Limit information dissemination to information necessary for the proper performance of agency statutory functions.
6. Clarify that agencies must make the information quality standards and corrective mechanisms applicable to their contractors and grantees who create or disseminate information “for” the agency.

Continue to require prior notice and consultation for significant information dissemination products.

8. Require that the agencies comply with both the OMB guidance and their own guidance, and make the corrective mechanisms applicable to failures to comply with either.
9. Place the CIO/ombudsman requirements in the corrective mechanisms section.

¹⁶ The power and responsibility to make recommendations for improvements in institutional practices related to his/her duties is ordinarily considered one of the important attributes of an ombudsman.

¹⁷ As noted previously, Circular A-130 calls for such reports by February 1 of each year, which appears to be inconsistent with the timing requirement in the proposal.

10. Explain the essential attributes that must be possessed and exercised by the CIO acting as an ombudsman (independence and initiative, impartiality, appropriate expertise and personal qualities, sufficient resources and power to both recommend and take appropriate corrective action, and timeliness of response by the CIO).
11. Require that agencies set a timeframe for responding to CIO recommendations.
12. Require that agencies change existing practices and procedures to comply with the directives in the OMB guidance and the statutes, while allowing the agency guidance to be tailored to their individual programs.
13. Require that the agencies provide for public comment on their proposed guidance so that such comments are available to OMB when it reviews their proposed guidance.
14. Provide for OMB discretion to review a particular information dissemination product when requested to do so if OMB determines that the product raises significant or novel issues of compliance with the OMB guidance.
15. Provide that OMB will review its guidance and the agencies' guidance at least every three years.
16. Recommend, separately from the OMB guidance, that E.O. 12866 be modified to add the principle that information disseminated as the basis for agency regulatory action must comply with the OMB guidance.
17. Provide definitions of "quality, objectivity, utility, and integrity" in declarative form.
18. The definition of "quality" should include that it must be soundly based and up-to-date.
19. The definition of "utility" should include the aspects of "practical utility" currently defined in the OMB information collection regulations, as well as those contained in the proposed guidance.
20. The definition of "integrity" should include the need for internal coherence, and the need for external consistency with other agency information dissemination products.
21. The guidance should be specifically stated to be applicable to all information dissemination products which an agency continues to disseminate following issuance of the guidance, even though created prior to issuance of the guidance.
22. The guidance should require that the CIO prepare and submit the annual report, and should clarify the date of submittal.
23. The agency annual reports should be made publicly available.

**Significant Information Quality and Dissemination
Portions of OMB Circular A-130 and Appendix IV
to A-130 (“Analysis of Key Sections”)**

Circular A-130 (Nov. 30, 2000 rev.)

“6. Definitions:

e. The term "dissemination" means the government initiated distribution of information to the public. Not considered dissemination within the meaning of this Circular is distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or Privacy Act.

j. The term "information" means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.

k. The term "information dissemination product" means any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, disseminated by an agency to the public.

“8. Policy:

Agencies will:

(b) Consider the effects of their actions on members of the public and ensure consultation with the public as appropriate.

(c) Consider the effects of their actions on State and local governments and ensure consultation with those governments as appropriate.

(j) Record, preserve, and make accessible sufficient information to ensure the management and accountability of agency programs . . .

(l) Provide for public access to records where required or appropriate

6. . . . Agencies will maintain and implement a management system for all information dissemination products which must, at a minimum:

- (a) Assure that information dissemination products are necessary for proper performance of agency functions (44 U.S.C. 1108);
- (e) Identify in information dissemination products the source of the information, if from another agency;
- (i) Establish and maintain communications with members of the public and with State and local governments so that the agency creates information dissemination products that meet their respective needs;
- (j) Provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products; and
- (k) Ensure that, to the extent existing information dissemination policies or practices are inconsistent with the requirements of this Circular, a prompt and orderly transition to compliance with the requirements of this Circular is made.”

“9. Assignment of Responsibilities:

- a. All Federal agencies. The head of each agency must:
 - 2. Ensure that the agency implements appropriately all of the information policies, principles, standards, guidelines, rules, and regulations prescribed by OMB.
 - 3. Appoint a Chief Information Officer, as required by 44 U.S.C. 3506(a), who must report directly to the agency head to carry out the responsibilities of the agencies listed in the Paperwork Reduction Act (44 U.S.C. 3506) . . .
 - 4. Direct the Chief Information Officer to monitor agency compliance with the policies, procedures, and guidance in this Circular. Acting as an ombudsman, the Chief Information Officer must consider alleged instances of agency failure to comply with this Circular, and recommend or take appropriate corrective action. The Chief Information Officer will report instances of alleged failure and their resolution annually to the Director of OMB, by February 1st of each year.
 - 5. Develop internal agency information policies and procedures and oversee, evaluate, and otherwise periodically review agency information resources management activities for conformity with the policies set forth in this Circular.”

“10. Oversight:

- a. The Director of OMB will use information technology planning reviews, fiscal budget reviews, information collection budget reviews, management reviews, and such other measures as the Director deems necessary to evaluate the adequacy and efficiency of each agency’s information resources management and compliance with this Circular.”

Appendix IV to OMB Circular A-130 – “Analysis of Key Sections”

“Section 3504 [of the Paperwork Reduction Act of 1995, 44 U.S.C. Ch. 35] authorizes the Director of OMB to develop and implement uniform and consistent information resources management policies; oversee the development and promote the use of information management principles, standards, and guidelines; evaluate agency information management practices in order to determine their adequacy and efficiency; and determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director.” Sec. 2.

“The Circular implements OMB authority under the PRA with respect to Section 3504(d), information dissemination” Id.

“The definition of ‘government information’ includes information created, collected, processed, disseminated, or disposed of both by and for the Federal Government. . . . For example, banks insured by the FDIC must provide statements of financial condition to bank customers on request.” Sec. 3.

“The inclusion of information created, collected, processed, disseminated, or disposed of for the Federal Government in the definition of ‘government information’ does not imply that responsibility for implementing the provisions of the Circular itself extends beyond the executive agencies to other entities. . . . [T]he information responsibilities of grantees and contractors are not identical to those of Federal agencies except to the extent that the agencies make them so in the underlying grants or contracts. Similarly, agency information resources management responsibilities do not extend to other entities.” Id.

“Information Dissemination Product. This notice defines the term ‘information dissemination product’ to include all information that is disseminated by Federal agencies. . . . [T]he term ‘information dissemination product’ applies to both products and services, and makes no distinction based on how the information is delivered.” Id.

“When creating . . . information, agencies must plan . . . whether and how they will disseminate it They must also plan for the effects their actions and programs will have on the public and State and local governments.” Id.

“State and local governments, and tribal governments, cooperate as major partners with the Federal Government in the collection, processing, and dissemination of information. . . . The States supply the Federal Government with data on [multiple examples]” Id.

“Agencies must justify the creation . . . of information based on their statutory functions. Policy statement 8a(2) uses the justification standard – ‘necessary for the proper performance of the functions of the agency’ – established by the PRA (44 U.S.C. 3508). Furthermore, the policy statement includes the requirement that the information have practical utility, as defined in the PRA (44 U.S.C. 3502(11) and elaborated in 5 CFR Part

1320. Practical utility includes such qualities of information as accuracy, adequacy, and reliability. ..." Id.

"Subsection [8a](6)(a) carries over a requirement from OMB Circular No. A-3 that agencies' information dissemination products are to be, in the words of 44 U.S.C. 1108, 'necessary in the transaction of the public business required by law of the agency.' (Circular No A-130 uses the expression 'necessary for the proper performance of agency functions,' which OMB considers to be equivalent to the expression in 44 U.S.C. 1108.) The point is that agencies should determine systematically the need for each information dissemination product." Id.

"Notice to the Public. Sections 8a(6)(i) and (j) present new practices for agencies to observe in communicating with the public about information dissemination. Among agencies' responsibilities for dissemination is an active knowledge of, and regular consultation with, the users of their information dissemination products. A primary reason for communication with users is to gain their contribution to improving the quality and relevance of government information -- how it is created, collected, and disseminated. Consultations with users might include participation at conferences and workshops, careful attention to correspondence and telephone communications (e.g., logging and analyzing inquiries), or formalized user surveys.

A key part of communicating with the public is providing adequate notice of agency information dissemination plans. Because agencies' information dissemination actions affect other agencies as well as the public, agencies must forewarn other agencies of significant actions. The decision to initiate, terminate, or substantially modify the content, form, frequency, or availability of significant products should also trigger appropriate advance public notice. Where appropriate, the Government Printing Office should be notified directly. Information dissemination products deemed not to be significant require no advance notice.

Examples of significant products (or changes to them) might be those that:

- (a) are required by law; e.g., a statutorily mandated report to Congress;
- (b) involve expenditure of substantial funds
- (c) by reason of the nature of the information, are matters of continuing public interest; e.g., a key economic indicator;
- (d) by reason of the time value of the information, command public interest; e.g., monthly crop reports on the day of their release;
- (e) will be disseminated in a new format or medium; e.g., disseminating a printed product in electronic medium, or disseminating a machine-readable data file via on-line access.

Where members of the public might consider a proposed new agency product unnecessary or duplicative, the agency should solicit and evaluate public comments. Where users of an agency information dissemination product may be seriously affected by the introduction of a change in medium or format, the agency should notify users and consider their views before instituting the change. Where members of the public consider an existing agency product important and necessary, the agency should consider these views before deciding to terminate the product. In all cases, however, determination of what is a significant information dissemination product and what constitutes adequate notice are matters of agency judgment.” Id.

“When agencies use private contractors to accomplish dissemination, they must take care that they do not permit contractors to impose restrictions that undercut the agencies’ discharge of their information dissemination responsibilities. The contractual terms should assure that, with respect to dissemination, the contractor behaves as though the contractor were the agency.” Id.

“Agencies should inform the public as to the limitations inherent in the information dissemination product (e.g., possibility of errors, degree of reliability, and validity) so that users are fully aware of the quality and integrity of the information. If circumstances warrant, an agency may wish to establish a procedure by which disseminators of the agency’s information may at their option have the data and/or value-added processing checked for accuracy and certified by the agency. Using this method, redisseminators of the data would be able to respond to the demand for integrity from purchasers and users. This approach could be enhanced by the agency using its authority to trademark its information dissemination product, and requiring that redisseminators who wish to use the trademark agree to appropriate integrity procedures. These methods have the possibility of promoting diversity, user responsiveness, and efficiency as well as integrity. However, an agency’s responsibility to protect against misuse of a government information dissemination product does not extend to restricting or regulating how the public actually uses the information.” Id.

“Each agency must appoint a Chief Information Officer, as required by 44 U.S.C. 3506(a), who will report directly to the agency’s head to carry out the responsibilities of the agency under the PRA.” Id.

“The CIO designated by the head of each agency under 44 U.S.C. 3506(a) is charged with carrying out the responsibilities of the agency under the PRA. Agency CIOs are responsible for ensuring that their agency practices are in compliance with OMB policies. It is envisioned that the CIO will work as an ombudsman to investigate alleged instances of agency failures to adhere to the policies set forth in the Circular and to recommend or take corrective action as appropriate. Agency heads should continue to use existing mechanisms to ensure compliance with laws and policies.” Id.