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Office of information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Comments on OMB Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity Utility and Integrity of Information Disseminated By Federal Agencies

Dear Ms. Dickson:

Please include this letter as a Comment in the record of the Office of Management and Budget (OMB) Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 66 Federal Register 34489 (2001).

The OMB's Proposed Guidelines seek to implement the directive contained in Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658). That statute directs the OMB to issue guidance to federal agencies to assist them in improving information quality, establishing mechanisms to correct errors and monitoring the adequacy of these mechanisms. Both the OMB Proposed Guidelines and Section 515 emphasize the usefulness of agency procedures likely to increase the reliability of the data used and distributed by federal agencies. This is the proper emphasis when making rules about information. Our legal tradition of access to government and legal records and our fundamental commitment to speech rights both rest on mechanisms which support the flow of information without trying to influence its content. Section 515 is within this mainstream. As the OMB implements this legislative directive to support agency efforts to maintain high standards, it must be careful not to lose sight of the inherent limitations of the law in the information context. It would be very easy to slip into statements and requirements that would distort the legitimate information functions the statute intends to encourage and which would also be inconsistent with related law.

Through most of the Notice on the Proposed Guidelines, the OMB stresses procedural mechanisms and values. For instance, in Section III of the Proposed Guidelines, OMB requires agencies to adopt high quality standards as their performance goal, develop processes for reviewing the quality of information and treat information quality as integral to their administrative processes. These requirements seem consistent with the important fact, which the OMB acknowledges earlier in the Notice, that is, that federal agencies deal with a great variety of data. Following these guidelines, each agency will seriously address the information quality issues that arise within its jurisdiction. OMB is right to provide only generic guidance, to refrain from issuing a "detailed, prescriptive, 'one-size-fits-all' government wide" approach. OMB is also correct in attempting to design the guidelines so that agencies can apply them in a "workable manner." (66 F.R. at 4490)

However, OMB strays from this path when it attempts to do too much with the Proposed Guidelines. OMB should take its cue from the mainstream of the law and be sure not extend its reach beyond the procedural. This problem is most evident in the Definitions section. Here OMB compounds latent problems inherent in the task by making broad declarations on the meanings of words which are used cautiously by professionals in all fields dealing with information systems – from judges to engineers. This caution comes from experience and expertise. OMB likewise should be cautious. The complexities of information use in this society cannot be removed by assertions of clarity, even with the best authority and the best intentions.

An example is the problem of defining utility. What does it mean to say, as Definition (1)(A) states, that information must be useful to "all users?" Data necessarily varies in its usefulness, depending on many factors, including the needs and expertise of the users. Information specialists and networks translate and relay data to many diverse receptor points. Information cannot be made reproducible or transparent to everyone. The category "all users" has little practical meaning.

Definition (1)(B)(ii)(a) sails into waters that are even more treacherous. It appears to require that an agency only disseminate scientific information that can be verified by "independent analysis." It is not clear what this means, but it is evident that such a requirement is misplaced. The problem of how to decide what is true and what is false, what is good science or bad science, "scientific knowledge" or not, has been contested for many years in regulation and in the liability context. The proof process is fundamentally context dependent and often costly. There is no role for such a requirement in the OMB guidelines. When the law requires factual accuracy, that is, when it affirmatively imposes the requirement that certain facts be proven true before a particular legal result attaches, such as a regulatory performance requirement or payment of civil damages, there are established procedures for doing so.

Outside of formal adjudication and rule making, government agencies perform a wide variety of functions. One of these is to serve as resources for social learning processes within their fields of specialization. Government agencies foster the production and understanding of scientific information and thereby support debate about it.

Agencies are not dispensers of factual truth, but important components in the system of civil deliberation that is embodied in our laws.

Definition (2) declares that within the term "information" shall be included "any communication or representation of knowledge such as fact, data, or opinions in any medium or form...." This definition conflates concepts that have been carefully distinguished elsewhere and selected for differentiated status in the law. An opinion and a fact do not rest on the same underpinnings and have very different effects, in the law and in common sense. Knowledge and data have very different meanings. These distinctions are rational and useful. While OMB has relied on this simplified treatment of information before, it is not clear that it should continue to do so. Indeed, in the present proceeding, the difficulty that OMB expresses in choosing the right level of precision for the Guidelines illustrates the inadequacy of simplistic approaches to information dynamics. The OMB should reconsider its past reliance on this kind of definition, as in OMB Circular A-130, and restructure the definitions in these Guidelines to acknowledge the variety of expressions which agencies handle.

Section 515(b)(2)(A) states that the agencies' guidelines will be for the purpose of "ensuring and maximizing" the quality of the agencies' information. These terms recognize that limiting agencies to the dissemination of "correct" information is not the goal. Indeed, it cannot be. Rather, the statute seeks to set up procedures to improve government and public participation in maintaining a healthy flow of data in and out of the government system. If the OMB's Proposed Guidelines stray from this task, they are likely to engender considerable confusion at the agency level and to conflict in fundamental ways with basic legal principles governing speech and information. It appears that the difficulty stems from the Proposed Guideline's attempt to define and simplify too much, guide too much, rather than simply assist the agencies in setting up their procedures.

The OMB's discussion of Underlying Principles (66 F.R. at 34490) reveals how very difficult is the task of defining and homogenizing the nature of "information." The OMB states that it has tried to avoid a "one size fits all" approach. This is an important principle. Articulating more precise rules for sorting and releasing data are likely to be counterproductive. For instance, on the surface it seems self-evident that, as the OMB states, "The more important the information, the higher the quality standards to which it should be held." However, it is often difficult or even impossible to tell ahead of time what information will turn out to be important. Synthesis and serendipity often enhance the usefulness of information, but they are often unpredictable. Time and budgetary constraints also mean that important decisions are made under conditions of uncertainty. Because of these and other idiosyncrasies, throughout the law – from the First Amendment and patent law to common law and the rules of evidence - maximum flow and disclosure form the baseline for information rules. The OMB should be wary of establishing guidelines that would lead agencies to issue content-based rules that attempt to discriminate among different types or grades of information.

Perhaps OMB's motivation in reaching beyond the requirements of Section 515 is linked to the concern it expresses that, when agencies use the internet to disseminate information, they are doing something fundamentally different from traditional agency action. OMB states that it is concerned that "harm" from poor quality data released on the internet may be greater than that stemming from traditional agency media. Again, this statement may seem self-evident, but closer scrutiny suggests that it may not be true and that, at least, it is an assertion which requires study and justification. For instance, if OMB guidelines were to have the effect of reducing information flow on a system-wide basis, this would certainly affect many interests which rely on agencies in order to function properly; these interests include both the general public and regulated communities. Moreover, "harm" is a tricky concept in this context. OMB should be very careful not to inadvertently incorporate into federal regulations the notions of harm associated with the common law of libel. First, "harm" in that context is a difficult thicket of inconsistent principles; second, federal agencies have not been given guidance on this matter from Congress.

Indeed, it seems most unlikely that Congress intended that Section 515 have the effect of leading the OMB to issue blanket definitions affecting government use of the Internet or government communication with the public. The Internet itself and the law concerning its use are very much works in progress. All federal agencies operate under elaborate and complex statutory authorizations. The OMB is not charged with making law in these areas and should not move too quickly, as in this abbreviated proceeding, to influence these broader areas.

Supporting the flow of communication without affecting its content may not be an easy task, but American legal institutions have collectively given it a high priority throughout our history and the OMB should be guided by this precedent.

Thank you very much.

Very truly yours,

Mary L. Lyndon
Professor of Law