

BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
AND
THE OFFICE OF MANAGEMENT AND BUDGET

Re: USDA FAIR Act Inventory FY 2004

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COMMENTS OF
THE CENTER FOR REGULATORY EFFECTIVENESS

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I. Introduction

- ▶ This document constitutes the Center for Regulatory Effectiveness' (CRE's) comments on and challenges to the USDA's FY 2004 FAIR Act inventory of activities that are not inherently governmental and of activities that are inherently governmental. This document is CRE's response to the Office of Management and Budget's *Federal Register* notice of May 3, 2005.¹ This document also serves as the consultation requested by USDA "Before Filing A Formal Request for Correction."²

II. Issue Summary

- ▶ In a nutshell, OMB and USDA have violated the FAIR Act. Specifically, in describing activities that the private sector might perform in lieu of the federal government, OMB requires that agencies utilize vague, broadly worded and non-specific "function codes" in lieu of statutorily mandated "particular" activities. Furthermore, USDA is not providing the cost savings and related data in Columns L, M, N, and O of the Inventory, information which is essential for Department to perform timely and transparent competitive source selection processes using realistic and fair cost comparisons as required by Sections 2(d) and 2(e) of the Act.
- ▶ CRE is filing this challenge to the USDA FAIR Act inventory and requesting that the USDA fulfil its legal obligations and provide a full and meaningful description of "particular activities" associated with for Public Key Infrastructure-related work performed by the Department.

III. OMB Circular A-76 and Associated Memoranda, Guidance, and Function Codes Contravene Law

What the Law Says

- ▶ The Federal Activities Inventory Reform Act of 1998 ("FAIR Act") allows challenges "of an omission of a *particular activity* from, or an inclusion of a *particular activity* on, a list for which a notice of public availability has been published under section 2."³

How OMB Violates the Act

A. OMB Prohibits Agency Listing of Particular Activities, Violating The Public Availability Requirement

- ▶ OMB Circular A-76 (Revised) states, "For annual inventories, an agency shall use the format and data requirements found at the OMB web site..."⁴

¹ 70 FR 22930.

² http://www.ocio.usda.gov/qi_guide/corrections.html

³ P.L. 105-270, Section 3(a). [Emphasis added.]

⁴ Office of Management and Budget, Circular A-76 (Revised), May 29, 2003, Attachment A, A. 2.

- ▶ OMB Memorandum M-02-04 which provides instructions to agencies on preparing their list of “commercial activities performed by Federal employees” states that “Agencies must use listed OMB Function Codes”⁵ in their submissions. The preceding sentence refers to Function Codes as “Function Activity Codes.” More recently, Memorandum M-05-01⁶ also discusses the use of “activities codes” and provides a link to OMB’s Year 2004 FAIR Act Inventory Function Codes.⁷
- ▶ OMB refers to their standardized codes as “Function Codes,” “Function Activity Codes,” and/or “activity codes,” thus obfuscating the distinction between functions and activities. This transformation of “particular activities” into function codes is not mere semantic quibbling. Instead, the deliberate change in terminology underlies a wholesale circumvention of the purpose and directives contained in the FAIR Act.
- ▶ Circular A-76 defines a “Function Code” as “The numerical code used to categorize an agency’s commercial and inherently governmental activities for inventory reporting purposes.”⁸ However, the Circular’s definition of an “Activity” states that “an activity may be an entire function or may be a part of a function.” The definition also states that an Activity is a “specific task or grouping of tasks...”
- ▶ Because, under OMB’s definitions: 1) Functions are not synonymous with Activities, let alone *particular activities*; and 2) OMB requires that agencies use codes associated with Functions not particular activities, OMB has directly contradicted the statutory requirement that agencies make public a list of particular activities.
- ▶ *One result of OMB’s failure to adhere to statutory requirements of the FAIR Act is that the inventory is absolutely unintelligible. To demonstrate the incoherence of the inventory, attached at the end of these comments is the first page of USDA’s nearly 1,100 page FY 2004 FAIR Act Inventory.*

B. OMB Effectively Prohibits All Meaningful Challenges to FAIR Act Inventories

- ▶ The FAIR Act explicitly authorizes challenges to agency FAIR Act inventories. However, the Act requires that the challenges to the inventory contents be to the omission or inclusion “of a particular activity....” Because OMB’s rules for preparing the inventories require that use of broad, vague Function Codes, it is not possible to identify particular activities on the inventory lists. Thus, OMB’s rules

⁵ Office of Management and Budget, M-02-04, February 27, 2002.

⁶ Office of Management and Budget, M-05-01, October 15, 2004.

⁷ http://www.whitehouse.gov/omb/procurement/fair/2004function_codes.html.

⁸ OMB Circular A-76 (Revised), Attachment D.

have the effect of denying interested parties their legal right to challenge the inclusion or omission of particular activities.

- ▶ The inability of parties to make a potentially effective challenge to FAIR Act inventories is further highlighted by instructions in Circular A-76 which state, “A written inventory challenge shall be submitted to agency inventory challenge authorities and shall specify the agency, agency component, agency organization, function(s), and location(s) for the activities being challenged.”⁹ How is a complainant to identify the “activities being challenged” when OMB’s guidance deletes any reference to any “particular activity” from the inventory?
- ▶ Further demonstration of the “Catch-22”¹⁰ situation created by OMB is contained in their “2004 Inventory Guide.”¹¹ The Guide states that:

To be considered valid for purposes of the FAIR Act, a challenge must be:

- *clear as to the activity being challenged for omission or inclusion on the inventory as specifically as possible by providing **sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged;***
 - *clear as to the activity being challenged for the reason code by providing **sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged;** and*
 - *justified by providing the basis for the challenge.*¹²
- ▶ By requiring an activity to be described in the inventories only through use of a broad, non-specific¹³ “Activity Function Code,” OMB has made it impossible for a complainant to provide the “sufficient description” required by OMB. Hence the “Catch-22” situation and the denial of the Congressionally-mandated right of

⁹ OMB Circular A-76, Attachment A, D. 2. [Emphasis added.]

¹⁰ Definition of a Catch-22 situation: “an impossible situation where you are prevented from doing one thing until you have done another thing, but you cannot do the other thing until you have done the first thing.” Source: <http://www.freesearch.co.uk/dictionary/catch-22>.

¹¹ [http://emissary.acq.osd.mil/inst/share.nsf/0/092c8f8757a8985485256fa10045b429/\\$FILE/m04-09.pdf](http://emissary.acq.osd.mil/inst/share.nsf/0/092c8f8757a8985485256fa10045b429/$FILE/m04-09.pdf)

¹² Ibid. [Emphasis added.]

¹³ Examples of the broad, non-specific activity codes required by OMB include “C303 Fixed Assets” and “C315 Financial Management Operations.”

interested parties to challenge the inclusion or omission of activities from the FAIR Act inventories.

- ▶ Under OMB's rules, the only way for a person to identify and distinguish the different functions listed on an inventory is by citing to the code number assigned to each line in the inventory. However, as will be discussed in Section III of this document, the use of the vague, non-specific function codes does not permit a complainant to sufficiently distinguish one particular agency activity from another. Thus, OMB has ensured that a complainant lacks the information necessary to "justify [the complaint] by providing the basis for the challenge."

C. OMB Creates Additional Restrictions on Challenges Not In Statute

- ▶ The FAIR Act creates specific limits on what can be challenged in an inventory, i.e., the omission or inclusion of particular activities. OMB, however, adds additional restrictions on challenges not contained in or supported by statute.
- ▶ Specifically, Circular A-76 states that "Function codes shall not be subject to the inventory challenge process." Since function codes are: 1) the heart of the inventory; and 2) generic to the point of being useless, OMB's prohibition on challenging the codes acts as a barrier to a meaningful challenge to inclusion or omission of particular activities.

D. OMB Omits Information Required by Statute

- ▶ The FAIR Act states, "Not later than...the head of each executive agency shall submit to the Director of the Office of Management and Budget a list of activities... The entry for an activity on the list shall include the following: ... (3) The name of a Federal Government employee responsible for the **activity** from whom **additional information about the activity** may be obtained."¹⁴
- ▶ OMB does not currently require the agencies provide contact information for employees knowledgeable about specific activities. Instead, under the heading "Contact Information," OMB's "Instructions for compiling commercial and inherently governmental FTE inventories" states, "This worksheet is provided for you to enter contact information for each bureau. You must provide at least one contact for each bureau. You should also provide additional contacts in the event that the primary contact cannot be reached."¹⁵ Thus, contact information is provided, at most, only for bureaus, not activities as the law requires.
- ▶ By subverting the direct statutory requirement to provide the public with a specific source for information about particular activities, OMB has cut off the last possible means an interested party could use to obtain information about what activities are and are not included in the FAIR Act inventories.

¹⁴ P.L. 105-270, Section 2(a). [Emphasis added.]

¹⁵ <http://www.ecr.gov/pdf/FAIR.pdf> [Emphasis added.]

IV. CRE Requests USDA and OMB Provide Statutorily Required Information Regarding USDA's Public Key Infrastructure/eAuthentication Activities

- ▶ USDA's National Finance Center (NFC) provides a variety of Public Key Infrastructure (PKI)/eAuthentication services. Information about NFC's various PKI/eAuthentication activities is disseminated on their website.¹⁶
- ▶ PKI activities are not inherently governmental in nature since at least two private-sector vendors, along with USDA/NFC, are included on the Certified Provider List of the Federal Identity Credentialing Committee's Shared Service Provider Subcommittee.¹⁷
- ▶ Despite the fact that USDA/NFC engages in a variety of PKI-related activities, there are no functions on USDA's 1,061 page FY 2004 FAIR Act Inventory¹⁸ that can be discerned as relating to PKI activities. In fact, it is not even possible to accurately identify functions that are performed by the National Finance Center.
- ▶ Since the NFC is located in New Orleans, LA and since some of activity function codes are performed in that fine city, some of these may be for the NFC but no definitive determination is possible. The "Agy_Bur" code 005-04 is associated with activity function codes in both New Orleans and Washington. The FY 2003 inventory included a column for "Bureau Title" (deleted from the FY 2004 inventory.) In the FY 2003 inventory, the code 005-04 was associated with the rather nondescript Bureau Title of "Executive Operations."
- ▶ The activity function codes for work performed in New Orleans are associated with such non-particular, generic terms as "Accounting Technicians" (code=C300) and "Financial Systems Support" (code=C313).
- ▶ The absolute, complete inability to identify "particular activities" from the FAIR Act Inventory is highlighted by the fact that more than 50 line items (Seq. No. 50-103) have the identical: "Activity Fct Code," "Agy_Bur" code, City and State, "Total FTEs," "Status" code, "Reason" code, and First Year on Inventory. How on earth could an interested party meet OMB's requirement to provide a "sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged" when the agency is providing identical and non-descriptive data about its activities?

CRE Challenge and Request

- ▶ CRE hereby challenges the FY 2004 USDA FAIR Act Inventory and requests that USDA and OMB fulfill their statutory duties by providing for each and every activity associated with the development, provision, support and/or maintenance of PKI/eAuthentication services and/or products:

¹⁶ <http://sig.nfc.usda.gov/pki/>

¹⁷ <http://www.cio.gov/ficc/cpl.htm>

¹⁸ <http://www.usda.gov/ocfo/fair/fairinv.pdf>.

- The fiscal year for which the activity first appeared on a list prepared under this section;
 - The number of full-time employees (or its equivalent) that are necessary for the performance of the activity by a Federal Government source; and
 - The name of a Federal Government employee responsible for the activity from whom additional information about the activity may be obtained.
- ▶ The public dissemination of the above information is a mandatory, not discretionary, duty.
- ▶ CRE *also* requests that each and every PKI-related activity be described in sufficient detail that an interested party would be able to meet OMB's own requirement of being able to provide sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged. Failure to include the sufficient detail in the Inventory would mean that the document is not useful to its intended users and does not meet the requirements of the FAIR Act.
- ▶ Although the FAIR Act restricts challenges to the omission or inclusion of particular activities to "interested parties," the CRE challenge is not to an activity's omission or inclusion but to the failure of USDA and OMB to provide the legally required information for "particular" activities.
- ▶ Furthermore, even though OMB has instructed agencies to use function codes rather than identify activities, as Circular A-76 explains, "This circular shall not be construed to alter any law..." Thus, nothing in the Circular supercedes or negates USDA and OMB duties under the FAIR Act to identify particular activities.

Sincerely,

/s/
Jim Tozzi
Member, Board of Advisors

FY 2004 FAIR Act Inventory

1	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
2	Fair Act ReportSeq						Total	Activity			First Year	Year of	CIV/FTE	Est Ann Cost	Year of
3	No.	Agy_Bur	Abbreviation	State	City	Country	FTEs	Fct Code	Status	Reason	On Inventory	Cost Compare	Savings	Comp Savings	MEO Review
3		1 005-03		3 DC	Washington	US		2 Y550	C	B		2002			
4		2 005-03		3 DC	Washington	US		4 Y810	C	B		2002			
5		3 005-03		3 DC	Washington	US		1 Y899	C	B		2002			
6		4 005-03		3 DC	Washington	US		31 Y199	I			1999			
7		5 005-03		3 DC	Washington	US		2 Y210	I			1999			
8		6 005-03		3 DC	Washington	US		9 Y215	I			1999			
9		7 005-03		3 DC	Washington	US		6 Y220	I			1999			
10		8 005-03		3 DC	Washington	US		3 Y525	I			2003			
11		9 005-03		3 DC	Washington	US		3 Y610	I			1999			
12		10 005-03		3 DC	Washington	US		26 Y810	I			1999			
13		Total:		3				87							
14															
15		11 005-04		4 DC	Washington	US	0.68	B000	C	B		1999			
16		12 005-04		4 LA	NEW ORLEANS	US		4 B000	C	E		1999			
17		13 005-04		4 DC	Washington	US	0.32	B100	C	A		1999			
18		14 005-04		4 DC	Washington	US	0.16	B100	C	B		2003			
19		15 005-04		4 DC	Washington	US	0.32	B102	C	A		1999			
20		16 005-04		4 DC	Washington	US	0.16	B102	C	B		2003			
21		17 005-04		4 DC	Washington	US	0.34	B300	C	A		1999			
22		18 005-04		4 DC	Washington	US	0.34	B300	C	A		2003			
23		19 005-04		4 DC	Washington	US	0.17	B300	C	B		1999			
24		20 005-04		4 LA	NEW ORLEANS	US		6 B300	C	E		1999			
25		21 005-04		4 LA	NEW ORLEANS	US		5 B400	C	E		1999			
26		22 005-04		4 LA	NEW ORLEANS	US		1 B500	C	E		2000			
27		23 005-04		4 DC	Washington	US	0.34	B501	C	A		1999			
28		24 005-04		4 DC	Washington	US	0.17	B501	C	B		2003			
29		25 005-04		4 LA	NEW ORLEANS	US		3 B501	C	E		2000			
30		26 005-04		4 LA	NEW ORLEANS	US		3 B700	C	E		2003			
31		27 005-04		4 DC	Washington	US	1.09	B701	C	A		1999			
32		28 005-04		4 DC	Washington	US	0.92	B701	C	B		1999			
33		29 005-04		4 DC	Washington	US	1.5	B702	C	B		1999			
34		30 005-04		4 DC	Washington	US	0.66	B720	C	B		1999			
35		31 005-04		4 DC	Washington	US	0.59	B999	C	A		1999			
36		32 005-04		4 DC	Washington	US	1.58	B999	C	B		1999			
37		33 005-04		4 DC	WASHINGTON	US		11 C000	C	E		1999			
38		34 005-04		4 DC	Washington	US		1 C000	C	B		1999			
39		35 005-04		4 DC	Washington	US		1 C000	C	A		1999			
40		36 005-04		4 DC	Washington	US		2 C000	C	B		2003			
41		37 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
42		38 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
43		39 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
44		40 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
45		41 005-04		4 LA	NEW ORLEANS	US	39	C000	C	E		1999			
46		42 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
47		43 005-04		4 LA	NEW ORLEANS	US		1 C000	C	B		2003			
48		44 005-04		4 VA	Washington	US		3 C000	C	A		1999			
49		45 005-04		4 DC	Washington	US		1 C110	C	B		1999			
50		46 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
51		47 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
52		48 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
53		49 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
54		50 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
55		51 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			
56		52 005-04		4 LA	NEW ORLEANS	US		1 C300	C	B		2003			