

Center for Regulatory Effectiveness

Suite 700

11 Dupont Circle, N.W.

Washington, DC, 20036-1231

Tel: (202) 265-2383 Fax: (202) 939-6969

secretary1@mbsdc.com www.TheCRE.com

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John D. Graubert
Principle Deputy General Counsel
Federal Trade Commission
Room 564
600 Pennsylvania Avenue, N.W.
Washington DC 20580

Subject: A Roadmap for Bringing the FTC Into Compliance With the Data Quality Act

Dear Mr. Graubert:

I want to thank you for your response to our Request For Reconsideration (RFR) of a petition filed under the Data Quality Act (DQA).

There were three elements of the Commission's response that were noteworthy:

1. **Timeliness.** Unlike some agencies, the FTC did not use interminable delays to put off making a decision on either our Request for Correction (RFC) or our RFR.
2. **Accurate Depiction of the RFR.** The FTC's response to the RFR accurately reflected the key issues raised by CRE in the document.
3. **Serious Consideration.** The CRE RFR was most certainly taken seriously and given considerable attention by the Commission. The FTC's dedication is recognized and appreciated.

That having been said, there is a significant perception gap between the FTC and CRE regarding the objectives of the Data Quality Act which needs to be addresses in several fora as discussed below.

Basically, it is CRE's understanding that the DQA was passed to allow ordinary citizens to call attention and obtain correction of misstatements in government documents and other information disseminations.

The purpose of the Act was not to give additional authority to attorneys to invoke the Administrative Procedure Act. Allow me to enumerate a number of positions taken by the FTC in their response to our RFR that suggests that the agency's rationale in their response to CRE was shaped by vestigial infirmities of the APA in lieu of the new and open public participatory process resulting from passage of the DQA.

1. **Standing.** The FTC has stated that CRE is not an affected person under the Commission's guidelines, *e.g.*, "even though the guidelines do not permit CRE to seek relief in this matter..." The FTC goes even further in minimizing the public's ability to seek and obtain correction under the Act by stating the CRE's view of an information correction process that is open to the public "if adopted, would be too broad, since it would include any member of the public with some general interest in the agency's actions. I am unaware of any direct economic, legal or other cognizable interest that would qualify CRE as a party entitled to seek relief under the guidelines...."

The Commission's statements sharply limiting the parties able to obtain correction under the Act not only run counter to our understanding of the DQA and implementing guidelines, but also counter OMB's view of the issue.

Specifically, in a Memorandum for the President's Management Council, that discussed differing views of who had standing to seek relief under the Act, Dr. Graham wrote that OMB preferred the approach (as exemplified by HHS) that "**best ensures full public access to the complaint process, a goal of Section 515** and the OMB guidelines. The focus of the complaint process should be on the merits of the complaint, not on the possible interests or qualifications of the complainant. **Other agencies need to adopt** a similar approach."¹

The FTC's insistence on a restrictive view of an "affected party," a view that closely mirrors the standards for Article III standing, is in direct contradiction to OMB and the DQA.

2. **Agency Failure to Address the Substance of the Complaint.** At several points, the agency's response to the RFR states that the "burden of proof" is on CRE. It is absolutely correct that the burden of proof is on the petitioner *to demonstrate that the agency failed to adhere to the Data Quality Act and implementing guidelines*. However, the FTC grossly distorts the burden of proof issue by in effect claiming that the petitioner would need demonstrate that, if performed correctly, the work would have had a different outcome.

¹ http://www.whitehouse.gov/omb/inforeg/iqg_comments.pdf. [Emphasis added.]

Specifically, the FTC stated “the issue before me is whether you have met the burden of proof to show a sufficient factual or legal basis for withdrawing and reissuing the study to include survey respondents outside the 18-74 age range. Upon review of your request, *it provides no such basis to reasonably conclude that the study results would have materially differed if respondents over the age of 74 had been included.*”²

CRE demonstrated (met the burden of proof) that the FTC violated the DQA and implementing guidelines by using biased data, *i.e.* excluding certain demographic groups. However, the FTC has twisted the burden of proof concept by claiming that it is the CRE’s burden to show that the FTC’s bias had a specific impact on the result of the survey. Thus, Commission is claiming, in effect, that a petitioner would need to do the FTC’s work for them before their claim can be considered. This position not only is not what the guidelines mean by burden of proof, it undermines the very intent of the DQA by restricting its use to those well-heeled parties that can afford to perform their own surveys or other agency task.

3. **Refusal to Discuss the Commission’s Own Reasoning.** In our RFR, CRE explained at length that the Commission’s reason for excluding older Americans from the survey (allegations of vision problems raised by a Commission consultant) made no sense whatsoever. Rather than address this important issue in their response to our Appeal, the FTC simply stated, “Nor is it necessary to address or explain the Associate Director’s stated reasoning for the exclusion....” Again, the FTC is relying a misrepresentation of the burden of proof issue rather than addressing the substance of CRE’s petition as well as the FTC own explanation for denying that petition.
4. **FTC Refusal to Recognize Leading Statistical Authorities.** In our RFR, CRE cites three statistical authorities to support our claim that the Commission failed to adhere to sound statistical techniques, the Federal Judicial Center’s “Reference Manual on Scientific Evidence, Second Edition,” the Advertising Research Foundation’s “Guidelines for Market Research” and a study by the Rand Corporation.

In response, the FTC asserted that “Neither the agency nor its staff, however, are directly governed by the...various research market guidelines you cite as authority for the relevant standards or burden of proof.” The FTC is focusing on the judicial “deference to be accorded to the agency’s regulatory choices and actions, and the allocation of the burden of proof” rather than on simple question of whether agency complied with sound statistical techniques as defined by leading authoritative bodies.

² FTC Response, 12/22/05. [Emphasis added.]

Need for Corrective Action

In order to close the gap between the objectives of the DQA and OMB's implementing guidelines and the FTC's current understanding of those objectives, the following actions need to be taken.

Executive Branch Actions

1. **OMB Review of FTC Responses to RFCs.** OMB has the authority to review the FTC's responses to Data Quality Petitions. OMB should revive the procedures established by the Carter Administration for the Regulatory Analysis Review Group (RARG) and apply them to the FTC's review of Data Quality petitions. Under the RARG procedures, OMB would file their comments on the record with the FTC. If, upon review of an RFC submitted to the FTC, OMB concludes that a particular RFC does meet the standards to be accepted, this OMB determination could be used by petitioners seeking judicial review of a denial by the FTC of their Request for Correction.

Please see CRE's "Blueprint for OMB Review of Independent Agency Regulations," <http://thecre.com/pdf/blueprint.pdf>.

2. **Amendment of FTC Guidelines.** OMB should direct the FTC to amend its information quality guidelines to clearly address the four issues outlined above by CRE.
3. **Bumpers-Style Amendment to FTC Guidelines.** Due to the extreme reluctance of the FTC to adhere to the DQA, the FTC guidelines should be amended to create a level playing field by removing the deference given to the agency during the review of RFCs. A proposal to remove deference given to agencies was proposed by Sen. Bumpers during the Carter Administration. For more information, please see http://www.thecre.com/ombpapers/unfinished_j.htm.

Congressional Actions

Congressional Improvement of the FTC Rulemaking Process. Congress should take actions to ensure that the actions described above take place in a timely manner. Congressional action would include:

1. A request for a response from the FTC on the views set forth by CRE.
2. A request for a response from OMB on the views set forth by CRE.

3. If the FTC fails to amend their information quality guidelines prior to the enactment of their FY 2007 Appropriations Act, the Congress should incorporate language in the Commission's Appropriations requiring the FTC to effectively address the four issues outlined above by CRE, thus ensuring that FTC funds are spent in an efficient manner.

Judicial Review

The Executive Branch and Congressional actions described above would significantly increase the likelihood that petitioners would receive appropriate judicial review of their information quality complaint should such action be necessary.

Sincerely,

/s/

Jim Tozzi

Member, Board of Advisors

cc: Dr. John D. Graham
Clay S. Johnson, III
Rep. Joe Barton