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CRE Response to HHS Request for Comment

Section 1003 Affordable Care Act

FR April 14, 2010

DHHS-2010-PRR

Center for Regulatory Effectiveness

- CRE is a regulatory watchdog founded and managed by former officials of the White House [Office of Management and Budget](#) .
- CRE’s watchdog activities center around two instruments used for regulatory oversight:
 - (1) **“Good Government” laws** which “regulate the regulators”, including the Data Quality Act, the Paperwork Reduction Act, and Executive Order 12866: Regulatory Review.
 - (2) **Interactive Public Dockets** which provide a 24/7 mechanism for [communicating](#) with regulators before, during and after a public comment period and are responsive to the Presidential [Open Government Directive](#).
- CRE routinely participates in the regulatory process, including filing or preparing:
 - [Public comments](#)
 - [Data Quality Alerts](#)
 - [Data Quality Petitions](#)
 - [Regulatory Reviews](#)
 - [Regulatory Editorials](#)
 - [Agency-specific websites](#)
 - [Judicial Actions](#)

HHS Request for Information

- CRE commends HHS for seeking public input during the formative stages of this very important undertaking.

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- CRE’s comments will focus solely on the actions that HHS, in particular the Office of Consumer Information and Insurance Oversight (OCIO), must take in order to be in compliance with the “good government” laws and the Presidential Open Government Directive.
- These comments are submitted pursuant to the instructions in the RFI that state groups filing comments need not comment on the totality of issues presented therein.

OCIO Compliance with the “Good Government” Laws

- OCIO has just begun operations; understandably it will take time to establish the policies and procedures needed to be in compliance with statutory and Presidential mandates.
- Nonetheless, if there is time to work on new regulatory initiatives there is time to work on compliance with the “good government” laws with an emphasis on the following:

Data [Information] Quality Act (DQA)

- The DQA and its implementing regulations::
 - Require OMB to issue [government-wide](#) standards governing data disseminated by federal agencies.
 - Require HHS to issue DQA guidelines in [conformance](#) with OMB guidelines.
 - Establish a [petition](#) (Section E) process for the public to seek and obtain corrections to inaccurate information disseminated by HHS, including information in reports and on websites.
 - Require HHS to conduct pre-dissemination reviews of influential material before it is released to the public to ensure it is in compliance with the DQA.
 - Require HHS to comply with OMB’s [peer review](#) guidelines
 - Require HHS to comply with OMB’s [risk assessment](#) guidelines
- Recommendation (Data Quality)
 - OCIO must comply with existing laws; accordingly they should issue regulations, pursuant to notice and comment, which address each of the six actions identified above.

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■ Enforcement (Data Quality)

- The DQA can be enforced by the agency Chief Information Officer, OMB or the [courts](#). Outside groups, such as CRE, can request [enforcement](#). or initiate a [legal](#) action,

Paperwork Reduction Act (PRA)

- No agency is allowed to collect information from ten or more persons unless they receive explicit approval from OMB.
- On PRA matters, OMB’s statutory authorities trump all of agency authorities.
- The PRA applies both to reporting and recordkeeping requirements.
- Certification Statement

The PRA requires that an agency official sign the following certification statement for each collection of information from third parties:

Certification for Paperwork Reduction Act Submissions

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

It is necessary for the proper performance of agency functions;

It avoids unnecessary duplication;

It reduces burden on small entities;

It uses plain, coherent, and unambiguous terminology that is understandable to respondents;

Its implementation will be consistent and compatible with current reporting and recordkeeping practices;

It indicates the retention period for recordkeeping requirements;

It informs respondents of the information called for under 5 CFR 1320.8(b)(3):

Why the information is being collected;

Use of information;

Nature of response (voluntary, required for a benefit, or mandatory);

Nature and extent of confidentiality; and

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Need to display currently valid OMB control number;

It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of the instructions);

It uses effective and efficient statistical survey methodology; and

It makes appropriate use of information technology

.If you are unable to certify compliance with any of these provisions, identify the item below and explain the reason in Item 18 in the supporting statement

■ Agencies must identify annual reporting and recordkeeping hour burdens.

- a. Number of respondents
- b. Total annual responses
- c. Total annual hours requested

■ Recommendations (PRA)

- OCIO should issue guidance to its employees informing them of the need to comply with the PRA.
- OCIO should note that PRA submissions to OMB must be DQA compliant as required by OMB's government-wide DQA guidelines.
- The PRA mandates that agencies meet with the public on Paperwork issues; OCCIO should establish internal procedures for public participation

■ Enforcement (PRA)

- The PRA is enforced by OMB.
- CRE will be giving special attention to OMB [enforcement](#) of the aforementioned certification provisions of the PRA.

Executive Order 12866- Regulatory Review (OMB)

- This [Executive Order](#) requires OCIO to submit its significant regulations to OMB prior to proposal in the Federal Register.

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- The agency submission to OMB must include:
 - estimate of benefits.
 - estimate of costs.
 - a demonstration of the “compelling public need”.
 - a description of the alternatives examined

Recommendation (Executive Order 12866)

- OCIO should appoint a policy official to oversee compliance with the Executive Order within OCIO.
- Enforcement (Executive Order 12866)
 - The Executive Order is enforced by OMB.
 - Historically, Congressional interventions have also had an impact on compliance.
 - CRE routinely [reports](#) non-compliance with the Executive Order; the said reports are available to the Congress and the media.

OCIO Compliance with the Presidential Open Government Directive.

- President Obama has issued one of the most significant [directives](#) related to open government.
- The Administration has issued directives to make the government more transparent, participatory and collaborative.
- The Open Government Directive defines collaborative as follows:

“Collaboration improves the effectiveness of Government by encouraging partnerships and cooperation within the Federal Government, across levels of government, and between the Government and private institutions.”

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- Of particular interest to CRE is the following statement in the Directive:

“The Plan should include proposals to use technology platforms to improve collaboration among people within and outside your agency. “

- One such platform to improve collaboration among people within and outside an agency is the Interactive Public Docket (IPD).

Interactive Public Docket (IPD)

- The Interactive Public Docket is a mechanism for communicating with regulators on a 24/7 basis, i.e., before, during and after the public comment period.
- 24/7 communication with regulators is essential because differing technology and lifestyles are on a 24/7 basis.
- CRE recognizes rulemakings have to come to an end. We also recognize the need for defined time periods for public comment
- The IPD is based on the observation that regulators can visit an IPD subsequent to the end of a public comment period and introduce material from an IPD in the record at will.
- The IPD was first championed by CRE.
- CRE’s work on the IPD received a favorable review from National Public Radio
- The IPD is a mega blog which allows the public and the regulated community to address a wide range of regulatory issues by posting comments and studies on a website which are displayed by subject area and public comments are posted.
- To view an IPD see the IPD developed by CRE for the energy industry on ocean zoning (marine spatial planning)
- The IPD consists of a:
 - o homepage
 - o discussion forum
 - o news page

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- The discussion forum and news page are interactive and the public and the regulated community may post their views on a 24/7 basis.
- Listserves can be used to broadcast CRE posts to federal and state regulatory officials.
- We protect our readers from spam, profanity and inflammatory rhetoric by having all posts go through a “posting queue”, the elements of which are then posted by CRE staff.

Recommendations (IPD)

- OCIO should develop a plan, similar to the one required by HHS to ensure compliance with the Open Government Directive, which explicitly encourages the use of third-party IPD’s to address the following directive:

“Your agency’s Open Government Plan should explain in detail how your agency will improve collaboration, including steps the agency will take to revise its current practices to further cooperation with other Federal and non-Federal governmental agencies, the public, and non-profit and private entities in fulfilling the agency’s core mission activities.”
- To this end the OCIO should announce in the Federal Register its intent to hold a public forum to explore options for creating an IPD Exchange, managed by non-federal entities, members of which would be focused on ensuring DQA compliance for actions taken pursuant to the Patient Protection & Affordable Care Act.

Enforcement (IPD)

- CRE is reviewing the possibility of establishing an Interactive Public Docket devoted exclusively to the activities of OCIO. If such an event materializes the site address will be <http://www.thecre.com/insurance> and would serve as the platform for DQA petitions.
- In this event, CRE would utilize the totality of actions identified on page one herewith to ensure that OCIO complies with the Data Quality Act, the Paperwork Reduction Act and Executive Order 12866.

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