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MEMORANDUM

To: The Center for Regulatory Effectiveness

From: Scott Slaughter, Esq.
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Date: May 29, 2002

Subject: Federal Agency Authority to Create Exemptions from the Data Quality Guidelines that are Required by the Paperwork Reduction Act's Information Dissemination Provisions

I. QUESTION PRESENTED

Can the Office of Management and Budget ("OMB") or any other federal agency exempt any publicly disclosed information from data quality guidelines promulgated under the Information Dissemination provisions of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3504(d)(1), 3516 note?

II. ANSWER

No. As explained below, the relevant statutory text and legislative history demonstrate clear congressional intent that these data quality guidelines, like the PRA's other Information Dissemination requirements, apply to any and all information that federal agencies have in fact made public. By contrast to the PRA's separate Collection of Information requirements, there are no statutory exemptions from any of the PRA's Information Dissemination requirements. OMB's attempt to create exemptions by restricting the definition of "dissemination" in its interagency data quality guidelines contradicts Congress' own pervasive and all encompassing use of this term. OMB's "dissemination" exemptions in its interagency data quality guidelines are also inconsistent with OMB's prior, much broader definition of "dissemination" in implementing the PRA's Information Dissemination requirements. The additional exemptions proposed by other federal agencies also violate clear Congressional intent because OMB cannot provide any exemptions from its interagency data quality guidelines, and the other agencies have to comply with OMB's interagency guidelines.

III. BACKGROUND

The PRA's Information Dissemination requirements are separate from the PRA's Collection of Information requirements. *E.g.*, 44 U.S.C. §§ 3502(3), (12); 3504(c),(d); 3506(c),(d). One express purpose of the PRA's Information Dissemination requirements is to:

... improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society.

44 U.S.C. § 3501(4).

The legislative history accompanying the 1995 PRA amendments that added most of the Information Dissemination requirements, H.R. 830, 104th Cong. (1995), explains that these amendments “promote[] the theme of improving the quality and use of information to strengthen agency decisionmaking and accountability and to maximize the benefit and utility of information created, collected, maintained, used, shared, disseminated, and retained by or for the Federal Government.”

H. Rep. No. 104-37, at 35 (Feb. 15, 1995) (“House Report”).

The recently enacted Data Quality Act, 44 U.S.C. § 3516 note, does not affect the PRA's Collection of Information requirements. Instead, it amends the PRA's Information Dissemination requirements in several respects. *Id.*

First, the Data Quality Act establishes statutory deadlines for OMB's promulgation of interagency data quality guidelines under section 3504(d)(1), 44 U.S.C. § 3504(d)(1), of the PRA's Information Dissemination requirements, and under OMB's PRA rulemaking authority provided by section 3516. 44 U.S.C. § 3516 note.

Second, the Data Quality Act requires that OMB's interagency data quality guidelines “provide 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....” *Id.*

Third, the Data Quality Act requires that OMB's interagency data quality guidelines “shall...apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies....” *Id.*

Fourth, the Data Quality Act requires that all federal agencies subject to the PRA promulgate their own data quality guidelines by a statutory deadline. *Id.* These individual agency data quality guidelines must comply with OMB's interagency section 3504(d)(1) guidelines. 44 U.S.C. §§ 3504(d)(1); 3506 (a)(1)(B); 3516 note.

Fifth, the Data Quality Act requires that OMB's interagency data quality guidelines require all federal agencies subject to the PRA to establish administrative processes allowing "affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with" OMB's interagency guidelines. 44 U.S.C. § 3516 note.

OMB has now promulgated PRA section 3504(d)(1) interagency data quality guidelines. 67 FR 8452 (Feb. 22, 2002)(final OMB guidelines); 66 FR 49718 (September 28, 2001)(Interim Final OMB data quality guidelines explain that they are issued "under sections 3504(d)(1) and 3516" of the PRA). The other federal agencies subject to the PRA are now proposing their own PRA data quality guidelines. *E.g.*, 67 FR 21234 (April 30, 2002)(EPA's proposed data quality guidelines).

OMB's interagency data quality guidelines exempt from their coverage certain publicly disclosed federal agency information:

"Dissemination" means agency initiated or sponsored distribution of information to the public (see 5 CFR 1320.3(d) (definition of "Conduct or Sponsor")). Dissemination does not include distribution limited to government employees or agency contractors or grantees; intra- or interagency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

67 FR 8452, 8460. The regulation referenced by OMB, "5 CFR 1320.3(d)," only applies to the PRA's Collection of Information requirements.

This definition of "dissemination" is considerably narrower than OMB's previous definitions of this term in a PRA Information Dissemination context. For example, in OMB Circular A-130, at page 3, OMB defined "dissemination" to mean:

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.

Other agencies have included the OMB exemptions in their proposed data quality guidelines. Some agencies have proposed to expand the OMB exemptions, or to add new exemptions. For example:

Retroactivity Exemption. Several agencies, such as NIH at page 4, make statements indicating that their guidelines, and the OMB guidelines, will apply only to information that is disseminated initially after October 1, 2002. This proposed exemption contradicts OMB's interagency guidelines which specify that they apply to information created or originally disseminated prior to October 1, 2002 if an agency continues to disseminate the information after that date.

Case-By-Case Exemption. Several agencies, including EPA at pages 22-23 of its proposed guidelines, propose application of the PRA's data quality guidelines on a case-by-case basis, rather than application of them to all information disseminated by the agency.

Rulemaking Exemption A number of agencies, including EPA at pages 22-23 and the Treasury Department at page 6 of their proposed guidelines, have stated that the data quality error correction process required by OMB's interagency data quality guidelines will not apply to information in proposed rulemakings, and that any alleged errors will be addressed only through the rulemaking notice and comment process. It is not clear from these proposed exemptions whether the agencies believe that any of the PRA's data quality standards apply to information disseminated during rulemakings.

Adjudicative Processes Exemption. EPA's proposed data quality guidelines, at page 17, substantially expand the adjudicative processes exception by broadening it to include, *inter alia*:

Distribution of information in documents relating to any formal or informal administrative action determining the rights and liabilities of specific parties, including documents that provide the findings, determinations or basis for such actions. Examples include the processing or adjudication or applications for a permit, license, registration, waiver, exemption, or claim; actions to determine the liability of parties under applicable statutes and regulations; and determination and implementation of remedies to address such liability.

IV. THE PRA'S DATA QUALITY GUIDELINES APPLY TO ALL INFORMATION THAT FEDERAL AGENCIES HAVE IN FACT MADE PUBLIC; NEITHER OMB NOR ANY OTHER AGENCY HAS DISCRETION TO CREATE ANY EXEMPTIONS

OMB's interagency data quality guidelines implement section 3504(d)(1) of the PRA. 44 U.S.C. § 3516 note. Section 3504(d)(1) requires that "with respect to information dissemination, the [OMB] director shall develop and oversee the implementation of policies, principles,

standards, and guidelines to apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated...” 44 U.S.C. § 3504(d)(1). All federal agencies subject to the PRA must comply with OMB’s interagency data quality guidelines. 44 U.S.C. §§ 3504(d)(1); 3506 (a)(1)(B); 3516 note.

The legislative history of the PRA’s Information Dissemination requirements states congressional intent that “the legislation’s policies and required practices apply to the dissemination of all Government information regardless of form or format...” House Report, at 27. This statement of congressional intent occurs in a section of the House Report subtitled “Information Dissemination.” House Report, at 26.

The relevant statutory text and legislative history demonstrate clear congressional intent that there is only one restriction on the terms “disseminated” or “dissemination”: they only apply to information that an agency in fact makes public.

The PRA defines “Public Information,” as used in the PRA’s Information Dissemination provisions, to mean “any information, regardless of form or format, that the agency discloses, disseminates, or makes available to the public.” 44 U.S.C. § 3502(12)(emphasis added). The dictionary defines “any” to mean “every; all.” *The Random House Dictionary of the English Language*, Second Edition, Unabridged (1983). The legislative history of the 1995 Act that added most of the PRA’s Information Dissemination provisions explains that:

The term “public information” is added. It means any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public. Its application in the act, as amended by this legislation, is primarily in the context of “dissemination” of information by an agency.

House Report, at 38.

The House Report contains a section entitled, “Additional Views on Information Dissemination Provision of H.R. 830.” This section restates the legislative history of H.R. 3695, which passed the House at the end of the 101st Congress, but on which the senate took no action. H.R. 3695 contained most of the Information Dissemination provisions enacted by H.R. 830, “and much of the policy remains identical.” House report, at 105. This section reiterates and reemphasizes the all-encompassing scope of the PRA’s Information Dissemination requirements:

H.R. 830 focuses on dissemination of information by agencies. “Dissemination” refers to the distribution of government information to the public through printed documents or through electronic and other media.”

H.R. 830 amends § 3502 of title 44 by adding paragraph (12) defining the term “public information” as “any information, regardless of format, that an agency discloses, disseminates, or makes available to the public.”

The concept of “public information” is fundamental to the information dissemination provisions of H.R. 830. The objective of the definition is to minimize disputes over what government information is subject to dissemination. The definition turns on an easily made factual determination rather than a complex legal one. “Public information” is information that an agency has in fact made public.

House Report, at 107, 109.

The only restriction on the PRA’s Information Dissemination requirements is that they only apply to information that agencies have in fact disseminated to the public:

Dissemination obligations are limited to those classes of information already publicly disclosable because of a law, agency rule or regulation, or existing agency policy or practice. Thus, no dissemination obligation arises with respect to information classified in the interest of national defense or foreign policy, information subject to restrictions under the Privacy Act of 1974, sensitive law enforcement investigatory data, or other information withheld from disclosure to protect other recognized public or privacy interests.

[A]n agency with an obligation to collect securities or tariff filings and to make those documents publicly available is clearly dealing with public information under the definition. Even if a portion of the filings is not public, the dissemination obligation attaches to the remainder if the class of public information can be identified and is routinely released.

House Report, at 109-10.

Congress’ clear intent to include within the PRA’s Information Dissemination requirements all information that an agency has made public is consistent with Congress’ use of the term “dissemination” in other statutes. *See* Telecommunications Research and Action Center v. FCC, 836 F. 2d 1349, 1351(D.C. Cir. 1988)(under the Federal Communications Act, “dissemination” of radio communications becomes broadcasting subject to FCC licensing requirement when it is intended to be received by the public); *U.S. Satellite Broadcasting Co., Inc. v. FCC*, 740 F. 2d 1177, 1186 (D.C. Cir. 1984)(same).

Congressional intent that the PRA’s data quality guidelines and other Information

Dissemination requirements apply to all information that an agency has made public is further demonstrated by the fact that there are no statutory exemptions from the PRA's Information Dissemination requirements. 44 U.S.C. §§ 3502(12); 3504(d)(1); 3516 note. By contrast, there are several statutory exemptions from the PRA's separate Collection of Information requirements. 44 U.S.C. §§ 3502(3)(B); 3518(c)(1). If Congress had intended to create any exemptions from the PRA's data quality standards and other Information Dissemination requirements, it would have done so expressly as it did for the PRA's separate Collection of Information requirements. *See* *Russello v. United States*, 464 U.S. 16, 23 (1983)(if Congress intended to restrict applicability of a particular statutory requirement, it would have done so expressly as it did with another requirement of the statute).

In sum, there is no basis for concluding that Congress intended any exemptions from the terms "dissemination" and "disseminated" when it used those terms in statutory "Information Dissemination" requirements from which there clearly are no exemptions. Given the statutory text and legislative history, neither OMB nor any other federal agency has discretion to create any exemptions from the data quality guidelines required by the PRA. *See* *U.S. Department of Defense v. Federal Labor Rel. Auth.*, 510 U.S. 487, 494 (1994)(FOIA represents a general congressional intent of full disclosure of government information and any exemption must be stated in clearly delineated statutory language); *Dole v. United Steelworkers of America*, 429 U.S. 26 (1990)(OMB has no discretion to interpret the PRA in a manner that conflicts with clear congressional intent).