Data Quality Act

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The Information Age began in earnest for the federal agencies on Oct. 1. Agency guidelines are now in effect under the Information Quality Law, commonly called the Data Quality Act, to ensure the "quality, objectivity, utility, and integrity" of all federal information. "Affected persons" can petition if they believe that scientific, technical and economic information does not meet these standards and, if necessary, appeal a denial.

The designated overseer of the act, the White House's Office of Management and Budget (OMB), worked toward the Oct. 1 deadline for more than a year, writing its own guidelines to the agencies, providing interpretive memos, organizing working groups and meeting with agencies to give views on what their guidelines should say. The courts are likely to review agency denials of appeals, thus completing a new process that could transform how the federal government justifies regulations and sets federal policy.

How did Congress launch this October revolution? The Data Quality Act consists of only a few lines in an appropriations bill. Sec. 515 of the Treasury and General Government Appropriations Act for the Fiscal Year 2001 (Public Law 106-554, H.R. 5658). It has no conventional legislative history. The widely accepted explanation is that corporate interests slipped the Data Quality Act through Congress to counter indiscriminate "data-dumps" of corporate information into federal Internet sites. Instead of such de facto regulation by information, the act in a sense provides for regulation of information, with the OMB's Office of Information and Regulatory Affairs (OIRA) under former Harvard Professor John

Graham designated to oversee agency compliance. There is no reason to expect the act to be powered exclusively by industry, though. It is dawning on public interest groups that they and many others can also file data-quality petitions.

THE POTENTIAL IMPACT ON AGENCIES AND DATA SOURCES

The agencies see that their information will have to meet higher standards. They also fear that regulations may be delayed and their budgets depleted as petitioners demand better substantiation for agency actions. Further, the agencies' sources of information -- businesses and industry, public interest groups, state and local governments and academic researchers -- are beginning to worry about the application of cumbersome quality-review procedures to their information before agencies will accept it. The Environmental Protection Agency (EPA) has already proposed to apply "assessment factors" to these "third-party" sources, citing the act. Whether the agency's own data will be held to these third-party standards remains to be seen.

Some of the dozens of agencies involved maintain that the Data Quality Act changes little if anything, since they already disseminate high-quality information. Others have written bare-minimum guidelines, adopted an experimental wait-and-see approach or insisted on broad exceptions. Thus, while most agencies' guidelines arguably meet OMB's basic requirements, a question still up in the air is whether the process will degenerate into a stakeholder-driven food fight, or whether OMB can, over time, make the Data Quality Act into a good-government statute that actually improves federal decision-making.

The OMB's own guidelines gave agencies flexibility to comply using their existing resources, so long as they set performance goals by which they -- and OMB and affected parties -- can measure improvements in information quality. One-size-fits-all guidelines

would not work for the roughly 90 agencies that disseminate all kinds of statistical, scientific and financial information on the economy, demographics, health care, agriculture, natural resources, energy, the environment, space exploration, the weather and more. But OMB did develop basic requirements to which all agencies must adhere.

The themes of transparency and objectivity permeate OMB's approach. In particular, "influential" information that has a "clear and substantial impact on important public policies or private sector decisions" must meet rigorous transparency standards, including the substantial reproducibility of the data. When reproducibility was proposed, it provoked such intense criticism that OMB had to clarify that reproducibility did not mean raw data had to be replicated before dissemination, but rather that agency analytic methods and data had to be set out with such clarity and detail that "an independent reanalysis could be undertaken by a qualified member of the public."

Agencies that perform health and ecological risk assessments have to apply even more demanding transparency requirements that OMB lifted from the Safe Drinking Water Act: the best available science and data-collection methods, clear expression of who exactly is most at risk, the central estimate of risk (not just its extremes), the scientific uncertainties that weaken these estimates and how supportive and nonsupportive studies were reconciled. The back-and-forth between OMB and the EPA was understandably intense, since information used to support precautionary regulations can be challenged under the act.

Transparency also required, the OMB suggested, that agencies establish information Web sites that provide clear explanations of their guidelines, procedures for challenges and appeals and examples of information corrections. Requiring the posting of the challenges themselves was also discussed but discarded. Interestingly, OIRA has itself practiced transparency, sharing

information readily with the public via the Web, **www.omb.gov**; and "hot links" to all agency guidelines are under discussion. OIRA's zeal for transparency is unprecedented for an office so close to the West Wing.

Beyond admonishing that agency information must be "accurate, clear, complete, and unbiased," OMB does go on to offer the agencies one specific objectivity criterion: Data and analytical results that have been subjected to "formal, independent, external peer review" may be presumed to be objective. Still, petitioners may rebut this presumption with persuasive evidence.

Beyond obvious exemptions from Data Quality Act review to protect privacy and commercial secrets, OMB also provided exemptions for data in press releases and conferences; third-party submissions for public filings; personal articles and reports authored by agency-employed scientists, grantees or contractors; testimony and reports to Congress; and subpoenas and adjudicative determinations. Some agencies had sought to construe these exemptions too broadly, but OMB tried to narrow the exemptions by stressing that Data Quality Act review must take place whenever an agency publicly relies on or endorses the information it disseminates.

A particularly nettlesome problem was how to treat information that makes its first appearance in proceedings that have long had procedural safeguards in place for contesting information. For example, the Data Quality Act does not appear to trump the well-established procedures for notice-and-comment rule-making. But information in a rule-making may go unreviewed for years. Hence OMB counseled agencies to allow early Data Quality Act review if it would not unduly delay agency action and if the complainant has shown a reasonable likelihood of suffering actual harm unless the challenge is promptly resolved.

CHALLENGES ARE AVAILABLE TO ANY 'AFFECTED PERSON'

The Data Quality Act authorizes any "affected person" to challenge agency information. The OMB wanted agencies to ensure full public access to the complaint process by allowing broad standing to complain. It also wanted them to create objective, neutral challenge-and-appeal mechanisms and to respond to (and ideally resolve) challenges and appeals in writing within 60 days. Thus, for example, the Department of Health and Human Services asks complainants only how they are "affected." The EPA established a high-level appeals tribunal consisting of its three top officials for information, science and policy.

Courts will likely have to oversee implementation of the Data Quality Act if its promise as a good-government statute is to be realized. The OMB and agency guidelines are judicially enforceable because the act states that OMB and the agencies "shall" write guidelines, and because the Paperwork Reduction Act provisions on which the Data Quality Act is specifically based direct OMB to write rules and regulations governing agency information. The public guideline-writing process was a model of notice-and-comment rule-making. Individuals and companies can be vitally affected by the concrete, mandatory provisions of the guidelines. Providing elaborate challenge-and-appeal mechanisms makes little sense if agency determinations are nonbinding under standards that can be ignored or changed when an embarrassing complaint is filed. Denial of an appeal would provide a narrowly focused issue capable of judicial resolution.

Courts have engaged in judicial oversight of other good-government statutes such as the Freedom of Information Act because they seek to change entrenched bureaucratic behavior. The Data Quality Act is silent on judicial review, but no contrary policy or legislative history rebuts the strong presumption favoring judicial review. Many agencies deny that their guidelines create judicially enforceable rights; however, courts decide for themselves what the statutory plan requires them to do. The OMB cautions agencies against

suggesting that they are free to disregard their own guidelines, or OMB guidelines, as if these were not meant to impose binding, government-wide policy. The OMB also cautions agencies to be careful what they promise, because their statements regarding judicial enforceability may not be controlling in the event of litigation.

It seems that the way the U.S. government informs and regulates has just been transformed. Of course, OMB oversight of data may lapse back to the opaque process it has been for almost 30 years. But the wise money is on change.

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