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May 29, 2008

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW, Room TWB-204
Washington, DC 20554

RE: Notice of Oral *Ex Parte* Communication
In the Matter of Broadcast Localism, MB Docket No. 04-233

Dear Ms. Dortch:

On Thursday, May 29, 2008, I and Bruce Levinson met with Mr. Rick Chessen, Legal Advisor to Commissioner Copps to discuss Regulatory Flexibility Act and Paperwork Reduction Act compliance issues in the above proceeding. Our discussion was consistent with the filings made by CRE in this proceeding. The attached discussion paper was provided to Mr. Chessen. The attached 2005 decision of the US Court of Appeals for the District of Columbia Circuit in United States Telecom Association, *et al.*, v. Federal Communications Commission was also discussed.

One electronic copy of this Notice is being submitted to the above captioned docket

Sincerely,

/s/

Jim Tozzi

Member, Board of Advisors

Attachments

PAPERWORK REDUCTION ACT CERTIFICATIONS: THE SARBANES-OXLEY FOR THE PUBLIC SECTOR

Each periodic report...shall be accompanied by a written statement by the chief executive officer and chief financial officer... The statement...shall certify that the periodic report...fully complies with the requirements...

– Sarbanes-Oxley Act of 2002

With respect to the collection of information and the control of paperwork, each agency shall...certify (and provide a record supporting such certification...

– The Paperwork Reduction Act of 1995

I. Issues

- ▶ Certification is a fundamental process for ensuring accountability.
- ▶ Accountability and enforceability are central to any effective management system.
- ▶ GAO has determined that agency Chief Information Officers (“CIOs”) are largely violating the Paperwork Reduction Act’s (“PRA’s”) certification requirements. GAO recommended that “OMB and the agencies take steps to improve review processes and compliance with the act.”
- ▶ In response to the 2005 GAO report, OMB stated that “The draft report has persuaded us that OMB’s draft PRA guidance does not serve its intended purpose, and we will explore alternative approaches to advising agencies on their PRA responsibilities.” To date, other than with respect to statistics, OMB has not issued any revised guidance to ensure agency compliance with their PRA obligations.

II. The Sarbanes-Oxley Act’s Dual Certification Requirement

- ▶ The Sarbanes-Oxley Act requires that corporate financial reports be certified by both the Chief Executive Officer and the Chief Financial Officer of the company. The certification process is so essential to the Act that the legislation contains two separate certification provisions, one enacted through SEC regulations and one directly promulgated by the law.¹

¹ P.L. 107-204, Sec. 302(a) and Sec. 906 (a).

- ▶ The certifications attest that the company’s reports are fully compliant with applicable legal requirements and “that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.”²
- ▶ Thus, there are two key aspects to the Sarbanes-Oxley certifications:
 1. Formal compliance with specific statutory requirements; and
 2. Over and above such compliance, that the publicly disseminated reports fairly and completely presents information.
- ▶ The Act’s requirements that: 1) certified reports “not contain any untrue statement of a material fact or omit to state a material fact...;”³ and 2) the SEC issue rules requiring companies to disclose whether they have a process for ensuring the “full, fair, accurate, timely, and understandable disclosure in the periodic reports...”⁴ incorporate principles that are the basis of the standards in the Information Quality Act.⁵
- ▶ The statute imposes harsh criminal penalties on officials who knowingly certify a report that “does not comport with all the requirements”⁶ set forth in the Act; up to twenty years in prison and a \$5,000,000 fine.

III. Why the Sarbanes-Oxley Act Requires Certification of Financial Reports

- ▶ “It reasonable to expect that corporate officers stand behind the company’s public disclosure and be subject to sanction should they violate that certification.”⁷
- ▶ There is the need “to give legislative teeth to a number of the recommendations that President Bush called for...requiring the CEO and CFO to personally vouch for and certify to the veracity,

² P.L. 107-204, Sec. 906(a).

³ Ibid., Sec. 302(a)(2).

⁴ Ibid., Sec. 406(c)(2).

⁵ P.L. 106-554 § 515.

⁶ P.L. 107-204, Sec. 906(a). [Emphasis added].

⁷ House Report, 107-404, Minority Views.

fairness of their company’s public disclosures, including their financial statements and certification that certain internal control procedures are in place...”⁸

- ▶ The Chairman of the SEC explained that “[n]ew requirements coming out of the Act, such as the personal certification by CEO’s and CFO’s of their companies’ financial disclosures...will strengthen companies in the long-run if they focus on the underlying intent of the Act rather than on mere compliance.”⁹
- ▶ The Chairman of a small to mid-size company testified that the “certification process has been a disciplining process for executives...and that disciplining process has filtered down to others within the company who report to them. From the board’s perspective, it has provided us with additional comfort as to our ability to rely on management’s representations...”¹⁰
- ▶ Thus, the functions of an **enforceable** certification requirement are to:
 1. Establish personal accountability for the quality of an organization’s information disseminations; and
 2. Strengthen the organization itself.

IV. The Paperwork Reduction Act’s Dual Certification Requirement

- ▶ The PRA requires that Information Collection Requests (“ICRs”) be certified as complying with a set of statutory requirements. The certification process is so essential to the Act that the legislation contains two separate certification provisions, one requiring certification and documentation that the proposed ICR complies with all applicable requirements,¹¹ and another provision directly prohibiting an agency from conducting or sponsoring a collection of

⁸ H.R. 3763—The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, Hearings Before The Committee On Financial Services: U.S. House of Representatives, One Hundred Seventh Congress, Second Session, March 13, 20; April 9, 2002, p. 145.

⁹ Senate Hearing 108-107, Hearings before The Committee On Banking, Housing, and Urban Affairs, United States Senate, One Hundred Eighth Congress, First Session, On the Dramatic Change Across the Corporate Landscape to Reestablish Investor Confidence In the Integrity of Corporate Disclosures and Financial Reporting, September 9, 23, and October 2, 2003, p. 7.

¹⁰ Ibid., p. 181.

¹¹ P.L. 104-13, Sec. 3506 (c) (3).

information unless they have provided the required certification to the Office of Management and Budget (“OMB”).¹²

- ▶ The PRA certification attests that an official “sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved”¹³ has reviewed the proposed collection of information and determined that it complies with ten specific PRA requirements.
- ▶ The centrality of the PRA certifications themselves to Congressional intent is further made evident by the Small Business Paperwork Relief Act of 2002 (“SBPRA”). In this law, Congress created an additional paperwork reduction duty for agencies with respect to small business, specifically that “in addition to the requirements of this chapter regarding the reduction of information collection burdens for small business concerns...make efforts to further reduce the information collection burden for small business concerns with fewer than 25 employees.” Even though Congress created a new, legally-binding PRA information collection burden relief obligation on agencies, they did not establish an 11th certification. This Congressional decision highlights the importance and gravity of the certifications themselves and that they are not simply a check-list of information collection obligations.
- ▶ In addition to the ten certifications required by the PRA, OMB has also stated that they “will approve only those information collections that are likely to obtain data that will comply with the OMB and agency information quality guidelines.”¹⁴
- ▶ Thus, there are two key aspects to the PRA certifications:
 1. Formal compliance with statutory requirements; and
 2. A fair evaluation by an independent official as to the agency’s compliance.
- ▶ The PRA requirements for certification of a fair and independent compliance assessment parallels requirements in the Sarbanes-Oxley Act and other securities laws.
- ▶ The PRA differs significantly from Sarbanes-Oxley in that the PRA does not contain an explicit judicially reviewable enforcement mechanism.

¹² Ibid., Sec. 3507 (a) (1) (c).

¹³ Ibid., Sec. 3506 (c) (1).

¹⁴ John D. Graham, Memorandum for President’s Management Council, “Agency Draft Information Quality Guidelines,” June 10, 2002.

V. The Crucial Role of Executive Branch Certifications

- ▶ OMB oversees certifications by Executive Branch agencies on multiple issues which are crucial to the proper functioning of the government and the national interest. With the exception of the PRA, OMB take these certifications are taken very seriously.
- ▶ For example, with respect to information systems security certifications required under the Federal Information Management Security Act (“FISMA”), OMB plays a strong, pro-active role ensuring proper certification even though the National Institute of Standards and Technology (“NIST”) is the lead FISMA agency. An OMB memo to the Chief Information Officers Council (“CIO Council”) explained that:
 - “A certification review is the last step after all of the above activities are completed and approved by agency management”; and
 - “The certification review should contain sufficient supporting documentation describing what has been tested and the results of the tests.”¹⁵
- ▶ The above OMB certification requirements parallel key aspects of the PRA certification process, specifically that certification follows completion and approval of the underlying tasks and that the agency certification needs to be objectively documented.
- ▶ OMB has also established, pursuant to statutory authority, a certification program for senior federal contracting officers. OMB, in a Memorandum to Chief Acquisition Officers, explained that the “certification process, including verification and assessment of applications, will be managed by each agency.” More significantly, the Memorandum stated that the Federal Acquisition Institute, which is an organization under OMB’s Office of Federal Procurement Policy, oversees and administers the certification program and,
 - “shall periodically review agencies’ implementation to ensure that the program remains rigorous and that the standards for certification for education, training, experience, and continuous learning are consistently applied by all civilian agencies.”¹⁶

¹⁵ <http://csrc.nist.gov/drivers/documents/WhatAgencycandoonow-OMB-memo.pdf>.

¹⁶ http://www.whitehouse.gov/omb/procurement/acq_wk/fac_contracting_program.pdf.

VI. Agency CIOs Are Not Complying with The Paperwork Reduction Act Certification Requirements

- ▶ One crucial difference between agency CIOs and their private sector counterparts was explained by the Treasury Department’s CIO in testimony before Congress. The Treasury CIO testified that,

*As public employees we must abide by statutory and regulatory requirements unique to the Federal Government. We agree that these requirements are important and necessary to guarantee the integrity of our actions for our citizens....*¹⁷

- ▶ The Treasury CIO also testified that “CIO's must demonstrate value and earn credibility to be effective.”
- ▶ Despite the duty of agency CIOs to abide by statutory requirements, GAO found widespread non-compliance with the PRA, including making inappropriate certifications.
- ▶ GAO testified before Congress that their review “of 12 case studies showed that CIOs provided...certifications despite often missing or inadequate support... Further, although the law requires CIOs to provide support for certifications, agency files contained little evidence that CIO reviewers had made efforts to improve the support offered by program offices.”¹⁸
- ▶ CIO certifications are often merely *pro forma*, completely lacking in substance. For example GAO noted that the assertion from one agency that “We have attempted to eliminate duplication within the agency wherever possible” provided “no information on what efforts were made to identify duplication or perspective on why similar information, if any, could not be used. Further, the files contained no evidence that the CIO reviewers challenged the adequacy of this support or provided support of their own to justify their certification.”¹⁹
- ▶ The problems GAO found were so severe that “none of the case examples contained support that addressed how the agency ensured that the collection was the least burdensome necessary.”²⁰

¹⁷ Statement of Jim Flyzik, Chief Information Officer, Department of the Treasury, Vice Chairman, CIO Council before the Subcommittee on Government Management, Information, and Technology, Committee on Government Reform, March 24, 2000.

¹⁸ United States Government Accountability Office, Testimony Before the Subcommittee on Regulatory Affairs, Committee on Government Reform, House of Representatives, “ PAPERWORK REDUCTION ACT: Burden Reduction May Require a New Approach,” Statement of Linda D. Koontz, Director, Information Management, GAO-05-778T, pp. 3-4.

¹⁹ Ibid, p. 12.

²⁰ Ibid., pp. 13-14. [Emphasis added].

- ▶ The failure of CIOs to carry though on their PRA responsibilities is not a mere technicality. As GAO explained, “Because these reviews were not rigorous, OMB, the agency, and the public have reduced assurance that the standards in the act—such as avoiding duplication and minimizing burden—were consistently met.”²¹
- ▶ GAO found what could politely be described as a lackadaisical attitude toward the PRA requirements by agency officials. As they informed Congress, “agency reviewers told us that management assigns a relatively low priority and few resources to reviewing information collections. ... reviewers often have insufficient leverage with program offices to encourage them to improve their justifications.”²²

VII. Conclusions

- ▶ The Sarbanes-Oxley and PRA certification requirements are public and private sector counterparts; the primary difference being that the PRA lacks a credible enforcement mechanism.
- ▶ Failure of agency CIOs to adhere to statutory requirements of the PRA undermines their credibility and effectiveness.

VIII. Recommendations

- ▶ **OMB to Agencies.** OMB should inform federal agencies that ICRs must include a true and accurate certification statement and then be submitted to OMB. Since the PRA requires that the agency certify that the proposed information collection “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities....” OMB should make clear to agencies that such certification can only follow completion of an Initial Regulatory Flexibility Analysis compliant with the requirements of the Regulatory Flexibility Act.
- ▶ **OMB to the President’s Management Council.** OMB, the agency statutorily mandated to enforce the PRA certification process, should notify the President’s Management Council that Information Collection Requests which are not appropriately certified, or for which there is not complete documentation, will be summarily rejected.
- ▶ **OMB to the Public.** OMB should publish issue a Notice of Inquiry in the *Federal Register* asking the public for: recommendations on how to improve enforcement of PRA certifications; and examples of non-compliance with PRA certification requirements.

²¹ Ibid., p. 4.

²² Ibid., p. 15. [Emphasis added].