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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES,
AND INDEPENDENT REGULATORY AGENCIES

FROM:

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Administrator

SUBJECT:

Information Collection under the Paperwork Reduction Act

On January 21, 2009, the President issued a memorandum calling for the establishment of “a system of transparency, public participation, and collaboration.”¹ The memorandum required an Open Government Directive to be issued by the Director of the Office of Management and Budget (OMB), instructing “executive departments and agencies to take specific actions implementing the principles set forth in this memorandum.”

Implementing the President’s memorandum, OMB’s Open Government Directive requires a series of measures to promote the commitments to transparency, participation, and collaboration.² Section 4 of the Directive specifically instructs the Administrator of the Office of Information and Regulatory Affairs (OIRA) to “review existing OMB policies, such as Paperwork Reduction Act guidance and privacy guidance, to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.”

This Memorandum responds to that requirement by offering clarifying guidance with respect to the Paperwork Reduction Act of 1995 (PRA)³ in order to specify its central requirements and to increase transparency and openness.

The PRA was designed, among other things, to “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government” and to “improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society.”⁴ Federal agencies play a critical role in collecting and managing information in order to promote openness, reduce burdens on the public, increase program efficiency and

¹ Available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>.

² Available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

³ 44 U.S.C. chapter 35; see 5 CFR Part 1320.

⁴ 44 U.S.C. § 3501.

effectiveness, and improve the integrity, quality, and utility of information to all users within and outside the government.⁵

Before requiring or requesting information from the public, the PRA requires Federal agencies⁶ (1) to seek public comment on proposed collections and (2) to submit proposed collections for review and approval by the Office of Management and Budget (OMB). OMB's Office of Information and Regulatory Affairs (OIRA) reviews agency information collection requests for approval or disapproval. When OMB approves an information collection, it assigns an OMB control number⁷ that the agency must display on the information collection.⁸ OMB has issued regulations and guidance to promote agency compliance with the PRA.⁹

What counts as "information" under the PRA?

OMB regulations define "information" as "any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media."¹⁰ This category includes:

- (1) requests for information to be sent to the government, such as forms (e.g., the IRS 1040), written reports (e.g., grantee performance reports), and surveys (e.g., the Census);
- (2) recordkeeping requirements (e.g., OSHA requirements that employers maintain records of workplace accidents); and
- (3) third-party or public disclosures (e.g., nutrition labeling requirements for food).¹¹

The PRA applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, "ten or more persons."¹² For the purpose of counting the number of respondents, agencies should consider the number of respondents within any 12 month period. If a collection of information is addressed to all or a substantial

⁵ 44 U.S.C. § 3506(b).

⁶ With some exceptions, the PRA applies to "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 44 U.S.C. § 3502(1).

⁷ The OMB Control Number is two four-digit codes separated by a hyphen. The first four digits identify the sponsoring agency and bureau, and the second four digits identify the particular collection. The public can find OMB's inventory of currently approved collections, with OMB control numbers, online at <http://www.reginfo.gov>.

⁸ The PRA prohibits agencies from penalizing or denying a benefit to (1) those who fail to respond to Federal collections of information that do not display valid OMB control numbers and (2) those who have not been informed that a response is not required unless the collection of information displays a valid control number. Litigants may raise these public protections at any time during an administrative process or judicial action. See 44 U.S.C. § 3512(b); *Center for Auto Safety v. NHTSA*, 244 F.3d 144 (D.C. Cir. 2001); *Saco River Cellular Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998).

⁹ Please see OIRA's website: http://www.whitehouse.gov/omb/inforeg_default/.

¹⁰ 5 C.F.R. 1320.3(h).

¹¹ See 5 C.F.R. 1320.3(c).

¹² 44 U.S.C. § 3502(3)(A)(i). Under the PRA, "person" means "an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision." 44 U.S.C. § 3502(10).

majority of an industry or sector in a 12 month period, that collection is presumed to be addressed to ten or more persons.¹³

The requirements of the PRA apply to voluntary collections as well as to mandatory collections and collections required to obtain a Federal benefit (e.g., a job, a grant, a contract).¹⁴ In implementing program activities, agencies should be aware of the applicability of the PRA and address PRA compliance in sufficient time to solicit and respond to public comment.¹⁵

What does not count as information under the PRA?

OMB regulations specify a number of items that are generally not “information” under the PRA.¹⁶ Important examples are

- affidavits, receipts, changes of address, or consents;
- tests of the aptitude, abilities, or knowledge of persons; and
- facts or opinions that are (1) submitted in response to general solicitations of public comments,¹⁷ (2) addressed to a single person, (3) obtained or solicited at or in connection with public hearings or meetings, (4) obtained through direct observation by the agency (e.g., through visual inspection to determine how long it takes for people to complete a specific transaction), or (5) obtained from participants in clinical trials (which typically do not involve answers to “identical questions”).

It is worth emphasizing that facts or opinions obtained in connection with public meetings do not count as “information.” This “public meeting” exception allows agencies to engage with the public on the Internet so long as the engagement is the functional equivalent of a public meeting (i.e., not a survey). In addition, it is important to underline that general solicitations, such as *Federal Register* notices, do not trigger the PRA. It follows that agencies may offer the public opportunities to provide general comments on discussion topics through the Internet. More generally, agencies may use social media and web-based technologies in a variety of specific ways without triggering the PRA.¹⁸

What information collections do not require OMB approval?

By statute, the PRA does not apply to some types of information collections. OMB approval is not required for information collections during a Federal criminal investigation or prosecution, during a civil action to which the United States is a party, or during the conduct of intelligence activities.¹⁹ Agency collections from “agencies, instrumentalities, or employees of

¹³ 5 C.F.R. 1320.3(c)(4)(ii).

¹⁴ See 44 U.S.C. § 3502(3); 5 C.F.R. 1320.3(c).

¹⁵ Given that the required public comment periods total 90 days, agencies should plan for at least 90 days plus time to respond to comments and questions that arise during OMB review.

¹⁶ 5 C.F.R. 1320.3(h). Please see the Appendix for the regulatory text.

¹⁷ Documents such as Advance Notices of Proposed Rulemaking, Requests for Comments, Requests for Information, and Notices of Proposed Rulemaking are generally not information collections.

¹⁸ For additional information, see OIRA Memorandum on Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act, available at http://www.whitehouse.gov/omb/inforeg_default/.

¹⁹ 44 U.S.C. § 3518(c). Please see the Appendix for the statutory exemptions.

the United States” in their official capacities are generally not subject to the PRA, unless those collections are for “general statistical purposes.”²⁰ It is worth emphasizing that agencies may ask for facts and opinions of Federal employees without triggering the PRA.

What are the public notice and comment requirements for information collection requests?

To obtain the public’s input on an agency’s proposal to collect information, the PRA generally requires the agency to publish a 60-day notice in the *Federal Register* soliciting public comment on the agency’s proposed collection. The notice must include a specific request that the public evaluate whether the proposed collection of information is necessary; evaluate the accuracy of the agency’s estimate of the burden that the collection would impose on respondents; comment on how to enhance the quality, utility, and clarity of the information to be collected; and comment on how to minimize the burden of the collection of information.²¹

After conclusion of the 60-day comment period and the agency’s internal consideration of the public’s comments, the agency submits the collection to OMB and publishes a second *Federal Register* notice to announce the start of OMB review.²² This second notice informs the public about how to submit comments to OMB and informs the public that OMB may act on the agency’s request only after the 30-day comment period has closed.



When and how may the public notice and comment requirements be reduced?

Under certain circumstances, an agency head or designee may request that it be permitted to seek expedited, or “emergency,” OMB review of an information collection request. When expedited review is granted, the agency must take all practicable steps to consult with members of the public, but OMB may modify or, if necessary, waive the public comment requirements.²³ And when review is expedited, OMB acts promptly through a suitably streamlined process, consistent with the purposes of the PRA.

OMB may grant expedited review if: “(i) Public harm is reasonably likely to result if normal clearance procedures are followed; (ii) An unanticipated event has occurred; or (iii) The use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed.”²⁴

²⁰ 44 U.S.C. § 3502(3)(A).

²¹ 44 U.S.C. § 3506(c)(2)(A). If a new information collection is associated with a proposed rule, OMB regulations require that only one notice be published. Agencies include this PRA notice in the preamble to the proposed rule and comments are directed to OMB. See 44 U.S.C. § 3506(c)(2)(B); 5 C.F.R. 1320.11.

²² 44 U.S.C. § 3507(a)(1)(D).

²³ 5 CFR 1320.13(c) and (d).

²⁴ 44 U.S.C. § 3507(j); 5 C.F.R. 1320.13(a)(2).

As these situations arise, agencies should consult with OIRA to select an approach that permits them to comply with the PRA while meeting their other obligations.²⁵

An agency may also request a “generic clearance” in situations in which (a) there is a need for multiple, similar low-burden collections that do not raise substantive or policy issues and (b) the specifics of each collection cannot be determined until shortly before the data are to be collected. Generic clearances have proved useful for customer satisfaction surveys, focus group testing, and website usability surveys. To obtain a generic clearance, agencies provide the public with opportunity for comment as required by the PRA and provide all information that would allow for meaningful comment, including a description of the need for the collection, the general nature of the collection, an estimate of the overall burden, and a description of the methodologies that will be used to collect the data. Once approval is granted for the overall collection, individual collections that fall within the generic clearance are reviewed on an expedited basis and are not generally required to undergo further public comment. Agencies are encouraged to consult with their OMB desk officers before developing a generic clearance to determine if it is appropriate.

What does OMB evaluate during its review of proposed collections?

A central goal of OMB review is to help agencies strike a balance between collecting information necessary to fulfill their statutory missions and guarding against unnecessary or duplicative information that imposes unjustified costs on the American public. In this regard, OIRA evaluates whether the collection of information by the agency:

- is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;²⁶
- minimizes the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected; and
- maximizes the practical utility of and public benefit from information collected by or for the Federal Government.²⁷

OIRA also reviews the extent to which the information collection is consistent with applicable laws, regulations, and policies related to privacy, confidentiality, security, information quality, and statistical standards. In addition, OMB coordinates efforts across Federal agencies in shared areas of interest and expertise.

Under the PRA, OMB may approve a collection for up to three years at one time.²⁸ To extend the expiration date of a collection, an agency must provide the public with an opportunity to comment on the continuation of the collection, with the two notices described above, and

²⁵ This includes setting a schedule for when the agency will provide the public with opportunities for full notice and comment under the PRA.

²⁶ 44 U.S.C. § 3508.

²⁷ 44 U.S.C. § 3504.

²⁸ 44 U.S.C. § 3507(g). Some approvals are for shorter periods of time. In the case of “emergency” requests, OMB approvals are limited to six months. 44 U.S.C. § 3507(j)(2).

resubmit the information collection request.²⁹ The public may have access to an inventory of currently approved agency collections at <http://www.reginfo.gov/public/do/PRAMain>.³⁰

What resources are available to provide assistance?

OIRA provides guidance on its website³¹ and makes its staff available to assist agencies in determining whether their activities are information collections under the PRA. When questions arise about the applicability of the PRA, an agency's internal resources, coordinated by the agency's Chief Information Officer, are the best sources for guidance and assistance. By working together, for example, OMB and the agencies have been able to minimize the number of PRA violations and to bring agencies into compliance when PRA violations occur. Finally, the PRA requires OMB to report to Congress annually on the Federal Government's major activities under the Act. This report, the Information Collection Budget (ICB), is available on OIRA's website.

²⁹ Agencies may also discontinue collections at any time by submitting a short request to OMB.

³⁰ To ensure that the public record is accurate, agencies must submit, and OMB must review, documentation of all proposed revisions to an active collection before those revisions may be implemented. If the agency is considering significant or substantive revisions to the collection, it must provide the public with an opportunity to comment on the proposed revisions, as it would with a new collection. For insignificant or non-substantive changes, the agency is not required to seek public comment.

³¹ http://www.whitehouse.gov/omb/inforeg_default/

Appendix

Statutory Exemptions³²

- (1) Except as provided in paragraph (2), this subchapter shall not apply to the collection of information--
- (A) during the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter;
 - (B) during the conduct of--
 - (i) a civil action to which the United States or any official or agency thereof is a party; or
 - (ii) an administrative action or investigation involving an agency against specific individuals or entities;
 - (C) by compulsory process pursuant to the Antitrust Civil Process Act and section 13 of the Federal Trade Commission Improvements Act of 1980; or
 - (D) during the conduct of intelligence activities as defined in section 3.4(e) of Executive Order No. 12333, issued December 4, 1981, or successor orders, or during the conduct of cryptologic activities that are communications security activities.
- (2) This subchapter applies to the collection of information during the conduct of general investigations (other than information collected in an antitrust investigation to the extent provided in subparagraph (C) of paragraph (1)) undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

OMB Regulations

OMB regulations specify categories of items that are generally not “information” under the PRA.³³ These categories include:

- (1) Affidavits, oaths, affirmations, certifications, receipts, changes of address, consents, or acknowledgments; provided that they entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument (by contrast, a certification would likely involve the collection of “information” if an agency conducted or sponsored it as a substitute for a collection of information to collect evidence of, or to monitor, compliance with regulatory standards, because such a certification would generally entail burden in addition to that necessary to identify the respondent, the date, the respondent’s address, and the nature of the instrument);
- (2) Samples of products or of any other physical objects;
- (3) Facts or opinions obtained through direct observation by an employee or agent of the sponsoring agency or through nonstandardized oral communication in connection with such direct observations;
- (4) Facts or opinions submitted in response to general solicitations of comments from the public, published in the *Federal Register* or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full consideration of the comment;

³² 44 U.S.C. § 3518(c).

³³ 5. C.F.R. 1320.3(h).

- (5) Facts or opinions obtained initially or in follow-on requests, from individuals (including individuals in control groups) under treatment or clinical examination in connection with research on or prophylaxis to prevent a clinical disorder, direct treatment of that disorder, or the interpretation of biological analyses of body fluids, tissues, or other specimens, or the identification or classification of such specimens;
- (6) A request for facts or opinions addressed to a single person;
- (7) Examinations designed to test the aptitude, abilities, or knowledge of the persons tested and the collection of information for identification or classification in connection with such examinations;
- (8) Facts or opinions obtained or solicited at or in connection with public hearings or meetings;
- (9) Facts or opinions obtained or solicited through nonstandardized follow-up questions designed to clarify responses to approved collections of information; and
- (10) Like items so designated by OMB.