

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

WILLIAM L. KOVACS
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June 7, 2012

Shawne McGibbon
General Counsel
Administrative Conference of the United States
1120 20th Street NW, Suite 706 South
Washington, DC 20036

**Re: ACUS Paperwork Reduction Act Recommendation to Give OMB
Discretion to Approve Collections for up to Five Years**

Dear Ms. McGibbon:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply interested in improving the Paperwork Reduction Act (PRA). We appreciate this invitation to provide comments for the June 2012 Plenary Session.

Over the previous few months, the Chamber has submitted comments to the ACUS Committee on Administration and Management regarding the PRA. We commend the committee for its hard work to identify problems with how the PRA operates in practice, and specifically identifying the need for agencies to better utilize the comment process and better engage the public. In addition to this comment, we have attached our previous comments for your consideration.

The Chamber remains very concerned with the committee's draft recommendation #5 that encourages Congress to give the Office of Management and Budget (OMB) the discretion to approve information collections for up to five years.

The Committee recognized that agencies are not receiving the public input necessary to make sound decisions under the PRA. Improving public engagement is the first and main focus of the recommendations. Yet, the Committee is

recommending that Congress consider amending the PRA to give the public fewer opportunities to provide the necessary input.

I. Problems with Recommendation #5

Recommendation #5: Congress should consider amending the PRA to define a subset of collections that could be approved for up to five years in order to enable OMB to shift its focus to those information collections that require the most scrutiny.

- **Hurts Public Engagement:** If OMB extended the time period for information collections, this would provide the public *and* agencies fewer opportunities for meaningful public engagement. There is no clear mechanism to address a problem if it arose within the extended time, and there is no reason to believe an agency or OMB would be alerted to problems. Often, it requires the statutorily mandated review for the public and agencies to take the time to look back at collections.
- **Less Information Undermines the Purpose of the PRA:** The purpose of the PRA is to reduce the burden on regulated entities. Unless agencies have more and better information, the poor burden hour estimates will only get worse. Further, agencies would be hurt by not gaining valuable insight to assist in their information management.
- **Overbroad:** This recommendation applies to a “subset of collections,” which could mean almost anything—a subset could be anything short of *all* collections.
- **The Exception Swallows the Rule:** Under current law, OMB may extend collections for three years. Practically, in part due to agency pressure and no logical way to distinguish among a “subset” of collections, OMB would extend all applicable collections for five years. This new exception would “swallow” the three-year rule.
- **Lack of Evidence and Knowledge:** There is no evidence or data that indicates some collections deserve more scrutiny than others, nor is there any reason to believe OMB, or anyone for that matter, would have the knowledge to make such a determination. Each collection, even within a subset of

collections, is different and needs to be treated differently.

- **The Purpose of the PRA is Not to Reduce the Burden on Agencies:** The PRA may impose obligations on agencies, but these obligations serve the purpose of the statute: to reduce the paperwork burden on the public.

II. Conclusion

Strong public participation is a major goal of our regulatory process. The Committee's PRA report identified strong evidence that public participation needs to be strengthened. There are numerous recommendations suggested to achieve that goal. However, completely inconsistent with that goal, the Committee identified a recommendation that would undermine public participation.

The Chamber strongly urges ACUS to reject recommendation #5 and take the opposite approach. As we wrote in prior comments, the problems identified with the PRA justify a recommendation that is the exact opposite of recommendation #5. The poor dialogue between the public and agencies justifies Congress amending the law to require more frequent reviews of information collections, not allowing fewer reviews (e.g. "major collections," which would need to be defined, should be reviewed every year).

Sincerely,



William L. Kovacs

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April 30, 2012

Mr. John Cooney
Chairman
Committee on Administration and Management
Administrative Conference of the United States
1120 20th Street NW, Suite 706 South
Washington, DC 20036

**Re: ACUS Committee on Administration and Management's Draft
Recommendation to Give OMB Discretion to Approve Collections
for up to Five Years**

Dear Mr. Cooney:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply interested in improving the Paperwork Reduction Act (PRA). We appreciate this opportunity to comment on the committee's latest draft recommendation report. Your efforts to promote better public engagement under the PRA are very important to improving the effectiveness of the law. The Chamber, though, is very concerned with the committee's draft recommendation #5 that encourages Congress to give the Office of Management and Budget (OMB) the discretion to approve information collections for up to five years.¹

The committee acknowledges in the draft recommendation report that the PRA has not worked as intended. For example, the comment periods have failed to facilitate "a meaningful dialogue between agencies and the public."² Agencies do not

¹ The Chamber's concerns also apply to recommendation #1(c), which appears to be a broader way of recommending that information collections be extended when there are no significant changes: "Congress and OMB should look at ways to streamline the public participation requirements when agencies seek renewal of approval from OMB for collections with no significant changes."

² "Paperwork Reduction Act, Committee on Administration and Management Draft Recommendation," Administrative Conference of the United States, Apr. 11, 2012, at 2.

utilize the comment periods as a way to educate themselves regarding the collection of information from regulated parties. As stated in the committee's draft report, "agencies tend to view information collection plans as final before this first comment period begins."³ The burden hour estimates, in other words, are a done deal before the public even provides comments.

This ineffective dialogue and poor communication are a major reason why the paperwork burden hour estimates have been extremely inaccurate. Developing reasonable burden hour estimates is difficult even for affected entities. For agencies and OMB, developing reasonable estimates is extremely unlikely without significant interaction with the regulated community.

I. Problems with Recommendation #5

Recommendation #5: "Congress should amend the Paperwork Reduction Act to grant OMB discretion to approve collections for up to five years when such collections are being reapproved without significant change."

Poor communication between agencies and regulated parties is the major problem with the PRA. There needs to be more opportunities for the public to exchange information with agencies. Therefore, allowing OMB to extend information collection cycles from three years to five years would hurt the goal of promoting more dialogue between regulated entities and agencies.

This recommendation should be rejected because it:

1) Makes the Problems Worse: This recommendation would extend the time that agencies would be unable to receive and act upon critical information necessary to make informed decisions regarding information collections.

2) Misconstrues Changes to Collections as the Only Type of Important Change: There can be changes in technology, the economy, and knowledge, to name just a few possible changes, which can have an even bigger impact on burden hours than changes to the information collections themselves. Therefore, "insignificant changes" to information collections do not justify extending collection periods when so many other factors and changes could come into play.

³ *Id.* at 3.

3) Unnecessarily Extends Problems: The burden hour estimates may be extremely flawed. By extending collections to five years from three years, OMB would be preventing agencies and the public from rectifying problems in a more timely fashion. Even if burden hour estimates are reasonably estimated during the comment periods, many things can happen during three years, and especially five years, including *unforeseeable* changes.

4) Asks Too Much of OMB: Calculating burden hours is extremely difficult. OMB does not have the expertise or the resources to go through reapproved information collections and determine those that should be extended for five years.

5) Gives OMB Far Too Much Power: The recommendation provides OMB the authority to extend any reapproved information collection with very few constraints. For example, OMB would not have to consider:

- The burden of the information collection—there is no distinction drawn between a major collection and a minor collection;
- Past compliance problems that make the information collection particularly difficult for regulated entities;
- Future compliance challenges that would make the information collection problematic; or
- The accuracy, or inaccuracy, of the estimated burden hours.

The term “without significant change” is also vague. OMB, as a result of this recommendation, would have carte blanche to extend information collections.

6) Harms Agencies: The PRA was designed to assist agencies in their information management practices. By reviewing information collections less frequently, agencies would lose out on valuable opportunities to gain feedback that could assist them in managing their information.

II. Conclusion

The Chamber commends ACUS for its important work on the PRA. However, we strongly urge you to reject recommendation #5. In fact, the committee should take the opposite approach. Poor dialogue between the public and agencies, along with poor burden hour estimates, justifies Congress amending the law to require

April 30, 2012

Page 4 of 4

more frequent reviews of information collections, not allowing fewer reviews (e.g. “major collections,” which would need to be defined, should be reviewed every year).

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a large initial "W".

William L. Kovacs

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March 28, 2012

John Cooney
Chairman
Committee on Administration and Management
Administrative Conference of the United States
1120 20th Street NW, Suite 706 South
Washington, DC 20036

**Re: ACUS Committee on Administration and Management's Draft
Recommendation on the Paperwork Reduction Act**

Dear Mr. Cooney:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply interested in improving the Paperwork Reduction Act (PRA). In response to the Committee's broad examination of the law and invitation for comments, the Chamber is pleased to provide these recommendations.

When considering the impact of regulation on business, the burden of mounting paperwork is often at the heart of the issue. The PRA was enacted, in large part, to reduce this burden. The purpose section of the PRA begins by explaining that the purpose of the law is to:

[M]inimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.¹

¹ Paperwork Reduction Act, 44 U.S.C. § 3501 *et. seq.*

The PRA and its goal of reducing the paperwork burden are as important today as they were when the law was enacted in 1980.² Unfortunately, the law has not worked as intended. The Committee, to its credit, has recognized this failure.³ The following recommendations focus on turning what has been a relative failure into a successful means of reducing the paperwork burden on the American public.

I. Government Compliance

First and foremost, agencies need to comply with the PRA for the law to be effective. In a 2005 Government Accountability Office (GAO) study,⁴ agencies certified that the requirements for proposed information collections had been met in 98 percent of that year's 8,211 collections.⁵ When the GAO took a random sample of certifications, 65 percent of those certifications had partial or missing support.⁶

For example, the GAO found that only two of eleven certifications studied had support showing that the collections avoided unnecessary duplication. In fact, seven of the certifications had no support at all.⁷ For the "plain English" requirement, 11 of the 12 certifications (92 percent) had no support at all.⁸

This compliance failure is unacceptable and undermines the legitimacy of government. Businesses and individuals have to comply with legally imposed requirements or else face penalties. Yet, chief information officers in agencies face no repercussions and not surprisingly, there is non-compliance with the reasonable analysis expected under the PRA.

For the PRA to be effective, there must be some means to ensure government compliance with the law (i.e. the law needs some teeth). The Regulatory Flexibility Act (RFA)⁹ had a similar problem with government compliance. In response, Congress passed the Small Business Regulatory Enforcement Fairness Act of 1996.¹⁰

² See e.g. "Paperwork Reduction Act of 1980" web page, U.S. Small Business Administration at <http://www.sba.gov/advocacy/829>

³ "Paperwork Reduction Act, Committee on Administration and Management Draft Recommendation," Administrative Conference of the United States, at 1.

⁴ "Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public," United States Government Accountability Office, GAO-05-424, May 2005.

⁵ *Id.* at 16.

⁶ *Id.*

⁷ *Id.* at 17.

⁸ *Id.*

⁹ Regulatory Flexibility Act, 5. U.S.C. § 601 *et. seq.*

¹⁰ Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121.

In its findings, Congress wrote:

[T]he requirements of chapter 6 of title 5, United States Code [Regulatory Flexibility Act], have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute.¹¹

According to the Small Business Administration (SBA):

Many agencies have failed to comply with the RFA over the past 16 years, and small businesses found little recourse in the courts due to the absence of any enforcement mechanism. The Small Business Regulatory Enforcement Fairness Act corrects that by permitting judicial review of agencies' compliance with the Regulatory Flexibility Act.¹²

The law created a judicial review process that allows affected parties to ensure that agencies followed the proper process, but does not provide for challenges to the substance of rules.¹³ A similar judicial review process, modeled after the RFA, should be included in the PRA.

The application of penalties also should apply beyond regulated parties. Penalty provisions should be imposed on any government official who knowingly makes false statements or representations, not unlike similar penalty provisions imposed on the public.¹⁴

II. Strengthen the 60-Day Comment Period

There are two distinct comment periods. The first comment period is 60 days and is designed for affected parties to assist agencies in developing information collections. The second comment period, which is 30 days, gives the public an opportunity to submit comments to the Office of Management and Budget (OMB) after agencies have developed their information collection proposals.

The recommendation in the draft Paperwork Reduction Act report to eliminate the 60-day agency comment period was disconcerting. Fortunately, the Committee has recognized the problem with such a move and is instead recommending that

¹¹ *Id.* at §202(5).

¹² "Summary of SBREFA" web page, U.S. Small Business Administration, at <http://www.sba.gov/advocacy/825/12285>

¹³ *Id.* and *See also* P.L. 104-121.

¹⁴ *See e.g.* Clean Water Act, 33 U.S.C. § 1318(c)(4) and Solid Waste Disposal Act, 42 U.S.C. § 6928(d).

“[a]gencies and OMB should take measures to revitalize the sixty-day comment period.”¹⁵

The 60-day agency comment period can be revitalized through:

1) *Conveying Information in a More Accessible Fashion*: Even for organizations that regularly track developments in the Federal Register, understanding and appreciating the nature of proposed information collections can be very difficult. Notices should provide more context and be written in “plain English.”

There also should be a “red flag” system that allows readers to know, at a glance, whether a particular proposed information collection is worthy of attention. Proposed information collections that exceed a certain threshold number of hours per respondent (not in total) should be labeled as “major collections.”

2) *Showing It Makes a Difference*: The best way to revitalize the 60-day comment period is for the public to believe it makes a difference. Unfortunately, as explained in the Committee’s report, the number of burden hours each year is growing at an alarming rate (26 percent for the period from 1997-2010)¹⁶—whether comments have made a difference in slowing down this growth is unclear. There are several specific actions that can be taken to show public comments make a difference:

A) Reduce the Burden

The Paperwork Reduction Act of 1995¹⁷ (PRA of 1995) required target goals of at least 10 percent for fiscal years 1996 and 1997, and five percent reductions for fiscal years 1998, 1999, 2000, and 2001.¹⁸ According to GAO, if the government had been able to reach the goals of the PRA of 1995, the burden hours would have decreased by about 35 percent (as of September 30, 2001). Based on data as of September 30, 2002, not only did the burden hours not decrease by 35 percent, but, based on the burden hour estimate, they went up by 17 percent.¹⁹

¹⁵ *Supra* note 3 at 4.

¹⁶ Stuart Shapiro, *The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform*, Report to the Administrative Conference of the United States,” at 18.

¹⁷ Paperwork Reduction Act of 1995, P.L. 104-13.

¹⁸ *See* 44 U.S.C. § 3505(a).

¹⁹ “Paperwork Reduction Act: Record Increase in Agencies’ Burden Estimates,” GAO Testimony Before the Subcommittee on Energy, Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, House of Representatives (GAO-03-619T), April 11, 2003 (expected testimony date) at 4.

Ideally, there would be mandatory goals, but it is difficult to envision how a required government-wide reduction could be enforced. A voluntary goal though should be set again, especially since the relevant statutory section addressing voluntary goals is outdated. A new target goal of 10 percent for at least the next ten fiscal years should be set under 44 U.S.C. § 3505(a) and progress towards this goal widely communicated.

B) Respond to Comments

Agencies and OMB should respond to comments received and explain why an information collection and/or estimated burden hours have been kept the same or modified. This would provide feedback to commenters and show their time spent submitting comments was justified.

III. A Better Measure of Burden Hours

The Committee's report details the problems for government officials in coming up with accurate estimates of burden hours. Citing OMB, the report states:

While these officials [program analysts] are often experts in their areas of responsibility and are usually familiar with the public's experience with responding to information collections they oversee, in many cases their estimates are not based on objective, rigorous, or internally consistent methodologies.²⁰

It is very difficult to calculate burden hours, especially for complicated collections. The more information and detail provided by agencies to affected parties, the better these parties can estimate and communicate the time impact of collections.

There are some steps that can be taken to better measure the burden hours:

1) Extend the 60-Day Comment Period for Major Collections

For complicated collections, 60 days may not be enough time to work with affected parties to get a sense of the burden hours. On "major collections," the comment period should be extended to 90 days.

²⁰ *Supra* note 16 at 21.

2) Develop Best Practices

The initial estimates developed by agencies should be calculated using sound and consistent methodology. OMB should develop best practices to assist government officials who calculate burden hours.

This would include:

- Comparing the proposed collection to similar collections (benchmarking data).
- Reaching out to appropriate trade groups and other organizations prior to issuing the notice, such as by attending and presenting at relevant conferences.
- Estimating that more time will be needed with new collections than existing collections due to initial investments and learning curves.

3) Publish Anticipated Major Collections

Agencies publish expected regulatory activity in the Unified Agenda. At a minimum, agencies should publish anticipated “major collections” in the Unified Agenda and prominently on their web sites. By doing this, affected parties can have more time to better measure the burden hours and communicate this invaluable information to agencies.

IV. Collections Should Remain at Three Years and Reduced to One Year for New Major Collections

In its draft recommendations, the Committee recommended that OMB have discretion to approve collections for up to five years.²¹ Given the poor burden hour estimates that already exist, such a recommendation would be inappropriate. Collections should be approved for at most three years, as allowed under current law, and approvals should be reduced to one year for *new* major collections.

The best way to determine burden hours is not to estimate but to look at actual experience. By looking back, agencies can gather objective data about the actual experiences of regulated entities. Even after this data has been used to determine burden hours, it is vital to continue reviewing the collections because many things can change, from technological innovations to changes in the legal environment. The

²¹ *Supra* note 3 at 4.

three-year sunset provision requires agencies to engage in the necessary review of collections on a reasonable basis.

The look-back concept is vital not only for adjusting burden hours but also the very need for collections. This concept has been widely used in the regulatory process for many decades.²²

V. Conclusion

The Chamber commends ACUS for considering how to reform this important law. The PRA, with the necessary changes, can play an important role in eliminating the paperwork burden imposed on businesses. We strongly urge the Committee to pass recommendations that give teeth to the law and instill confidence that commenting on information collections can make a real difference.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a small dot above the 'i' in "Kovacs".

William L. Kovacs

²² See e.g. E.O. 12866 and the Regulatory Flexibility Act, 5. U.S.C. §610.