



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Administration & Management

Minutes

February 29, 2012

Members Attending

Paul Bardos
*Gov't Member, International
Trade Commission*

Amy P. Bunk
*Liaison, Office of the Federal
Register*

John Cooney (Committee
Chair)
*Public Member, Venable
LLP*

Bridget C.E. Dooling
*Gov't Member, Office of
Management and Budget*

Lenny Loewentritt
*Alternate for Gov't Member,
Government Services
Administration*

Nina Olson (by phone)
*Liaison, Office of the
National Taxpayer Advocate
(Internal Revenue Service)*

Michael Ravnitzky
*Gov't Member, Postal
Regulatory Commission*

Robert Taylor
*Gov't Member, Department of
Defense*

James J. Tozzi
*Public Member, Center for
Regulatory Effectiveness*

Jill Wright
*Alternate for Liaison,
Department of Health and
Human Services*

ACUS Staff Attending

Emily Bremer
In-House Researcher

Jeffrey S. Lubbers
Research Director

Paul R. Verkuil
Chairman

Invited Guests Attending

John Kamensky
*Senior Fellow, IBM Center for
the Business of Government*

David Plocher
Government Affairs Office

Stuart Shapiro
*Consultant, Rutgers
University*

The meeting commenced at 1:33 pm in the conference room of the Administrative Conference. Following introductions, the committee approved on a voice vote the draft minutes of the last committee meeting, held on October 28, 2011. The committee members further agreed that members of the public would be permitted to speak during the course of the meeting.



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Mr. Cooney introduced the committee's new project by giving an introduction to the origin and purpose of its subject, the Paperwork Reduction Act (PRA or Act). Chairman Verkuil put the project in context, explaining that the Conference is examining the key statutes that regulate how government works. In this respect, the PRA Project is a natural follow-up to the recently completed project on the Federal Advisory Committee Act.

Professor Shapiro discussed his research, explaining that he used a benefit-cost framework to evaluate how the PRA could be improved. Having served as desk officer and manager at the Office of Information and Regulatory Affairs (OIRA) for five years, Professor Shapiro came to the project with the benefit of significant experience with the PRA. His research methodology included gathering data on information collections via www.reginfo.com, reviewing the legislative history of the Act and available (but limited) academic literature, and interviewing PRA experts. He conducted 21 interviews, including one with a group of current OIRA officials, and 20 with a balanced group of individuals who have had extensive experience with the PRA.

Mr. Tozzi asked how many of the interviewees had participated in information collection requests by responding to them. Professor Shapiro said that none of the interviewees fit that description, although two or three were representatives of business. Mr. Tozzi explained that the Act was originally viewed as burdening agencies for the benefit of small business interests. He expressed concern that the proposed recommendations might be biased because the research did not include the intended beneficiaries of the PRA. Most of the proposed recommendations cut back on the Act's requirements. Professor Shapiro explained that the interviews were roughly split between those who generally supported the Act and those who did not. Nonetheless, all of them saw a need for reform.

Mr. Tozzi continued to express concern that the interviews did not include representatives of the small business community, a prime beneficiary of the Act. He noted that some agencies perform outreach to midsized and small business during the initial 60-day comment period. Indeed, that period was intended to be interactive. If it has not turned out to be interactive, perhaps there are ways to improve it, rather than just eliminating it. Mr. Cooney agreed that the PRA has always had a small business focus and echoed Mr. Tozzi's concern that the Small Business Administration (SBA) was not involved in the research. He suggested that the staff could reach out to the SBA before the next committee meeting.

Professor Lubbers explained that some groups intended to be benefitted by the PRA may be hurt if its requirements are too restrictive for agencies. For example, such groups may be harmed if the PRA inhibits an agency from doing a complete regulatory impact analysis. In the status quo, agencies cannot do focus groups to determine the impact of various regulatory alternatives. He suggested that perhaps there should be a carve-out in the law to allow such focus groups.



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Ms. Dooling prefaced her comments by noting that she could not respond on behalf of the Office of Management and Budget (OMB). She observed, however, that an agency's regulatory analysis may be improved by OMB's review of the agency's research plan. Ms. Dooling explained that OMB helps ensure that agencies use methodology that will yield useful results. Ms. Olson stated that the problem is the lack of flexibility. OMB review requires the agency to plan information collections early and specifically. If the agency finds that it needs to go in a different direction, it has to start the clearance process all over again. Ms. Dooling noted that an agency can secure a generic clearance, allowing it to more spontaneously convene focus groups as the agency's needs evolve.

Professor Lubbers asked whether the process might be sped up if OMB provided more guidance to agencies as to what is required to secure approval for an information collection. Mr. Tozzi explained that the first, 60 day comment period was intended to provide an interactive process to help agencies structure information collections well. Professor Shapiro agreed, but noted that, in practice, agencies tend to view a proposal as finished once this comment period starts.

Mr. Ravnitzky observed that the PRA is viewed as one size fits all. He suggested that the law's lack of adaptability to the needs of different agencies may explain the disparity between the intent of the law and its operation. For example, small agencies may have just one or two information collections per year, making the process daunting due to lack of experience. And the PRA may prevent agencies from undertaking some collections that would not be burdensome. Mr. Ravnitzky suggested the committee consider an adaptive threshold for triggering the PRA, to give it the flexibility to accommodate different agencies' needs. He suggested that a system with two or three tiers of review requirements could be simple and effective.

Mr. Taylor thought that sounded reasonable, but expressed concern with tying the requirements of the PRA to the size of the agency. A large agency may have an information collection that imposes only a minor burden that warrants lower tier treatment. Mr. Ravnitzky agreed. He suggested that burden to the public should be the key. Mr. Tozzi observed that the Act is concerned with the burden on the public and not the burden on agencies.

Mr. Plocher, an attorney at the Government Accountability Office (GAO), explained that he worked with Senator Glenn on the PRA's reauthorization in 1995. He explained that one goal of that effort was to improve efficiency for collecting agencies. Indeed, the structure of the comment periods was intended to cultivate the capacity of agencies to better evaluate their own information collection plans before seeking OMB approval. This approach seems to have failed, though, as evidenced by the findings of several GAO reports. The difficult question is what it would take to improve the quality of agency proposals, but GAO has not found a good answer.



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Mr. Kamensky noted that technological evolution has created new issues in the administration of the PRA. Today, there are tools available that permit greater, and nearly instantaneous, citizen engagement. But the PRA's lengthy review process prevents agencies from using these tools. In some cases, the Act may even be a barrier to an agency accomplishing its mission. Mr. Tozzi noted that OMB has issued a policy statement addressing the use of social media under the PRA. He suggested that, if technological problems persist, the committee needs to identify them quite specifically.

Mr. Cooney turned the committee's attention to paragraphs one through three of the proposed recommendations, which address exemptions to the PRA's requirements.

Mr. Cooney asked Professor Shapiro how he selected the exemption threshold in paragraph two of the recommendation. Professor Shapiro explained that he used data available on page 33 of the draft report, which shows that 15-20% of all information collections require OMB review because they impose a significant burden on the public. While he was not wedded to the specific threshold recommended, it would capture more of 90% of the total burden of information collections. Mr. Tozzi noted that the proposed threshold would reduce the number of OMB reviews by nearly 80%. Agencies would prefer that outcome, but the public might not.

Mr. Taylor suggested that both the total and the individual burden of a proposed information collection should be considered. Professor Shapiro thought that was reasonable. Ms. Dooling clarified that paragraph two would not waive the application of the PRA, but would rather delegate the responsibility of compliance to the agency. She further explained that OMB currently delegates such authority to the Federal Reserve and the Federal Trade Commission (FTC). She suggested that studying how those delegations have worked might be prudent. Mr. Cooney noted that OMB has more confidence in some agencies than others, and Mr. Plocher added that it is not simply a matter of confidence, because some agencies have more discretion under the law than others.

Mr. Kamensky stated that exempting voluntary information collections would solve many of the problems associated with agency uses of social media. He asked why that approach was not included in the recommendation. Professor Shapiro replied that two reasons kept him from including such a recommendation. First, people do not view government collections as voluntary, regardless of whether they are identified as such. Second, a large percentage of the voluntary collections agencies perform seek statistical data, and the primary benefit of OMB review is that it improves statistical methodology. Additionally, focusing on the burden hour threshold will reduce review burdens for many voluntary collections, while retaining OMB's discretion to review.

Mr. Taylor observed that the existing delegations to the Federal Reserve and FTC are different than the delegations proposed in paragraph two. For one thing, those delegations are not



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based on the burden of the information collections. Studying how those delegations work may thus not be very useful. Ms. Dooling generally agreed, but observed that it could help to see how those agencies have structured their internal review under the delegations. Mr. Taylor argued that paragraph two should be focused on providing a waiver or a streamlined procedure, rather than on facilitating delegation. He further opined that it should be tied to burden. Ms. Dooling observed that a statutory change would be required for OMB to grant waivers. Other members of the committee agreed.

Mr. Tozzi asked what has changed in the last 30 years that would make it acceptable to exempt 80% of information collections from the PRA. He stated that, if the committee is going to recommend such change, it has to be justified. Professor Shapiro replied that there have been two changes. First, we now have 32 years of experience with the PRA. In that time, a relatively pro forma process has developed for a large number of information collections. Some of these collections could use more inspection, but they are not getting it because agencies are overworked. Second, when the PRA passed, regulatory review was in its infancy. Many information collections are regulatory in nature, and the end products of those efforts are today reviewed by the Executive.

Mr. Tozzi objected that if the process has become pro forma, that suggests less burden on agencies. And most information collection requests are cleared in 60 days. Mr. Kamensky pointed out that it is 60 days from the time of submission to OMB. The entire process takes quite a bit longer than that. Mr. Tozzi observed that it is not clear what causes the delay, but it looks as though it is coming from within the agencies and not from OMB. He also noted that there are emergency exemptions available for collections that need to be conducted on a tight timeframe.

Mr. Cooney explained that the PRA's two comment periods were intended to prevent retaliation or intimidation of regulated parties by regulators. The fast-track process was designed to act as a safety valve, but Professor Shapiro's report doesn't explain how that works in practice. Professor Lubbers expressed some skepticism about the anti-intimidation explanation. Mr. Plocher thought the idea was to create a record during the first comment period that would help prevent intimidation at OMB review stage.

Professor Lubbers thought it might make more sense to exempt voluntary collections than to permit delegations as contemplated in paragraph two. In his view, a notice of voluntariness should be sufficient to dispel the problem of the public perceiving all government collections as mandatory. He clarified, however, that he would not consider information collections related to benefits as voluntary in nature. Mr. Bardos noted that customer service surveys should be treated differently from benefits-related collections. Mr. Tozzi expressed concern that exempting voluntary collections would result in all collections being identified as voluntary. He



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further noted that agencies sometimes design a voluntary collection to yield a certain, desired result. OMB review can address such methodological problems.

Moving on to paragraph three of the proposed recommendations, Ms. Olson suggested that the Inspectors General (IGs) could benefit from the methodological review OMB provides. Professor Shapiro noted that he was not suggesting a blanket exemption for the IGs, but rather sought to clarify how the Act currently applies to them. Ms. Dooling explained that the meaning of the regulatory text defining the IG exception often becomes an issue. The application of the PRA is not dependent on the identity of the agency that is collecting the information, but rather focuses on what is being asked and in what context. Professor Shapiro added that the goal of the Act's IG exemption is to keep OMB out of enforcement actions. Mr. Ravnitzky observed that the language of paragraph three appears to expand the IG exemption. Since that is not the intent, the language should be clarified.

Mr. Cooney moved the discussion to paragraphs four and seven of the proposed recommendations, which address potential congressional changes to OMB's authority and the requirements of the PRA.

Addressing recommendation four, Mr. Tozzi explained why the PRA's drafters settled on a three-year limit for information collection approvals. The drafters recognized that the government's use of information changes over time, and it is necessary to ensure that the public does not remain subject to burdens that become obsolete. Mr. Tozzi acknowledged that technological evolution has exacerbated the problem, because things now change faster than ever. Extending the approval period to five years is too long. Professor Lubbers objected that approvals need not last five years. Rather, the recommendation would give OMB discretion to approve appropriate collections "up to five years." Mr. Tozzi replied that, in practice, it will mean most collections are approved for the full five years. Professor Shapiro thought the change would increase flexibility in the Act. He further noted that many information collections are reapproved without change anyway, so increasing the potential approval period should not create a problem.

Ms. Dooling asked Professor Shapiro why he chose five years. Professor Shapiro explained that OMB has reported that expanding the maximum approval time to four years would reduce the volume of information collection requests by approximately 20%. On the other hand, most of those interviewed thought six to eight years would be too long. Five years thus seemed like a good compromise to improve the process without losing much of its benefits.

Hearing no comments on paragraph seven of the proposed recommendations, Mr. Cooney turned the discussion to paragraph five, which advocates eliminating the first, 60-day comment period.



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Mr. Ravnitzky offered that he supported eliminating the first comment period as long as the action was coupled with the creation of a dedicated website to provide the public with an easy way to find out about contemplated information collections. Ms. Olson would go further because she was uncomfortable with eliminating the opportunity for public participation in crafting an information collection request. She would require agencies to make affirmative efforts to engage the public, rather than allowing them to rely exclusively on a passive website.

Mr. Plocher noted that the purpose of the first comment period was to create an opportunity and put pressure on agencies to craft information collection plans with the benefit of public comment. The committee needs to identify its goal in order to formulate good recommendation, and it has to include more than just encouraging the use of new technologies. Rather, the recommendation should improve the agencies' capacity to formulate good studies. Or it should create a more streamlined and transparent process. Congress has typically viewed the Act through the eyes of the small business community, so the committee will need to consider that perspective, too.

Ms. Olson suggested that eliminating the second, 30-day comment period and making the 60-day period coterminous with OMB review might be a better solution. Professor Shapiro noted that OMB would need some time after the end of the comment period to respond to comments. Ms. Dooling added that such a recommendation would need to consider how an agency would respond to comments if OMB review was already ongoing.

Ms. Olson understood that the problem was the failure to engage the public, but she was not sure that paragraph five would solve that problem. Mr. Cooney agreed, adding that he was not comfortable with idea that low participation during the 60-day period warrants eliminating the opportunity for the public to comment. Mr. Tozzi agreed. Given the importance today of transparency and public participation, it would be hard to convince people that eliminating the comment period is a good idea. Moreover, eliminating the first comment period changes OMB's role in the process. Rather than just reviewing an agency's plan, the OMB would shift into a decision-making role. Mr. Plocher disagreed on this point, but agreed that it was necessary to find a way improve public engagement in the process. The Act's current solution has failed, but we have to identify the source of the problem in order to fix it.

Professor Lubbers suggested that the recommendation could be designed to both rationalize the comment periods and also require agencies to undertake more affirmative outreach to the public. There was general agreement on this approach. The committee further agreed that conference staff should come up with language to effectuate it.

Mr. Cooney moved the discussion to paragraphs six and seven, regarding reforms that OMB and OIRA can make to improve the process. He noted that these paragraphs come back to the earlier point that small agencies need more assistance with the PRA. Mr. Plocher noted that



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Jeff Hill had put together a great handbook on the PRA, but it remains in draft form. Mr. Kamensky suggested that communities of practice may provide one solution. One or more large agencies could act as repository of knowledge that would be made available to smaller agencies.

Mr. Cooney moved the discussion to paragraph eight of the proposed recommendations. He observed that much of the PRA is about information management, rather than collection, but this truth has largely been ignored. Mr. Ravnitzky thought it was a good point in theory, but that including paragraph eight might make implementing the other paragraphs of the recommendation harder. Mr. Plocher agreed, observing that this has been one of the Act's problems from the beginning. Professor Lubbers asked whether the recommendation could say anything useful on the subject. Mr. Plocher suggested that just highlighting the problem might be enough. GAO has issued a number of reports on information technology and management, without coming to many useful conclusions. It's a difficult topic that might warrant its own, independent study. Chairman Verkuil noted that the preamble might be a good place to address the issue. Mr. Tozzi, Mr. Ravnitzky, and Chairman Verkuil all agreed that it would be inappropriate for the Conference to recommend the allocation of additional funding. There was also general agreement that paragraph eight should be omitted and discussion of the relevant issues relegated to the preamble.

The meeting adjourned at 4:18 pm.