

Jim Tozzi, Public Member

**Comments on the Draft Report to  
The Administrative Conference of the United States  
on the Paperwork Reduction Act  
February 2012**

**Issue**

The Paperwork Reduction Act (PRA; 44 U.S.C. 3501 *et seq*) creates two public comment periods for certain non-emergency Information Collection Requests (ICRs). The two comment periods are: 1) an advance 60 day notice in which comments are submitted to the agency while the ICR is under development; and 2) a subsequent 30 day period when comments on the completed ICR may be submitted to OMB. The two comment periods apply to proposed new information collections that are not contained in proposed rules and to ICR renewals irrespective of whether or not there were originally contained in an ICR. As OMB's draft Implementing Guidance for the PRA explains,

*Unless the proposed collection is contained in a Notice of Proposed Rulemaking or unless exempted, the agency needs, for each proposed collection of information or extension of an existing one to “provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies.”<sup>1</sup>*

The Administrative Conference of the United States (ACUS) is considering a recommendation to eliminate the advance public comment period and, instead, would allow agencies to initiate an expanded public consultation process during the subsequent 30 day public comment period after the ICR has been developed and provided to OMB. The text being considered by ACUS reads as follows:

*Eliminate the sixty-day comment period from the Paperwork Reduction Act. Encourage agencies and OMB to use alternative means of reaching the public (in addition to a formal Federal Register notice) during the 30 day comment period that occurs simultaneously with submission to OMB.*

Any suggested modification of the PRA or its implementing rules should be preceded by an understanding of the views set forth by the Administration in recommending that the PRA be enacted, please see, <http://thecre.com/ombpapers/PaperWorkReductionAct.htm>.

In particular, the OMB review of ICRs is more than just a review of burden estimates and statistical methodologies. Instead, the review is much broader and encompasses a wide range of statutory mandates cutting across many disciplines and many agencies – as emphasized in the “coordinate, integrate” Purpose of the PRA [44 U.S.C. 3501(2)]. This broad perspective is outside the purview of a single agency but easily within the acumen and jurisdiction of OMB.

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<sup>1</sup> Office of Information and Regulatory Affairs, Office of Management and Budget, *The Paperwork Reduction Act of 1995: Implementing Guidance for OMB Review of Agency Information Collections (Draft)*, August 16, 1999, p. 57 available at <http://thecre.com/pdf/PRAguidenew.pdf>.

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In the Congressional hearing on the PRA over thirty years ago, Administration witnesses addressed this concern when they stated:

*To accomplish this goal requires an organization which has a Government-wide perspective and can objectively balance competing, and sometimes conflicting, interests—such as program and societal needs, burden on the public, privacy, and budget impact. We believe that the Office of Management and Budget is the one organization that can accomplish the task.<sup>2</sup>*

This paper will analyze: 1) the scope of the issue; 2) the reason why there is an advance comment period on ICRs; 3) the role of the advance comment period in light of President Obama's transparency initiative; and 4) the irreplaceable function of the *Federal Register*; and 5) an alternative approach to reducing ICR comment periods.

### **Scope of the Issue**

Before discussing the 60 day advance comment period, it is important to understand the scope of the issue. Understanding the public's use of the advance comment period has the potential to lead to identifying alternative approaches to improving the efficiency of the ICR process.

The Office of Information and Regulatory Affairs (OIRA's) *Reginfo.gov* website provides data on the ICR clearances under OIRA review. According to the *Reginfo* “dashboard” there were 807 pending ICRs as of February 20, 2012.

Most of the ICRs under OMB review are grouped in three major categories, New Information Collections, Extensions without change of existing collections, and Revisions to existing collections. The remaining ICRs are in a variety of categories including reinstatement of ICRs with and without changes, discontinuances, and information collections which are in use without a control number.

The *Reginfo* dashboard does not indicate the share of new ICRs which are part of a rulemaking and thus not subject to the 60 day comment period. Similarly, the summary dashboard does not indicate the share of the ICRs on which comments were and were not filed, although the data can be gleaned from the underlying database, an exercise CRE undertook.

CRE's analysis of OIRA's *Reginfo* database shows that of the 196 proposed new ICRs under OMB review as of February 20<sup>th</sup>, 52 were associated with a rulemaking while 144 were not. Five of the 144 proposed new non-rulemaking information collections were submitted under an emergency designation and were not subject to public comment. Thus, about 70% of proposed new information collections under OMB review were subject to the 60 day comment period.

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<sup>2</sup> Statement of Wayne G. Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget; Accompanied by Jim J. Tozzi, Assistant Director for Regulatory and Information Policy, “Paperwork Reduction Act of 1980,” Hearings Before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives, Ninety-sixth Congress (Second Session), February 7, 21, and 26, 1980, p. 91 available at <http://thecre.com/pdf/Granquist.PDF>.

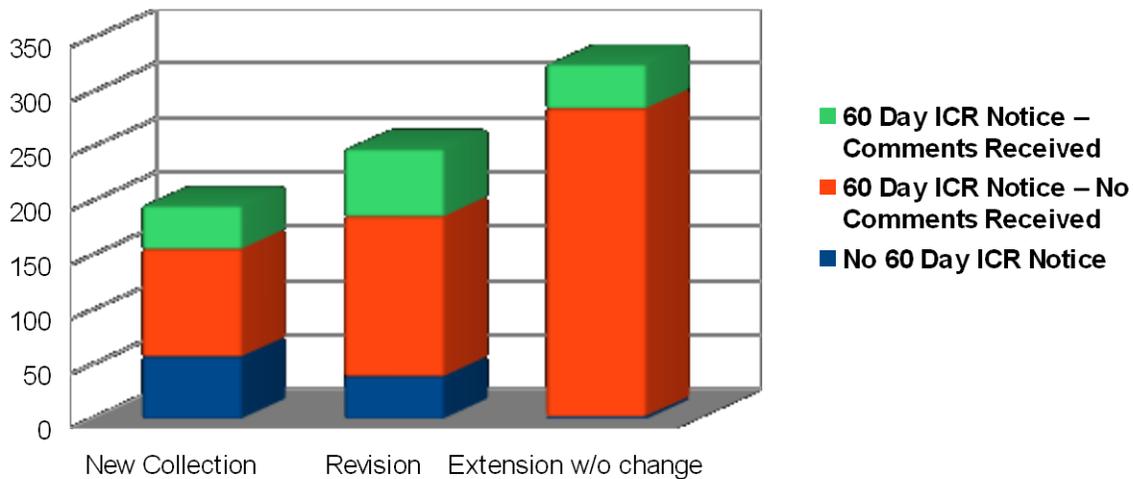
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Of the 139 new ICRs with 60 day comment periods, the public provided comments in 40 instances or almost 30% of the time.

The chart below summarizes the number of ICRs under OMB review by major category, whether or not they were subject to the 60 day comment period, and the extent to which comments were received. The database does not indicate whether comments received were submitted in response to the first or second comment period. Since the data goes up on the Reginfo site soon after it reaches OMB, it is assumed for purposes of this analysis that all comments noted on the site were sent in response to the first notice.

### ICRs Under OIRA Review

(February 20, 2012)



The chart makes clear that, although comments were received on all types of ICRs, they are most common to new and revised ICRs and are least used for renewals of existing ICRs without change. Thus, if a 60 day comment period was to be eliminated, it would make to sense to do so *only* for ICRs being renewed without change.

Based on the chart, an alternative approach to reducing public comment presents itself, eliminating the second comment period for ICRs in which no comments were received in during the 60 day notice. The possibility of eliminating the second comment period, when no comments were received during the first comment opportunity, is discussed below.

### Why There is an Advance Comment Period

The reason there are two ICR comment periods is to allow the affected public to work with the agency as their partners in developing and revising information collections based on their knowledge and experience with the subject matter.

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During the first comment period, the agency is, or should be, considering possible alternate approaches and methods to collecting, processing and using the data. It is during this formative process when public input is of critical importance in assisting the agency in developing and structuring the proposed ICR in order to achieve the PRA's goals of minimizing the burden of the collection and maximizing its benefits.

The 30 day comment period takes place after the planned information collection has been developed and submitted to OMB. The earlier comment period is not a substitute for the 30 day comment notice since the agency did not yet have a detailed information collection plan to respond to. The reasons for the two comment periods was explained by OMB in their draft PRA Implementation Guidance:

*This advance 60-day notice, however, is designed to help the agency in its ongoing development of the new collection or evaluation of an existing collection. An agency should provide the proposed collection of information in the form into which it has been developed at that point; if the agency, for example, is at that point considering alternative approaches to collect the information, a range of possible questions, or different kinds of disclosure, the agency should be prepared to provide the public with these alternative approaches.*

*The agency does not have to have completed the development of the collection of information at the point of the 60-day advance notice. The interested public will have a second opportunity to submit comments at the time the agency has refined the collection of information and is submitting the information clearance package to OMB for review.<sup>3</sup>*

It should be noted that the document's discussion of the 60 day comment period is an expansion and elaboration of the discussion in an earlier Preliminary Draft guidance document, reflecting the development of OIRA's views on the advance comment period.<sup>4</sup>

As the draft OMB guidance makes clear, the functions of the two comment periods are distinct and the public is not asked twice to comment on the same proposal. Since agencies would not benefit from systematic public guidance in developing information collections if the advance period was eliminated, ending the advance notice could result in higher burdens and reduced benefits from the information collection.

From the standpoint of evaluating the proposed recommendation, it should be recognized that any hypothesized efficiency gains from eliminating the 60 day comment period have not been quantified or compared with the losses from reduced public participation in the process.

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3 Office of Information and Regulatory Affairs, *Supra*, note 1, p. 58. [emphasis added, note omitted]

4 Office of Management and Budget, The Paperwork Reduction Act of 1995: Implementing Guidance, Preliminary Draft, February 3, 1997 available at <http://www.thecre.com/pdf/THE%20PAPERWORK%20REDUCTION%20ACT%20OF%201995.pdf>.

### **Advance Comment Opportunity and Transparency**

OMB's draft Implementing Guidance explanation of the reasons for the 60 day comment period included providing the affected public with advance information on the agency's options and thinking on the matter under deliberation. Eliminating the advance notice and comment period would, therefore reduce the transparency of agency work and run directly counter to President Obama's landmark Memorandum on Transparency and Open Government.<sup>5</sup>

The Memorandum sets forth three principles, each of which is met by the 60 day comment period. Specifically, the President's Transparency initiative states:

- **Government should be transparent.** The 60 day comment period provides the public with practical insights into agencies' views on a new or existing information collection before they are formalized.
- **Government should be participatory.** Public comments on a new or renewed information collection and the “otherwise consult with” provision provides the public with their only opportunity to participate in the development of a new or revised information collection. It is much more difficult for the public to achieve a substantive change in the agency's position after it has been formalized.
- **Government should be collaborative.** Since the 60 day comment period is “designed to help the agency in its ongoing development of the new collection or evaluation of an existing collection” it is the embodiment of public-private collaboration. Although there are other opportunities for the public to collaborate with agencies, they are often limited in subject and scope. Because ICRs are used by virtually every agency for a very broad range of regulatory and non-regulatory purposes, the 60 day advance notice is arguably one of the government's single most important collaborative mechanism.

Eliminating the 60 day comment period would also effectively eliminate the current “otherwise consult with provision” of the PRA [44 U.S.C. 3506(c)(2)(A)] along with the formal, *Federal Register* comment period. OMB's discussion of the “otherwise consult with” provision makes clear that it reaches and includes in the process persons who may otherwise not participate.

*This provision calls upon each agency affirmatively to reach out to the public and actively consult concerning those information collections that deserve such effort. This provision thus recognizes the ongoing practice and effort by agencies to work informally with respondents and other interested parties and agencies to develop and refine their collections of information, particularly those of an ongoing nature, of particular burden, or otherwise a source of controversy. This provision also recognizes that media other than the Federal Register, e.g., the trade press and the public interest groups, can be of use in providing the*

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<sup>5</sup> See, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/).

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*interested public--potential respondents and others--with notice of a collection of information.*<sup>6</sup>

The proposed recommendation to eliminate the 60 day comment period states that the agency should “use alternative means of reaching the public” during the 30 day comment period, in addition to the *Federal Register* notice. As the OMB discussion makes clear, however, the current advance consultation process could not effectively be conducted in a 30 day Federal Register notice time frame after the information collection has been developed and submitted to OMB, let alone an expanded process as suggested in the draft recommendation.

In short, eliminating the advance 60 day *Federal Register* notice would erase two distinct participatory and collaborative processes, comments in response to the *Federal Register* notice and the other consultations, for developing and refining of information collections.

### **The Irreplaceable Role of the Federal Register**

The Report to ACUS on the PRA states (p. 40) that “that in the age of the Internet, using Federal Register notices as the means of communicating with the public is far from ideal.” The Report then includes a quote referring to hiding information “under a rock called the Federal Register.” The phrase “rock called the Federal Register” really means the weight of the Federal Register – compliance with the PRA and the Data Quality Act (DQA).

There is nothing new about agencies seeking to be free from the “good government” law compliance responsibilities associated with *Federal Register* notices by seeking internet-based alternatives. In 1998, an article in Government Executive magazine discussing EPA’s Sector Facility Indexing Project noted that “EPA is attempting to use the Internet as a ‘backdoor Federal Register.’”<sup>7</sup>

The Report follows up on its dismissiveness of the *Federal Register* by stating on p. 40 that “Steps could be taken to publicize information collections during the second thirty day comment period using the Internet, including social media.” Facebook and Twitter are not substitutes for the *Federal Register*, they will never be substitutes for the *Federal Register* and efforts to do so are simply attempts at avoiding agency compliance with the good government laws that regulate the regulatory process.

While assorted internet sites are not a substitute for the *Federal Register*, this does not mean that there isn’t a role for internet and social media in the information collection process. To the contrary, as HHS has demonstrated that, done right, the internet can substantially enhance, not replace, the Federal Register-based information collection process. Specifically, on January 27, 2011, HHS published in the *Federal Register* a request for public comment on an ICR for a proposed project to “Public Input

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<sup>6</sup> Office of Information and Regulatory Affairs, *Supra*, note 1, p. 59.

<sup>7</sup> Alison Maxwell, “EPA to Rate Compliance Online,” Government Executive, March 3, 1998, *available at* <http://www.govexec.com/federal-news/1998/03/epa-to-rate-compliance-online/2242/print/>.

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to Nominate Non-Federal Health and Health Care Data Sets and Applications for Listing on Healthdata.gov....” In this request for comment, the Department explained that they were “

*The Department of Health and Human Services is promoting the use of health and health care datasets that are not specific to individual's personal health information to improve decision making by individuals, organizations, and governments through better understanding of the data. Federal agencies are making health indicator datasets (data that is not associated with any individuals) and tools available for use by the public through a web portal community known as healthdata.gov or <http://www.data.gov/health>. These datasets and tools are anticipated to benefit development of applications, web-based tools, and other electronic resources improve community action for health and health care. The development of tools, reference sets, dashboards, and electronic data visualization methods serve to provide context and understanding to complex health and health care data.*<sup>8</sup>

The Federal Register notice further explains that in support of the Department’s goals,

*HHS is soliciting public input on nominations of non-Federal health and health data indicator datasets and applications using them to improve health and health data. For example, health indicator datasets representing surveys conducted by state government or private organizations may be considered as high-value datasets among researchers, applications developers, and others.*

In the example above, HHS is demonstrating that: 1) they were seeking, on a voluntary basis, access to more extensive health datasets that did not raise privacy issues; and 2) would be making available web-based tools to benefit federal and private research. What HHS did not do, however, was reduce the role of the *Federal Register* in developing ICRs or attempt to avoid any of the good government laws. For example, although the *nominations* for non-federal datasets to be included in the federal database are open, such datasets would need to comply with the DQA before the nomination could be accepted and the federally-disseminated data would, of course, be subject to the “seek and obtain” correction provision of the DQA.

### **Opportunity to Rationalize the Comment Process**

Although the law provides multiple opportunities for participation in the development and review of most information collections, as the chart demonstrated, they are not always utilized.

It could reasonably be argued that, if an agency receives no comments during the 60 day period, there might not be a need for the subsequent 30 day comment period. Thus, before eliminating a widely used notice-and-comment process to help the agency develop its new and/or renewed ICRs, it would be prudent to consider eliminating the second comment period if no comments were received during initial notice.

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<sup>8</sup> 76 Fed. Reg. 4904; January 27, 2011.

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### **Conclusion**

- The amendment to the Paperwork Reduction Act discussed herein is not substantial enough to be made in isolation, it should be proposed only if it is contained in a broader Administration program aimed at improving the federal regulatory process.