June 4, 2012

Bob Coakley

Comments on Committee recommendations re improving administration of the Paperwork Reduction Act.

Chairman, Committee on Administration and Management

Administrative Conference of the United States

Dear Mr. Cooney:

The Administrative Conference of the United States (ACUS) May 25th notice to the Federal Register announces plenary session consideration of recommendations for improving administration of the Paperwork Reduction Act (PRA).[1] Several observers have suggested I clarify certain of my comments submitted to the Committee on Administration and Management for its May 2 meeting. Accordingly, I respectfully request the Committee post this clarification on the ACUS website as appropriate.

Recall during the Committee's May 2 meeting on the PRA you noted that a letter I sent May 1, and comments provided by Mr. Tozzi on the Coakley letter were posted to the ACUS web site for review.[2]

My letter amounted to a follow-up to comments I made at the close of the Committee's March 28th meeting.[3] It made recommendations to the Committee regarding its ongoing deliberations. Specifically, I appealed to the Committee that it consider which issues addressed by its draft recommendations were a consequence of statutory requirements or of executive branch discretion in administering the Act's provisions. To be clear, the executive branch most assuredly includes the Director of OMB and his responsibility and accountability under the Act for the activities of the Office of Information and Regulatory Affairs (OIRA). My stated view is that any Committee recommendations to improve administration of the Act are better

[1] Federal Register, May 25th,2012 page 31290

[2] See http://www.acus.gov/research/the-conference-current-projects/paperwork-reduction-act. See Documents for the May 2 Meeting. The Coakley and Tozzi letters can be found therein.

[3] Ibid., See Watch our Webcasts, March 28, 2012 Meeting.

directed at the Director of OMB rather than the Congress if it is within the delegated authority of the Director to accomplish.[4]

The comments provided by Mr. Tozzi on the May 2 letter were provided some eight hours after my letter. They appear to be based on a staff analysis which are incorporated into his own. The analysis misconstrues certain relevant provisions of the PRA statute I cited to explain why the Director of OMB is not required by the statute to independently publish a "notice" in the Federal Register to alert the public of opportunities for public comment to him on agency proposed collections of information beyond that already required by the statute of the respective agency itself.

A statutory requirement to provide a comment period is different than a statutory requirement to publish a "notice" in the Federal Register. The PRA's §3507(b) does not require, as the incorporated staff analysis suggests, the Director of OMB publish a separate Federal Register notice than ones required to be published by the agency for collections of information either contained, or not contained, in proposed rules.[5]

Neither does the statute require an additional thirty day comment period after an initial sixty day comment period for all proposed collections of information.[6] The statute does require, at a minimum, the Director provide 30 day comment periods for proposed collections of information both in proposed rules and not in proposed rules. It does empower the Director to require a second or concurrent comment period to him, or as many comment periods as the Director deems necessary to meet the affirmative responsibility the statute assigns to him to enable effective public participation in the clearance process established by the statute.[7] Most

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[4] The PRA and the authorities and responsibilities Congress legislatively delegated to the Director of OMB can be found at 44 USC 35.

[5] §3507(b) reads: "(b) The Director shall provide at least 30 days for public comment prior to making a decision under subsection (c), (d), or (h), except as provided under subsection (j).

[6] Of note is that neither do the relevant provisions of the existing rule implementing the clearance procedures for PRA at **5 CFR Part 1320** "require" an "additional" 30 day comment period after an initial sixty day period for propose collections of information contained or not contained in proposed rules. Notice in the Federal Register as required by the statute starts the initial comment period. It is the sponsoring agency, not the Director of OMB who provides the notice to the Federal Register that enables the 30 day comment period the Director provides pursuant to **§3507(b)** of the PRA. See **§1320.10**, *Clearance of collections of Information, other than those contained in proposed rules or in current rules;* **§1320.11** *Clearance of collections of information in proposed rules;* and **§1320.12** *Clearance of collections of information in current rules.*

[7] **§3508. Determination of necessity for information; hearing ;** even authorizes the Director to hold hearings and grant an opportunity to be heard within and outside of the clearance process. That is the meaning of the language which reads: *"Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. **To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.*** [emphasis added] See also **§3517(a)**

significantly, the statute clarifies the Director's plenary approval authority is a final agency action even in the case of collections of information contained in existing and proposed rules.

Mr. Tozzi's comments obfuscate both the meaning of my suggestion to the Committee and the reasoning I provided for it. My quintessential point is that any intent by the Committee to improve public engagement, including ensuring improved interaction between the government and the public via separate comment periods that are responsive to both the agencies' and the Director's responsibilities under the Act, can be obtained without resort to a statutory change.

Permit me an explanation for those who consider both my letter and Mr. Tozzi's written comments in response in future deliberations on how to improve administration of the PRA.

During the Committee's consideration of its draft recommendation on Improving Public Engagement I raised the concern, as I had in my letter, that the recommendation appeared to presume that the PRA itself requires that agencies **must** put a proposed collection of information out for 60 days of comment **before finalizing it and submitting** it for OIRA's approval. I commented that while that may be an administrative practice the statute itself does not require this. Instead, the statute requires that the agency **submit certain materials to OMB before expiration of sixty days and in the case of collections of information in proposed rules, no later than day one of a sixty day period that is started by an agency publication to the Federal Register that must comport with certain statutory requirements.**

In my opinion, concurrent, interactive deliberations between the public, the agencies, and the Director of OMB in order to obtain an approval and validly assigned control number to be displayed to the public are the correct construction of the meaning of the statutory provisions I cited. The Director does has discretionary authority to direct the sequential character to that interaction as seen fit to bring about meaningful public participation. The Director's approval authority and responsibility to assign valid control numbers for display are final agency actions within this context.

During the meeting, Mr. Tozzi noted among other things, a brief history of how the 1980 PRA got passed as background to his version of the concern I expressed. A dialogue ensued.[8] Mr.

[8] See http://www.acus.gov/research/the-conference-current-projects/paperwork-reduction-act. Watch our Webcasts May 2, 2012. The dialogue may be found at the early part of the webcast.

Tozzi's oral comments however, did not relate the reasoning of his written comments to my letter.

Let me address Mr. Tozzi's letter which critics my own.

I. The opening two sentences; notification to the federal register is different from comment periods.

In his opening two sentences, Mr. Tozzi posits my assertion that the language of the PRA does not require a two-step *notification* process to the public via separate Federal Register publication, and then restricts his additional analysis to "...only the statutory requirements for the *comment periods*, not OMB practices that are within their discretion."

Statutory requirements for *notice* to the public via the Federal Register are different then statutory requirements for *comment periods*. The Tozzi comments and the analysis that support them appear to equate these two kinds of statutory requirements as the same. A result is an erroneous statutory construction of certain relevant statutory provisions I highlighted as explanatory in **§3506**. Federal agency responsibilities, and **§3507**. Public information collection activities; submission to Director, approval and delegation.

1. An example of this erroneous construction is the Tozzi comment that "The assertion that a single comment period is sufficient, however, contradicts the non-discretionary requirement in 44 USC 3507(b) that "The Director shall provide at least 30 days for public comment prior to making a decision...". **My comments do not assert that a single comment period is sufficient in all instances. That is a red herring.**[9]

Moreover, the Director can meet his statutory requirement to provide a comment period, or several if the Director deems necessary, consistent with the statutory requirement that a single Federal Register notice be provided by the respective agencies to the public. Among other things, the initial Federal Register notice starts the defined time periods allocated by the Act to

[9] The statute does contemplates a single comment period encompassing agency, public, and the Director's review and comment upon a collection of information proposal within sixty days can be sufficient in certain instances. If the Director of OMB approves a proposal within an initial comment period of sixty days properly noticed in the federal register and determines (1) meaningful public participation and interaction has occurred, and (2) the **§3508** standard of necessity, including practical utility has been satisfied, then a single comment period involving concurrent reviews of agency proposals by the agency, the public, and the Director can suffice. The 30 day comment period the statute requires the Director to provide in **§3507(b)** can be accomplished within the initial sixty day period. I do assert that what is important is that the integrity to the statutory scheme of the PRA to protect the public from agency excesses be maintained. Early and meaningful public participation in the clearance process is instrumental to that end. Under the law the Director of OMB has been granted authority and an affirmative responsibility to do so. See **§3517 (a)**.

the Director to meet his statutory requirements and responsibilities. For example, short of the Director commenting on the record within sixty days in the case of a proposed collection of information contained in a proposed rulemaking, (which can trigger additional time for comments) the period of time for approval is limited by the statute to sixty days after the notice of proposed rulemaking.

2. A second example is the construction the Tozzi analysis infers that §3507(b) requires the Director to publish a notice in the Federal Register in order to "provide" a 30 day comment period. *"...the Director may be required to act on an ICR (approve /reject/file a comment) in a proposed rule before the Director's comment period ends--depending on when the Director's Federal Register notice is published. ..."* As I noted, the statutory requirement for the Director to provide a comment period does not require the Director to publish a notice in the Federal Register. The statute does not require a separate and distinct "*Director's Federal Register notice*" as Mr. Tozzi's adopted analysis declares.

II. A Tozzi non sequitur

The Tozzi analysis employs a non sequitur when it declares: *Even if the Director were to use his Section 3516 authority to the agency to delegate to the agency the authority to publish the Section 3507(b) notice, such a delegation of authority would be discretionary by the Director, not required by statute.* There is no statutorily required 3507(b) "notice" requirement. The word "notice" does not appear in Section 3507(b). The notion that a use of Section 3516 authority to have the agency publish one would be discretionary rather than required by statute does not logically follow.

III. Mr. Tozzi's Bottom Line.

The Tozzi Bottom Line is revealed in two sentences. The first addresses public comment requirements, not the federal register notice requirements I discuss in my recommendation. Moreover, it does not speak at all to my assertion that the statute does not require, as the Committee draft recommendation presumed, that agencies must provide a 60 day comment period ***before finalizing* and submitting** their requests for OMB approval.[10] That is the aspect that I suggest merits careful attention by the Committee else it word a recommendation that implies a statutory change is needed to carry out a recommendation intended for improved

[10] My reading of the existing rule indicates that regulatory changes to 5 CFR Part 1320 would have to be promulgated by the Director to implement this presumption as well. The present rules for clearance procedures do not insist that all agency submissions to OMB for approval or disapproval be "finalized" before submission.

public engagement that could be more easily and effectively carried out by the Director of OMB.

Suggesting Congressional consideration for legislative change to the statute is far more problematical in my opinion, and not necessary to achieve the Committee's stated objectives. My comments are based on the understanding that the statute empowers the Director to carry out as many comment periods as deemed necessary to ensure meaningful public participation in both distinct clearance processes established by the statute for approval of collections of information contained in proposed regulations and for proposed collections which are not. This includes continuing collections of information which require at least three year periodic review, renewed approval, and re-assignment of a valid control number to be displayed to the public in order to carry out the purposes of §3512. Public protection.

The second sentence of Mr. Tozzi's Bottom Line resorts to speculation by an anonymous third party participant in the PRA clearance process. The anonymous person remarked:

"Jim, if the statute does not require two distinct public comment periods, do you really believe there is any reason the agencies would perform two reviews?"

For Mr. Tozzi, this flippant speculation apparently amounts to a mathematical proof of sorts in the power of his analysis to answer the question posed, a la his use of Q.E.D. after the second sentence, an initialization of *quod erat demonstrandum.*[11]

IV. A different bottom line; an alternative to speculation

One need not rely on speculation from an anonymous participant in the clearance process. An alternative answer is available to come to the understanding that agencies may be required to perform more than one review of public comments without a statutory requirement to do so.[12]

Such an alternative answer can be based on a legislative history of the consideration underpinning the amendments to §3506 and §3507 of the Act and how they comported with

[11] From Wolfram Mathworld comes the following explanation of the use of "Q.E.D." "Q.E.D" is an abbreviation for the Latin phrase "quod erat demonstrandum" (that which was to be demonstrated), a notation which is often placed at the end of a mathematical proof to indicate its completion.

[12] See §3502(1) for the PRA's definition for an agency. Under the PRA, all establishments in the Executive Office of the President, including OMB, are defined as an "agency".

other provisions and the overall statutory scheme, especially §3508 and §3512, that culminated with Congressional passage and Presidential signing of the 1995 PRA.[13]

Among other things, the amendments mandated the promulgation of new regulations to replace the pre-existing regulations by the Director of OMB to implement the Act.[14] Those regulations address directly the clearance procedures underpinning the Act. They address directly the distinct comment periods provided for and the concurrent and sequential nature of agency, OIRA, and public interaction for collections of information proposals not contain in proposed rules, collection of information contained in proposed rules, and continuing collections of information subject to the three year "sunset" provisions.

Recall the Supreme Court issued its opinion in *Dole v. Steelworkers*[15] in February of 1991. As noted in a Senate Report by the Committee on Governmental Affairs [16] an effect of the decision was that an estimated third or more of all collections of information considered covered under the Act were not being submitted by the agencies to the public for public comment or OMB for review. The public protections intended by the Act and its existing implementing regulations were being systematically violated by federal agencies. Billions of federally sponsored burden hours upon the public were being ignored. Congress undertook considerable deliberations upon the impact of the decision during the 102cnd, 103rd, and early part of the 104th Congresses.[17]

After the 1991 Court decision, prior to the 1992 November elections, and at the behest of President Bush, Acting Administrator of OIRA, James MacRae and OIRA Counsel, Jeffrey Hill, undertook extensive deliberations with members of the Senate Governmental Affairs and House Government Operations Committees to among other things, address the loophole created by the Court decision. On May 2, 1991 Senators Nunn, Bumpers, Roth, and Kasten, among others, introduced S.1139 to respond to the concerns created by the Court decision.[18] Amendments to §3506 and §3507 as well as other sections were included in the proposed legislation to specifically overturn the Court decision.

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[13] See for example the explanation given in S.R. 104-8, 104th Congress. (V.Section-By-Section Analysis. pp. 44-53)
[14] Found at 5 CFR Part 1320. Published in Federal Register August 29, 1995. (60 FR 44984)
[15] (494 U.S. 26)
[16] S.R. 104-8. pp.11-13 and pp.20-23.
[17] Ibid., (IV.Committee Action. pp. 32-34.)
[18] See Congressional Record, May 22,1991, S 6402-6411.

On October 29th, 1992 Senator Nunn explained why his legislation would not be passed in the 102cnd Congress.[19] A difference of opinion existed between the respective Committee Chairman, John Glenn, and the sponsors of S. 1139. Administrator MacRae had expressed President Bush's support of the Nunn sponsored bill.

In November of that year, President Clinton was elected. Administrator MacRae, a career civil servant with decades of service to the Executive office of the President, continued as Deputy Administrator of OIRA when Sally Katzen became Administrator in early 1993. Efforts to reverse the limiting of the Director's review authority and resolve the loopholes to the clearance process and the public protections provided by the PRA continued.[20]

In 1993 at the beginning of the 103rd Congress, Senator Nunn, Bumpers, Roth, and others effectively reintroduced S.1139 as S.560. Senator Glenn and others introduced S. 681, which took a different approach to amending the Paperwork Reduction Act. During that Congress, steps to come to an agreement were agreed to by Senator Glenn, Nunn, Roth, and President Clinton. Congressmen Horton and Sisisky, the key House sponsors to companion legislation to Senator Nunn and Roth's' bill, were in support.

Key to the agreement that was to be reached was a hearing held by the Senate Governmental Affairs Committee. As stated by the Report of the Committee on Governmental Affairs:

"On May 19, 1994, the Committee held its major hearing in the 103rd Congress to consider legislation to reauthorize OIRA's appropriations, strengthen the Paperwork Reduction Act of 1980, and review OIRA's implementation of the 1980 Act as well as its regulatory review activities under President Clinton's Executive Order 12866 (Successor to E.O12291 and E.O. 12498 under the Reagan and Bush Administrations). Testimony included comments and discussion regarding a Committee staff draft that blended many of the provisions of S.681 with those of S.560."[21]

Administrator Katzen testified and acknowledged the detrimental impact of the Court decision and expressed the Clinton Administration's support to overturning it. Deputy Administrator James MacRae and OIRA Counsel Jeffrey Hill remained in the hearing room after her testimony to hear panel testimony and discussion between representatives of the Paperwork Reduction Act Coalition, who supported Senator Nunn and Roth's approach to overturning the

[19] See Congressional Record, October 29th, 1992 S 18335 and S 18336

[20] From the perspective of the PRA's statutory scheme, the scope of the Director's review authority and the public protections intended by §3512 Public protection are synonymous.

[21] S.R. 104-8. page 33.

Supreme Court decision and representatives from OMB Watch and Public Citizen Litigation Group, who did not. Robert E. Coakley, Executive Director of the Council on Regulatory and Information Management; and Lorraine Lavett, Director of Domestic Policy, U.S. Chamber of Commerce, Co-Chaired and spoke on behalf of the Paperwork Reduction Act Coalition. David C. Vladeck, Director, Public Citizen Litigation Group; and Gary D. Bass, Executive Director of OMB Watch, represented their respective organizations.[22]

The panel was asked to react to a draft proposal suggested by Chairmen Glenn that addressed Public Citizen and OMB Watches concern that the Supreme Court decision had not resolved whether the Director of OMB's approval authority was final for collections of information specifically contained in proposed rules. Mr. Coakley indicated the proposal would "gut" the Director's final authority to disapprove collections of information contained in rules, an authority that had existed since the 1942 Reports Act and explicitly clarified by the 1980 and 1986 Paperwork Reduction Acts.[23]

Chairman Glenn, with Senator Nunn and Roth present suggested that more public participation and extended or additional comment be enabled when the Director determined that the Act's standard of review for necessity, including practical utility had not been met by an agency in the rulemaking subject to the Director's review and final determination. The Coalition witnesses supported the encouragement for more public participation. The OMB Watch and Public Citizen witnesses, while noting the possibility of adding more hurdles for agency rulemaking did not disagree.

The principle of continuing the Director's ultimate authority to say no while strengthening his responsibility to ensure additional public participation when the Director disapproved a collection of information specifically contained in a proposed rule was agreed to by all the Senate sponsors accordingly. In the case of collections of information contained in rules, the Director was to be given sixty days to comment on the record, else a proposed collection by an

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[22] I was the Executive Director of the Council on Regulatory and Information Management and Co-Chair to the Coalition. Later in early 1995 I testified again on behalf of the Paperwork Reduction Act Coalition before the House Committee on Governmental Reform. At that approximate time I joined the staff of Jan Meyers, the Chair of the House Small Business Committee where I represented her participation in the Senate House Conference on the 1995 Paperwork Reduction Act.

[23] My insight came from work for Senator Chiles, (1974-1988) ,who had been a Committee member from 1970-1988. He was an author to the 1980 and 1986 Acts. I was his staff lead. The reference was to the impact the draft proposal would have to the Director's authority contained in §3508. David Vladeck for Public Citizen had been instrumental to the challenge before the Supreme Court in *Dole* on whether all regulations were outside the authority of OMB under the PRA if they embodied substantive policy decision making entrusted to another agency. Among other things, the Coalition was vehemently opposed to this interpretation and supported Senator Nunn and Roth's efforts to make clear that Congress overturn and repudiate any such inference from the Court decision in *Dole*. We believed the viability of the all important §3512 Public Protection was at stake.

agency was to be approved. If the Director did comment, the agency was to respond to the Director's comments no later than at the time of final promulgation of the respective rule. If an agreement was not reached between the Director and the agency, the Director had authority to obtain additional public comments, take action to disapprove the proposed collection, or mandate an additional rulemaking among other possible actions. Moreover, the protections of the public protection section were to prevail.[24]

Deputy Administrator James MacRae and OIRA Counsel Jeffrey Hill maintained close collaboration and liaison with the Committee sponsors throughout the Senate's deliberations in the 103rd Congress to among other things, ensure the agreement reached by the Senate Committee was not changed. The Committee reported S.560 unanimously on August 2,1994. The Senate passed S.560 on October 6, 1994. On behalf of the Clinton Administration, close liaison was kept by Deputy Administrator James MacRae and OIRA Counsel Jeffrey Hill with the House Sponsors of companion legislation, Congressmen Sisisky and Horton. Committee Chairman John Conyers of the Government Operations Committee declined to move the legislation in the 103rd Congress.

Given the continuing administrative difficulties resulting from disparate agency interpretations of the *Dole* decision, Deputy Administrator MacRae and Counsel Hill continued to maintain their close liaison with the Senate and House sponsors of legislation which became the Paperwork Reduction of 1995. At the beginning of the 104th Congress, both the House and Senate changed party majorities. The Conference Report on S.244 that evolved was an intense collaboration between representatives of the Senate, House, and the Administration.[25] Among other things, high priority by the Conferees was given to maintain the agreement that had been reached shortly after the May 19th, 1994 Senate hearing.[26]

The agreement was ensconced in the final legislative provisions that evolved from the Conference and that had been closely monitored by Deputy Administrator MacRae and Counsel Hill. Challenges to the authority and scope of the Director's review authority as well as to the Act's public protections resulting from the Court decision were explicitly overturned. The Director of OMB's final approval and disapproval authority were upheld and maintained.

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[24] §3512 is the Public protection section. The agreement included the idea that the Director of OMB would be limited to sixty days to take necessary action and carry out his responsibilities on collections of information not contained in proposed rules as well.

[25] H.R. 104-99 is the Conference Report.

[26] As noted previously, I represented House Small Business Chair Jan Meyers in the Conference. My memory is that OIRA Counsel Jeffrey Hill attended all meetings between the House and Senate. He was in frequent communication with the Administrator and Deputy Administrator of OIRA as well as the conferee's during the deliberations. All the Conferees were keenly aware of the Administration's positions. All the Conferees were keenly aware of the 1994 agreement struck in the previous Congress.

Both the authority and responsibility of the Director to ensure meaningful public participation in the clearance process required by the procedural requirements of the Act were clarified and strengthened.

Every voting member of both the House and Senate voted yes to the conference bill on roll call votes. When President Clinton signed the legislation on May 22, 1995, Deputy Administrator James MacRae stood in the room and watched President Clinton sign the bill into law. Governor Lawton Chiles, Frank Horton, Sam Nunn, and Bill Roth, all original sponsors of the 1980 Paperwork Reduction Act, stood next to the President as he did so. Each was aware of the agreement. [27]

Within three months, the rule implementing the new Act was finalized into regulatory law.

Former acting Administrator and then Deputy Administrator James MacRae did not retire from decades of service in the Office of Management and Budget until every t and i was crossed and dotted on the PRA of 1995; until every t and i was crossed, dotted, and cast in cement in the rule implementing the language found in the 95 Act.

A paramount objective of his vigilant attention was to preserve the substance of the agreement reached by the Senate and House sponsors of what was to be expressed in the language of 95 Act right after the May 19, 1994 Hearing in the Senate. That is when a resolution was reached between Senators Nunn, Glenn, and Roth between the views of the Paperwork Reduction Act Coalition and those of Public Citizen and OMB Watch over the implications of overturning certain aspects of the Supreme Court Case.

A consequence was the lifting of the purpose and language of §3504 (h) from the PRA prior to the 95 amendments and an incorporation of them in the procedural requirements of §3506(c) and §3507. This change was to place in statute a procedure to replace what previously had been manifest in the rule and agreed to after the May 19th hearing. The sponsors believed codification in law would strengthen the understanding of the agreement. The intent was to enable agencies and the Director to concurrently carry out their respective responsibilities under the PRA and the notice and comment procedures of the Administrative Procedure Act for proposed rules.

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[27] I attended the signing ceremony in the Old Executive Office Building. My account is drawn from that experience as well as others. Mr. Tozzi was present at the signing ceremony. To my knowledge, he had not been an active participant in the "agreement" that Mr. MacRae had worked on so diligently to ensure continuity between the 103rd and 104th Congresses. Perhaps that is a reason Mr. Tozzi seems susceptible to third party anonymous participants in contemporary clearance processes that try their hand at statutory construction of the 1995 Act via speculative means.

The Director of OMB's plenary authority to approve or disapprove as a final action all collections of information falling within the scope of the public protection section, including those contained in proposed and existing rules was central. So too was the Director's authority and affirmative responsibility to ensure meaningful public participation. More public participation and extended comment periods if necessary to protect procedural rights were the principles upon which all parties were brought together.

As to Mr. Tozzi's reference to an anonymous participant in the PRA process who questioned speculatively why agencies would perform two reviews if the statute did not require two distinct public comment periods, a straightforward answer is because the statute directed authority **and responsibility** to the Director of OMB to ensure public participation and as many comment periods as necessary to carry out the purposes of the Act.

Mr. MacRae worked to ensure and did not retire until that was the case. Insisting the statute, as opposed to the Director of OMB, require two separate and distinct comment periods for all collections of information, one sixty days in which agencies **finalize** their submissions to OMB, and then another for 30 days to engage OMB, was not part of the drill. It was not deemed necessary to mandate agency's undergo two reviews.

After retirement, James MacRae joined the Advisory Board of the Council for Regulatory Effectiveness.[28] Mr. Tozzi is a founder and fellow advisory board member of this distinguished institution. The question arises as to why James MacRae was not consulted regarding the anonymous participant's speculation as to why agencies would do two reviews if the 1995 statute did not require it? It is a good question given that the 95 Act was developed and written during James MacRae's tenure at OIRA.

There is an alternative answer to the anonymous participant's speculation. To repeat, James MacRae did not retire until he understood the amended statute would overturn the Supreme Court decision, grant the Director of OMB plenary authority to approve or disapprove all collections of information, and make clear the Director as well as the agencies had an affirmative responsibility to ensure appropriate and meaningful public participation in the clearance process.

[28] See http://www.thecre.com/advisory.html

If that affirmative responsibility to ensure meaningful public participation required multiple comment periods and/or multiple and sequential review periods, the Director did not need any additional requirement mandated by statutory language to bring it about. [29]

V. A Bottom Line as I see it.

What happened after Jim MacRae's retirement goes beyond the speculative point of Mr. Tozzi's anonymous participant in the clearance process. Both the statute and the rule remain essentially as Mr. MacRae left them upon retirement. Their application by the agencies, including OIRA, has evolved in a manner where it can be fairly stated that not enough responsible federal officials are aware of the procedural requirements intended by the Act or its implementing rule to manage the reduction of burden or afford the public protection against agency excesses. It continues to be a missed opportunity. Too much of the clearance process, to the extent it is used for information resources management, occurs outside the requirements of the law and its implementing regulations. Meaningful public participation in the clearance process is more a wish than a reality, despite the law's requirements and assignment of affirmative responsibilities to the Director of OMB and the agencies. The clearance process is broken.[30]

Nevertheless, I believe if improvements are to be sought, it is vitally important as a first step to understand what the law requires and distinguish procedural requirements of law from the discretion granted the Director of OMB within the Executive office of the President to administer those procedural requirements. In my opinion, recommendations for improvement to the Act's administration to improve public engagement in the interaction between the agencies, OIRA, and the public will be flawed if they presume a flawed statutory construction of the Act's requirements.

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[29] Worth noting is that a whistle blowing provision, the language of §3507(e)(3)(B), was added to the PRA as part of the agreement. The Director need not disclose and can provide anonymity to commentators who take the opportunity to comment directly to the Director, thereby avoiding any fear of retaliation or discrimination from an agency who may see their comments. The Director need not disclose: "(B) any communication relating to a collection of information which is not approved under this chapter, the disclosure of which could lead to retaliation or discrimination against the communicator." See Senator Nunn's comments on the provision's importance for meaningful public participation during his final floor statement on the PRA of 1995. Congressional Record, March 6, 1995, page S 3504 and S 3505. A corollary whistle blowing provision can be found at §3517(b) requiring the Director to respond within sixty days to any request to determine whether a collection of information is a "bootleg".

[30] My view is that to too large an extent, OIRA and the agencies are not following the procedural clearance requirements of either the law or the regulations intended to implement it. Neither is OIRA enforcing the law as it as a responsibility to do. This lack of compliance is the central problem for any reforms to improve the PRA's administration. There needs to be a better awareness and willingness to follow the law. The Hans Christian Anderson tale of the "Emperor's New Clothes" comes to mind.