May 1, 2012

Mr. John Cooney

Chairman, Committee on Administration and Management

Administrative Conference of the United States

Dear Mr. Cooney,

I wish to again thank the Committee on Administration and Management for the opportunity to comment and participate in its study regarding the administration of the Paperwork Reduction Act (PRA). I look forward to the scheduled May 2 meeting intended to further deliberate on the Committee's draft recommendations.

As I noted at the March 28th meeting, I have been involved with the PRA, its predecessors, and their implementation from 1978 to the present. I have read the draft report, provided comments, and watched and listened to the February 28th meeting. I have read the comments of other commentators reflected on ACUS' webpage.

At the close of the March 28th meeting I noted the confusion and misunderstanding associated with the Committee's deliberations regarding which issues addressed by its draft recommendation were a consequence of statutory requirements or of executive branch practice. My belief is that the Committee could serve a vital function if it were better informed and helped promote better understanding regarding what is required by the PRA itself as distinct from executive branch practice which has evolved from the administrative discretion provided therein. I appealed to the Committee that it and the staff review the draft recommendations on the clearance process in this light.

Among other considerations, the provisions of the PRA do not require agencies to provide a 60 day comment period ***before*** finalizing and submitting their requests for OMB approval. Neither is an additional, or second, 30 day comment period required by the statute.

The draft recommendation is predicated on a contrary view. The preamble to the recommendations state as much. Recommendations which do not accurately acknowledge the distinction between statutory requirements and the exercise of administration discretion undermine the recommendations credibility. If they do not clarify the basis for recommended changes they are not grounded in the statute and are less compelling. Whether to direct recommendations for change to the Director of OMB

or the Congress is a vital distinction. The consultant's report and the draft recommendation regarding the clearance process do not make these important distinctions clearly.

I also suggested the Committee and its staff review the comments submitted by Dr. Beltzer in advance of the March 28th meeting. Dr. Beltzer is the President of Regulatory Checkbook and a former official in OIRA. He is experienced as well in responding to collections of information proposals from the agencies and their disposition on behalf of respondents amongst the public. He was unable to attend the meeting.

Among other considerations, Dr. Beltzer observes in his opening comment that the "...study's research design is such that it cannot support most of the recommendations he proposes, most obviously those which would require congressional action. There is simply no place in a democratic society for legislation founded on the opinions of anonymous sources." **I concur in that assessment and suggest the committee address the consequences of moving forward on recommendations that use unverifiable data from anonymous interviews.**

Permit me brief comments on the importance of both suggestions to ongoing deliberation on the draft recommendation.

I. The language of the PRA does not require a two step notice process.

The minimum and maximum **time** OMB may take in its decisions to approve or disapprove a proposed collection, together with an assignment of a valid control number is circumscribed by the provisions of the PRA. Moreover, the provisions contemplate that agency justification and OMB review responsibilities be undertaken ***concurrently*** during the time allocated for public notice, comment, and participation. Relevant provisions for a statutory construction of what the procedural requirements are can be found within Sections 3506 and 3507 of the Act. They are:

(1) Section 3506(c) (2)(A) and 3506 (c) (2)(B) which read in respective parts:

...(A) except as provided under subparagraph (B) or section 3507(j) , **provide 60-day notice in the Federal Register,** and otherwise consult with members of the public and affected agencies concerning each proposed collection of information to solicit comment to--- ...

...(B) for any proposed collection of information contained in a proposed rule (to be reviewed by the Director under section 3507 (d)), provide notice and comment through the notice of proposed rulemaking for the proposed rule and such notice shall have the same purposes specified under subparagraph (A) (i) through (iv);...

(2) Section 3507 (a) which reads in part:

..."(a) An agency ***shall not conduct or sponsor*** the collection of information unless ***in advance*** (emphasis added) of the adoption or revision of the collection of information--

"(1) the agency has---

"(A) conducted the review established section 3506(c)(1);

"(B) evaluated the public comments received under section 3506(c) (2);

"(C) published a notice in the Federal Register--

"(i) stating that the agency has made such submission, and

"(ii) setting forth--

..."(VI) notice that comments may be submitted to the agency ***and*** Director;

(3) Section 3507 (b) reads in part:

"(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).

(4) Section 3507(c) reads:

3507 (c) (1) For any proposed collection of information not contained in a proposed rule, the Director shall notify the agency involved of the decision to approve or disapprove the proposed collection of information.

(2) The Director shall provide the notification under paragraph (1), ***within 60 days*** after receipt or publication of the notice under subsection (a)(1)(D), whichever is later.

(5) Section 3507(d) (1) reads:

"(d)(1) For any proposed collection of information contained in a proposed rule--

"(A) ***as soon as practicable, but no later than the date of publication of a notice of proposed rulemaking in the Federal Register***, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information and any information requested by the Director necessary to make the determination required under this subsection; and

"(B) ***within 60 days*** after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information contained in the proposed rule ;

(6) Section 3507(d) (4) contains language that establishes additional time periods for discretionary interaction between the Director and the agency ***if*** the Director chooses to file comments ***within 60 days*** after notice of the proposed rulemaking or if the Director finds the agency has modified the final rule without adequate notice. If he does not file he is precluded under terms of the Section from any further action. Any additional time taken for approval or disapproval is limited by the controlling provisions of 3507 (d)(4) and is a function of the discretionary interaction between the Director and the agency rather than a procedural requirement of the statute. Ultimately, the Director has final authority and responsibility on whether an agency is assigned a validly assigned control number as required by Section 3512, the public protection provision of the PRA.

In brief, these six provisions establish that collections of information can be classified as falling into one of four categories and the time allowed to manage the approval process for each category is established by the statute accordingly. They are either not contained in a proposed rule, contained in a proposed rule , fall into fast track (3507(j)), or seek extension of a previous approval (3507 (h)).

- If a proposed collection of information is not contained in a proposed rule, the maximum amount of time the statute allows for an OMB decision of approval or disapproval is within sixty days after the agency has provided notice in the federal register consistent with its statutory requirements which include inviting public comments ***to both itself and OMB***. The Director ***may*** decide to approve or

disapprove ***after 3O days***. No requirement for a second notice before submission is required. Any delay beyond this sixty day limit is not attributable to procedural requirements in the law but rather executive branch administration of the discretion allowed.

- If a proposed collection of information is specifically contained in a proposed rule, then the Director must approve the rule and assign a control number or file comments ***within sixty days of the proposed rule notice***. The only additional time permitted by the statute is if the Director decides the agency's required response to his comments at the time of final rulemaking are not consistent with the statute's requirements.
- If a proposal for a collection of information is fast tracked the time involved ***is as requested by the Agency head*** and can be immediate if merited.
- If an extension of an existing approval is requested, section 3504(h) requires only one notification to the federal register ***sixty days before expiration*** in order to meet the procedural requirements for renewal or modification as described in section 3507(c), (d), or (j).

In no category does the statute "require" a second comment period for a collection of information proposal. Section 3516 does grant the Director of OMB broad authority to administer the statute's procedural requirements. It reads: *The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter*.

Any recommendation by the Committee to streamline the clearance process due to delays beyond sixty days that recommends a statutory change to the law should be informed that delay is not due to statutory requirements but rather administrative practice under the supervision of the Director of OMB. **I recommend the Committee address and clarify what it believes the law requires before recommending any change to the law to the Congress. I suggest it would be more appropriate to recommend changes to the Director of OMB.**

II. Dr. Beltzer's comments raises concerns over the methodology of the Committee's consultant report that challenge whether the Committee should use the report's findings as a basis for recommendations.

1. Dr. Beltzer's observes that the report which informs the Committee's work employs a collection of information as part of its research design which provides unverifiable, anonymous information. He further asserts that the collection of information coupled with the overall research reflected in the draft study contains no information at all concerning the extent to which agencies comply with the procedural requirements of the Act, no information whatsoever concerning to which agencies evade the PRA by conducting "bootleg" (i.e. illegal) collections of information, and very little information concerning the extent to which OMB enforces the law.

He concludes it is impossible to evaluate the costs and benefits of a regulatory regime without ascertaining the extent to which regulated parties comply with it, or the extent to which the regulator enforces it.

The U.S. Chamber raises a similar concern in its comments to the Committee that whether the law is followed by the agencies is a vital aspect of any determination on how to improve administration of the Act and meet its purposes.

I agree with these assessments**. I recommend the Committee determine whether it will collect and use information on agency compliance with the Act before it proceeds to make any recommendations.** Otherwise, the credibility of its work will be challenged as a biased effort to represent interests in the federal executive branch who seek to attack the integrity of the clearance process and avoid the continuing regulatory reform and information resources management reforms mandated by the law.

As an example, the Committee's deliberations have considered the phenomena of agencies engaging in a practice of avoiding the requirements of law by undertaking collections of information that involve less than 10 persons. What has not been discussed is that many of these efforts are illegal and constitute bootlegs. The rule implementing the Act establishes that many collections of information involving nine or less are within the Act's scope of requirements. Title 5, Part 1320.3(4)(i)and (ii) helps define the term "ten or more persons" as used in the Act. It reads in part:

(i) Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons.

(ii) Any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons.

Moreover Part 1320.18 declares in part:

(*a) OMB **shall** (emphasis added)determine whether **any** collection of information or other matter is within the scope of the Act, or this Part.*

The Committee should consider whether the practice of agencies gathering information from 10 or less persons is encouraging violations of law in order to avoid procedures ensuring good information resources management. The draft report seems to suggest the practice is a good thing and should be encouraged . **I recommend the Committee avoid the appearance that its work and recommendations encourage illegal activity by the agencies.**

III. The collection of information used by ACUS' consultant is a "bootleg".

ACUS is a federal agency under the terms of the PRA. The consultant's study employs a "sponsored" collection of information as that term is defined in the PRA to 10 or more persons. As a manifestation of the consultant using "identical questions" in his collection of information, he reported in the February meeting that 100 per cent of the interviewees supported changes to the statute itself. This collection of information does not "display" a validly assigned control number as required and avoids the public protections intended by the Act. Given the methodological flaws in the collection of information used, the study's research design would have benefited greatly from review by ACUS and OMB in accord with the principles and requirement for information resources management. In all likelihood, the use of "anonymity" and its "practical utility" for the purposes of informing the Committee's work would have been scrutinized differently.

I recommend that the Committee itself determine whether it believes the collection of information employed by the ACUS consultant to inform the Committee is a bootleg. It should consider whether it wants to move forward on its recommendations given what I believe is illegally obtained information. It should

consider whether appropriate remedial action should be taken. The procedures associated with section 3517 (b) of the Act are available for resolution of this concern in consultation with OMB.

Bob Coakley