Comments on Coakley Letter of May 1, 2012

This comment pertains to Mr. Coakley's assertion that the PRA does not require a two-step notification process. This comment concerns only the statutory requirements for the comment periods, not OMB practices that are within their discretion.

Mr. Coakley is unquestionably correct about the four categories of ICRs. These comments do not address the later two ICR categories discussed by Mr. Coakley, fast-track and extensions. Each of the first two categories, new ICRs contained in proposed rules and new ICRs not in proposed rules, will be addressed separately for clarity's sake even though some of the analysis is the same.

I. ICRs Not In Proposed Rules

The crux of Mr. Coakley's assertion is the view that the agency and OMB review periods are intended by statute to "be undertaken ***concurrently*** during the time allocated for public notice, comment, and participation." In support of his position, Mr. Coakley cites 44 USC 3507(a)(1)(D)(vi) regarding the agency Federal Register notice which states "notice that comments may be submitted to the agency and Director;"

Based on PRA's use of the linkage "and" Mr. Coakley asserts that no further notice is required by statute since public comments may be sent to both the agency and OMB simultaneously (the logic behind the PRA allowing dual submissions is discussed in Section II below).

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...."

It is important to recognize that the statute does not say that there shall be at least 30 days for public comment prior the Director's decision. Instead, the statute explicitly and unambiguously states that it is the Director who shall provide a 30 day comment period. Thus, the 60 day comment period the agency is required to provide in §3506(c)(2)(A) is distinct from 30 day comment period the Director is required to provide in §3507(b).

In short, "each agency shall—provide" ≠ "The Director shall provide...."

Even if the Director were to use his §3516 authority to delegate to the agency the authority to publish the §3507(b) notice, such a delegation of authority would be discretionary by the Director, not required by statute.

II. ICRs In Proposed Rules

When a proposed information collection is contained in a proposed rule, agencies are still required to provide a 60 day comment period by §3506(c)(2)(A). However, in such cases, §3506(c)(2)(B) also applies (the statutory linkage is the word "and" between paragraphs A and B) *viz.* "provide notice and comment through the notice of proposed rulemaking for the proposed rule...." Thus, the form the 60 day PRA-required Federal Register notice takes is through the NPRM – a distinction from non-rulemaking ICRs.

Moreover, the §3507(b) 30 day notice must also be used. As is the case with non-rulemaking ICRs, "each agency shall—provide" ≠ "The Director shall provide...."

Mr. Coakley correctly notes that when an ICR is contained in a proposed rule, the Director must act "within sixty days of the proposed rule notice." Mr. Coakley's statement shines a welcome light on an odd aspect of the PRA; 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. Instead of creating a quirk or aberration in the clearance process however, the language of the statute explains why comments on the agency's §3506(c)(2)(A) Federal Register notice may also be sent directly to OMB at the discretion of the person submitting the comment.

It is because of the tight time constraints built into the ICR-in-a-rule process that initial comments to the agency may also be sent to OMB.

By explicitly allowing OMB to consider comments to the agency prior to publication of the §3507(b) notice, the PRA is providing the public with a mechanism for getting OMB up to speed on any perceived problems with the proposed information collection as soon as possible, without waiting for the Director's notice.

Based on the preliminary information obtained from public comments to the agency, OMB can decide whether there may be issues which require close scrutiny following the Director's comment period. Should the Director decide OMB needs more time to fully evaluate an issue, they can file a comment on the ICR and delve into any additional data provided during the second notice.

Thus, the public submission of ICR comments simultaneously to the agency and OMB that Mr. Coakley highlighted, allows for quicker determination by OMB as to whether they *may* need additional time to study the concerns raised by the public.

III. Rubber Stamp "Certifications" – A Source of Process Confusion

Mr. Coakley's comments draw welcome and much needed attention to §3507(a)(1)(C). Mr. Coakley's comments, doubtless inadvertently, dropped the text of paragraph "C" from his comments and instead substituted the paragraph "D" text ("published a notice in the Federal Register –") as paragraph "C." This was unfortunate as §3507(a)(1)(C) provides an important insight into the chronology of the information clearance process.

44 USC 3507(a)(1)(C) states that one of the requirements that an agency must meet before conducting or sponsoring a collection of information is that they have:

"submitted to the Director the certification required
under section 3506(c)(3), the proposed collection of
information, copies of pertinent statutory authority,
regulations, and other related materials as the Director may
specify; and"

Thus, §3507(a)(1) sets four requirements that an agency must meet prior to collecting information:

A. The review required by section 3506(c)(1);
B. Evaluation of public comments received from FR notice;
C. Submitted section 3506(c)(3) certifications to OMB; and
D. Publication of a Federal Register notice.

The chronological order in which these four requirements must be achieved is not explicit in the text not does it necessarily follow sequentially. For example, it would be difficult for the agency to undertake B, evaluation of public comments, prior to D, soliciting the public comments. This is an oddity in the PRA's drafting that Mr. Coakley's comments recognize.

The statutory text of the PRA does, however, provide the logic that allows determination of the sequencing of the four requirements. A Federal Register notice soliciting comments must be published before those comments can be evaluated. Similarly, the agency certifications required by §3506(c)(3) cannot take place until after the public comments are evaluated – if the certifications are substantive, rather than empty formalities.

When the word "certification" is used in statute, it reflects a formal attestation of facts, Sarbanes-Oxley is only one example.

Under a substantive certification process, an agency would not be able to certify that the ICR "reduce[s] to the extent practicable and appropriate the burden on persons" before, at a minimum, hearing from those persons affected by the ICR.

Because the certifications have, in practice, become a rubber stamp, they do not have to be made following review of comments. When the certification process is a non-substantive formality, it does not provide sequential process guidance in understanding the PRA. In this situation, the sequence of the four requirements seems arbitrary even though it is not.

When the certification process is substantive, it can only take place after the comments have been evaluated. Thus, under the substantive certification scenario, the sequential process becomes clear; the three requirements which cite section 3506, A, B, and C take place in that order. The only requirement that seems out of sequence is D, publication of the Federal Register notice. However, D is not a new requirement in section 3507, it is a simple reiteration of the section 3506 notice requirement. Because it is not a new requirement, it need not be in chronological order.

The conclusion is that careful adherence to the PRA's requirements is necessary for understanding the statute's process.

Bottom Line

The 60 and 30 day public comment requirements are in two distinct sections of the Act, one dealing with duties of the Director, the other the duties of the agencies. In addition as one participant in the PRA process remarked: "Jim, if the statute did not require two distinct public comment periods, do you really believe there is any reason the agencies would perform two reviews? Q.E. D.
Jim Tozzi