

Citizens for Sensible Safeguards

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Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave, NW
Washington, DC 20580

Re: Federal Trade Commission's Data Quality Guidelines

Dear Secretary:

The undersigned members of Citizens for Sensible Safeguards (CSS), appreciate the opportunity to comment on the Federal Trade Commission's (FTC) draft data quality guidelines. While we support the efforts of FTC to ensure that data disseminated to the public is of high quality, we believe this should not inhibit public access to government information nor interfere with existing rulemaking processes.

CSS is a broad-based coalition of organizations representing health, safety, civil rights, and environmental concern. CSS has been very engaged in agency regulatory processes, encouraging agency rules to be sensible and more responsive to public need.

General Response

As stated above, the undersigned support efforts to improve the quality and accuracy of data disseminated to the public. However, the definition of "quality" information is crucial. OMB treats "quality" as "an encompassing term comprising utility, objectivity, and integrity" and provides definitions for each of these constituent terms. It is important for agencies to realize that regardless of how they specifically define the components, information quality will remain a moving target difficult to describe or capture in a broad prescriptive administrative action. Of course perfect information, the ideal, is unattainable. The Data Quality Act (DQA), which orders the guidelines, does not alter the substantive mandates and primary missions of any agency.

OMB notes that its guidelines are intended to allow agencies to incorporate their existing practices in a "common-sense and workable manner," rather than "create new and potentially duplicative or contradictory processes." For example, OMB acknowledges that under OMB Circular A-130, agencies already address data quality issues. Indeed, in the preamble to its final guidelines, OMB stressed the importance of minimizing the burden of these guidelines stating:

It is important that these guidelines do not impose unnecessary administrative burdens that would inhibit agencies from continuing . . . to disseminate information that can be of great benefit and value to the public. In this regard, OMB encourages agencies to

incorporate the standards and procedures required by these guidelines into their existing information resources management and administrative practices rather than create new and potentially duplicative or contradictory processes.

At the same time, OMB prescribes a number of requirements that go beyond the statute, instructing “agencies should not disseminate substantive information that does not meet a basic level of quality.”

Indeed, the Act was added at the last second as an appropriations rider with no congressional debate, hearings, or even report language clarifying its intent. This total lack of legislative history and congressional involvement would indicate that the size of the mandate is very small, and tradeoffs with major congressional priorities should be minimized. The presumption is that legislation passed in this way could not have survived open debate. Therefore, any reorganization of priorities is not required or appropriate, and the agency should retain maximum flexibility in implementing the guidelines.

In fact, it can be inferred that the lack of public debate signifies that the DQA is simply a clarification of requirements already publicly debated in the Paperwork Reduction Act (PRA). The PRA carefully defines "dissemination," which does not contemplate research used in rulemakings. The PRA also does not envision any standards, such as distinguishing "influential" from other types of information, creating a standard for reproducibility, or many other factors that OMB created and imposed as a part of its guidelines. FTC must keep these factors in mind as it proceeds with its guidelines.

In particular, FTC should clearly state that when deciding whether to disseminate or use data, “quality” is only one factor to consider as envisioned by the PRA. First, the agency must answer to its core substantive mission, as directed by Congress. Second, the agency must operate within budgetary constraints; the guidelines will place off-budget burdens on FTC, which could potentially cause a massive transfer of already scarce resources to addressing data quality complaints and procedural requirements. This should be avoided. And third, the agency should consider the benefits of timely dissemination in carrying out its core mission and the general goal of democratic openness.

On this last point, FTC should also include a section in the data quality guidelines emphasizing that public access to information is a central government responsibility that the agency plans to uphold. Too few agencies have taken this opportunity to acknowledge and reaffirm their commitment to the important benefits derived from providing public access to government information. If there is any question about whether information should be disclosed and accessible to the public, FTC should err on the side of the public’s right-to-know. The Environmental Protection Agency’s draft data quality guidelines provide a good example of this type of statement.

Moreover, FTC’s data quality guidelines should acknowledge the useful role that public access to government data plays in correcting information and improving the overall quality of data being used. EPA’s Toxics Release Inventory is a perfect example of data

quality improving as a direct result of public access to the information. Of course, agencies should build in mechanisms for allowing incorrect information to be corrected. EPA's Integrated Error Correction Process (IECP) is an example for such a mechanism. This system has already resolved hundreds of corrections without ever removing public access to any data. Agencies should also further build mechanisms into the data collection process that flag errors before data is submitted to the agency.

Finally the guidelines produced by OMB to assist agencies in developing their individual Data Quality guidelines contain numerous extra-statutory provisions and other requirements that may allow the Act to be exploited by regulated industry. These extra-statutory provisions may allow the regulated industry to limit information disseminated to the public by federal agencies and to inhibit agencies' rulemaking activities. For these reasons FTC should not depend solely on the OMB guidelines in its efforts to produce Data Quality Guidelines. FTC should look to the Data Quality Act itself in determining the scope and components that are required to be in the guidelines.

Judicial Review

Of critical concern is the issue of whether these guidelines are to be legally binding on agencies. It seems clear that industry will attempt to use these guidelines as a vehicle to challenge federal regulation, by challenging the information that supports it.

Regulated entities will undoubtedly attempt to force agencies to rescind or "de-publish" information they dislike by trumping up questions of "quality." Representatives of regulated industry have indicated on numerous occasions that they intend to seek judicial review on data quality decisions. If regulated industry is allowed to use the courts to challenge data quality decisions it could bog down agencies and hobble core functions. Therefore, it is imperative that FTC make every effort to clearly assert the limits of these guidelines and preserve its own flexibility to accomplish core mandates unfettered.

FTC should clearly state that the data quality guidelines are just that – guidelines. The statement should make clear that FTC does not consider the guidelines judicially reviewable, and that they do not provide any new adjudicatory authority. This section of the guidelines should also establish that FTC is not legally bound by the guidelines and should reserve the right to depart from them when appropriate. There are several draft data quality guidelines that contain good examples of such statements, including those drafted by Environmental Protection Agency, Department of Transportation, and the Department of Labor.

Administrative Mechanism

OMB's implementing guidelines require agencies to establish "administrative mechanisms allowing affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines." The design of this mechanism and the procedures by which it will operate are critical. As every agency faces limited resources, this mechanism should be constructed cautiously with adequate procedural safeguards to protect the agency from becoming mired down in minor data disputes, bad faith requests,

and frivolous, repetitive, or non-timely claims. Additionally, agencies should limit the mechanism to only what is required in the Data Quality Act so as to avoid any possibility of creating new rights under administrative law. In particular:

- FTC should clearly state that the burden of proof lies squarely with the requester to demonstrate both that they are an affected party and that the challenged information does not comply with OMB's guidelines. It is not FTC's responsibility to defend the validity of information dissemination. The Department of Transportation has such a statement in its discussion of the administrative mechanism in its draft guidelines.
- The administrative mechanism should apply only to corrections of factual data and information. The guidelines should explicitly state that the administrative mechanism will not consider interpretations of data and information, or requests for de-publishing.
- FTC should limit complaints under its administrative mechanisms to information that is not already subject to existing data quality programs and measures. This avoids duplication of agency efforts, consistent with OMB's implementing guidelines. For example, several agencies note in their draft guidelines that adequate procedures and opportunities exist in the rulemaking process to question or correct information, and therefore data disseminated from a rulemaking process cannot be disputed under the data quality administrative mechanism.
- FTC should state that if a request has been made and responded to, a new, similar request may be rejected as frivolous or duplicative.
- FTC should establish a timeliness requirement for requests after which an agency has the option to reject a request (e.g., a data quality complaint must be made within three month's of the information's release).
- FTC should limit complaints for any data quality standard that presents a potential moving target (i.e., "best available evidence") to information available at the time of dissemination.
- FTC should specifically state in the data quality guidelines that FTC's response to correction requests will be proportional to the significance and importance of the information in question. This will establish the necessary flexibility for FTC to set aside a request that has been superceded or is otherwise outdated.

Reconsideration of Complaints

FTC should be aware that the Data Quality Act does not address reconsideration of complaints and that such a requirement is far outside the scope of the statutory requirements. In that context, the agency reconsideration process should remain fairly informal and limited in scope, consistent with the fact that neither the initial consideration nor the agency's reconsideration is a legally enforceable process.

It should also be noted that the review mechanism is to ensure that initial agency review was conducted with due diligence. Accordingly, FTC's reconsideration should be limited to showing due diligence in the initial consideration of a request. It is also important that agencies establish a timeliness requirement for requesting reconsideration. Several agencies have proposed a 30-day time limit, which we support.

Public Disclosure

Keeping the public properly informed of the use of this administrative mechanism will be an important aspect to evaluating its progress and usefulness, as well as demonstrating the transparency that the data quality guidelines advocate. FTC should specify that it will establish a running public docket of requests and changes. The docket should include information on who requests a change, the nature of the request, any specific changes made, why they were made, and any appropriate supporting documents. Thus, any changes made to publicly accessible databases should contain flags noting the information above so that the public has a log of requests and content that is changed as a result of the specific request.

Risk Analysis

The implications of the data quality guidelines for agency risk assessments, which generally serve as the foundation and justification for health, safety, and environmental regulation, are of particular concern to us. In laying out agency-wide parameters for the guidelines, as directed by Congress, OMB went far beyond the congressional mandate and inappropriately asked agencies to "adapt or adopt" principles for risk assessment laid out in the Safe Drinking Water Act (SDWA).

FTC should make clear that it answers first to underlying statutes, as well as the particularities of each specific risk, in conducting risk analysis. The agency should explain how current practice fits with the principles of the Safe Drinking Water Act, but should avoid undertaking new policies for risk analysis that impose additional burdens in response to OMB's guidelines. Such significant and far-reaching action must come only at the direction of Congress, which has previously considered and rejected such across-the-board requirements for risk assessment.

If the agency insists on establishing new policies and procedures for risk assessment within the data quality guidelines, then we urge the agency to adapt, not adopt, the SDWA principles. The SDWA requires, among other things, "the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices." In one of the most important adaptations we have seen, EPA – the agency that operates under the SDWA and its risk assessment principles – interprets "best available" as the best available at the time the study was done. Other agencies also make conditional adaptations, noting "when possible" and "where available," these SDWA principles or some version of them will be applied.

Peer Review

While OMB has made it clear that it favors peer review and has cited its own September 20th memorandum for peer review as "recommendations" to which agencies should adhere, it is important to note that Congress has never passed an across-the-board peer review requirement. There are a number of points FTC should make clear on peer review.

First, the FTC should state that the sort of peer review envisioned by the Safe Drinking Water Act is inappropriate for all types of risk analysis, and may conflict with underlying statutes. Independent external peer review of research can be extremely useful to agencies. At the same time, the agency should clearly reserve the option to bypass peer review, except where mandated by statute. In fact, OMB's guidelines place agencies in a difficult position by stating that independent external review is satisfactory in determining "quality," but may not be satisfactory when challenged. This is further evidence that OMB fully intended for the agency to have flexibility in employing peer review.

Second, FTC should state that "influential" information will not be subject to new formal, external, independent peer review to meet the "objectivity" standard. And third, where peer review is employed, the agency should commit to using appropriately balanced peer review panels and avoiding conflicts of interest. The OMB peer review recommendations on this point are inadequate. They do not require **public** disclosure of information relating to peer reviewers and do not prioritize the importance of avoiding conflicts of interest. When agencies utilize peer review, they should avoid conflicts of interests and where there any potential conflicts, they should be disclosed not just to the agency, but also the public.

Information Coverage

Industry will strongly advocate that the agency label information as "influential." This should be avoided, as it would be time-consuming, burdensome, and likely interfere with dissemination efforts. Instead, the agency should detail and expand on the types of information and methods of dissemination that are not covered by the guidelines. FTC should also narrowly define "influential" information, employing a high threshold for coverage. By limiting the coverage of these guidelines, FTC can maximize its flexibility and preserve its ability to act in a timely fashion.

Third Party Issues

Industry wants agency guidelines to apply to dissemination of information submitted by third parties if an agency initiates or sponsors the distribution, which could raise many complications. In an effort to simplify the process and minimize any undue burden on the agency, the data quality guidelines should clearly state that they only apply to information disseminated from the agency itself and not when the agency is merely acting as a conduit of information.

Thank you for consideration of our views.

Sincerely,

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