



# It's The Law

Office of the Assistant General Counsel for Finance and Litigation

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## Paperwork Reduction Act Amendments

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### INTRODUCTION

The Paperwork Reduction Act of 1995 (Pub. L. 104-13, "revised PRA"), which went into effect on October 1, 1995, considerably modifies the previous law (Pub L. 96-511, 44 U.S.C. 3501 *et seq.*). On October 18, 1995, the Federal Assistance Law Division distributed a memorandum discussing the revised PRA and included as attachments: (1) regulations implementing the revised PRA (contained at 5 CFR Part 1320); (2) a memorandum from Alice Rivlin, Director of the Office of Management and Budget (OMB) transmitting the regulations to agency heads; (3) a memorandum from Sally Katzen, Administrator of the Office Information and Regulatory Affairs (OIRA) of OMB, discussing implementation of the revised PRA; and (4) a memorandum from Michael Levitt, Assistant General Counsel for Legislation and Regulation at the Department of Commerce (DoC), asking for information on the revised PRA's effects on DoC regulations. In addition, Barbara Fredericks, Assistant General Counsel for Administration at the Department of Commerce, Michael Levitt, and Alan Balutis, Director for Budget, Management and Information at

the Department of Commerce circulated a memorandum on October 11, 1995 addressing the revised PRA. This edition of "It's the Law" will discuss in greater detail topics raised in those memoranda and attachments that are of particular interest to those dealing with financial assistance.

Questions regarding the implementation of the PRA should be directed to Gerald J. Tache, Information Collection Analysis Division Chief, (202) 482-3271. General legal questions on the revised PRA should be directed to the Office of the Assistant General Counsel for Administration, (202) 482-5391. Legal questions pertaining to rule-based collections of information should be directed to Dan Cohen of the Office of the Assistant General Counsel for Legislation and Regulation, (202) 482-4144.

### PURPOSE

The purpose of the revised PRA, as stated in the implementing regulations, is to "reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed,

maintained, used, shared and disseminated by or for the Federal government.”

## **WHAT DOES THE REVISED PRA COVER?**

The revised PRA’s applicability is very broad. It covers any information that the Federal government itself seeks **or** causes to be generated, reported or maintained, whether voluntary or mandatory. Information is defined as “any statement of fact or opinion, regardless of form or format, whether in numerical, graphic or narrative form, and whether oral or maintained on paper, electronic or other media.” (1320.3(h)) A “collection of information” is a requirement imposed on ten or more persons and broadly includes “any requirement or request for a person to obtain, maintain, retain, report, or publicly disclose information.” (See 1320.3(c). Thus, requirements for performance and financial reporting, certifications, customer surveys, data retention, etc. contained in application kits, solicitations, special award conditions, correspondence, or just about anything else may constitute information collections. As we will discuss, this definition is so inclusive that it is more likely than not that something will constitute an information collection.

## **HOW ARE THE PRA’S GOALS ACCOMPLISHED?**

Before an agency can collect information, the revised PRA requires it to: (i) ask for public comment; (ii) review those comments within the agency and determine that the requirements are necessary; (iii) certify to the Office of Management and Budget (OMB) that the

collection is necessary; and (iv) receive OMB approval for the collection. If this is not done, the agency cannot collect the information and those persons being asked to provide it can decline to do so with no penalties imposed on them.

## **HOW DOES THE REVISED PRA AFFECT GRANT PROGRAM OPERATIONS?**

Probably the most important change for grant programs is the provision in 1320.8(d)(1), which deals with general requirements for collections of information. This requires that an agency engage in a 60-day notice and comment period on an information collection **before** it sends the request to OMB. The agency then must publish a **second** notice in the *Federal Register* on or before the date it submits an information collection request to OMB to provide the public **30** days to comment to OMB directly. OMB is required to wait **30 days** to receive the comments before taking action and has **60 days** from the date of the agency submission to respond to the collection request. Therefore, the minimum time for clearance of information collection requests is **90 days** and can extend to **120 days** if OMB takes the full amount of time allowed to it under the revised PRA. This means that programs must submit their information collection requests as much as 4 months before they need to begin collecting the information. And, realistically, given internal Department of Commerce clearance requirements, several additional weeks should be planned for.

As noted above, the revised PRA requires agencies to certify the need for the collection when they forward a

request to OMB for approval. This **new responsibility** may increase the awareness of information collection activities within agencies and thereby increase the scrutiny of requests that are submitted. Additionally, since there is, for now at least, heightened attention being given to paperwork reduction at OMB, that agency too may pay especially close attention to what is submitted. All of this could increase the demands for modifications to information collections that are submitted, either within the agency or by OMB, lengthening approval time even more. Therefore, we advise that programs review their current information collection activities right away and consult with the staff and offices listed in the Introduction to determine what requires OMB approval. Otherwise, programs may be caught short when they attempt an information collection that does not have OMB's blessing.

### **WHAT SHOULD PROGRAMS LOOK FOR IN REVIEWING THEIR INFORMATION COLLECTIONS?**

Just about any requirement that a program is applying to 10 or more persons **could** need OMB approval. And the list is larger now than it used to be. For example, under the old PRA, **certifications and assurances** were not categorized as collections of information. Under the revised PRA, they may be. Section 1320.3(h)(1) provides that a certification is an information collection if “an agency conducted or sponsored it as a substitute for a collection of information to collect evidence of, or to monitor, compliance with regulatory standards, because such

a certification would generally entail burden in addition to that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument.” This means that certifications and assurances (such as those on the SF-424 and CD-511), because they would require a collection of information to show compliance with the requirements, **are** information collections under the revised PRA. (NOTE: Since the SF-424 series was promulgated by OMB and the CD-511 implements governmentwide requirements, individual programs and agencies within the DoC do not need to seek clearance for these forms.) An example of a certification that is not an information collection might be a conflict of interest certification signed by a proposed peer reviewer, since the person signing is providing a personal assurance about his or her situation and does not have to keep any records as part of the assurance. Program specific assurances and certifications likely will need clearance under the revised PRA. Another noteworthy change in the revised PRA (included to overturn a Supreme Court decision), is a requirement for OMB review before agencies can mandate that records are to be maintained for possible disclosure to third parties, even if those records are not to be provided to the Federal government. Thus, if a program requires that statistical information be maintained for possible later review by a third-party evaluator, that would require OMB review. Also, a requirement that publications and reports contain an acknowledgment of the finding source with a disclaimer of content might also require OMB approval.

If a program has a rule that **previously received OMB clearance** and still has a valid control number, it is not required to receive immediate approval for the information collections it contains. However, when approval of the collection comes up for renewal, the new procedures discussed above must be followed.

If a program has a rule that contains an information collection that **did not previously require OMB approval** but now does, it must **immediately apply** for that approval. Until that request is submitted, the information collection **MUST BE DISCONTINUED**. Once the submission has been made to OMB, the agency can resume the collection.

### **WHAT CAN PROGRAMS DO TO AVOID PRA REQUIREMENTS?**

One option that program managers occasionally suggest in addressing PRA requirements is to ask that information be submitted, but not mandate that a particular form be used. That will not work, since Section 1320.3(c)(1) specifically states that a collection may be in “any form or format.”

What, then, about making the information collection “optional” or voluntary”? That will not work, either. Even the old PRA applied to voluntary submissions, and the revised PRA continues to do so as well. (See Section 1320.3(c)(1)).

What **might** work is use of a term of award which does not ask for the

submission or retention of information, but merely further defines an existing requirement for the recipient. Thus, the SF-424 assurance, in which the person signing certifies that there is no conflict of interest involved in the award, might have the phrase “conflict of interest” more fully explained in a term of award without requiring an OMB paperwork reduction review.

### **CONCLUSION**

As we said earlier, programs need to immediately examine what they require of applicants, recipients and other members of the public. This requires a review of announcements, applications kits, application forms, terms and conditions and correspondence. If there is a question about whether OMB approval is needed please seek legal advice. We have previously identified information collections requiring OMB review in application kits, surveys, and special award conditions. While the PRA does provide for clearances on an emergency basis, that authority is not apt to be invoked by OMB if a timing problem arises from poor planning. As always, attorneys in the Federal Assistance Law Division are available to work with you to speed up the review and approval process, including serving as a liaison with other General Counsel offices and DoC’s Office of Information Collection Analysis.