Re: Information Quality Guidelines

Dear Colleagues:

The Section of Administrative Law and Regulatory Practice of the American Bar Association is pleased to submit comments on the proposed guidance for Data Quality that your agency has proposed under Section 515 of Public Law 106-554. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

These comments are focused on the mechanisms proposed for implementation of section 515’s “correction of information that does not comply with (OMB guidance)”. In commenting on the mechanisms we hope to improve them; these comments do not suggest that any of the substantive missions of the agency discussed in your published proposal would or would have our Section’s support. Because many of the nation’s experts in the administrative process and information policy are members of our Section, we hope to speak to the process and procedural aspects of the proposed guidelines.

1. The decision to use $100,000,000 as the “influential” threshold (p. 5 and p. 21 item XI A) appears to conflate the threshold for the Major Rule rulemaking executive order’s OIRA jurisdiction with the Section 515 role of OIRA. They are distinct roles. The use of this very high threshold as a barrier to data quality evaluations means that many fewer impactful rules will be subjected to transparency review. We urge the Department to revisit the “high impact” norm it is proposing and to drop the
dollar threshold approach to transparency. The threshold for the major rule processes was intentionally set high because the cost of procedural steps triggered for “major rules” was so great; by contrast the marginal additional cost of assuring quality and responding to correction requests is far less.

2. The decision to deny correction requests for website errors on the basis that the website contained the same error on Sept. 30, 2002 (p. 22 item XI-C) appears to directly conflict with OMB item III(4)’s second sentence at 67 F.R. 8459 col. 1. This should be changed as in conflict with the OMB Guidelines.

3. Item VIII-f at page 18, last sentence, presupposes that the same person is both rulemaking commenter and correction requester. The affected person seeking correction may not have known that a rulemaking was underway, especially if the request comes from an individual or small business. The decision (p. 4 last paragraph) to not even consider a correction request that might have been raised during the comment period that has “come and gone” is too harsh. The paragraph conflates rule adoption and information correction; the correction may be sought without undoing the rule. DOT should consider drawing a distinction between the correction request that comes from an entity that actively participated in the rulemaking, and others whose interests were not likely to have been protected by the scrutiny given to proposed rules by sophisticated commenters.

4. DOT asks how information review principles could be applied to the submissions made by private sector persons (p. 3). We note that Section 515 does not attempt to do so and that the constitutional right to petition for redress does not require the petitioner to meet any particular level of detail. The variety of inputs received from the public make this a virtually impossible task. If a rulemaking support issue arises then the program office responsible for the rule can ask for additional support for a submission on a case by case basis. But transforming these Guidelines into a qualitative screen for private inputs would be a poor use of DOT resources,
5. Page 9 item IV-f would exclude filings, but may be better framed as filings that are not submissions of statistical or technical data presented for the adoption of policy based on the content of the study. Section 515 was remedial, and agency data submitted in rulemaking dockets was among the set of data for which quality and correction mechanisms were intended. There will likely be instances of technical supportive data that go into a docket as “filings” but which should be subjected to the quality review process. We recommend a clarification and narrowing, if not simply elimination, of this limitation.

6. More than one person may be affected by a DOT report or web data set. Item VIII-d-6 at page 17 blocks all subsequent requests for correction if the first request was poorly done, even if the data is wrong or the requests have obvious merit. There can be a more user-friendly way to do this same function; if the request previously considered was dismissed for reasons of process inadequacy or did not reach the merits of the agency data, then the subsequent request should be considered.

7. Data base “flags” regarding errors are used by other agencies such as the EPA Office of Environmental Information while an acknowledged error in agency data sets is pending revision, e.g. prior to a monthly “refresh” of the entire data base. Item VIII-e para. 5 at page 18 should be revised to state that where an error is acknowledged and the website containing the error will be unaltered for some period of time, the IT staff will make reasonable efforts to signal to users that the data is suspect pending removal.

8. We recommend the appeal panel used by EPA serve as a model for the appeal process described in IX at p. 19. This will enhance the perception of fairness in the reconsideration.

Thank you for considering these comments. If you wish clarification, please contact Professor James O’Reilly, Chair of our Committee on Government Information & Privacy, at (513) 556-0062.

Sincerely,