Dear Mr. Pyke:

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 not 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. We agree with the positive statement defining “accurate” in the context of non-quantitative data (“Objectivity” para. 2). This is a fair statement of how to measure qualitative or subjective matters as being reasonably “accurate”.

2. None of the other dozens of federal agencies has adopted the rigid approach to deterring correction requests which this Draft proposes. At 22402, item (e)(7)(i), the Department chooses to
create a form of summary judgment that will terminate with prejudice the majority of incoming correction requests. Individuals rarely can win the next step if their request alone is the basis for such a daunting determination. There will be small business and individuals whose unsophisticated effort without legal advice is meritorious, where an actual error exists on the website, but the request is rejected because the words of the request are deemed insufficient. We observe that no other federal agency erects such an entry barrier against the person seeking correction, nor does OMB suggest such barriers.

3. At 22402, (e)(8)(i) the barrier gets steeper and the odds of success harsher against the individual. The agency wins if it violated its own standards but would have reached the same result (in the opinion of the very same office that committed the violation). It is helpful to observe that no other federal agency’s 515 rules are so hostile to correction requests, and none allow their units to violate a standard but then excuse themselves because of their own conclusion that they would have reached the same conclusion. Since there is no hearing and this occurs within the same office that has done every step of compiling, publishing, and then evaluating the challenge, this approach raises very serious questions of fairness and compliance with the spirit of the correction provisions of section 515.

4. But the highest barrier of all – found in no other agency’s 515 rules, to our knowledge – excuses an error from being corrected if correction would necessitate “a commitment of resources unavailable to that official.” 22402, ((e)(8)(iii)) OMB has listed some reasons for not making corrections, 67 F.R. 8460 col. 2 item C, but funding is not listed. The seeds of a possible claim of abuse of discretion are sown when the agency person in charge of the erroneous data is excused from correcting the error on the excuse of deficient staff resources. Perhaps the Department could ask OMB to add an “extraordinary budget circumstances” clause in its exceptions, but the cost of flagging a data base entry is miniscule. This noncorrection of known errors seems to be too smooth a path of evasion by the most interested staff members, against those
requesters seeking legitimate redress and whose claim of error is acknowledged to be correct.

5. The difficulties for requesters continue on appeal at 22402, (f)(iii) with the concept that an “acceptable degree of imprecision or error” excuses an acknowledged agency error. The “acceptable degree of imprecision” is an element of reproducibility, 67 F.R. 8460 col. 3 item 10, but this use of the term and expansion to “acceptable error” seems incongruous. This approach in (f)(iii)(B) again makes an appeal virtually impossible for the individual challenger since the staff who made the error retrospectively declare it to have been an acceptable error and their superior is likely to concur.

6. Legal requirements for proof of “standing” arise from the federal courts’ Article III “case or controversy” norms. A person dealing with a federal agency does not normally have to bear the same burden of proving their legal standing to interact with the agency at the administrative level. OMB Guidelines and Section 515 itself are silent on the term “affected person” (67 F.R. 8452, 8459-60). Yet at 22401 (d)(1) the Draft sets the very highest barrier of any other agency, for the definition of who is “affected”. To our knowledge no other agency has taken the judicial “standing” test and applied it as a threshold limitation for 515 correction requesters. This varies from OMB’s Guidelines which are more receptive to correction requests, and the importation into administrative mechanisms of the judicial “standing” barrier is a substantial imposition against requesters. It is much more likely to draw litigation against the Department for having erected the barrier, and the transaction costs of the litigation by a dissatisfied requester would be an additional expense that other agencies will not undertake. In addition, the level of specificity needed for one to get past this barrier cuts out most individual consumers or small business people who lack the sophistication to overcome factors i, ii, and iii in order to have their request even considered by the Department. We recommend that part (d)(1) be replaced with the EPA’s definition: “Affected person means a person who may benefit or be harmed by the disseminated information.” (67 F.R. 21234, www.epa.gov/oei/qualityguidelines at p. 22 line 716.)
7. No other agency has chosen to summarily dismiss correction requests on grounds they would “serve no useful purpose” (22401 col. 3 at (3)(i)(C)). We did not see Section 515 or OMB Guidelines language which supports such a dismissal. It may be virtually impossible for an individual or small business to overcome this claim by demonstrating to the Department’s satisfaction that there is a “systemic problem resulting in consistent errors in the dissemination of such information”.

8. By the point at which a substantive evaluation is made, few correction requests are likely to be processed; 22402 at (6)(ii) and (7)(i) cumulates the procedural barriers to consideration in a way that seems extreme compared with the OMB Guidelines. Again, we note that virtually all other federal agencies will look at the merits of the correction request and reply to the requester; the effect of (6)(ii)’s summary judgment at the intake level will be to generate much dissatisfaction with the Department’s 515 compliance. The most unsatisfactory outcome would be an acknowledged fact error in a Commerce Department website or publication, which is perpetuated because the barriers to even obtaining substantive examination of the error were set so very high. The reason given for 515’s existence was dissatisfaction with errors; an approach which compounds dissatisfaction seems counter-productive.

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,

C. Boyden Gray
Section Chair