

The Legislative History of the Paperwork Reduction Acts.

President Roosevelt commissioned the Central Statistical Board to study the problem of governmental paperwork on May 16, 1938,¹ and the Board's study thereafter became the basis for the Federal Reports Act of 1942 ("FRA"),² which constituted the first attempt by Congress to regulate the information collection activities of federal agencies. The FRA granted authority to the Bureau of the Budget to approve the requests of federal agencies seeking to collect information,³ and it prohibited any federal agency from engaging in such conduct if the Director did not approve the proposed collection of information.⁴ The act granted the rule making authority necessary for its implementation,⁵ and on February 13, 1943, such rules were promulgated.⁶ These rules clearly encompassed both forms used by federal agencies to collect information as well as agency regulations.

A weak attempt to strengthen the FRA was made in 1973,⁷ and revisions to Circular No. A-40 which implemented the FRA were made on May 3, 1973, again on February 10, 1976, and finally on November 5, 1976. In late 1974, Congress established a Commission on Federal Paperwork and directed it to study and report needed changes in the laws, regulations and procedures which would insure that information essential for the functioning of federal agencies was obtained with a minimal amount of burden, duplication and cost.⁸

¹ Senate Rep. No. 479, 77th Cong., 1st Sess. (1941). The Central Statistical Board later became a part of the Bureau of the Budget, whose name was eventually changed to the Office of Management and Budget ("OMB").

² P.L. 77-831, 56 Stat. 1078 (1942), codified at 44 U.S.C. §3501, et seq. (1981).

³ 44 U.S.C. §3509 (1976).

⁴ 44 U.S.C. §§ 3506, 3509(2) (1976).

⁵ 44 U.S.C. §510 (1976).

⁶ Circular No. A-40, having application solely to federal agencies, was never published in the Federal Register. These regulations and subsequent amendments were effective until March 31, 1983, when regulations for the PRA were adopted.

⁷ See P.L. 93-153, 87 Stat. 576, §409 (1973).

⁸ See P.L. 93-556, 88 Stat. 1789 (1974), codified at 44 U.S.C. §3501 (1982).

On October 3, 1977, after lengthy and careful study of the matter of paperwork requirements mandated by federal agencies, the Federal Paperwork Commission submitted the last of its many reports.⁹ This Report concluded that while the existing FRA seemed sufficient to control the use of forms by federal agencies to collect information, it was insufficient to control the source for the use of such forms, i.e., agency regulations.¹⁰ Prior to this report, it had been suggested that Congress clarify and strengthen the FRA "to allow the clearance agency to challenge the need for regulatory information."¹¹ The Commission readily perceived that changing the rule making process of federal agencies was essential to reduce paperwork burdens:

"Rulemaking is, in essence, legislation by executive departments and agencies. Agency rules and regulations have the full force and effect of law, and translate broad congressional mandates into operational programs and practices.

"Most of the specific reporting and recordkeeping requirements imposed on the public stem from such rules and regulations."¹²

Still later, another report concluded as follows:

"The Act is not clear on its coverage of a major portion of the paperwork burden — recordkeeping requirements — although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines... Not all agencies covered by the Federal Reports Act comply fully with its requirements.

"For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law

⁹ A Report of the Commission on Federal Paperwork, Final Summary Report (Oct. 3, 1977).

¹⁰ *Id.*, at 606.

¹¹ Report of the Comptroller General, "Status of GAO's Responsibilities Under the Federal Reports Act," May 28, 1976, at 20.

¹² Final Report, at 613.

enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine."¹³

While legislation was proposed in 1976 to address the problem of federal paperwork burdens, it was not until 1979 that a major effort was undertaken in this respect. In hearings upon a paperwork reduction bill introduced in the Senate, Senator Lawton Chiles stated:

"While OMB is required to supervise the approval or disapproval of agency requests within 60 days, individuals, businesses, and State and local governments will be told they do not need to answer requests not acted upon by OMB.

"Forms without an OMB number on them will be 'bootleg forms' that the public can ignore."¹⁴

While Senator Chiles stated the purpose of this proposed legislation, Senator Lloyd Bentson explained some of the problems the legislation was designed to address:

"Each of these reporting requirements, all of which have been approved by either OMB or GAO under the provisions of the Federal Reports Act, creates an average of ten separate forms — and the staff at the GAO reported finding one OMB-approved reporting requirement that actually created 90 separate forms."¹⁵

Senator Bentson's sentiments in this respect were echoed by Gerald L. Hegel, of the Association of Records Managers and Administrators:

"The Federal Paperwork Commission addressed the issue of statutory recordkeeping and reporting requirements and found that, not statutes, but agency rules and regulations comprised the bulk of the paperwork burden. For example, in the Occupational Safety and Health Act, there are five

¹³ The Reports Clearance Process, A Report of the Commission on Federal Paperwork 43 (1977).

¹⁴ Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcomm. on Governmental Affairs, at 12, 96th Cong., 1st Sess. (1979).

¹⁵ Id., at 131-132.

references to reports from employers, but the Commission identified more than 400 reporting and recordkeeping references in OSHA regulations. Bear in mind that OSHA is not an isolated example."¹⁶

Plainly, this legislative history reveals a Congressional intent to make not only agency forms but also agency regulations subject to the control of the OMB. The intent and purpose of the proponents of this law was to force federal agencies to comply by submitting their information collection requests to OMB for approval, and this approval by OMB was to be evidenced by the proper display of an OMB control number upon the item seeking information. If an agency did not comply, then the law was to have some "teeth": unapproved collections of information were to be considered "bootleg" requests that the public could ignore with impunity.

The 1980 and 1995 Paperwork Reduction Acts.

On December 11, 1980, the Paperwork Reduction Act of 1980 was approved; see P.L. 96-511, 94 Stat. 2812, previously codified at 44 U.S.C. §§ 3501, *et. seq.* This act in substance required all federal agencies to submit to the Director of OMB all "collections of information" for his approval and the assignment of OMB control numbers; see §3507. Subsection (f) of this section provided:

"An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

Section 3502(4) defined the term "collection of information" generally as the obtaining of facts or opinions by a federal agency "through the use of written report forms, ... reporting ... requirements, or other similar methods calling for ... answers to identical questions." An "information collection request" was defined in §3502(11) to mean "a written report form, application form, schedule, questionnaire, reporting or record keeping requirement, or other similar method calling for the collection of information."

The chief method of securing compliance by federal agencies with this act was §3512, which provided:

¹⁶ Id., at 165.

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

Clearly just from the act itself, federal agencies were required to submit to OMB all information collection requests for its approval, which was to be evidenced by the display of an OMB control number on the request. If any collection of information failed to make the required display, the public was authorized to ignore the request with impunity. Indeed, the Senate Committee on Governmental Affairs expressly so stated:

"The purpose of this section is to protect the public from the burden of collections of information which have not been subjected to the clearance process described by section 3507. Information collection requests which do not display a current control number or, if not, indicate why not are to be considered 'bootleg' requests and may be ignored by the public."¹⁷

The Public Protection Clause of the PRA was intentionally designed to enlist the support of the American public in helping OMB secure compliance with the commands thereof by federal agencies. This was repeatedly stated in the many reports on this legislation, but was perhaps stated best by President Carter when he signed the bill on December 11, 1980:

"The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It also ensures that the public need not fill out forms nor keep records which are not previously approved by OMB."¹⁸

There can thus be no dispute that this act by clear legislative intent and express statutory language was specifically designed to afford the American public

¹⁷ Senate Report No. 96-930, 1980 U.S. Code Cong. and Admin. News 6241, at 6292.

¹⁸ Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795.

a right to refuse to provide to a federal agency information which had not been approved by OMB, and approval was to be demonstrated by the proper display upon the request of a control number. This right to refuse to provide information not approved by OMB could be exercised without running the risk of the imposition of penalties of any kind, civil or criminal.

The implementation of regulations for the PRA was hotly contested, and 54 federal agencies and 90 members of the public offered comments and criticisms of the proposed regulations.¹⁹ The major issue of concern related to whether agency regulations, current as well as those to be promulgated in the future, were subject to the requirements of the act, the federal agencies contending that only forms were covered by the act. This contention was rejected by O.M.B.:

"It is not possible to argue that OMB clearance authority is confined to forms and similar instruments... Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all record keeping requirements are imposed by other means, including oral surveys, guidelines, directives, and – most significantly – regulations... The only way all reporting and record keeping requirements can be covered by the Act is to cover these other methods for the collection of information, including regulations," *Id.*, at 13667.

"It follows that OMB has authority over reporting and record keeping requirements in rules that were in effect when the Act was passed as well as in rules subsequently issued with or without public notice and comment," *Id.*, at 13668.

"Pursuant to these authorities, the Director has concluded that all collections of information, including those mandated by regulations, must display a currently valid OMB control number," *Id.*, at 13669.

The initial regulations for the PRA thus expressly subjected agency regulations to the PRA clearance and approval process; see 5 C.F.R. §1320.14.

The act clearly required that forms seeking the collection of information must be approved by OMB and had to display OMB control numbers. But,

¹⁹ See preliminary remarks to such regulations, 48 Fed. Reg. 13666 (March 31, 1983).

regarding the instances in which specific "reporting requirement" regulations would likewise be subject to the PRA, the remarks stated:

"As discussed in connection with section 1320.7(d), any collection of information specifically contained in a regulation (such as a form printed as part of a regulation) is considered part of the collection of information requirement imposed by that regulation, and does not need an additional approval. Such a collection must display the control number assigned to the collection of information requirement in the regulation. On the other hand, a form is not considered to be 'specifically contained in' a regulation merely because the regulation refers to or authorizes the form. A generally valid test is that the form requires independent clearance if the information collection component of the related regulation cannot be enforced without the form. For example, if a regulation states that respondents must supply certain data 'on a form to be provided by the agency', the form must be cleared independently," *Id.*, at 13682.

Stated differently, if a reporting requirement regulation simply mentions a form, both the regulation and the form must be separately approved by OMB, although sometimes both might display the same OMB control number.

The first regulations promulgated for the PRA on March 31, 1983 (48 Fed. Reg. 13689), 5 C.F.R., part 1320, were specific in the requirements placed upon the information collection activities of federal agencies. Section 1320.4(a) of these regulations provided that:

"An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date."

Section 1320.7 contained important definitions. A "collection of information" was defined as including forms and reporting requirements, the latter being defined as "a requirement imposed by an agency on persons to provide information to another person or to the agency." By the plain terms of this definition, a "reporting requirement" encompassed a regulation which required the provision of information. The "display" of OMB control numbers meant the printing of such numbers in the upper right hand corner on forms. For regulations, the "display" of the control number was required to be a "part of the regulatory text or as a technical amendment." Section 1320.14 of these regulations plainly commanded

federal agencies to obtain and display OMB control numbers for agency regulations subject to the act.

Subsequent regulations for the PRA prove the above contention precisely; see 53 Fed. Reg. 16623, May 10, 1988. Section 1320.5 of this edition of the PRA regulations provided that:

"The failure to display a currently valid OMB control number for a collection of information contained in a current rule does not, as a legal matter, rescind or amend the rule; however, its absence will alert the public that either the agency has failed to comply with applicable legal requirements for the collection of information or the collection of information has been disapproved, and that therefore the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply."

In May, 1995, Congress substantially amended the PRA in an obvious effort to rectify problems which had arisen under the earlier 1980 act.²⁰ Such apparently confusing terms like "collection of information requests" and "collection of information requirements" were avoided in this new act, which contained at §3502(3), the following definition of the term "collection of information":

"(3) the term 'collection of information'—

"(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

"(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

"(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes..."

Under §3507 of the new act, Congress has continued its prior prohibition that no federal agency may solicit information without approval of the Director of OMB, which is indicated by "a control number to be displayed upon the collection of information." Like its predecessor, the new act also contains a public protection provision in §3512:

²⁰ See P.L. 104-13, 109 Stat. 163, currently codified at 44 U.S.C. §3501, et seq.

“(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if –

“(1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or

“(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

“(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.”

Under the new PRA regulations, a “collection of information” is defined in 5 C.F.R. §1320.3(c), as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons... ‘Collection of information’ includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. As used in this Part, ‘collection of information’ refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate.” There can be no doubt that existing agency regulations are subject to the PRA because §1320.12 of the PRA regulations clearly commands that they be submitted to OMB for approval.

This legislative and regulatory history plainly demonstrates that collections of information do appear within regulations adopted by various federal agencies and consequently, those regulations must be approved by OMB. Further, regulations subject to the PRA must display a control number, either in the text of the regulation itself or in a preamble to that text; see 5 C.F.R. §1320.3(f).