Tozzi Comments on *Agency Publicity in the Internet Area (*September 2015)

Public Member

Professor Cortez's report provides ample basis for concluding that the Data Quality Act (DQA) is the mechanism of choice to be used by the public for addressing the issue of agency publicity; his report also provides a basis for a forceful action on the part of ACUS.

Pursuant to the requirements of the DQA federal agencies invested a substantial amount of resources in implementing the statue; the agencies are to be complimented for their diligent work in installing a government-wide petition process to address issues related to agency publicity. It is now time for ACUS to capitalize on this sizeable investment by informing the American public of the availability of the DQA to address agency publicity.

It should be noted that some members of the public are not waiting for ACUS to act. Most recently a member of the public in *Harkonen v. DOJ* utilized the DQA to address an issue of agency publicity. The Center for Regulatory Effectiveness has also used the DQA to avert issues of agency publicity in several of the databases mentioned in the consultant's report, in particular EPA's TRI data base and the CMS data base on its star rating system. Nonetheless the availability of this "insiders tool" to address the shortcomings in the ever growing presence of federal databases should be disclosed to the general public.

In that public requests for correcting the massive databases of both the CPSC and the CFPB as identified in the consultants' report are housed in non-executive branch agencies the issue of justiciability of the DQA should be addressed.

To this end It should be noted that four circuit court decisions addressed this matter: the initial decision (*Salt)* affirmed the decision of the lower court namely that the DQA was not reviewable but in each of the three subsequent circuit court decisions the reviewing court ignored the opinion of the lower court and punted on reviewability. One circuit opinion even opined that the DQA guidelines are binding on agencies.

Clearly there is an elephant in the room and the elephant will eventually be given its due, either through the DOJ dropping is claim that the DQA is not judicially reviewable or in the alternative when a future ruling of a circuit follows on the

march to justiciability as set forth in the aforementioned decisions made in three circuit court rulings.

DOJ has expressed its concerns to the court when it informed the DC Circuit Court of its views on a post made by CRE on its website at http://thecre.com/pdf/20100603_Government_DQA_Appeal_to_Court.abrev.pdf and supplemented by an earlier statement on the same by CRE http://www.thecre.com/oira/wp-content/uploads/2015/02/Prime-Time-Master.pdf

Since OIRA will play a major role in issues of agency publicity there is a need to re-evaluate the mission of OIRA after its first thirty five years of existence. When new responsibilities are assigned to OIRA it has to be given additional resources. However it is unlikely that OIRA will be given the needed resources until it develops a national constituency. One method for establishing a national constituency for OIRA is for students of law, public policy, public administration, and political science to understand its operation by incorporating the OIRA Teaching Module into their course curricula, please see http://www.thecre.com/oira_forum/?p=5363

Consequently the ACUS recommendations should include one that advises the public that the DQA is the preferred mechanism for addressing issues of agency publicity and that all actions taken thereto must be in compliance with the regulations issued by OMB.