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## The Information Quality Act—Antiregulatory Costs of Mythic Proportions?

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In the fall of 2002, most federal agencies issued guidelines to ensure the quality of information disseminated by those agencies. These “information quality” guidelines include administrative mechanisms to allow affected persons to obtain correction of disseminated information that does not comply with the guidelines. Required by an obscure provision of an appropriations act, these guidelines have inspired strong feelings among critics and supporters alike. Proponents of the guidelines have crowed that they “will have the most profound impact on federal regulations since the Administrative Procedure Act was enacted in 1946.”<sup>1</sup> Opponents of the guidelines view them as equally momentous, but ominously so. To these skeptics, the guidelines are yet another way for regulated industries to delay, dilute or defeat regulatory protections vital to protecting public health and welfare: “[The Office of Management and Budget’s] data quality initiative, if not properly administered, will create ‘death by data quality.’”<sup>2</sup> The guidelines’ provenance only confirms in the minds of doubters the nefarious purpose of the guidelines: rollback by rider.

This article argues that the guidelines are indeed the most significant conceptual advance in administrative law in the last three decades, but their likely impact has been vastly overstated by both sides of the debate. The article also predicts that the guidelines, like most administrative mechanisms, will prove in practice to be more useful to both sides than is currently foreseen, and should increase transparency and public participation in agency information activities.

Part I of the article briefly describes the origin of the guidelines and summarizes the elements that are common to all agency guidelines. Part II makes the intellectual and practical case for the guidelines, in effect providing some of the additional legislative history that might have been created had the guidelines originated from authorizing legislation rather than a spending bill. This discussion illustrates not only the need for something like the guidelines but the degree to which that need had

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been recognized prior to their issuance. Part III analyzes the most controversial legal issues raised by the guidelines and makes some predictions about how courts will ultimately interpret them. In a nutshell, it argues that critics of the guidelines will largely be proven wrong, not only about the legal power of the guidelines, but also (and perversely) about the amount of anti-regulatory consequences likely to flow from their implementation.

## **I. THE IQA AND OMB GUIDELINES**

### **A. The Information Quality Act**

The information quality guidelines were mandated by Section 515 of the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 2001, enacted on December 21, 2000 as part of an omnibus spending bill.<sup>3</sup> Known generally as the “Information (or Data) Quality Act” (IQA), Section 515 provides in its entirety:

(a) IN GENERAL- The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES- The guidelines under subsection (a) shall—

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply—

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information

maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and (C) report periodically to the Director—

- (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
- (ii) how such complaints were handled by the agency.

The IQA originated in the House version of the Treasury/Postal Bill.<sup>4</sup> The conference report for the bill has the following, not terribly illuminating statement regarding the provision: “The Committee includes a new provision requiring the OMB to develop guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by federal agencies.”<sup>5</sup>

This was not the first appearance of this concept in legislation, however. Two years earlier, the Treasury/Postal appropriations bill for FY99 had triggered a small firestorm of controversy due to the Shelby Amendment, a provision of the bill requiring the OMB to revise its regulations regarding government grants to provide that grantees must make publicly available, under the Freedom of Information Act (FOIA), any data generated pursuant to the award.<sup>6</sup> Little noticed at the time, the House report for that bill included language virtually identical to the IQA. Set out below in a footnote, the report language differed from the Act in only two significant respects: it “urge[d]” the OMB to issue “rules” rather than mandating it to issue “guidelines,” and it omitted references to specific sections of the Paperwork Reduction Act (PRA).<sup>7</sup> The rule/guideline distinction is probably inconsequential, for reasons discussed in Part III(A)(1). The PRA reference *is* important, for reasons discussed there as well. The OMB never issued the rules it was urged to publish, however, and so Congress responded two years later by enacting the IQA.<sup>8</sup>

## **B. OMB’s Guidelines**

The IQA requires the OMB to issue generic implementing guidelines applicable to all federal agencies covered by the PRA. Each agency is then tasked with adapting these guidelines to its own circumstances. As a result, there is now a plethora of such guidelines.<sup>9</sup> The OMB guidelines, most recently issued in February 2002, contain the core elements applicable to all, and so are discussed here.<sup>10</sup>

OMB’s guidelines apply to “information” that is “disseminated” by federal agencies.<sup>11</sup> The guidelines establish both standards that information must meet and administrative mechanisms for ensuring that those standards are met.

## 1. Quality Standards

The guidelines require all disseminations to meet “a basic standard of quality . . . appropriate to the nature and timeliness of the information . . . .”<sup>12</sup> “Quality” is defined in terms of objectivity, utility and integrity, all concepts borrowed from the PRA.<sup>13</sup> “Integrity” is the simplest concept—it means protection of information from corruption or falsification.<sup>14</sup> “Utility” refers to the usefulness of the information to its intended users, including the public.<sup>15</sup> “Objectivity” really pulls the laboring oar, and applies to both substance and presentation. In each case, higher standards apply to scientific, financial and statistical information that is “influential”; *i.e.*, has a clear and substantial impact on important public policies or private sector decisions, in the disseminating agency’s reasonable determination.<sup>16</sup>

**Substance.** From the perspective of substance, “objectivity” means that information must be accurate, reliable and unbiased.<sup>17</sup> Scientific, financial and statistical information must be generated using sound statistical and research methods.<sup>18</sup> This may be presumed where the information has undergone formal, independent, external peer review.<sup>19</sup> “Influential” scientific, financial and statistical information must be sufficiently transparent to be reproduced, subject to several caveats.<sup>20</sup> Perhaps most controversially, influential information regarding risks to health, safety or the environment must also conform to standards drawn from the Safe Drinking Water Act (or the agency’s adaptation of these standards); *viz.*, they must be based on “the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and . . . data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).”<sup>21</sup>

**Presentation:** From the perspective of presentation, “objectivity” means that information must be presented in an accurate, clear, complete and unbiased manner, which includes presentation in the proper context.<sup>22</sup> Taking a page from the securities laws, the OMB notes that sometimes other information must also be presented to meet this standard.<sup>23</sup> The sources of the information must be disclosed subject to confidentiality and privacy limits, and where appropriate, data should have full, accurate and transparent documentation, with sources of error identified.<sup>24</sup> Scientific, financial and statistical information must be accompanied by supporting data and models.<sup>25</sup> Again controversially, influential information regarding risks to health, safety or the environment must also conform to standards drawn from the Safe Drinking Water Act (or the agency’s adaptation of these standards); *i.e.*, the presentation must be comprehensive, informative and understandable, and must specify:

- (i) each population addressed . . . ;
- (ii) the expected risk or central estimate of risk for the specific populations;
- (iii) each appropriate upper-bound or lower-bound estimate of risk;
- (iv) each significant uncertainty identified in the . . . assessment . . . and studies that would assist in resolving the uncertainty; and
- (v) peer-reviewed studies . . . that support, are directly relevant to or fail to support any estimate of health effects and the methodology used to reconcile inconsistencies in the scientific data.<sup>26</sup>

## **2. Administrative Mechanisms**

The OMB guidelines call for two sorts of administrative mechanisms. The first kind, required by the OMB “[a]s a matter of good and effective agency information resources management,” is called “pre-dissemination review.”<sup>27</sup> Under it, agencies are to establish a process for reviewing (and substantiating) the quality of information at every step in the development of information, from creation to collection to maintenance to dissemination.<sup>28</sup> In effect, the idea of this process is for agencies to get it right the first time. This mechanism applies to information that agencies first disseminate after October 1, 2002.<sup>29</sup>

The second mechanism, expressly required by the IQA, is the “administrative correction” mechanism.<sup>30</sup> In the words of the statute, it is intended to “allow[] affected persons to seek and obtain correction of information maintained and disseminated by [an] agency that does not comply with the guidelines . . . .” In effect, this mechanism is intended to fix information that slipped through the cracks of the predissemination review process, as well as information first disseminated before that process became effective. Also effective October 1, 2002, the administrative correction mechanism applies to any information that is disseminated after that date, regardless of when it was first disseminated.<sup>31</sup>

OMB’s guidelines provide several important glosses on the administrative correction mechanism. First, they clarify that it can be used to obtain compliance of information not only with OMB’s guidelines, but also with those of the disseminating agency.<sup>32</sup> Second, they instruct agencies to establish an administrative appeal mechanism for consideration of correction requests that are denied initially.<sup>33</sup> The OMB takes no view on whether such appeal decisions are judicially reviewable, although several agencies assert that their guidelines create no legal rights on anyone’s part when applied in particular circumstances.<sup>34</sup>

## **II. THE PUBLIC POLICY CASE FOR THE GUIDELINES**

While Congress did not supply a great deal of guidance explaining its intent for the IQA, the legislation does address a serious public policy problem that critics had identified more than a quarter century earlier: the Administrative Procedure Act (APA) and other prior law provided no clear accountability for governmental use of information to accomplish policy goals. The nature of this problem, and some reasonable solutions, were being recognized and articulated at the time of enactment not just by “industry,” but by broadly representative groups like the American Bar Association (ABA). Indeed, the Environmental Protection Agency (EPA) had already begun voluntarily implementing several of these concepts when the IQA was passed. Thus, while the IQA marked a profound innovation in administrative law, that innovation was not a bolt from the blue.

This part of the article describes the growth of government information activities and summarizes their benefits and risks. It then demonstrates how federal law predating the IQA was largely inadequate and ill-suited to guard against these risks. Finally, it describes the ABA’s 2001 recommendation for a new set of administrative procedures, consistent with the Freedom of Information Act, tailored to government information activities. It also notes where the EPA had already adopted elements of this recommendation.

### **A. Government Use of Information as a Policy Tool**

More and more, agencies at all levels of government are seeking to accomplish regulatory and policy goals by disseminating information, particularly through the Internet, about the entities, products, regions and topics that they oversee. While agencies have commonly released information, often voluminous, in the dockets that support rulemaking, recent years have seen an exponential increase in the use of “freestanding” disseminations of information not expressly linked to particular rules. This use of information has many actual and potential benefits, including speed, flexibility, efficiency and public right-to-know. On the other hand, if the government’s disclosures are inaccurate or misleading, they can inflict unwarranted harm on private parties and disserve the public and the government. Beyond reputational harm, improper disclosures can also compromise legitimate interests in business confidentiality and, as has become more clear since September 11<sup>th</sup>, can jeopardize domestic security. In contrast to traditional regulatory activities, however, the government’s use of information tools was subject to few, if any, procedural protections before the IQA.

**1. Explosive Growth in Information Dissemination by Government**

While federal, state and local governments have always published information, the nature and extent of this activity has changed qualitatively in recent years. The first fundamental shift occurred with the enactment in 1986 of the Emergency Planning & Community Right-to-Know Act (EPCRA).<sup>35</sup> Most prominently, this statute established the Toxic Release Inventory (TRI), an annual, national compilation of chemical releases from facilities that the EPA was required to “maintain in a computer data base . . . accessible to any person.”<sup>36</sup> EPCRA also created, in as many words, the concept of the public’s right to know about potential hazards. This concept has become an immensely popular and powerful force.

The second dramatic change in the nature of government information dissemination has resulted from the advent of the Internet and the ubiquity of computers. All federal agencies have websites, and use of these sites has increased geometrically. In late 2000, the federal government established a single portal, <http://www.firstgov.gov>, to provide central access to all agency databases.<sup>37</sup> Congress effectively codified this portal in the E-Government Act of 2002, passed last December.<sup>38</sup> Agency websites commonly contain links to other, nongovernmental websites, blurring the line between the public and private sectors.

Virtually all new documents released publicly by federal agencies, and many historic documents, are now available on their websites. These include not only documents intended for public release, but those developed for internal, managerial purposes. The trend toward Internet publication of virtually all releasable governmental data is accelerated by several drivers, principally advances in technology, the concept of public right-to-know, and the Electronic FOIA Amendments of 1996.<sup>39</sup> EFOIA requires federal agencies to establish “electronic reading rooms”—that is, websites—containing policy and guidance documents and, most important, all documents that “the agency determines have become or are likely to become the subject of subsequent requests.”<sup>40</sup> Most recently, the E-Government Act requires all federal agencies, to the extent practicable, to establish on-line dockets for rulemakings, including all comments filed on proposed rules, and to accept comments electronically.<sup>41</sup>

The final shift in government’s use of information has been the clear articulation, in recent years, that information disclosure is not merely an issue of transparency, but a mechanism to accomplish regulatory goals. In the words of Jonathan Cannon, former EPA General Counsel, “[i]nformation . . . can be a supplement, sometimes even an alternative, to regulation. When broadly available, information can change behavior.”<sup>42</sup>

## 2. Principal Forms of Information Disseminated by Government

To understand the issues raised by government information activities, it is useful to categorize the types of information disseminated.

- *Information reported by individuals and organizations.* Perhaps the most common sort of information released by federal agencies consists of data reported to it by private entities directly or via state and local agencies. Historically, much of this data was only released in aggregate form (e.g., census data), but increasingly the government has been required or has chosen to publish on a reporting-entity basis. The Toxics Release Inventory (TRI) is a prime example.<sup>43</sup>
- *Information generated by government about its relationships with individuals and organizations.* A more recent trend has been the release by governments of information that it generates about entities that it regulates or oversees. For example, both the Occupational Safety & Health Administration and the EPA maintain websites containing company-specific inspection and enforcement data.<sup>44</sup> Much of this data historically had been maintained solely for internal purposes, or only released selectively in the aggregate.
- *Scientific or judgmental information generated by government about particular products or substances.* Agencies charged with regulating in the area of safety and health are compelled to make scientific and technical determinations. These determinations typically reflect generic policy positions or the exercise of judgment. A prime example is the Integrated Risk Information System (IRIS), created in 1986 as the EPA's internal consensus mechanism for quantifying the hazards of substances, but now located on the EPA's website "to support community-based environmental protection."<sup>45</sup> Another example is the National Toxicology Program's Reports on Carcinogens, in which the Department of Health and Human Services identifies substances "known or reasonably anticipated to be" human carcinogens and provides additional data regarding exposure and the degree of risk reduction achieved by current standards.<sup>46</sup>
- *Multi-dimensional "information products."* Most recently, federal agencies have begun to integrate databases and models to characterize geographic

regions, industries, businesses, and facilities. These information products respond to desires of researchers and others for the coordination of disparate databases regarding the same underlying topics. Examples include the EPA's Index of Watershed Indicators, which integrated state water quality data with geographic information systems,<sup>47</sup> and its Risk Screening Environmental Indicators Model, which ranks sources of toxic chemical releases by a methodology that combines hazard and exposure data.<sup>48</sup> These products face challenges regarding the quality and comparability of data, and in articulating the meaning and limitations of that data. They also incorporate a host of assumptions and policy choices.

### **3. The degree of Congressional Direction Varies**

Rarely, if ever, could government dissemination be regarded as *ultra vires*. In some cases, Congress has specifically required agencies to gather and publish information. In addition to the TRI program<sup>49</sup> and the Reports on Carcinogens<sup>50</sup> discussed above, examples include mandates for the EPA to gather and disseminate information on indoor air quality,<sup>51</sup> and to publish risk management plans developed by facilities in anticipation of accidental chemical releases.<sup>52</sup>

More commonly, Congress has simply given agencies general powers to collect and disseminate information. For example, the Clean Air Act authorizes the EPA to "collect and disseminate . . . basic data on chemical, physical, and biological effects of varying air quality and other information pertaining to air pollution and the prevention and control thereof."<sup>53</sup> These broad authorizations generally are decades old, and thus were not enacted at a time when these agencies were consciously using information as a means of achieving regulatory goals. In fact, the IQA can be seen as one of Congress's first attempts to articulate its views on this practice and what procedural protections might be appropriate for it.

## **B. Benefits and Risks of Government Information Activities**

### **1. Virtues of Using Information as a Policy Tool**

From the government's perspective, information disclosure has numerous advantages over traditional regulation as means of promoting regulatory goals. Foremost, it is a solution to the much-maligned "ossification" of administrative processes (that is, the notion that a proliferation of procedural requirements and judicial review have combined to rigidify and slow the rulemaking process).<sup>54</sup> While a rulemaking may take most of a decade from initiation to conclusion of judicial review,

a database or other information product can be assembled and placed online in a matter of months, a few years at most. It can be revised at will, rather than only by another round of notice and comment. Information dissemination is also generally more efficient, especially if the agency already possesses the information or can gather it cheaply. Rulemaking, by contrast, requires substantial contractor support and the creation of numerous ancillary documents for compliance with executive orders and statutes. Finally, but perhaps most attractive, information activities have often been held not to be subject to judicial review, and thus the investment in them cannot be undone by a single judicial decision.

Information disclosure can also have benefits from the perspective of regulated entities. It creates no enforceable obligations. To the extent it has the practical effect of coercing action, it does not require any particular action, and hence is more flexible and performance-based. Industrial interests have praised the TRI program precisely because it only requires facilities to report; what further steps they take, and when they take them, are up to the facilities. Such an approach is bound to be more efficient overall than any command-and-control regulatory system.

Information disclosure obviously has broad public appeal from a right-to-know perspective, and the efficiencies discussed above would cumulate into societal savings.

## **2. Risks of Harm Posed by Government Information Activities**

While information disclosure by government has undeniable virtues, it also has the inherent potential to cause significant harm to regulated entities and others, including the general public. These sorts of harm can be classified as follows.

- *Reputational harm and market losses from inaccurate or misleading data.* Many businesses' most valuable asset is their reputation. Reputations are easily damaged and not as easily rehabilitated. Inaccurate or misleading information, coming from the government, can be uniquely damaging to a business' reputation, due to the "moral suasion" deriving from government's presumed authority and impartiality.<sup>55</sup> It also ultimately is damaging to the agency's reputations. This issue is not new; it was identified by Ernest Gellhorn 30 years ago.<sup>56</sup> It has become exacerbated, however, by the explosive growth in government information activities, especially the release of data previously not made public. One example is the EPA's Sector Facility Indexing Project, which linked public TRI data with previously non-public compliance and enforcement statistics for individual facilities in five industry sectors. Many facilities discovered

substantial errors in the compliance data, and have continued to experience difficulties getting these errors corrected.<sup>57</sup> Another example is a Pennsylvania Department of Environmental Protection website of facilities with underground storage tank violations, which had to be taken down when it turned out to be massively in error.<sup>58</sup>

Inaccurate and misleading data can cause more than just reputational injury. A product that is wrongly linked to health risks, or whose toxicity is overstated, may be abandoned or “deselected” by the public, or by manufacturers using the product to make other products.

- *Competitive harm from revelation of sensitive business information.* The importance of protecting trade secrets and other confidential business information has long been recognized in federal legislation such as the Trade Secrets,<sup>59</sup> Freedom of Information<sup>60</sup> and Economic Espionage Acts.<sup>61</sup> The need to protect this information has only grown, moreover, as businesses and foreign nations have increased the level and sophistication of economic espionage. The problem is further complicated by the “mosaic effect”—the phenomenon in which numerous pieces of information, not trade secrets in themselves, can be assembled to reveal confidential business information.<sup>62</sup> Government officials and consultants believe that much of economic espionage is conducted with publicly available information.<sup>63</sup> Consolidation of previously disparate databases will only facilitate this activity, both by integrating different sorts of information and by making it instantly accessible.
  
- *Threats to public safety or national security by inadvertently helping criminals or terrorists identify targets.* The global nature of the Internet greatly reduces the physical and geographic barriers that have previously hampered those who would do harm to U.S. residents and institutions. In the wake of September 11<sup>th</sup>, numerous press stories have documented the extent to which Al Qaeda has used the Internet to probe vulnerabilities in the U.S. and elsewhere.<sup>64</sup> The mosaic effect operates in the security context as well, as bits and pieces of open source information may be assembled by sophisticated users to reveal national security secrets.<sup>65</sup> The ability of potential terrorists and other criminals to use the Internet for targeting purposes became a crucial issue in 1999, when the EPA prepared to post a website containing information on the worst-case chemical release scenarios for tens of thousands of facilities. These scenarios, required by the Clean Air Act Amendments of 1990, could readily have been compared

to determine which releases would threaten the greatest number of people. The FBI, the National Security Council and the Department of Justice (DOJ) initiated a legislative process that resulted in public access to these scenarios being deferred for a year until the EPA and the DOJ could conduct a rulemaking on the process.<sup>66</sup> That rulemaking, concluded during the Clinton Administration, determined that these scenarios should not be made electronically available in a way that would permit the identification of facilities.<sup>67</sup>

Finally, all three of these concerns are heightened by fact that federal government computer systems generally have very poor security and are thus vulnerable to unauthorized access.<sup>68</sup>

### **C. Shortcomings of Existing Statutes as Applied to Information Activities**

On balance, government information disclosure offers many important benefits. Its continued growth is inevitable. The challenge is to ensure that sufficient protections exist to minimize the potential for serious harm that also flows from government information activities and thus maximize their net benefits. As is shown below, before the IQA was enacted, existing law was not well equipped to provide such protections—it was either (i) inadequate, (ii) overkill, or (iii) of unpredictable applicability.

#### **1. The Federal Tort Claims Act**

The FTCA does not help those about whom information has been erroneously disclosed or misrepresented. Persons or institutions who feel they have been injured by erroneous or misleading government statements have no tort remedy under the FTCA, since it does not waive sovereign immunity for “any claim arising out of . . . libel, slander, misrepresentation, [or] deceit.”<sup>69</sup>

#### **2. The Administrative Procedure Act**

As a general matter, the APA is not well-suited to address the risks posed by information activities. Requiring proposed websites or information products to undergo notice and comment in the Federal Register would be overkill in the great majority of cases and an administrative nightmare, largely vitiating the benefits noted above.

Also—at least until enactment of the IQA—the APA has not provided effective judicial review of free-standing disseminations in most cases.<sup>70</sup> For example, late last year the Eleventh Circuit Court of Appeals held that an EPA report on environmental tobacco smoke, required by an indoor air quality statute, was not agency action. Reversing a district court decision that focused on the “far-reaching consequences” of the report—such as General Services Administration (GSA) regulations banning smoking in GSA vehicles—the appellate court declared that any such consequences “stem from independent actions taken by third parties,” and that the report itself did not have “direct and appreciable legal consequences.”<sup>71</sup> The D.C. Circuit has held the Reports on Carcinogens discussed above to be reviewable, but it did so principally because a Report’s listing a substance as a carcinogen triggers other regulatory obligations under other federal and state laws.<sup>72</sup> Absent such a direct consequence, the opinion suggests, a government report would not be reviewable.<sup>73</sup>

Case law regarding the concept of “finality” may also present obstacles to claims involving information products, especially websites, which are constantly changing and arguably never “final.”<sup>74</sup> Information dissemination under general authority to do so may also be defended as being “committed to agency discretion by law,”<sup>75</sup> because “there is no law to apply.”<sup>76</sup>

Finally, the various APA standards of review are likely to be unavailing or not produce predictable results. Given the number of general legislative authorizations to disseminate information, few information products will ever be in excess of statutory authority. Putting aside the IQA, it is not easy to predict how case law on “arbitrary and capricious” review would apply to freestanding information activities.

### **3. Privacy Act**

The Privacy Act establishes a “code of fair information practices”<sup>77</sup> that includes restrictions on disclosure, and a right to seek amendments, of government data regarding an individual that is not accurate, relevant, timely or complete.<sup>78</sup> But expanding the Privacy Act to encompass legal persons, rather than only individuals, would be regarded as serious overkill by most. The Privacy Act prohibits agencies from disclosing records concerning an individual without that individual’s consent. Giving regulated organizations the same right would dramatically conflict with (i) the presumption in many laws that data about such organizations should be made public and (ii) right-to-know philosophy in general.

More problematic, the Privacy Act contains no provision clarifying whether it would apply where another federal law requires disclosure.<sup>79</sup> Would the Privacy Act trump mandatory disclosure provisions of other laws, such as the Clean Air Act requirement that emissions data be made public?<sup>80</sup>

If the Privacy Act applied to organizations, agencies seeking to disseminate information about them would presumably rely on the “routine use” exception; i.e., that disclosure is “for a purpose which is compatible with the purpose for which it was collected.”<sup>81</sup> But this exception is already “one of the most controversial provisions in the Act”;<sup>82</sup> how it would apply to information collected about regulated organizations is highly uncertain. Quite likely, the exclusion would swallow the prohibition—arguably, virtually all agency disclosures about organizations they regulate are consistent with the purposes of that regulation.

#### **D. ABA Recommendation**

Over the course of 2000 and 2001, the ABA’s Section of Administrative Law and Regulatory Practice considered the issue of government accountability for information dissemination, culminating in a report and recommendation to the ABA’s House of Delegates, which adopted the following recommendation at its August 2001 annual meeting:

The American Bar Association recommends, concerning significant agency information dissemination activities intended to promote policy goals, that:

- (1) the President seek public participation by requiring agencies to list at an appropriate time such proposed activities in a widely available medium, such as the agency’s website or the semiannual regulatory agenda.
- (2) agencies take into consideration public input by
  - (a) identifying proposed activities, including the sources from which the information is drawn, and by inviting the public to comment on such activities and to attend public meetings as appropriate.
  - (b) establishing and publicizing a process for the correction of factual errors.<sup>83</sup>

While ABA sections’ reports are not adopted by the House of Delegates, the report accompanying this recommendation is still a revealing indication of the degree to which Congress, federal agencies and leading administrative law practitioners were considering the issues of government information dissemination generally and error correction in particular.

At the outset, the report declared that public participation practices have not kept pace with the rapidly-evolving practice of information dissemination, and described the recommendation as a code of good practice that would address this problem without unduly burdening agency information activities.<sup>84</sup> It noted that

Paragraph (1) was modeled after the semiannual Unified Regulatory Agenda now published by agencies pursuant to Executive Order 12,866, and that the EPA in late 2000 had unveiled a Web-based “Information Products Bulletin.”<sup>85</sup>

The report explained that Paragraph (2)(a) could play a key role in promoting public participation in the development and improvement of information products, thus helping to prevent those products from being misleading.<sup>86</sup> It said that this recommendation was consistent with a General Accounting Office (GAO) report urging the EPA to develop guidance and standards to “address obtaining stakeholders’ involvement in [information] projects’ design and development,” a recommendation repeated by the Senate Appropriations Committee a year later.<sup>87</sup> It also pointed out that the Consumer Product Safety Act (CPSA) requires the Consumer Product Safety Commission to give prior notice to a manufacturer of any disclosure regarding a product that would enable the public to readily identify the manufacturer.<sup>88</sup>

With respect to Paragraph (2)(b), the report stated that agencies should make it easy for companies and others to bring factual errors to the agency’s attention.<sup>89</sup> Notably, the report said this recommendation was “consistent with recent congressional action concerning information activities,” referring to the IQA, which had been passed several months earlier.<sup>90</sup> It also cited a GAO report calling for such an error correction process in light of the EPA’s experience with the dissemination of compliance data in the agency’s Sector Facility Indexing Project.<sup>91</sup> Finally, it noted that the EPA and the states had begun to implement an “Integrated Error Correction Process” of the type the recommendation endorsed.<sup>92</sup>

Admittedly the ABA recommendation was limited to correction of factual errors, rather than correction of quality shortcomings. Yet it is clear that, at the time the IQA was adopted, some sort of mechanism to ensure governmental accountability for erroneous or misleading information products was viewed broadly as a “good practice” whose time had come.

### **III. THE LEGAL POWER OF THE GUIDELINES AND THE CONSEQUENCES OF THEIR APPLICATION—SOME PREDICTIONS**

The symposium that gave rise to this paper is emblematic of the controversies that now swirl around the IQA guidelines issued by the OMB and other agencies—how powerful a tool are they, and what sorts of changes will they work in administrative practice? As noted earlier, representatives of regulated entities assert that the guidelines are immensely powerful and will have a profound effect on how agencies do business, including how they go about rulemaking.<sup>93</sup> Proponents of an unfettered

regulatory state argue that the guidelines are of limited applicability and effect, but raise the specter that they nonetheless will further bind the hands of a bureaucracy already shackled by a host of statutes and executive orders.<sup>94</sup>

This final portion of the article first addresses several of the legal “hot topics” associated with the guidelines: Are they legislative rules that bind agencies? Are agency determinations under them judicially reviewable? Do they apply in the case of information disseminated in connection with a rulemaking? Do they create a new cause of action for challenging rules? The article then considers whether, even if the answer to many of these questions is “yes,” the guidelines are in fact likely to lead to dramatic changes in administrative practice, and whether any such change is likely to favor only regulated entities.

### **A. How Powerful Are the Guidelines?**

#### **1. Are the Guidelines Legislative Rules that Bind Agencies?**

Probably the most important threshold question for anyone evaluating the likely significance of the guidelines is whether they are legislative rules—in other words, rules with the force of law that agencies are constrained to follow—or whether they are merely policy statements that agencies can disregard at will. If the latter, then affected persons will have a much more difficult time ensuring that agencies actually abide by them. Also, if the guidelines are legislative rules, then they would seem to qualify for *Chevron* deference; if not, they would more likely be reviewed (assuming they are reviewable) under the less deferential *Skidmore* standard.<sup>95</sup>

The first step in this inquiry, of course, is to consider the statute. Three aspects of the IQA counsel that the OMB guidelines, at least, are legislative rules. The first is the statute’s specification of the administrative correction mechanism as “allowing affected persons to seek *and obtain* correction of information . . . that does not comply with the guidelines.”<sup>96</sup> Congress’ use of the phrase “and obtain” seems consistent only with an interpretation that the guidelines are mandatory. Had Congress just said “seek correction,” it might be more plausible to argue that the guidelines are not binding; that agencies could in their discretion decline to provide corrections. The ability to obtain a correction, however, presupposes an ability to require an agency to follow its guidelines. While the case is less clear, the “obtain” language also arguably presupposes that agencies must issue quality standards in the first place—there is no utility to a correction mechanism that has nothing with which to enforce compliance.

The second aspect of the statute that indicates Congress’ intent for the guidelines to be binding rules is its reference to the OMB issuing guidelines “under sections 3504(d)(1) and 3516 of the . . . Paperwork Reduction Act.”<sup>97</sup> The first of

those sections empowers the OMB to “develop and oversee the implementation of . . . guidelines to . . . apply to Federal agency dissemination of public information”<sup>98</sup>; separately, PRA Section 3506(a) clarifies that “each agency *shall* be responsible for . . . *complying* with the . . . *guidelines* prescribed by [OMB]” under Section 3504(d)(1).<sup>99</sup> Section 3516 authorizes the OMB to promulgate rules and regulations necessary to implement the PRA.<sup>100</sup> For these references to have meaning, as all parts of a statute must, the OMB guidelines must be viewed as rules that agencies “shall . . . comply[] with.”

Finally, the statute speaks throughout in mandatory terms, stating that the OMB guidelines “shall . . . apply to . . . Federal agencies” and “shall . . . require that each Federal agency” issue guidelines and establish a correction mechanism.<sup>101</sup> When Congress uses such mandatory terms, courts interpret its intent to be mandatory.<sup>102</sup>

While these three provisions address only the binding nature of OMB’s guidelines, the same logic applies to the individual agency guidelines as well. Affected persons must necessarily use agency guidelines to obtain a correction, so the agency guidelines must be binding on the issuing agencies.<sup>103</sup> An agency is therefore obligated by the PRA, as well as the IQA, to comply with *both* OMB’s guidelines *and* the agency’s own implementation of them.

The strongest contrary statutory argument is based on Congress’ use of the term “guidelines,” especially since the earlier version of the bill spoke of “rules.”<sup>104</sup> By implication, arguably, Congress in 2000 abandoned its original notion of binding rules in favor of nonbinding guidelines. There are several problems with this argument, however. First, as just noted, the IQA calls on the OMB to issue “guidelines under section[] 3504(d)(1) of . . . the Paperwork Reduction Act.” That section of the PRA uses the word “guidelines,” and so Congress may simply have been endeavoring to maintain consistency in terminology. And, as we also saw above, PRA “guidelines” are really rules that bind agencies. The second problem is that, just as it did in the PRA, Congress frequently uses the word “guidelines” when it means “rules.” A prime example is the “effluent limitation guidelines” established by Section 304(b) of the Clean Water Act, which despite the name are clearly regulations.<sup>105</sup> The federal sentencing guidelines are another example.<sup>106</sup> The test in any case is not the language used but the substance and effect of the measure.<sup>107</sup>

Case law addressing the rule vs. policy statement question asks whether a particular agency document is issued pursuant to a legislative enactment, and in particular whether it fills a “legislative gap” such that the statute would be inoperative without it.<sup>108</sup> The guidelines clearly fit this bill; the IQA would have no effect without the guidelines. The guidelines do not simply clarify or interpret a statute or rule (like an interpretive rule) or announce agencies’ tentative intentions for the future (like a policy statement).<sup>109</sup> The use of notice and comment is also relevant in this connection.<sup>110</sup> While neither the OMB nor any of the other federal agencies published

their draft guidelines as “notices of proposed rulemaking,” they did all publish their draft and final guidelines (or notices of their availability) in the Federal Register.<sup>111</sup>

As the agency charged by Congress with implementing the IQA, the views of the OMB on this question would certainly be relevant. The OMB was under intense pressure from agencies to declare that its guidelines and those of the agencies were not rules. In the end, OMB’s guidelines—as well as its own, OMB-specific version of the guidelines<sup>112</sup>—were silent on the topic.<sup>113</sup> The OMB did, however, issue a fairly blunt memorandum to federal agencies in reaction to draft agency guideline provisions like the EPA language quoted in the footnote below.<sup>114</sup>

Regardless of what kinds of litigation-oriented disclaimers the agencies may include, agency guidelines should not suggest that agencies are free to disregard their own guidelines. [W]e ask that you not include extraneous assertions that appear to suggest that the OMB and agency guidelines are not statements of government-wide policy, i.e., government-wide quality statements which an agency is free to ignore based on unspecified circumstances.<sup>115</sup>

This admonition points up the policy question that really motivates this issue: what is the point of the guidelines if agencies will not pledge to follow them? It rings hollow for agencies to make resounding statements about their mission and commitment to data quality if they reserve themselves the right to abandon those statements whenever it is convenient. On the other hand, if agencies do, in fact, follow OMB’s guidelines and their own consistently, the question of whether those guidelines are really rules may never come before a court.

## **2. Are Agency Decisions under the Guidelines Judicially Reviewable?**

Another hotly debated issue is whether an agency’s final denial of a correction request would be subject to judicial review.<sup>116</sup> For example, the Center for Progressive Regulation argues that it “is clear from the language of the [IQA] itself [that] there is no independent judicial review of claims regarding data quality,” and that such review would “embroil” agencies “in collateral litigation [that] would siphon agency resources away from rulemaking.”<sup>117</sup> On the other hand, if agency decisions are not reviewable, affected persons will have no means of ensuring that agencies comply with their own or the EPA’s guidelines. The administrative correction process could well become a toothless mechanism that exists only on paper. As noted earlier, many agency guidelines addressed this issue by asserting that final denials were not reviewable,<sup>118</sup> and OMB’s guidance is silent on the topic, though the OMB has separately advised

agencies that they “should be aware that their statements regarding judicial enforceability might not be controlling in the event of litigation.”<sup>119</sup>

As an initial matter, case law supports OMB’s statement—the availability of judicial review for agency denials of correction requests is one for the courts to decide, and agency guidelines cannot control its resolution.<sup>120</sup> Further, that same case law also strongly supports the view that such denials are reviewable. First, the silence of the IQA on the question is of no moment. Unless a statute contains different judicial review provisions, the Administrative Procedure Act provides for judicial review in the district courts of any “final agency action for which there is no other adequate remedy in a court.”<sup>121</sup> There should be no question that the denial by an agency’s administrative appeal mechanism of an affected person’s appeal of an adverse initial decision on a correction request constitutes final agency action. It would be an “order” arising “in a matter other than rulemaking”; i.e., an informal adjudication.<sup>122</sup> That decision marks the consummation of the agency’s decision-making process, and it establishes the rights and obligations of both the requestor and the agency.<sup>123</sup> From it legal consequences—including potentially the economic or reputational injuries discussed in Part II(B)(2)—would flow.<sup>124</sup>

Moreover, there is a strong presumption of judicial review under the APA—review will be afforded in any case unless a court finds either that the relevant statute expressly “preclude[s] judicial review” or that the agency’s decision “is committed to agency discretion by law”—two narrowly construed exceptions.<sup>125</sup> Clearly, neither of these circumstances obtains in the case of the IQA—the Act does not preclude review, nor does it give the agency such broad discretion that there is no relevant law to apply—rather, it provides ample direction to the OMB regarding the outlines of its legislative authorization, authorization that the OMB has implemented through its guidelines.<sup>126</sup> Finally, it can be compellingly argued that the fundamental purpose of enacting the IQA was to establish statutorily an administrative decision-making process precisely so that affected persons would have some final agency action from which to appeal. As explained in Part II(C)(2) above, courts have often been reluctant to find that agency disseminations of information—at least those not directed by some statute—were final agency action. The IQA was surely meant in substantial part to overcome the obstacle posed by those cases, and providing judicial review of final decisions under it would accomplish that goal.

### **3. Does the IQA Apply to Rulemakings?**

Probably the single greatest controversy associated with the IQA is whether, and if so how, it applies to information that a federal agency disseminates in connection with a rulemaking. As noted earlier, many of the Act’s biggest fans are most enthused about how it “will have [a] profound impact on federal regulations,”<sup>127</sup>

rather than freestanding distributions. Likewise, its biggest critics are especially troubled about how “collateral litigation over the data quality of the studies on which the agency is relying in the rulemaking . . . would siphon agency resources from rulemaking and could indefinitely delay any ongoing rulemaking proceeding.”<sup>128</sup>

As Part II documents, freestanding disseminations have been the focus of the ABA and other organizations that have expressed concerns about unaccountable governmental use of information. But government information released in connection with a rulemaking can also have the same adverse consequences. And an exemption for this type of information from all or part of the IQA would create a loophole that would inexorably drive agencies, insofar as possible, to tie information releases to rulemakings. Finally, allowing the IQA to apply to rulemaking may actually improve the quality of agency rules. This section of the article reviews the objections to applying the IQA to rulemaking and explains why they are ill-founded or overwrought.

**Arguments against applying the IQA to rulemaking.** Critics contend that the IQA—or at least its administrative correction mechanism—simply has no application in the case of information disseminated in connection with a rulemaking. They have developed several arguments, which for convenience I have numbered:

1. The statute “by its own terms does not apply to data that are used in agency rulemaking but are not otherwise disseminated.”<sup>129</sup>
2. The IQA is a minor statute, a few sentences of text attached as a rider to a huge spending bill without the benefit of committee hearings or floor debate. The APA, by contrast, is the backbone of federal administrative law, enacted after years of struggle and largely unchanged for almost 60 years. Congress simply could not have intended that the former would ever trump or interfere with the latter.<sup>130</sup>
3. The rulemaking process itself provides an adequate opportunity to challenge the quality of data on which an agency is relying.<sup>131</sup>
4. If the concept of “dissemination” includes rulemaking, then the Act’s requirement for an administrative correction mechanism would be redundant, because the rulemaking process already includes the ability to correct information used in the rulemaking. Therefore dissemination must mean only “freestanding” disseminations, not those associated with rulemaking. This interpretation is also consistent with the purpose of dissemination (to spread information) as compared with the purpose of rulemaking (to regulate).<sup>132</sup>
5. The IQA process will disrupt and ossify rulemakings under other statutes whose purposes must be harmonized with that of the Act.<sup>133</sup>

**The statute and the OMB’s interpretation.** Presumably a court considering the interaction of the IQA and the APA would look initially at the text of the IQA. That

act is completely silent on the question of how it relates to the APA. Nothing in the statute suggests that any different rules apply when information is disseminated in the course of a rulemaking – for example, the law does not say “except in the case of information first disseminated in the course of a rulemaking subject to section 553 of Title 5, United States Code . . . .” Since the IQA is a later enactment than the APA, Congress must be presumed to have known that it was legislating against the backdrop of the APA.<sup>134</sup> Thus, the answer to the first argument, and the first response to the second, is that the silence of the IQA militates in its favor, not the APA’s.

OMB’s guidelines do not address this topic, which seems only to have emerged after they were issued, as the various agencies issued their own draft guidelines. Once confronted with these concerns, as well as the much more powerful objections of the federal bureaucracy, the OMB crafted a compromise approach. In a September 5, 2002 memorandum to the agencies, the OMB stated that where public comment procedures provide “well-established” procedural safeguards enabling affected persons to seek corrections “on a timely basis,” agencies could use those processes for correction purposes, adding that “agencies should respond sooner where needed to avoid the potential for actual harm or undue delay.”<sup>135</sup> The OMB provided language that it “request[ed] agencies to incorporate in their upcoming final guidelines either verbatim or adapted to the style and format of the agency’s draft”:

In cases where the agency disseminates a study, analysis or other information prior to the final agency action or information product, requests for correction will be considered prior to the final agency action or information product in those cases where the agency has determined that an earlier response would not unduly delay issuance of the agency action or information product and the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does not resolve the complaint prior to the final agency action or information product.<sup>136</sup>

A court addressing this issue is bound to give the OMB’s memorandum some amount of deference, though more likely under *Skidmore*<sup>137</sup> than *Chevron*<sup>138</sup>, since the memorandum is essentially an interpretive gloss on OMB’s guidelines.<sup>139</sup>

**Can the IQA and APA function independently?** Further to the second argument, it would be entirely possible for a court to give full effect to the IQA without requiring any accommodation of the APA. There is nothing inherently impossible about the normal APA rulemaking process and the administrative correction process proceeding in parallel. Neither the pendency of a correction request, the administrative appeal of a request, or a judicial challenge to a final denial of a request would, as a matter of law at

least, prevent an agency from proceeding to close a comment period or to issue a final rule. At most, assuming a court were to overturn the denial of a correction request after a rule had been finalized on the basis of that information, a second court considering a challenge to the rule might consider the decision of the first court to be evidence that the rule was not well-grounded and hence was arbitrary and capricious. But the second court could come to that conclusion anyway, without regard to the action of the first court. And it would not be legally bound by the decision of the first court to conclude that the rule was arbitrary and capricious—it could decide that the rule was adequately supported by other data or that the quality defect was not sufficient to invalidate the reasoning behind the rule.

**Is the rulemaking process adequate to serve the IQA's purposes?** The third argument is the asserted adequacy of the rulemaking process to address information quality concerns. The fourth argument depends crucially on this premise as well. In fact, there is ample reason to doubt the ability of the rulemaking process to provide a remedy even roughly equivalent to the correction process established by the IQA. This doubt arises principally from two concerns: the delay and uncertainty, compared to the IQA process, in securing a response under the rulemaking process, and the failure of the rulemaking process to provide any administrative appeal mechanism.

- Delay and uncertainty. OMB's September 5th memorandum urges agencies to act on correction requests within 60 days,<sup>140</sup> and agency guidelines are generally within that ballpark.<sup>141</sup> In most rulemakings, by contrast, a response to comments document is issued a year or more after the proposed rule. Often it is never issued; there are many examples of advanced notices of proposed rulemaking and proposed rules that have not finalized after a decade or more.<sup>142</sup> It is difficult to see how the much greater—and potentially infinite—delays associated with rulemaking are equivalent to the shorter and more dependable deadlines in the agency guidelines. In cases of significant reputational or financial harm, the difference could have major consequences. In this connection, the comments of the ABA's Section on Administrative Law & Regulatory Practice on the EPA's draft guidelines are telling, and their recommended solution is like OMB's:

Historically, delays in EPA rulemaking have in many cases far exceeded the norms for the time of completion of rulemaking in other agencies. Certainly if a commenter raises an issue concerning the quality of support for the content of the agency proposed rule during the comment period, there should be no

need for separating that comment from the entire set of public comments. But the effect of [the EPA's proposed guidelines] would be to "freeze" a request for "timely" correction during all of the years from advance notice of proposed rulemaking, through the stages of proposal, analysis, final rule and perhaps also the remands of rules that have occurred frequently. We recommend that the . . . "freeze" period be much narrower[, and limited to cases] where the comment is most appropriately presented as part of the rulemaking record for consideration by the rulemaking decisional officials.<sup>143</sup>

- Administrative appeal mechanism: It is also difficult to see how the rulemaking process would provide any sort of administrative appeal mechanism. Would the response to comments document be appealable through the normal administrative correction appeal process? The ability of persons to appeal a response to comments document administratively could raise doubts about the finality of the rule, doubts that would not occur if the appeal process were considering a separate, independent decision under the IQA. What if the administrative appeal of the response to comments document was granted—how would that affect the validity of the rule? Alternatively, would judicial review of the rule substitute for the administrative appeal process? If so, do we really want people litigating rules because of information problems that could have been addressed earlier and more simply? What if the affected person did not care about the substance of the rule, only the information issued with the proposal—do we want people who otherwise would not do so challenging rules for essentially ancillary reasons?

Judicial review of rules also will not be nearly as reliable a remedy as the administrative appeal process. For one thing, affected persons would confront a whole range of justiciability obstacles (standing, ripeness, etc.) that should not be relevant in an administrative appeal. Assuming these hurdles were cleared, the gravamen of a rulemaking challenge under the APA is and will continue to be the rule at issue, not the reams of information supporting it. At bottom, judicial review of a legislative rule is of the specific words the rule will add to (or delete from) the Code of Federal Regulations (CFR).<sup>144</sup> In some cases, the law allows a challenge to the preambular language accompanying the CFR language, but those cases seem to exist more in theory than in actuality.<sup>145</sup> In view of these cases, the

likelihood that a court will allow a challenge to information underlying the rule seems even more speculative.

If a rule did not ultimately rely on the information in question, or relied on sufficient other information that the challenged information was not dispositive, the rule could (and perhaps would have to) be upheld in the face of the bad information. Indeed, it is questionable whether the court would even have jurisdiction to consider a correction request for any purpose other than determining whether to vacate or remand the rule. If it upheld the rule, it may well have no authority to simultaneously require a correction. If it struck down the rule, it similarly may have no authority separately, or additionally, to order the agency to correct some piece of information.

Fundamentally, it seems inefficient (and perverse, from the perspective of avoiding ossification) to construct a process where corrections would not be made until a rulemaking was concluded. A better policy would be to determine if information meets quality standards earlier, rather than later, so that the rule can be improved and made more defensible.

**Adequacy of agency resources.** The fifth argument is simply that agencies do not have sufficient resources to handle both the APA and IQA processes at the same time, or that doing so would unduly impair the course of the rulemaking. But these are practical, real-world concerns, not conclusive legal arguments, and they are offset to some extent by the many practical concerns just identified about attempting to make the clumsy rulemaking process serve the narrow purpose of the IQA. Finally, use of the IQA process could actually improve the quality of rulemaking and the likelihood that rules will be upheld, whereas forcing the rulemaking process to be the IQA administrative correction mechanism could actually increase legal challenges to rules.

All this being said, the question before any court that considers this issue will be whether OMB's resolution is a reasonable accommodation of the IQA and APA. The OMB has said that the normal APA process may serve as the administrative correction mechanism unless (i) an earlier response would not unduly delay issuance of the agency action or information product and (ii) the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does not resolve the complaint prior to the final agency action or information product.<sup>146</sup> In effect, OMB's resolution wisely distinguishes between those cases where the harm arises from the *information* being disseminated (in which case the correction request may be cognizable), and those cases where the harm arises (or will arise) from the *regulatory action that the information supports* (in which case the correction request may fairly be treated like any other comment on the proposed rule). In making this distinction, OMB's approach reserves the IQA for cases that present the

public policy problem that the IQA was intended to address – government’s unaccountable use of information. Assuming the OMB receives any deference at all, it is hard to see how this result, which largely favors rulemaking, could be found to be unreasonable.

**4. Does the IQA Provide a Separate Basis for Invalidating Rules?**

Opponents of the IQA have raised the concern that an agency’s noncompliance with OMB’s or its own guidelines would serve as an independent basis for invalidating a rule. As explained earlier, the erroneous failure to correct bad information could be cited as the basis for concluding that a rule relying on that information is arbitrary and capricious. But that same conclusion could follow simply based on the inadequacy of the information, apart from its status under IQA guidelines. It would not have to follow, moreover. It is possible that courts might develop a rule of thumb that a violation of IQA guidelines creates a presumption of invalidity, rather like the presumption that a violation of an industry standard may create a presumption of negligence. But this is quite speculative, and it would seem clearly wrong for such a presumption to be conclusive. If the guidelines were held to be rules, an agency’s blatant failure to follow IQA guidelines—for example, by never responding to repeated correction requests—could be cited as a reason to invalidate a rule for having been issued “without observance of procedure required by law.”<sup>147</sup> Relying on judicial review of a rule to provide the administrative appeal mechanism required by the IQA only increases the likelihood of this event, though.

**B. How Much Havoc Will the IQA Really Wreak?**

It should be clear from the preceding section of this article that I believe the IQA and associated guidelines are more powerful than their detractors believe. Perhaps paradoxically, though, I do not believe the guidelines will lead to nearly the degree of delay and disruption that these people predict, or that any adverse effects will be solely in favor of regulated interests. Indeed, I believe the IQA should increase both the transparency of government information activities and public involvement in them, two goals recently emphasized by Congress in the E-Government Act.<sup>148</sup> These beliefs are based on the following considerations.

## **1. Information Quality is for Everyone**

Most of the criticism of the IQA contends that it is a creature of “industry” or “corporations,” who assertedly will be its sole beneficiaries.<sup>149</sup> The same criticisms were leveled against the APA when it was enacted in 1946.<sup>150</sup> A brief review of any administrative law treatise will reveal that public interest groups have employed the APA masterfully, bringing many rulemaking challenges and frequently sending agencies back to the drawing board.<sup>151</sup> It is only reasonable to expect that these groups will be equally skillful in using the IQA. For example, the National Resources Defense Council (NRDC) has undertaken a major initiative against industry-funded science and scientists in EPA decision-making.<sup>152</sup> To the extent that the NRDC believes that a particular chemical assessment is based on a flawed study, it could easily file a correction request arguing that the study is biased or not the best available.

It is instructive, for purposes of the IQA, to look back at the experience of the Shelby Amendment that preceded it by two years.<sup>153</sup> At the time that the OMB was implementing that amendment (by revising its “Circular A-110”),<sup>154</sup> scientific and academic institutions were sounding the alarm, sure that the new “data access” requirements would hobble research and tie up scientists with responding to FOIA requests.<sup>155</sup> Three years after revised Circular A-110 was issued, there is no indication that it has materially changed life for federal grantees.<sup>156</sup>

## **2. The Guidelines Do Not Set Many Bright-Line Standards**

The OMB’s guidelines, and even the various agency guidelines, are written in exceedingly general and subjective terms. This is of necessity, since they potentially encompass practically the full range of human knowledge. Given the deference that is inevitably afforded agencies, courts will not lightly conclude that agencies have erred in determining that a particular statement is “clear” or that it lacks “utility,” or that a given study was not conducted in accordance with “sound statistical and research methods,” or that particular “robustness checks” were not “especially rigorous.” How obvious and undebatable will it be that an agency “[un]reasonably determine[d]” that a particular dissemination would not have “a clear and substantial impact on important public policies”? Even the seemingly precise language borrowed from the Safe Drinking Water Act leaves great room for agency interpretation and discretion. How often will a court be able to say that an agency abused its discretion in concluding that a particular study was “the best available science”?

**3. The Remedy for Presentation Errors is Probably Just a Different Presentation**

As we saw earlier, “objectivity” has two components: a substantive one (such as, is the information accurate?) and a presentational one (such as, is the information presented in the proper context?) As to the latter, it is fairly clear that the remedy in most cases is simply to present the information in a different way. It may be exceedingly simple for an agency to redraft a report or a Web page to include additional qualifying sentences. Indeed, the preamble to the OMB’s draft guidelines noted that “[s]everal commenters suggested that agencies use disclaimers to distinguish the status of information, a practice that agencies should consider adopting . . . .”<sup>157</sup> Having to insert disclaimers into documents is hardly going to immobilize the regulatory state.

**4. Agencies Do Not Have to Fix Every Error**

OMB’s guidelines modify the IQA in a very significant way: they provide that agencies “shall establish administrative mechanisms allowing affected persons to seek and obtain, *where appropriate*, timely correction of information. . . .”<sup>158</sup> This is an enormous addition – as the OMB makes clear, agencies “are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved. . . .”<sup>159</sup> “For categories of inconsequential or trivial complaints identified in the agency guidelines, an agency may decide that no response is necessary.”<sup>160</sup> These statements, and OMB’s constant emphasis on “flexibility,”<sup>161</sup> are hard to reconcile with claims that agencies will be hamstrung with correction requests that will bring their regulatory programs to a standstill.

**5. The Pre-Dissemination Review Process Will Improve Information Quality and Reduce the Number of Correction Requests**

Business experience has shown that no quality control program can produce significant improvement simply by correcting errors at the end of a process. Similarly, information quality should be built into the entire life cycle of information management within agencies. The predissemination process, therefore, is key to the success of the IQA. If it is implemented faithfully, the need for correction requests and the success rate of those that are filed will both diminish.

To work effectively, the predissemination review process should require consideration of information quality standards at every stage in the life cycle of an information product. Quality must be factored in at the very outset of any information

dissemination initiative, so that the applicable data quality requirements can be designed into the data collection stage. Once the project is underway, it may be too late to change the way the data are being generated. Conversely, even if the initial data generation step is conducted appropriately, information quality can still be compromised at the analysis stage or in the final “packaging” of the information.<sup>162</sup>

One aspect of the ABA recommendation discussed earlier is that external stakeholders should be brought early and often into the process of developing information products.<sup>163</sup> The thought behind this recommendation is simple: stakeholders often know more than an agency about a particular topic, and input from them can assure that a product is developed correctly at the outset, rather than being designed internally, in isolation, and then criticized at a late stage in the process, when it will likely be much more time-consuming and costly to correct. Failure to adequately involve knowledgeable outsiders early and often enough in the process is probably the strongest single criticism that can be leveled at the problematic agency information products discussed in Part II(A)(2).

Two of the purposes of the E-Government Act of 2002 are “to provide increased opportunities for citizen participation in Government” and “to make the Federal Government more transparent.”<sup>164</sup> The predissemination review requirement of OMB’s guidelines has the potential, not only to improve the quality of agency information and limit correction requests, but to serve as a means of implementing these policies of public participation and transparency in the development of government information.

#### **IV. CONCLUSION**

The IQA addresses concerns about government use of information to accomplish policy goals that were first identified more than a quarter of a century ago and that were widely recognized to be necessary. The guidelines issued under the IQA are thus profoundly important. They will not lead to anything like the degree of disruption or delay in regulatory processes that have been predicted. Instead, they will lead to salutary results, including greater public participation in the development of information products, better quality government information and better agency decision-making.

**Notes**

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1. Paraphrasing William Kovacs, *OMB Guidelines on Quality of Information Seen as Having Profound Impact on Agencies*, DAILY ENV. REP. (BNA), Jan. 14 2002 at B-1.
2. Letter from Center for Progressive Regulation to Docket Clerk regarding EPA's draft information quality guidelines (May 31, 2002), at 4, available at <http://www.epa.gov/oei/qualityguidelines/dockets/ivb1105-053102-mcgarrity.pdf> [hereinafter CPR comments]. See also John Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform:" In Defense of Environmental Right-to-Know*, 12 KAN. J. OF L. & PUB. POL'Y 579 (2003). ("[T]he rider threatens to delay the release of information and generally impede the flow of information to the public."); Rena Steinzor, "*Democracies Die Behind Closed Doors*": *The Homeland Security Act and Corporate Accountability*, 12 KAN. J. OF L. & PUB. POL'Y 641 (2003).
3. Consolidated Appropriations FY 2001 of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-153 to 2763A-154.
4. See H. R. Conf. Rep. No. 756, 106<sup>th</sup> Cong., 2d Sess. 83 (2000).
5. *Id.*
6. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-495. The Shelby Amendment is discussed further in Part III(B)(1).
7. The House report reads:

The Committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee expects issuance of these rules by September 30, 1999. The OMB rules shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.

H.R. Rep. No. 592, 105<sup>th</sup> Cong., 2d Sess. 49-50 (1998).
8. There is no question that the OMB had the legislative authority to issue the rules it was originally urged to promulgate. See 44 USC §§ 3504(d), 3516 (2000); see also Part III(A)(1) *infra*.
9. See Center for Regulatory Effectiveness, *Data Quality Guidelines*, available at <http://www.thecre.com/quality/agency-database.html>. This website is an unparalleled resource

- for information related to the IQA.
10. 67 Fed. Reg. 8452 (Feb. 22, 2002).
  11. *Id.* at 8454, 8460. “Information” is defined to mean any “representation of knowledge such as facts or data,” but excluding opinions. “Dissemination” means “agency-initiated or sponsored distribution of information to the public,” including information prepared by others that the agency disseminates “in a manner that reasonably suggests that the agency agrees with the information.” Many distributions are excluded, however, including responses to FOIA requests, press releases, public filings and findings made in the course of adjudications).
  12. 67 Fed. Reg. 8452 at 8458.
  13. *Id.* at 8459; *cf.* 44 U.S.C. § 3504(e)(1)(B) (2000).
  14. 67 Fed. Reg. 8452 at 8460.
  15. *Id.* at 8459.
  16. *Id.* at 8460.
  17. *Id.* at 8549.
  18. *Id.*
  19. *Id.*
  20. *Id.* at 8460.
  21. *Id.*; *see also* 42 U.S.C. § 300g-1(b)(3)(A) (2000).
  22. 67 Fed. Reg. 8452 at 8459.
  23. *Id.* *Cf.* 15 U.S.C. §§ 77(j)(b), 77k(a) (2000) (SEC order power, and civil liability, triggered by “any untrue statement of a material fact or omi[ssion] to state any material fact required to be stated . . . or necessary to make the statements . . . in light of the circumstances . . . not misleading”).
  24. 15 U.S.C. §§ 77(j)(b), 77k(a) (2000).
  25. 67 Fed. Reg. 8452 at 8460.
  26. National Drinking Water Regulations of 2003, 42 U.S.C. § 300g-1(b)(3)(B) (2000). *See also* 67 Fed. Reg. 8452 at 8460.
  27. *See* 67 Fed. Reg. 8452 at 8459. (While not expressly required by the IQA, this mechanism was clearly within OMB’s authority to establish. *See* note 8, *supra.*)
  28. *Id.*
  29. *Id.*
  30. *Id.* at 8452.
  31. *Id.*
  32. *Id.*
  33. *Id.*
  34. *See, e.g.,* EPA, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information*, available at <http://www.epa.gov/oei/qualityguidelines/EPA-OEI-IQG-FINAL-10.2.pdf> [*hereinafter* EPA Guidelines]. The OMB has advised agencies that they “should be aware that their statements regarding judicial enforceability might not be controlling in the event of litigation.” OMB Memorandum, *OIRA Review of Information Quality Guidelines Drafted by Agencies* (June 10, 2002) at 15, available at [http://www.whitehouse.gov/omb/inforeg/iqg\\_comments.pdf](http://www.whitehouse.gov/omb/inforeg/iqg_comments.pdf) [*hereinafter* OMB OIRA Review Memorandum].
  35. 42 U.S.C. §§ 11001-50 (2000).
  36. 42 U.S.C. § 11023(j) (2000).

37. In late 2002, the federal government added the URL <http://www.science.gov> to provide centralized access to federal scientific information.
38. E-Government Act of 2002, Pub. L. No. 107-347, § 204, 116 Stat. 2899.
39. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, codified at 5 U.S.C. § 552.
40. 5 U.S.C. § 552(a)(2)(D).
41. E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2915.
42. Quoted in Environmental Law Institute, *THE ENVIRONMENTAL FORUM* 36 (July/August 1998).
43. *See* note 35, *supra*.
44. *See* OSHA, *Establishment Search*, available at <http://www.osha.gov/cgi-bin/est/est1>; EPA, *Enforcement and Compliance History Online*, available at <http://www.epa.gov/echo>.
45. *See* *FY 2001 Annual Performance Plan and Congressional Justification (EPA's Proposed Budget)*, at 40, available at <http://www.epa.gov/ocfopage/budget/2001/2001cj.htm>. IRIS is located at <http://www.epa.gov.iris>.
46. *See* National Toxicology Report on Carcinogens, available at <http://ntp-server.niehs.nih.gov/NewHomeRoc/AboutRoC.html>.
47. *See* EPA, *Watershed Information Network*, available at <http://www.epa.gov/iwi>.
48. *See* EPA, *Risk-Screening Environmental Indicators*, available at <http://www.epa.gov/opptintr/rsei/>.
49. EPCRA § 313, 42 U.S.C. § 11023 (2000).
50. Public Health Service Act § 301(b)(4)(A), 42 U.S.C. § 241(b)(4)(A) (2000).
51. Radon Gas and Indoor Air Quality Research Act § 403(b)(6), 42 U.S.C. § 7401 note (2000).
52. Clean Air Act § 112(r)(7), 42 U.S.C. § 7412(r)(7) (2000).
53. 42 U.S.C. § 7403(b)(6) (2000). *See also* Resource Conservation & Recovery Act, 42 U.S.C. § 6983(e) (2000); Clean Water Act, 33 U.S.C. § 1254(b)(6) (2000); Toxic Substances Control Act, 15 U.S.C. § 2609 (2000).
54. *See* E. Donald Elliott, Remarks at the Symposium on “Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics,” at Duke University School of Law (Nov. 15, 1990), *cited in* Thomas McGarity, “Some Thoughts on ‘Deossifying’ the Rulemaking Process,” 41 *Duke L.J.* 1385, 1385-86 (1992).
55. *See* *Airline Pilots Ass’n v. Dept. of Trans.*, 446 F.2d 236, 241 (5<sup>th</sup> Cir. 1971).
56. *See* Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 *HARV. L. REV.* 1380, 1426-27 (1973).
57. *See* GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL INFORMATION: AGENCYWIDE POLICIES AND PROCEDURES ARE NEEDED FOR EPA’S INFORMATION DISSEMINATION, 15 (Sept. 1998) GAO/RCED 98-245 [*hereinafter* GAO, ENVIRONMENTAL INFORMATION].
58. Ad Crable & Ryan Robinson *Local Storage-tank Owners Furious About Violators’ list*, LANCASTER NEW ERA (Feb. 3, 1999); *Tank Owners Left Scrambling*, PITTSBURGH TRIBUNE-REVIEW (Feb. 2, 1999).
59. 18 U.S.C. § 1905 (2000).
60. 5 U.S.C. § 552(b)(4) (2000).
61. 18 U.S.C. § 1831 (2000).
62. *See* DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 4, n. 265-67 and accompanying text (May 2002), available at

- <http://www.usdoj.gov/oip/exemption4.htm#competitive>; S. REP. NO. 161, 106<sup>th</sup> Cong., 1st Sess. 81 (1999).
63. NATIONAL COUNTERINTELLIGENCE CENTER, ANNUAL REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION & INDUSTRIAL ESPIONAGE 18 (1995); GAO, ENVIRONMENTAL INFORMATION, *supra* note 57, at 15-16.
  64. *E.g.*, Barton Gellman, *Cyber-Attacks by Al Qaeda Feared*, WASHINGTON POST, (June 27, 2002) at A1; *FBI: Al Qaeda May Have Probed Government Sites*, at [www.cnn.com/2002/TECH/internet/01/17/fbi.alert/](http://www.cnn.com/2002/TECH/internet/01/17/fbi.alert/) (Jan. 17, 2002).
  65. *See The Dark Side of Open Source – Dealing with Data Aggregation Issues*, GCSS FOS SECURITY NEWSLETTER (Spring/Summer 2002) at 1 (copy on file with the author).
  66. *See* 42 U.S.C. § 7412(r)(7)(H) (2000).
  67. 65 Fed. Reg. 48108 (Aug. 4, 2000).
  68. *See* GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: SERIOUS AND WIDESPREAD WEAKNESSES PERSIST AT FEDERAL AGENCIES, (Sept. 2000) GAO/AIMD 00-295. In 1977, Justice Brennan said: “The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.” *Whalen v. Roe*, 429 U.S. 589, 606 (1977) (concurring opinion).
  69. *See* 28 U.S.C. § 2680(h) (2000).
  70. Part III(A)(2) below discusses how the APA might apply where an agency has finally denied an IQA request for correction of a freestanding dissemination; Part III(A)(3) discusses how the IQA (or might not) address information disseminated as part of a rulemaking record.
  71. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. U.S. Env'tl. Protection Agency*, 313 F.3d 852, 858-860 (4<sup>th</sup> Cir. 2002).
  72. *Tozzi v. Dept. of Health & Human Servs.*, 271 F.3d 301, 310-11 (D.C. Cir. 2001). *Accord*, *Synthetic Organic Chemical Mfr.s Ass'n v. Dep't of Health & Human Servs.*, 720 F. Supp. 1244 (W.D. La. 1989).
  73. The decision distinguished an earlier case in which the court had refused to review a guide on respirators published by the EPA and the National Institute of Occupational Safety & Health, notwithstanding the claim of respirator manufacturers that the guide effectively “decertified” most of the respirators on the market. It noted that the respirator publication did not trigger regulatory consequences. *Tozzi*, 271 F.3d at 311, (distinguishing *Industrial Safety Equipment Ass'n v. Env'tl. Protection Agency*, 837 F.2d 1115 (D.C. Cir. 1988)).
  74. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (final action is one from which legal consequences will flow). *But see Appalachian Power Co. v. Env'tl. Protection Agency*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (“[A]ll laws are subject to change . . . . The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.”)
  75. 5 U.S.C. § 701(a)(2) (2000).
  76. *But see Synthetic Organic Chemical Mfr.s Ass'n v. Dep't of Health & Human Servs.*, 720 F. Supp. 1244, 1250 (W.D. La. 1989) (rejecting that contention in a case involving specific Congressional direction).
  77. DEPARTMENT OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, at Introduction, available at [http://www.usdoj.gov/04foia/04\\_7\\_1.html](http://www.usdoj.gov/04foia/04_7_1.html).

78. See 5 U.S.C. § 552a (2000).
79. DEPARTMENT OF JUSTICE, *supra* note 77, at chapter on routine users.
80. 42 U.S.C. § 7414(c) (2000).
81. 5 U.S.C. §§ 552a (b)(3), (a)(7) (2000).
82. DEPARTMENT OF JUSTICE, *supra* note 77, at chapter on routine users.
83. See *House of Delegates 2001 Annual Meeting*, DAILY J. OF THE AM. BAR ASSOC., Report No. 107c, at 17, 20 (Aug. 6-7, 2001), available at <http://www.abanet.org/ftp/pub/leadership/2001journal.doc>.
84. *Id.* at 5.
85. *Id.*, citing EPA, *Information Products Bulletin*, available at <http://www.epa.gov/ipbpages>.
86. *Id.*
87. *Id.* at 6, citing GAO, ENVIRONMENTAL INFORMATION, *supra* note 57, and S. REP. NO. 161, 106th Cong., 1<sup>st</sup> Sess. 81 (1999).
88. *Id.*, citing 15 U.S.C. § 2055(b) (2000).
89. *Id.* at 7.
90. *Id.*
91. *Id.*, citing GAO, ENVIRONMENTAL INFORMATION, *supra* note 57.
92. *Id.*, citing EPA, *Information Quality*, available at <http://www.epa.gov/oei/quality.htm>.
93. See note 1 and accompanying text.
94. See note 2 and accompanying text.
95. As the Supreme Court explained recently in *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001), a legislative rule is reviewed under the deferential standard established in *Chevron U.S.A. Inc. v. Nat'l Resources Def. Council*, 467 U.S. 837, 842-43 (1984), under which, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A policy statement or other non-legislative rule, by contrast, is reviewed under the less deferential standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which provides it effectively as much deference as it deserves, depending on its thoroughness, validity and consistency with prior decisions; i.e., "all those factors which give it power to persuade, if lacking power to control." . Since the OMB is the agency charged by the statute with writing the initial, government-wide guidelines, the OMB's guidelines would seem most likely to qualify for Chevron deference. The proper standard for the other agency guidelines is more uncertain.
96. Information Quality Act, Pub. L. No. 106-554, § 515(b)(2)(B), 114 Stat. 2763A-154 (emphasis added).
97. *Id.* at § 515(a).
98. 44 U.S.C. § 3504(d)(1) (2000).
99. 44 U.S.C. § 3506(a) (2000) (emphasis added).
100. 44 U.S.C. § 3516 (2000).
101. Information Quality Act § 515(b)(2), 114 Stat. 2763A-154.
102. *E.g.*, *United States v. Chavez*, 627 F.2d 953, 954-55 (9<sup>th</sup> Cir. 1980) (Congress's use of "shall" in a statute means the provision is mandatory).
103. As noted earlier, the OMB, the agency charged by Congress with implementing the IQA, has interpreted it to mean that agencies must enable correction of information that does not comply with either the OMB guidelines or the relevant agency guidelines. See *supra* note 32 and

accompanying text.

104. *See supra* note 7 and accompanying text.
105. 33 U.S.C. § 1314(b) (2000). *See also* E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 124-36 (1977) (discussing 33 U.S.C. § 1314(b)); Georgia-Pacific Corp. v. Env'tl. Prot. Agency, 671 F.2d 1235, 1237 (9<sup>th</sup> Cir. 1982) (discussing 33 U.S.C. § 1314(b)).
106. The Sentencing Reform Act of 1984 established the U.S. Sentencing Commission and required it to issue “guidelines” applicable to federal judges to use in setting fines, terms of imprisonment or other penalties under federal criminal statutes. 28 U.S.C. § 994(a)(1) (2000). While they are denominated “guidelines,” the guidelines are mandatory upon judges. *Stinson v. United States*, 508 U.S. 36, 42 (1993); *Mistretta v. United States*, 488 U.S. 361, 391 (1989).
107. *See Anderson v. Butz*, 550 F.2d 459, 463 (4<sup>th</sup> Cir. 1977) (“[T]he label attached is not controlling.”)
108. *See American Mining Congress v. U.S. Dep’t of Labor*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1045-47 (D.C. Cir. 1987).
109. *See American Hospital Ass’n*, 834 F.2d at 1045-47; *Appalachian Power Co. v. Env’tl. Prot. Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).
110. *Id.* at 1020.
111. For example, the OMB published its draft guidelines on September 28, 2001. 66 Fed. Reg. 49718. As a result, the various agencies may be able to argue that, as a practical matter, they complied with the notice and comment requirements that the APA imposes on legislative rulemaking.
112. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION QUALITY GUIDELINES (OCT. 1, 2002), *available at* [http://www.whitehouse.gov/omb/inforeg/iqg\\_oct2002.pdf](http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf).”
113. The closest that OMB’s guidelines come to this issue is a statement that agencies may waive information quality standards “temporarily . . . under urgent situations (*e.g.*, imminent threats to public health or homeland security).” 67 Fed. Reg. 8460.
114. The “EPA retains discretion to adopt approaches on a case-by-case basis that differ from the guidelines, where appropriate . . . . Factors such as imminent threats to public health or homeland security, statutory or court-ordered deadlines, or other time constraints, may limit or preclude applicability of these guidelines.” ENVIRONMENTAL PROTECTION AGENCY, DRAFT GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE ENVIRONMENTAL PROTECTION AGENCY 13, *available at* <http://www.epa.gov/oei/qualityguidelines/EPA-IQG-May-1-Draft.pdf>. This language was dropped from the final EPA guidelines, in favor of language that said the guidelines were “non-binding” but that the EPA “inten[ds] to fully implement” them. EPA Guidelines, *supra* note 34, at 4.
115. OMB OIRA Review Memorandum, *supra* note 34, at 14-15.
116. This discussion presumes exhaustion of administrative remedies, like an unsuccessful appeal to the agency’s administrative appeal mechanism. It also assumes that an affected person can satisfy the standard justiciability requirements of standing and ripeness.
117. *Supra* note 2, at 12.
118. *See supra* note 34.
119. *Id.*
120. *See General Electric Co. v. Env’tl. Prot. Agency*, 290 F.3d 377, 382 (D.C. Cir. 2002) (the “most

- important” test is binding effect of agency action); *Portland Cement Alliance v. Envtl. Prot. Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996) (agency characterization is “not dispositive”).
121. 5 U.S.C. § 704 (2000). *See also id.* at § 703 (2000).
122. *See* 5 U.S.C. §§ 551(6), (7) (2000) ; *See also* S. BREYER ET. AL., *ADMINISTRATIVE LAW & REGULATORY POLICY* 567-68 (4<sup>th</sup> ed. 1999).
123. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).
124. *Id.*
125. 5 U.S.C. §§ 701(a) (2000). *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).
126. *Overton Park*, 401 U.S. at 411-13.
127. *See supra* note 1.
128. *Supra* note 2, at 12.
129. *Id.* at 11.
130. Remarks of Alan Morrison at National Academy of Sciences Workshop on “Ensuring the Quality of Information Disseminated by the Government” (March 21, 2002), 65-70, 93-94, *available at* [http://www7.nationalacademies.org/stl/4-21-02\\_Transcript.doc](http://www7.nationalacademies.org/stl/4-21-02_Transcript.doc). *See also* note 2, *supra*, at 75-76.
131. *Id.*
132. S. Shapiro, *Rulemaking and the Data Quality Act – The Perils of Reform by Appropriations Rider*, presentation at the Fall Meeting of the American Bar Association Section on Administrative Law & Regulatory Practice (Oct. 17, 2002) (copy on file with the author).
133. *Id.*
134. “Courts generally adhere to the principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones.” *United States v. Lara*, 181 F.3d 183, 198 (1<sup>st</sup> Cir. 1999) (citing *HCSC- Laundry v. United States*, 450 U.S. 1, 6 (1981); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); Norman J. Singer, *Statutes and Statutory Construction* §§ 51.02-03 (1992)).
135. OMB memorandum, *Information Quality Guidelines – Principles and Model Language* (Sept. 5, 2002), *available at* <http://www.whitehouse.gov/omb/inforeg/pmcmemo.pdf> [*hereinafter* OMB Information Quality Guidelines].
136. *Id.*
137. *See* note 95, *supra*, and accompanying text.
138. *See* note 95, *supra*.
139. *See* note 93, *supra*.
140. *See* OMB Information Quality Guidelines, *supra* note 135.
141. *See* EPA Guidelines, *supra* note 34, at 31. For example, the EPA’s guidelines establish a “goal” of responding within 90 days.
142. An example is what constitutes a “federally permitted release” under the Superfund statute (notices of proposed rulemaking published in 1983, 1988 and 1989; final “guidance” issued in 2002). *See* 48 Fed. Reg. 23552 (May 25, 1983), 53 Fed. Reg. 27268 (July 19, 1988), 54 Fed. Reg. 29306 (July 12, 1989), 67 Fed. Reg. 18899 (April 17, 2002). Another example is protecting endangered species from pesticides (notice of proposed rulemaking published in 1988 (54 Fed. Reg. 27984 (July 3, 1989)), no final rule ever issued).
143. Comments filed May 31, 2002, *available at* <http://www.epa.gov/oei/qualityguidelines/ivc1104->

- 060302-gray.pdf.
144. *See, e.g.*, *Florida Power & Light Co. v. Env'tl. Prot. Agency*, 145 F.3d 1414, 1418 (D.C. Cir. 1998) (judicial review is of “*final regulations*”) (emphasis in original); *American Portland Cement Alliance v. Env'tl. Prot. Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996) (“[T]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.”) (quoting *Telecommunications Research and Action Center v. F.C.C.* 800 F.2d 1181, 1186 (D.C. Cir. 1986)).
145. *Florida Power & Light Co.*, 145 F.3d at 1420 (“[A] preamble may under some circumstances be reviewable,” depending on whether it “has a direct and immediate rather than a distant and speculative impact on [the petitioner].”) (quoting *Kennecott Utah Copper Corp. v. Dept. of the Interior*, 88 F.3d 1191, 1222 (D.C. Cir. 1996)). Neither of these cases allowed review of the challenged preamble.
146. *See supra* note 136 and accompanying text.
147. 5 U.S.C. § 706(2)(D) (2000).
148. Pub. L. No. 107-347, §§ 2(b)(2), (9). Notably, another goal of that act was “[t]o make the Federal Government more . . . accountable.” *Id.* §2(b)(9), which the IQA does.
149. *E.g.*, Echeverria, *supra* note 1, at 619 (“Because the [IQA] establishes a one-sided process exclusively for the benefit of industry, the rider also threatens to skew the substantive content of information made available to the public.”)
150. In the words of one critic, inserted in the *Congressional Record* on Senate passage, the bill’s judicial review provision “goes entirely too far, is dangerous, and would result in an impossible substitution of the judicial for the administrative process . . . . This subsection constitutes a bold and ambitious effort on the part of the critics of administrative law to kill it or nullify it before it has had an opportunity to prove its true worth.” Allen Moore, *The Proposed Administrative Procedure Act*, 92 CONG. REC. 2160, 2163 (1946); (quoting George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1668-69 (1996)).
151. *E.g.*, *Cement Kiln Recycling Coalition v. Env'tl. Prot. Agency*, 255 F.3d 855, 861-67 (D.C. Cir. 2001) (environmental groups overturned an EPA rule regarding hazardous waste combustors, almost nine years in the making, thus delaying implementation of tougher emission standards for many more years).
152. *See* L. Greer & R. Steinzor, *Bad Science*, 19 ENVT’L FORUM 28, 31 (Jan./Feb. 2002) (arguing that “EPA science is dominated by self-interested industry research and peer reviewed by self-interested industry experts”). The NRDC’s work in this connection has been supported by a grant from the Beldon Foundation “[t]o implement [the NRDC’s] Public Interest Service Initiative, a campaign to remove industry-funded scientists from EPA advisory boards and to appoint scientists dedicated to protecting human health and the environment.” Beldon Fund 2000 Grants, available at [http://www.beldon.org/grants2000\\_07.html](http://www.beldon.org/grants2000_07.html) (updated Feb. 26, 2001) (copy on file with the author).
153. *See supra* note 6 and accompanying text.
- <sup>154</sup> *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations* (Sept. 30, 1999), 64 Fed. Reg. 54926 (Oct. 8, 1999), available at <http://www.whitehouse.gov/omb/circulars/a110/a110.html>.
155. *See, e.g.*, *Democrats and Scientists Seek Repeal of Law on Open Records for Grants*, CHRONICLE

- OF HIGHER EDUCATION, A60 (July 23, 1999); *see also* 64 Fed. Reg. 43786-87 (Aug. 11, 1999) (summarizing concerns).
156. A LexisNexis search conducted in late 2002 found no articles on this topic published in that year.
157. 66 Fed. Reg. 49721.
158. 67 Fed. Reg. 8459 (emphasis added).
159. *Id.* at 8458.
160. 66 Fed. Reg. 49721.
161. 67 Fed. Reg. 8452.
162. While it predates the IQA, a good description of the needed systemic process is contained within the EPA's insightful LESSONS LEARNED ABOUT DESIGNING, DEVELOPING AND DISSEMINATING ENVIRONMENTAL INFORMATION PRODUCTS, EPA 260R-00-001 (Nov. 17, 2000), *available at* <http://www.epa.gov/webguide/resources/lessons.html>.
163. *See*, note 83 *supra* and accompanying text.
164. Pub. L. No. 107-347, §§ 2(b)(2), (9).